6. Discretion, the ACCC and Authorisation Determinations

This chapter examines the use of discretion by the Australian Competition and Consumer Commission (ACCC), which, it argues, comes in many forms. Four types of discretion are conceptualised: epistemological, procedural, outcome weighting and immunity discretion. While epistemological discretion is related to the information considered, procedural discretion focuses on who is participating in these deliberations, outcome-weighting discretion looks at how discretion can be directed to specific results, and immunity discretion relates to the variety of ways to manage the issue at hand without necessarily making a specific decision. Although the ACCC has used all these forms of discretion to operate innovatively, it has at times silenced voices and views. To become a truly responsive regulator, the ACCC needs to show greater commitment to encouraging dialogue among the stakeholders and enhancing inclusivity.

Epistemological Discretion

There has been an ongoing cross-jurisdictional debate as to how to weigh public benefits, and whether they are quantifiable. The approaches taken vary, which illustrates the presence and exercise of discretion in deliberations. Different approaches have been adopted in different jurisdictions, also, thus illustrating the exercise of discretion.

Quantification of Public Benefits

Use of quantification, that is, statistical or econometric analysis and computer-simulated economic modelling, to estimate or quantify the outcome of strategic interactions between industry players in competition and antitrust cases, is increasing. This is partly because of the sophisticated economic-modelling packages that are available and because of the increase in economic experts who provide a seemingly objective, value-free basis for regulatory decision-making.[1]

Quantification provides three main benefits. First it provides clear guidelines for business. Business groups, when aware that possible benefits need to be expressed in dollar terms, are able to make their submissions on that basis. Second, it provides a platform for interested parties as well as regulators. Parties

1 Lewis Evans, 'Economic Measurement and the Authorisation Process: The Expanding Place of Quantitative Analysis' (1999) 13 *Competition and Consumer Law Journal* 99, 99.

seeking to make a submission are able to address specific matters and, where necessary, query specific benefits. Regulators find quantification useful to explain the process for exercising their discretion, interpreting the evidence and negotiating possible outcomes. Finally, quantification adds transparency to the decision-making process.

Four main problems commonly arise in requiring quantification of all benefits. First, there is no single quantification method and parties use this diversity in strategic ways. For example, in the Qantas Airways and Air New Zealand authorisation, economics experts submitted that the proposed arrangement between airlines would lead to a saving of A$670 million in five years. Expert evidence by Professor Henry Ergas for the airlines claimed that this benefit would result in the form of cost savings, including removal of duplicative capacity, and from a projected increase in tourism. The applicants claimed some of the cost savings would be passed on to the consumer, while other benefits, such as increased tourism, would benefit a wider section of the market. Other competitors, particularly the Gulliver Group, did not accept this evidence and argued that it was an overestimate and queried the claimed 'pass-through effect'. The ACCC found that, rather than saving money, the proposed arrangement would lead to an increase in fares and decrease the capacity and quality of service of routes involving Australia where both airlines are present.[2] The ACCC also found co-operation between Qantas and Air New Zealand, without an authorisation, was possible and would yield some of the claimed benefits. The Australian Competition Tribunal (ACT) found it was unlikely that all the cost savings asserted would be passed on to travellers, although it accepted that a significant, albeit indeterminate, amount would be passed on.[3] The tribunal also accepted that not all the benefits claimed necessarily flowed from the authorisation and accordingly placed little weight on certain claimed benefits.[4] The tribunal noted that in the intervening eight months, the market had changed, as had the number of players in the market, and found that there were sufficient public benefits to warrant authorisation.[5] It is also relevant to note here that the New Zealand Commerce Commission considered the same arrangement and reached a different decision, accepting the econometric modelling evidence and granting authorisation.

Quantification of changing consumer demand is also a difficult area. Behavioural economists have suggested that the notion of the rational consumer is too simplistic and a more complex understanding of consumer behaviour is necessary. A consumer making a decision to take up an insurance policy will

2 *Qantas Airways and Air New Zealand* A30220–A30222, 9 September 2003, ii.
3 *Qantas Airways Limited* [2004] ACompT 9 (12 October 2004), paras 14, 211, 652.
4 ibid, 654.
5 ibid, 770.

decide the issue depending on the manner in which the terms are framed. Framing the product in terms of risks that may be incurred by not taking up an insurance policy will appeal to a different category of consumers than framing the production terms of the gains that may result in taking up an insurance policy.[6] Thus the forecasts of consumer demand and sales that are usually used in determining the future with/without the authorisation and the quantification used in this process would not be a straightforward task.

Second, adopting quantification in all cases will increase the expense incurred by applicants, who will have to avail themselves of econometric modelling in preparing their submissions. This would add to the concern expressed by non-profit organisations about the high costs of preparing such applications. It may also deter interested parties from making submissions because of the level of expertise that would be required. Third, the difficulties of quantifying certain benefits, particularly of a non-efficiency nature, cannot be ignored. Such problems have been discussed in other fields and are particularly evident in relation to environmental cases where the claims are hard to quantify because they require judgements to be made not only about the product, but also about hidden factors regarding its use, production and disposal.[7] Many non-efficiency benefits, such as product safety, promotion of ethical business practices or facilitating the right to justice and due process, may defy easy quantification and this could lead to them being discounted. In the Australian Association of Pathology Practices Incorporated, the tribunal acknowledged the difficulties in quantifying the impact of certain conduct.[8] Likewise, benefits that are likely to be delivered over a longer period may also be difficult to quantify.[9]

Finally, relying heavily on quantification would require ACCC staff to be skilled in handling such data. Use of consultants may be costly. One of the economists interviewed was critical of the level of skills of the ACCC staff, stating that they do not have a broad range of persons with expertise in economic matters.[10] Another economist compared the ACCC with its counterpart in the United States, stating that the Federal Trade Commission had dozens of staff with PhDs in econometrics.[11] Having staff capable of generating confidence is important and,

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6 See Organisation for Economic Co-operation and Development, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report 2006* (Report by Ian McAuley declassified by the Committee on Consumer Policy, 71st session, 29–30 March 2006) 11; see also Joshua Gans, '"Protecting Consumers by Protecting Competition": Does Behavioural Economics Support this Contention?' (2005) 13 *Competition and Consumer Law Journal* 3.

7 See Amanda Cornwall, 'Regulating Environmental Claims in Marketing' (1996) 3 Competition and Consumer Law Journal 1, 1.

8 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004).

9 See European Union (EU), 'Guidelines on the Application of Article 81(3) of the Treaty' (2004) *Official Journal of the European Union* C 101/08, 34 para 70.

10 Interview 10.

11 Interview 11.

in the absence of this, it may not serve the ACCC well to opt for quantification as a general rule for authorisation decisions. Such a strategy may be good in theory, but unrealistic given the world of public sector staffing.

In authorisation cases, public benefits and anti-competitive detriments can be quantified. This is commonly done in New Zealand in relation to authorisations. The New Zealand Commerce Commission has acknowledged that not all the elements that go to make up the judgement are equally capable of quantification. But quantification is the norm and the Commerce Commission has stated:

> The Commission encourages applicants to make submissions on, and to quantify as far as is possible, projected detriments because this ensures better-focussed submissions. This does not necessarily mean that the Commission itself will rely completely on quantification as a determinative measure of detriments, nor that it will accept any one party's estimation. The Commission will take each case on its own merits and use quantification to the extent that it is appropriate and not likely to distort the weighing process.[12]

Although the provision of quantified information has been acknowledged as useful by the ACCC, which has stated that 'the submission gives an indication of the likely costs to industry' and estimates the savings at 'over $100 million',[13] it has not sought to go down the path of the New Zealand regulator. A number non-efficiency-related benefits have been increasingly recognised in ACCC decisions (Figure 4.8). Michael Pusey's arguments that economic rationalism has led to an increasing emphasis on efficiency at the expense of many other values[14] can be directly contradicted by this evidence, which points to an early awareness on sustainability issues that have been given attention since 1976 and, particularly so, since 2003.

Measuring Public Benefits

As use of quantification has steadily increased in Australia there has been some pressure on the ACCC to adopt a uniform policy on the issue.[15] As discussed earlier, however, the claim that specific rules can constrain discretion is untrue[16] and discretion can simply move to another area. Rule ritualism may further

12 Government of New Zealand, Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments* (revised ed, 1997) 11.

13 *Newcastle Port Corporation* A91072, A91073, A91074, 23 April 2008, 37. See also *CEMEX Australia Pty Limited* A91082, 2 July 2008.

14 See Michael Pusey, *The Experience of Middle Australia: The Dark Side of Economic Reform* (2003).

15 Interview 2; see also 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.

16 Julia Black, 'Managing Discretion', (Paper presented at Australian Law Reform Commission Conference, Penalties: Policy, Principles and Practice in Government Regulation, Sydney, June 2001), 2.

exacerbate the problem.[17] The main issue facing regulators is which test to adopt for the purpose of quantification in competition law cases. There have been four possible tests or standards mooted: the total welfare standard, the consumer welfare standard, the price standard and, the balancing weights standard.

Total Welfare Standard

The total welfare standard considers the economy-wide welfare effects, requiring that if/when one person is made better off, others are not made worse off. The focus is on efficiency.[18] The standard does not concern itself with wealth redistribution and does not require that benefits be passed on to the consumer.[19] Although not couched in these terms, the total welfare standard has been adopted in Australia in a few cases where the conduct is occurring at an intermediate level of production. One such example is the Port Waratah case, where the producers were the main beneficiaries of the authorisation. An ACCC staff member pointed to this decision as an example of the total welfare standard at work.[20] An economist, interviewed for this study, argued that the total welfare standard may result in making poorer shareholders better off, something which may be just as worthwhile as making consumers better off.[21] The same economist preferred the total welfare standard to any other and argued strongly that competition policy should not concern itself with wealth redistribution; wealth redistribution should be left to tax policy.[22] In the context of mergers, the ACT has stated it would adopt a total welfare standard subject to a caveat regarding the weight to be given to public benefits to the extent to which they are not shared generally among members of the community.[23] It has stated that there should be no difference in the weight attached to benefits or costs, irrespective of the beneficiaries or bearers of the detriments.[24]

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17 John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (2007) 220.

18 Robert Officer and Philip Williams, 'The Public Benefit Test in an Authorisation Decision', in Megan Richardson and Philip Williams (eds), *The Law and the Market* (1995) 157–66. See also Suzanne Loomer, Stephen Cole and John Quinn, *Quantifying Efficiency Gains in a Competition Case: Sustaining a Section 96 Defence* (Paper presented at Canada's Changing Competition Regime, National Conference, Toronto, 26–27 February 2003) <http://www.coleandpartners.com/pdf/Quantifying_Monograph.pdf> at 30 February 2004.

19 The Canadian Competition Tribunal applied this standard in the *Superior Propane 1* case. The case dealt with a merger application and the tribunal found there were $29.21 million of efficiency gains that offset the deadweight loss of $3 million, which the commissioner of the Competition Bureau had established. The decision of the tribunal was rejected by the Court of Appeal in *Superior Propane 2*. The Federal Appellate Court in *Superior Propane 2* stated that it preferred the Balancing Weight approach and rejected the tribunal's decision.

20 Interview 2.

21 Interview 12.

22 Interview 12.

23 *Qantas Airways Limited* [2004] ACompT 9 (12 October 2004), paras 190–91.

24 *VFF Chicken Meat Growers* [2006] AComp Tribunal, para 75.

Consumer Welfare Standard

The second standard is the consumer welfare standard, which is the sum of the individual benefits derived from the consumption of goods and services.[25] This standard looks at the effect of a proposed authorisation on the consumer. It disregards the benefits experienced by producers or shareholders and requires the benefit to be passed on to consumers. The Canadian Competition Bureau preferred this approach in interpreting the efficiencies defence within section 90 of the Competition Act 1985 (Canada), although recent guidelines show it has now changed its approach.[26] In the context of mergers, Michal Gal pointed out that this standard requires substantial efficiency gains to ensure that there is no wealth transfer.[27] Michael Trebilcock argued that this standard is the most economically sound and tractable approach for small market economies.[28] A number of ACCC staff stated that they usually look at consumer welfare and are impliedly applying this standard.[29] It is evident that this is not always the case, as demonstrated by the discussion on collective bargaining, in which the main concern was to facilitate negotiations by small business.[30] Past ACCC staff members indicated that authorisation decisions made in the 1980s used the consumer welfare standard, albeit impliedly, and cited the examples of the Kuring-gai Building Society insurance cases.[31] The cost as well as the benefit that may reach the consumer has been considered in cases including the Refrigerant authorisation,[32] and the determinations appear to be paying greater attention to the issue of pass-through (Figure 3.2).

Price Standard

The third standard is the price standard, which examines the effect of the proposed authorisation on the price of the goods or service. If the likely result from the authorisation is that the downward pressure on price is greater than the upward pressure, the conduct should be allowed to proceed. The price standard

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25 Rhonda Smith, 'Authorisation and the Trade Practices Act: More about Public Benefit' (2003) 11(1) *Competition and Consumer Law Journal* 21, 23.

26 Canadian Competition Bureau, *Merger Enforcement Guidelines*, (March 2001) <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1673&Ig=e> at 15 May 2005. See also the recent Canadian Competition Bureau, *Merger Enforcement Guidelines* (September 2004) <http://www.competitionbureay.gc.ca/internet/index.cfm?itemID=1245&Ig=e> at 15 May 2005. For a fuller discussion of the total welfare standard see this paper, 69.

27 Michal Gal, *Competition Policy for Small Market Economies* (2003) 226.

28 Michael Trebilcock, 'The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundation of Canadian Competition Law or a Storm in a Teacup?' (Paper presented at the New Zealand Competition Law Conference, Auckland, 13–15 August 2004) 37. For an alternative view, see Gal (2003).

29 Interview 2; Interview 4; Interview 5; see also Smith (2003).

30 Konrad von Finckenstein,'Remarks to the 2002 Competition Law Invitational Forum' (Speech delivered at the Competition Law Invitational Forum, Langdon Hall, Cambridge, Ontario, 9 May 2002) <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02361e.html> at 28 February 2004.

31 *Re Kuring-gai Building Society* (1978) 2 ATPR 40-094. See also *Royal Australasian College of Surgeons* A90765, 30 June 2003.

32 *Refrigerant Reclaim Australia Ltd* A91079, 14 May 2008.

examines the effect of the proposed conduct on the price paid by the consumer. Gains to producers, shareholders, employees or any other group is given little weight, whereas consumer gains are accorded a much larger weighting. It has been argued that there is no rationale to disregarding the benefits flowing to shareholders simply because they are shareholders.[33] Suzanne Loomer and Stephen Cole, and Treblicock have pointed out that this standard is harder to satisfy than the consumer welfare standard, since the proven efficiency gains must be so significant the post-authorisation price will be set at a level lower than the pre-authorisation price.[34] The European Commission's guidelines state that, although it requires the calculation of cost efficiencies, it does not require this for qualitative efficiencies.[35] It has also pointed out that qualitative efficiencies, such as improved products, may create sufficient value for consumers but may nevertheless be accompanied by a price increase,[36] illustrating the difficulties of relying on prices as a sole guide to determine efficiency or indeed public benefit. In Australian Association of Pathology Practices Incorporated, the tribunal recognised that, in certain circumstances, price may not necessarily reflect efficiencies. In this case, market failure was due to the principal–agent problem intrinsic to the asymmetry of information in the patient–doctor relationship,[37] in which the doctor, who does not pay for them, orders the necessary tests from a medical rather than consumer perspective.

Balancing Weights Standard

The balancing weights standard is sometimes used in Canadian merger cases. It gives a weighting for all effects, including the redistribution that may result from a merger. Applying this test to authorisations sees a weight attached to all benefits and detriments. Further, where a particular benefit results in regressive wealth transfers, for example, from poor consumers to wealthy producers, this net welfare loss is also measured.[38] In the context of mergers, Gal supported this standard because it is not limited to efficiencies but also looks at subsidiary issues such as market power.[39] The Federal Appellate Court in Superior Propane 2 suggested this would be the appropriate test to apply to the case, sending it back to the tribunal to do so. The tribunal was required to take into account all

33 See Trebilcock (2004).

34 Loomer, Cole and Quinn (2003) 7, discusses this standard in the context of mergers in Canada. See also Trebilcock (2004) 33, where the author rejects this standard on the basis that the requirements of the price standard are too demanding and would largely vitiate the rationale for an efficiencies defence in the context of Canadian merger law.

35 See EU (2004); EU, 'Commission Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimis)', (2001) *Official Journal of the European Union* C 368/13. See also EU, 'White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', (1999) *Official Journal of the European Union* C 132/01, paras 56–57.

36 EU (1999) para 102.

37 *Australian Association of Pathology Practices Incorporated* [2004] ACompT (8 April 2004), para 34.

38 Loomer, Cole and Quinn (2003) 7.

39 Gal (2003) 224–28.

of the effects of the merger, including the negative effects on resource allocation. The tribunal found that it was difficult to quantify the net welfare loss. The approach of the European Commission also shares much in common with this approach. The European Commission adopts what it has termed the balancing test, which involves a careful consideration of the anti-competitive and pro-competitive effects of proposed undertakings or conduct.[40] The European Commission, however, has stated that efficiency gains may not necessarily affect the cost structure of the firm and has also acknowledged that qualitative efficiency gains may be hard to estimate.[41] Clearly, quantification of all the factors would be one of the drawbacks of this standard. To apply the standard, information must be available on the distribution of income between different consumer, shareholder and producer groups, which may easily be estimated incorrectly. One of the interviewed economists suggested that the ACCC's approach to authorisation determinations is best described as the balancing weights approach.[42] Another suggested that the approach of the ACT in the Qantas authorisation saw the application of a balancing weights standard rather than the total welfare standard because the tribunal did allocate weightings to the benefits. This argument is supported by the following statement in the decision:

> [W]e have also given due weighting to the fact that … benefits will accrue initially to Qantas, and its shareholders, and that not all the benefits will necessarily flow through to foreign shareholders in Qantas, we have not attributed any weight to those benefits …[43]

Given that there is no further clarification, however, it remains unclear as to whether this could definitely point to the balancing weights standard.

Trebilcock pointed out the main problems with this standard when he noted that, while it is more politically palatable than the total welfare standard, it is difficult to apply in practice and requires the competition authorities to make value judgements about who is more worthy of a dollar.[44] Such a standard may be much easier to justify politically than a total welfare standard, which permits conduct resulting in potentially regressive wealth transfers.[45] He criticised this standard on the basis that it does not take into account 'trickle down' effects and efficiency improvements introduced for private gains that will often have significant spill-over effects benefiting consumers. Further, this standard may not consider the manner in which certain conduct (in Trebilcock's case mergers)

40 See EU (2004) para 92.
41 ibid, paras 92, 100.
42 Interview 10.
43 *Qantas Airways Limited* [2004] ACompT 9 (12 October 2004), para 770.
44 Trebilcock (2004) 36.
45 ibid, 20.

speeds up innovation and induces technological diffusion. Thus, he argues, these gains cancel out some of the negative effects of the wealth transfers from consumers to producers.[46]

The Dawson Committee impliedly advocated the total welfare standard because of the emphasis it places on the importance of achieving efficiency gains.[47] The ACT appears to advocate a total welfare standard, although it has been suggested that there would be scope to give different weightings to different benefits. Interviews with ACCC staff indicated that one particular test is not used consistently. Two interviewees stated the consumer welfare standard was used in the College of Surgeons decision[48] and was commonly used in older decisions in the 1980s and 1990s. One staff member stated the total welfare standard was used in the Port Waratah decision,[49] while another staff member argued the Port Waratah decision illustrated the application of the balancing weights standard. One interviewed economist favoured the total welfare standard, while two other economists were equivocal about its application to all circumstances. In interviews with consumer groups, there was a general feeling that non-efficiency-based benefits would be harder to quantify than efficiency benefits and, accordingly, no standard may adequately reflect the non-efficiency benefits or detriments of proposed conduct. Another interviewee, however, pointed out that bad quantification could occur with both efficiency and non-efficiency data. Another lawyer interviewed contrasted the Australian approach with the New Zealand approach, saying the Australian approach was much more flexible and recognised a variety of benefits.

Until 2007 the ACCC did not publicly advocate any particular standard in non-merger authorisations.[50] It has been argued in the past that the commission favoured a consumer welfare standard, even though it also acknowledged private benefits in a number of its determinations.[51] Following the Qantas Airways application, however, the ACCC has been careful to point to this tribunal decision and refer to it as a public benefit standard,[52] stating:

> The term 'total welfare standard' has a variety of uses and meanings in economic and legal literature. To avoid any potential confusion, the

46 ibid, 30.

47 David Round, 'W(h)ither Efficiencies: What is in the Public Interest? A Commentary on "The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to Economic Foundations of Canadian Competition Law or a Storm in a Teacup?" by Michael Trebilcock' (Paper presented at the Fifteenth Annual Workshop of the Competition and Policy Institute of New Zealand, Auckland, 13–15 August 2004) 12.

48 Royal College of Surgeons A90765, 30 June 2003.

49 *Port Waratah* A90650, 25 March 1998.

50 See ACCC, *Merger Guidelines* (June 1999) 69–71, paras 6.39–6.45. Here, the commission states that resource savings not passed on to the consumers in the form of lower prices can constitute a public benefit.

51 Smith (2003), 5; Alan Fels and Tim Grimwade, 'Authorisation: Is It Still Relevant to Australian Competition Law?' (2003) 11 *Competition and Consumer Law Journal* 187, 200–02.

52 ACCC, *Guide to Authorisation* (2007) 34.

> ACCC proposes to refer to the approach taken by the tribunal in Qantas Airways as the application of a 'public benefit standard'. The ACCC will apply a public benefit standard when determining the weight to be given to productive efficiency savings in considering authorisation applications.[53]

This section illustrates the manner in which discretion can exist in giving effect to rules, reinforcing the concerns discussed in Chapter 5 that specific rules can increase discretion, rather than constrain it. It also illustrates the manner in which such exercise of discretion can vary over time within one regulatory agency, as well as the manner in which the exercise of discretion can be constrained by the tribunal. Methodologies can be much easier to apply in some contexts than others. I have attempted to show that choices of quantification methodologies can be fundamental drivers indeed of how discretion is exercised. Although outside the scope of this study, it is possible to apply a Foucauldian critique to these methodologies, that can see the use of quantification as a technology of control, which normalises certain practices while enabling new skills and capabilities. Certainly the use of quantification does just that while, at the same time, aligning itself to dominant neo-liberal discourses.

Procedural Discretion

The ACCC, in making authorisation determinations, has processes in place for collecting information and consulting with parties. This section looks at the main steps of the process before examining the ways in which participation is facilitated within the process and, by so doing, discretion is being exercised.

Steps in the Process

Information relevant to the authorisation application is obtained by the ACCC in a variety of ways. The authorisation application addresses in detail the proposed conduct, as well as the public benefits and possible detriments contended as likely to arise. This allows the ACCC to set the authorisation process in motion on the basis of significant information. After receiving the application, the ACCC invites interested parties to make submissions in response, and has stated that the nature of the authorisation will determine the parties it may seek to consult:

> The range of interested parties consulted by the Commission depends upon the nature of the conduct for which authorisation is sought and the types of persons likely to be affected. Typically, interested parties can

53 ibid, para 5.29.

> include competitors, customers, suppliers and other persons affected by the conduct; relevant government bodies, including regulators; relevant industry associations, consumer groups and community associations; and industry experts. When appropriate, the Commission may also seek submissions from the community by advertising in newspapers and trade journals. As well as inviting submissions, the Commission conducts its own market inquiries and research.[54]

The first and most accessible information source is the formal submissions made to the ACCC by parties with an interest in the process. These can include other competitors in the market; other parties who may be affected by the conduct, be it upstream or downstream; industry groups; government bodies; and, independent bodies and non-industry groups. These submissions may either favour the application or refute the claims made in the application. Some of the submissions examined simply state that the party has no objection to the application. Others are lengthy, containing a significant degree of analysis. The majority of such submissions are briefer than the application itself, focusing on the viewpoint of the particular business. Most of this information, with the exception of submissions in which a confidentiality claim is accepted, is publicly available on the ACCC website.[55]

A draft determination is distributed to the applicant and all parties making submissions, and copies of the draft determination are placed in the public register on the ACCC website. Further formal submissions may also be made to the ACCC after the release of a draft determination. There are generally fewer submissions made at this stage. Here, the parties specifically address the ACCC's decision. In a number of cases, this stage provides the opportunity for a dialogue and, with the approval of the ACCC, the applicant may introduce changes to the application.[56] In other cases, the draft determination may be altered by the ACCC following consideration of the submissions made;[57] yet, in others, the draft determination remains unchanged.[58] Stakeholders rarely have the attitude that because the ACCC has taken a certain line in a draft determination, this sets the framework for the decision in concrete, because the commission has a track record of moving in response to critiques of its draft. The procedure of draft followed by revisions is at the heart of claims the ACCC can make to being genuinely responsive.

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54 ACCC, 'Submission to the Commission of Inquiry: Review of the Competition Provisions of the *Trade Practices Act 1974* (Dawson Review)' (2002) 248.

55 Section 89 *Trade Practices Act*.

56 See *Port Waratah Coal Services Ltd* A90906–A90908, 9 July 2004; *Steggles Limited* A30183, 20 May 1998; *Showmen's Guild of Australasia* A90729, 25 February 2003.

57 *Federation of Australian Commercial Television Stations* A11909, 12 September 1984; *Medicines Australia Ltd* 90779, A90780, 14 November 2003.

58 *Port Waratah* A90906–A90908, 9 July 2004.

Information relevant to the deliberations is also collected informally. This may include telephone calls to lawyers, applicants or interested parties to discuss certain claims made in the application.[59] It can also include site visits and meetings to discuss the application. For example, in the Australian Dairy Farmers Association authorisation, ACCC officials met with members of the association in Adelaide to discuss the application further.[60] The process of recording such meetings has been finalised since 2006. File notes briefly stating the matters discussed, date and persons attending are now systemically used and placed on the website. Decisions prior to 2006 did not include such a systematic keeping of file notes with the materials publicly available.

Another step in this information-gathering process is the pre-decision conference. Following the draft determination, the ACCC invites applicants and interested parties to a pre-decision conference, which provides them with the opportunity to discuss the draft determination and to put their views directly to a commissioner.[61] Conferences are only called on matters involving diverse interests and, in some cases, these conferences can be perfunctory.[62] In certain complex cases, however, such as in the aviation industry where there are many counterfactuals proposed, the pre-decision conference may be an opportunity for an inclusive dialogue.[63] Such conferences are chaired by a commissioner and conducted informally, acting as a venue for all attendees to have a reasonable opportunity to express their views. The ACCC takes into account these views in making its decision. The record of the conference, which is on the public register, gives an outline of the issues raised and the persons in attendance. Following the pre-decision conference, it is usual practice for the ACCC to invite interested parties to lodge final written submissions. After this, a final determination is made and sent to the applicant as well as all interested parties and is also placed on the public register. The final determination usually mirrors the draft determination in its structure, although the substance will differ depending on the preceding consultative process. Applications for review of the authorisation may be lodged to the ACT by the applicant or a party with sufficient interest.[64]

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59 *Australian Brick and Blocklaying Training Foundation* A90993, 26 April 2006.

60 *Australian Dairy Farmers Limited* A90966, 26 April 2006. Also see *Port Waratah* A90650, A90651, 25 March 1998; *BHP Billiton Iron Ore* A90981, A90982, A90983, 1 February 2006.

61 See section 90A; see also ACCC (2002) 249.

62 Interview 9.

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

64 Sections 101, 102.

Participation in the Process

Section 90A requires the ACCC to consult, although it does not prescribe the process or the parties who should be consulted. The ACCC attempts to collate relevant information and consults widely. The authorisation process allows for a range of interested parties to be heard, including private parties, industry groups, governments, other independent bodies and non-industry bodies. Parties can be heard in both a formal and informal manner. It is easier to gauge the level of participation and its impact when examining formal submissions. The informal processes are harder to evaluate as they do not provide access to data or refer in detail to this process in the determinations. The ACCC is becoming more evidence-based on procedural fairness and undertakes survey research on business attitudes to their treatment by the ACCC.

Formal Submissions

The data are used to illustrate how the authorisation process has changed over the last 30 years by specifically examining the weight given by the ACCC to the submissions made to an authorisation application. Certain authorisation applications attract numerous submissions, often because a wide section of the community may be affected. For example, the Federation of Australian Wool Organisations authorisation attracted 25 submissions, with seven from industry associations and five from government departments.[65] In other cases, the ACCC seeks submissions from affected parties, as was the case in the EFTPOS authorisation, in which the ACCC sought public submissions from numerous bodies, including consumer organisations as well as other competitors in the market.[66] Although most submissions either favour or oppose the authorisation application, there are some that do not take any particular stance.[67] Formal submissions from five different groups — private parties, industry groups, governments, non-industry bodies and independent bodies — are examined below.

Submissions from Private Parties

Submissions by private parties provide the ACCC with important information about industry structure and practices. Robert Baldwin and Julia Black pointed to the importance of being responsive to the firm's operational and cognitive frameworks. Often this information is hard to obtain and such submissions

65 *Federation of Australian Wool Organisations* A90984–A90985, 11 January 2006.

66 *EFTPOS Interchange Fee Reform* A30224, A30225, 11 December 2003.

67 See, for example, *Association of Australian Bookmaking Companies* A30243, 30 March 2006, where 15 submissions prior to the draft decision were received. Here many of the parties simply indicated that they had no objection to the application or that they would not be making a submission and would simply like to be kept informed.

may present one opportunity to obtain such valuable information, allowing the regulator to facilitate competition and ethical practices in the industry. The participation by private actors making submissions has increased significantly since the Act's introduction. In 1976 business had little interest in engaging with the authorisation process and few submissions were made.[68] The commission was criticised for its adversarial approach by business.[69] This antagonism towards the commission's perceived intrusion into business was vividly expressed in the North Queensland Forest Products Association Ltd decision in which the parties were seeking authorisation of a recommended price list. Here the applicants refused to furnish the further information sought by the commission, saying that it did not have the time and finance to furnish the additional information sought and requesting that the commission rely on information previously supplied.[70] Business treated the law and the commission as restrictions on its freedoms. The practice was for the commission to make its own enquiry into the conduct rather than to rely on submissions by the applicant or other parties.[71]

The 1976 review committee commented on this and recommended increased dialogue between the commissioners and the regulatees.[72] The committee's advice was 'taken on board' and the picture changed with the ACCC seeking to harness business involvement in the authorisation process. By 1998 there was commonly more dialogue between interested businesses and the commission on such matters. This shift reflects the commission's use of a variety of regulatory practices and, as John Braithwaite stated, a 'willingness to broker a new kind of conciliation between the conflicting parties'.[73] There was also an attempt by the commission to reinforce the value of business involvement by clearly stating the influence such submissions had on its decisions. Such practices are important in gaining confidence and they are, perhaps, further evidence of the ACCC being responsive to the firms' own operating and cognitive frameworks.[74] In the Air New Zealand authorisation the airline sought authorisation to set up a joint agreement with all of its members to offer discounts on published fares to corporate customers.[75] Qantas made a submission staunchly opposing the application, arguing that it did not present a correct view of the market; the price-fixing conduct was unnecessary as multi-layered contractual relationships, which could be used to offer similar discounts already existed; the proposed conduct would lessen competition as the agreement would allow

68 *North Queensland Forest Products Association Ltd* A15536, A16527, A16528, 31 August 1976.

69 See Trade Practices Act Review Committee, Parliament of Australia, *Report to the Minister for Business and Consumer Affairs* (1976) 39, where this criticism is leveled in the context of public hearings.

70 *North Queensland Forest Products Association Ltd* A15536, A16527, A16528, 31 August 1976.

71 ibid, 101, where the process for making applications is discussed.

72 ibid, 103.

73 Braithwaite, *Restorative Justice and Responsive Regulation*, (2002) 231; see also Marshall Breger and Gary Edles, 'Established by Practice: The Theory and Operation of Independent Federal Agencies' (2000) 52 *Administrative Law Review* 1111, 1115.

74 Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 69–70.

75 *Air New Zealand on behalf of all members of the Star Alliance* A30209–A30213, 4 September 2003.

the participants to understand and utilise their competitor's pricing methods and strategies; and, the proposed arrangements were unlikely to give rise to public benefits.[76] The ACCC authorised the conduct subject to an undertaking that it negotiated with Air New Zealand to cease participation in the agreement and conventions program if it entered into an alliance with Qantas Airways.[77]

Submissions by Industry Groups

Industry groups have always been active in making formal submissions to the ACCC. After all, they have knowledge of the industry, their own interests to protect and the necessary skills to put together such submissions, and their participation is increasing. Many in the ACCC are aware of the allegation of being captured by industry groups, and many of the past and present officials interviewed pointed to the transparency and accountability mechanisms in place that would counter any such influence.[78]

Figure 6.1 collates the instances where submissions were made by industry bodies and categorises them on the basis of their success. In the 35 determinations studied for 1976, there were eight submissions made by industry bodies; authorisation was granted in six of these cases. By 1984 there were submissions made by industry bodies in 12 out of 35 cases. In 1998, 26 submissions from industry bodies were received and, of these, 20 were successful. This indicates that participation by industry groups in the authorisation process has been increasing steadily.

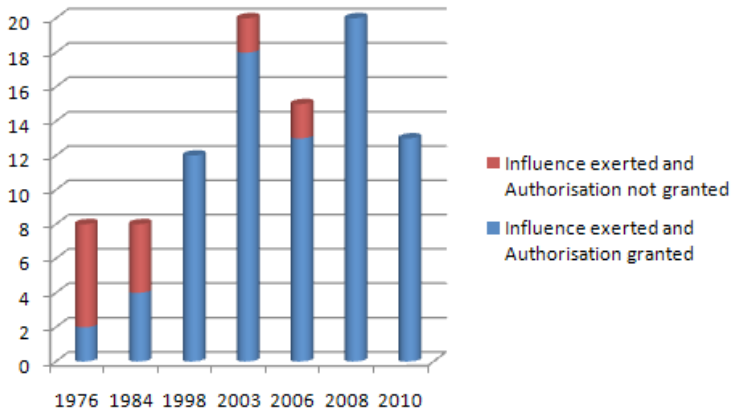

Figure 6.1: Influence and success of submissions by industry groups in authorisation determinations

Source: Author's research.

76 See submission by Qantas, *Air New Zealand* A30209, A30210, 4 September 2003, 15–16.
77 ibid, i.
78 Interview 2; Interview 3.

Groups such as the Australian Gas Users Group were able to exert an influence on the ACCC in the decision involving the North West Shelf Project. They raised concerns about the joint venture that prompted the ACCC to grant authorisation subject to conditions.[79]

The increasing participation by such groups is an example of the ascendency of New Public Management and consequent changes in public administration, including the deregulation of government businesses. As Michael Power pointed out, this is in part due to the creation of quasi-markets and the introduction of contracting between newly separated service providers and purchasers.[80] The empirical study shows that in 2003 and 2006, industry bodies made submissions in 26 out of 35 decisions. During these years, submissions by industry groups were made in authorisation applications involving section 45 including collective agreement,[81] industry groups seeking approval for a code of conduct,[82] as well as other agreements made within a professional or business association.[83]

Not all industry groups share the same view. This is illustrated by the Australian Brick and Blocklaying Training Foundation authorisation, where four industry bodies made submissions on an application that sought to impose a levy on the sale of bricks and concrete masonry products to fund a national program designed to alleviate the shortage of skilled bricklayers in the industry. Of these four industry bodies, two made brief but supportive submissions, whereas the other two were dubious of the benefits that such a scheme would bring, pointing to the duplication of resources as well as the existence of alternate training programs that may fulfil similar goals.[84] In 2008 and 2010, industry groups exerted influence in 20 and 13 cases respectively, with all being granted authorisation. Again, diverse industry bodies were represented and the industry groups related to the health industry that made submissions in 2008 included the Rural Dental Action Association,[85] Victorian Hospitals Industry Association, Victorian Health Care Association, Rural Doctors Association of Australia, Rural Doctors Association of Victoria,[86] Australian Medical Association Limited,[87]

79 See *North West Shelf Project* application by participants in relation to co-ordinated marketing, determined on 29 July 1998, 35.

80 Michael Power, *The Audit Society* (1997) 43.

81 See *Qantas Airlines* A90963, A 9 September 2003; *Air New Zealand* A30209, A30210, A30211, 4 September 2003; *Inghams* A90825, 22 January 2003; *Australian Dairy Farmers* A90961, A90962, 20 February 2006.

82 See *Re Medicines Australia Ltd* A90779, A90780, 14 November 2003; *Australian Direct Marketing* A90876, 29 June 2006.

83 See *NSW Health* A90754, A90755, 4 September 2003; *Refrigerant* A90854, 24 September 2003; *Agsafe* A90871, 18 September 2003; *Showmen's Guild* A90729, 25 February 2003; *College of Surgeons* A90765, 30 June 2003; *Australian Swimmers Association* (2006), *Federation of Wool Organisers* (2006).

84 *Australian Brick and Blocklaying Training Foundation Limited* A90993, 25.

85 *Australian Dental Association Inc* (2008).

86 *Australian Medical Association Limited & Ors* (2008).

87 *CALMS Ltd* (2008).

Australian Society of Anaesthetists, Rural Doctors Association of Victoria[88] and the Complementary Healthcare Association of Australia.[89] This reflects the the complex and diverse interests that are present in the market and which have to be considered in decision-making by any regulator.

Submissions by Governments

In the Keynesian welfare state, the state played an important role in the provision of public services, such as telecommunications, electricity, gas and many forms of transport. These services were exempt from competition law and the worldwide competition commissions were focused on policing the activities of private corporations. Today the deregulation of government businesses has meant that these businesses are subject to competition law.[90] This has meant that both state and federal governments are now participating in the authorisation process by making submissions to the commission, attending pre-decision conferences and commenting on the final decision.

Many of these changes bring to the fore the significance of the historical, social and political context which shape the institution's response (in this case the regulatory agency's response). Fiona Haines referred to this as 'regulatory character', whereas Baldwin and Black called it the institutional environment.[91] Hubert Buch-Hansen and Angela Wigger have adopted a critical political economy perspective, linking the development of competition policy to the wider regulation of capitalism and the take up of competition principles in Europe as reflecting a shift to neoliberal discourses dominant in the 1980s.[92] In doing so they alert us to the political nature of competition law and policy which is undoubtedly also relevant to its development in Australia, where the notions of liberalism and state centric governance was displaced by the neoliberal discourse leading to the deregulation of government businesses and state enterprises in the mid nineties. This is demonstrated in the role played by government in making submissions on authorisation determinations where the state is now subject to market forces and the notions of economic efficiency take

88 *Rural Doctors Association of Australia Limited* (2008).

89 *ACT Health Food Co-Operative Limited* (2008).

90 See s 2A of the *Trade Practices Act 1974*, which opened Commonwealth Government businesses to the Act.

91 Fiona Haines, Globalisation and Regulatory Character: Regulatory Reform after the Kader Toy Factory Fire (2005) 36–37; Baldwin and Black (2008) 70–77; see also Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (2002) 19(1) Law and Policy 51–93; Michael Horn, The Political Economy of Public Administration: Institutional Choice in the Public Sector (1995) 42–43; Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 148, 153–54.

92 See Hubert Buch-Hansen and Angela Wigger, The Politics of European Competition Regulation: A Critical Political Economy Perspective (2011), Hubert Buch-Hansen and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' (2010) 17(1) *Review of International Political Economy* 20 – 44.

prominence.[93] Figure 6.2 illustrates the changing role of the federal government and Figure 6.3 looks at the submissions made by the state governments in this process. The submissions by both federal and state governments have increased dramatically from 1984 to 1998 adding the Australian evidence to the bigger story told by Buch-Hansen and Wigger.

There were no submissions by either federal or state governments in 1976, as illustrated in Figure 6.2 and Figure 6.3. The period from 1998 onwards, however, saw a greater role for these governments. This is partly explained by the substantial degree of deregulatory activity and microeconomic reform taking place in Australia. For instance, in 1998 federal government departments made submissions in support of the deregulation of the electricity industry as well as the wool industry, while the state governments were involved in decisions about the restructuring of the egg and milk industries.[94]

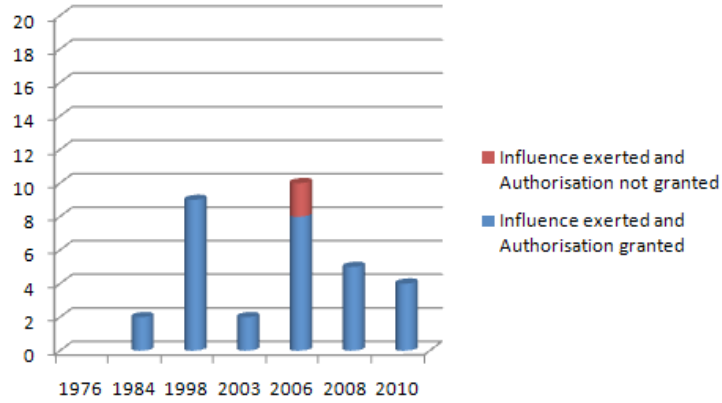

Figure 6.2: Moderately and highly influential submissions by federal government in authorisation determinations

Source: Author's research.

The Qantas authorisation is an interesting example of the different considerations involved in a highly regulated market for international travel. Here Qantas Airways Limited was applying for authorisation of a cooperation agreement with Orangestar Investments Holdings Pty Ltd to co-ordinate their flying operations in and out of Australia to predominantly Asian and Pacific locations and on routes in and out of Singapore to Asian locations. The Federal Department of Transport and Regional Services was strongly supportive of the application stating that the international aviation market has many barriers to entry, such

93 Buch-Hansen and Wigger (2010) 40. See Vijaya Nagarajan, 'The Paradox of Australian Competition Policy: Contextualizing the Coexistence of Economic Efficiency and Public Benefit' (2013) 36(1) *World Competition: Law and Economics Review* 133–164.

94 *National Electricity Code* A90652; *Australian Wool Exchange Limited* (1998); *Steggles Limited* (1998).

as the government imposed ownership restrictions that require carriers remain substantially owned and effectively controlled by their nationals. Such barriers restricted the access by airlines to certain markets. The Department noted: the 'proposed cooperation agreement will enable Qantas to take advantage of Orangestar's overseas networks that have been gained by Valuair and JA as Singaporean carriers'.[95] The Department suggested that the authorisation be granted for a period of 3–5 years. The ACCC granted authorisation for five years, stating that it retained the power to review the authorisation prior to expiry in case of any material change.[96] In the Tasmanian Forest Contractors authorisation in 2006 the applicants were not successful in their application. Figure 6.4 shows that there were two unsuccessful authorisations applications in 2006. Both of these were connected to Tasmanian Forest Contractors applications. Here the Department of Employment and Workplace Relations made a submission stating that it was generally supportive of collective bargaining arrangements that are in the public interest, but disputed a number of benefits claimed in this particular case. The queries raised by the Department were noted by the ACCC although it rejected the application.[97] This was also the case with the support shown by the Federal government for the application. It is interesting to note that the ACCC saw fit to clearly refuse to be persuaded by the position of both government departments illustrating the changing role of the regulatory agency in the regulatory state.

On the other hand, a good deal of influence was exerted on the ACCC in the 7-Eleven Stores Pty Ltd authorisation decision.[98] The ACCC was revoking an earlier authorisation under section 91(4) on the basis that several material changes had occurred. That decision had allowed for certain anti-competitive practices to continue in relation to the distribution system of newspapers. One of the material changes the ACCC cited for revoking the authorisation was that there had been far-reaching changes in competition policy, which required re-evaluation of the modes of newspaper distribution. Two Federal government submissions strongly argued that the maintenance of an efficient home delivery system for newspapers generated numerous public benefits. These benefits included the provision of business opportunities for small business; the distribution of information important for the functioning of a democratic society; assistance to vulnerable consumer groups such as the elderly and disabled; as well as the efficiency considerations arising from reduced wastage and better planning for publishers. The ACCC considered these submissions and concluded that the existence of an efficient home delivery service was in

95 *Qantas Airways Limited* A40107, A40108, A 40109, 26 April 2006, 19.
96 ibid, 40.
97 *Tasmanian Forest Contractors* A9073, A90974, 22 February 2006.
98 *Re 7-Eleven Stores Pty Ltd, Australian Association of Convenience Stores Incorporated; Queensland Newsagents Federation* (1994) ATPR 41-357, 42658.

the publishers' interests and that they were likely to ensure that it continued. The tribunal was sympathetic to the ACCC's position and stated that it 'is clear that the submissions of the government to the commission played a very large role in the deliberations of the commission in reaching its conclusions to grant authorisations'.[99]

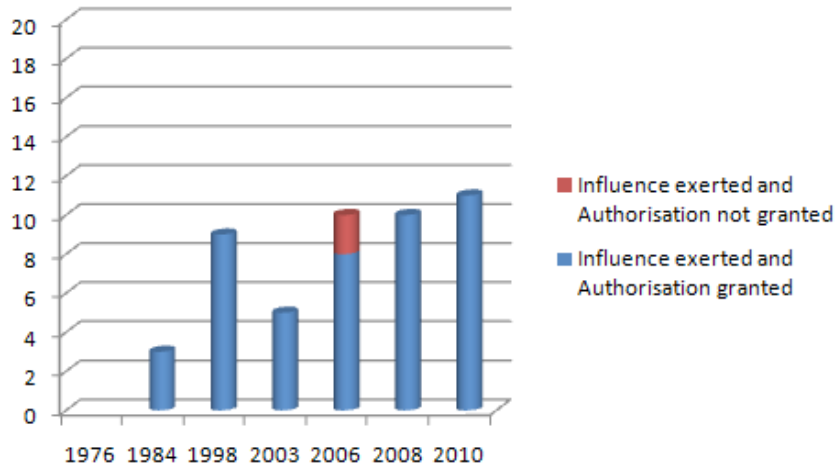

Figure 6.3: Moderately and highly influential submissions by state government and authorisation determinations in the sample studied

Source: Author's research.

The ACCC has received submissions from federal government departments where the authorisation involved deregulated industries. The detailed and considered submission made by the Commonwealth Department of Primary Industries and Energy in the Australian Wool Exchange Limited authorisation is a good example of these actors seeing their role as one of assisting the commission to reach its decision, rather than relying on the commission to cater to their interests.[100] This submission lists a number of reasons for supporting the self-regulating scheme the 'old' Australian Wool Corporation sought to implement.

State governments too are actively participating in this process. Issues involving benefits for the community, employment in industries based in the state, as well as maintaining professional standards aimed at protecting community rights

99 ibid; see also *Re 7-Eleven Stores Pty Ltd; Independent Newsagents Association; Australasian Association of Convenience Stores Incorporated* [1998] ACompT 3, 18 November 1998, in which the tribunal had the opportunity to consider the ACCC's revocation of an earlier authorisation. Here, the tribunal reiterated its earlier comments on the consideration given by the commission to the federal government's submissions in this matter. These submissions contained a detailed analysis of the public benefits derived through the newspaper distribution system.

100 *Australian Wool Exchange Limited* in relation to its business rules, 30 December 1998, 28.

attract such participation. At times the response of the state governments can be adversarial as the ACCC activities may directly impinge on their autonomy. In Re Australian Medical Association Limited the applicant sought approval for a fee agreement in rural South Australian public hospitals. This was a particularly controversial decision as it had the potential of directly impacting on the conduct of state public hospitals. The Queensland, Western Australian and Victorian governments all expressed concern about how the arrangement would affect costs and the operation of hospitals within their state.[101] In the Australian Dental Association authorisation[102] three state bodies and a federal body made submissions in favour of the application and in Refrigerant the importance of supporting industry initiatives was recognised by the Western Australian Department of Environmental Protection, which supported the application and stated that it believed it will result in a favourable environmental outcome.[103]

In the Ansett, however, the response from the two federal departments and six state departments was specifically directed at the proposed authorisation. Here a number of airlines sought to enter into an agreement to coordinate airline services and argued that increased tourism would be a resultant public benefit. The West Australian ministers for transport and tourism, the chief minister of the Northern Territory, the premier of Tasmania, as well as spokespersons for the Queensland Government, South Australia Government and Victorian Government all provided varying degrees of support for the authorisation.[104]

Submissions by Non-industry Bodies

The main criterion for belonging to this category is that the parties are not-for-profit bodies representing the interests of a societal sector. It does not include industry bodies that may be not-for-profit but which nevertheless pursue specific interests, for example, the Gas Users Group. Consumers Federation of Australia, Australian Council of Social Service, Victorian Council of Social Service and the Farmers Federation would fall into this category of non-industry bodies.

The short-lived effort to empower consumer groups at the inception of the Act resulted in a good deal of participation by these groups in the authorisation process.

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101 See A90622, 18–19.

102 *Australian Dental Association Inc* A91094, A91095, 10 December 2008.

103 *Refrigerant* (2003) 13; for other 2003 decisions where such submissions were made see *EFTPOS interchange fees* A30224, A30225, 11 December 2003; *The Australian Self-Medication Industry* A30223, 8 January 2003; *College of Surgeons* A90765, 30 June 2003.

104 *Ansett Australia Limited and Others* A90649, A90655, 22 July 1998; for other 1998 decisions where such submissions were made see *National Electricity Code* A90652, A90553, A90654, 19 October 1998; *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658 26 August 1998; *Port Waratah* A90650, A90651, 25 March 1998.

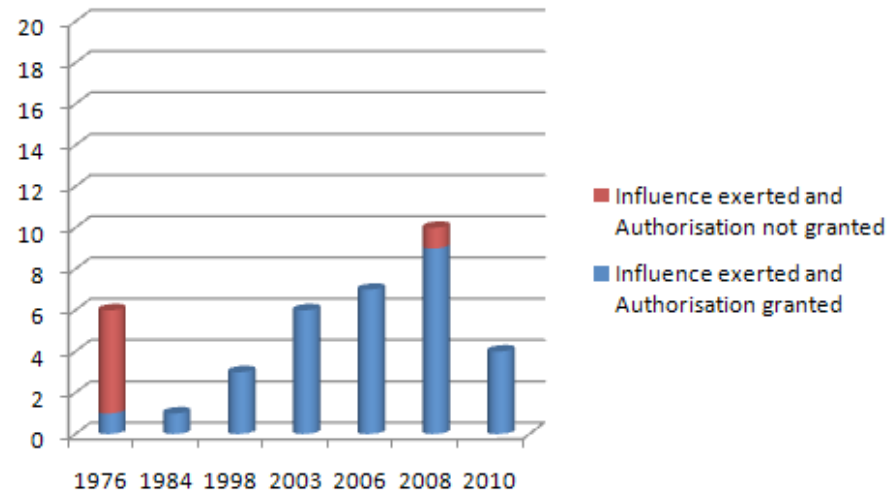

Figure 6.4: Moderately and highly influential submissions by non-industry groups and authorisation determinations

Source: Author's research.

This is reflected in Figure 6.4 which shows a relatively higher degree of participation by the not-for-profit sector in 1976. Out of the six authorisation decisions in which such submissions by non-industry bodies were made, however, only two were successful. In every year after 1976, participation was accompanied by a grant of authorisation. The manner in which the participation by non-industry groups has played out is not straightforward. In a minority of determinations studies, the non-industry groups supported the application and authorisation was granted.[105] In some other determinations studied, certain concerns were discussed in the draft determination and/or pre-decision conference and subsequent amendments were made to the authorisation application.[106] In the majority of the determinations studied, where concerns were raised by non-industry groups, some of these concerns were addressed through the imposition of conditions. This occurred in 12 out of a total of 17 determinations in which non-industry groups participated in the samples studied in 1984,[107] 1998,[108] 2003[109] and 2006.[110]

105 This only occurred in two determinations studied, both occurring in 2006: *Federation of Australian Wool Organisations* A90984 and A90985, 11 January 2006.

106 This occurred in the sample studied in the following determinations: in 2006 in *Australian Direct Marketing Association (ADMA)* A90984 and in 2003 in the *EFTPOS* A30224 and A30225, 11 December 2003.

107 *Federation of Australian Commercial Television Stations* A11709, A21265, 12 September 1984.

108 *Gas Services Business Pty Ltd: Service Performance Contracts* A90630, A90631, 19 August 1998.

109 *College of Surgeons* A90765, 30 June 2003; *Medicines Australia Ltd* A90779, A90780, 14 November 2003; *Australian Self-Medication Industry* A30223, 22 October 2003.

110 *Community Care Underwriting Agency* A90997 and A90998, 6 July 2006.

In the United Permanent Building Society authorisation, the applicants sought authorisation for an agreement to allow for property to be insured with a nominated insurer. The Canberra Consumers Incorporated and Australian Federation of Consumers Organisations made submissions opposing the application on the basis that it was a restraint of competition between insurance companies, it resulted in a denial of choice of insurers and policy benefits and, it also led to unsatisfactory premiums.[111] The ACCC took note and did not authorise the tying agreements, although it did authorise other proposed agreements in the application.[112] In Re Herald Weekly Times & Ors, the submissions of Canberra Consumers Incorporated did not have the same degree of sway. The commission noted that the demands by the consumer body for the codes of conduct to go beyond the legislative requirements and be more responsive to the needs of the public was 'a natural attitude for a consumer body and one that it is useful to have expressed publicly,' but the commission did not accept the arguments.[113]

This participation dwindled in 1984 primarily due to funding cuts for such groups. Another reason for the decreased participation was the enormous complexity of the authorisation decisions and the materials submitted by the applicant to such proceedings. Making sense of the data, undertaking independent research in order to verify or deny the claims of the applicants, and presenting a persuasive case involves a good deal of time and expertise, all of which involves high costs. There is limited participation by such groups in the determinations in 1984 and 1998, increasing again in 2003 and 2006. In 1984 only one case in the study had participation by non-industry bodies. This was in the FACTS authorisation, where the Federation of Australian Commercial Television stations sought authorisation for the rules, guidelines and procedures of the federation, which was charged with self-regulating advertising on commercial television. Three consumer groups, the Australian Federation of Consumers Organisation, the Australian Consumers Association (ACA) and Canberra Consumers Incorporated, made submissions critical of the guidelines, reflecting the public issues raised in the application. The main criticisms were that: the system being operated by the industry did not always interpret or apply laws and codes according to their purpose, the system was not open to external scrutiny and, there was insufficient public access to and knowledge of the system.[114] The ACA had undertaken a survey of 902 television commercials to support their arguments.[115] The commission stated of the ACA's submission:

> The importance of ACA's criticism is that it represents the perception of the largest consumer organisation in the country … Even if the

111 *United Permanent Building Society* (1976) 16874.
112 It authorised the compulsory life insurance schemes, which was/were the content of A21059.
113 *Herald & Weekly Times & Ors* (1976) 16572.
114 *Re Federation of Australian Commercial Television Stations* A11709, A21265, 12 September 1984, ATPR 50-076, 55399.
115 ibid, (1984) ATPR 50-076, 55401.

> perception is wrong, or partly wrong, that does not dispose of the matter, [I]t still seems evident that regulation of an industry so closely affecting consumers, when the regulation is done largely by the industry itself and purports to serve not primarily the industry itself but the community at large, needs community confidence rather than opposition. The criticisms, concerning [the]... way matters such as complaints are handled, represents a signal that the system is seen to be more industry-oriented than the industry itself perceives, or perhaps even deserves.[116]

In 1998 the role for non-industry groups to participate in decisions involving deregulation of essential services is demonstrated by the involvement of the Victorian Council of Social Services in Gas Services Pty Ltd.[117] This trend continued in later years with such groups becoming active in authorisations involving deregulated markets and professions, such Re College of Surgeons,[118] Re EFTPOS interchange fees,[119] and Re Federation of Australian Wool Organisations.[120] The non-industry groups that made submissions in successful authorisation decisions included:

- Australian Consumer Association (ACA)
- Australian Federation of Consumers Organisation
- Breast Cancer Action Group
- Canberra Consumers Incorporated
- Cancer Voices NSW
- Centre of Law and Genetics
- Consumer Credit Legal Centre NSW Incorporated
- Consumer Law Centre Victoria
- Consumers Federation of Australia
- Consumers Health Forum of Australia
- Council of Social Services of New South Wales
- Cyberspace Law and Policy Centre
- Financial Services Consumer Policy Centre, University of New South Wales
- Royal Institute for Deaf and Blind Children
- Volunteering Australia

116 ibid, 55405.
117 *Gas Services Business Pty Ltd* A90630, A90631, 19 August 1998, 8.
118 *Royal Australasian College of Surgeons* A90765, 30 June 2003.
119 *EFTPOS Interchange Fee Reform A30224 and A30225,* A30224, A30225, 11 December 2003.
120 Federation of Australian Wool Organisations A90984, A90985, A90984–A90985, 11 January 2006.

The ACA made the most submissions. The non-industry groups have been making more submissions since 1998 and the rate of success has been greater after 1976. The changes in this area should be viewed against the backdrop of a shift in the practice of government.[121] Power stated that the success of political discourses has demanded improved accountability from public services, not only in terms of their conformity to legally accepted process but also in terms of their performance.[122] So, citizens are now the consumers of public services and are entitled to monitor them. But it is difficult to reach a firm conclusion on the increasing emphasis given to 'the consumer' in all statements by the ACCC and the call by the ACCC for such not-for-profit groups to participate in its decision process.[123] It could be seen optimistically as an indication that the commission is ready to consider submissions if they are made or, more pessimistically, as an example of rhetoric by the ACCC.

Submissions from Independent Bodies

The influence of reports, directives, memoranda and general policy drives cannot be ignored. The recent past has seen a growing interdependency between government departments, all of whom may be actors within the regulatory space.[124] This interdependency is both implied and expressed. The most obvious example of implied interdependency will occur because the bodies share responsibility for the regulatory space. Express interdependency may be mandated by co-operative agreements or memoranda of understanding. For example, in September 1998 the ACCC and the Reserve Bank of Australia entered into a memorandum of understanding that set out an agreed basis for policy co-ordination and information sharing and, in 2001, the ACCC recommended that the Reserve Bank use its powers to regulate credit card schemes.[125] Many independent bodies make formal submissions to the ACCC where there is an overlap in responsibilities or where the decisions may affect the conduct of others associated with the same domain. Figure 6.5 shows that such involvement has changed over the past three decades and illustrates where the submission has either a moderate or high degree of influence on the ACCC's decision. From there

121 See Colin Scott, 'Accountability in a Regulatory State' (2000) 27(1) *Journal of Law and Society* 38, 44.
122 Power (1997) 44.
123 As was done in the *Vodaphone* A90681, 22 April 1998, where the ACCC called on the Australian telecommunications users group for comments.
124 Here I am restricting my discussion to the state actors. By doing so, I am not discounting the role of non-state actors, whose participation I have discussed above, under Submissions by Non-industry Bodies. See also Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) (Summer) *Public Law* 329, 337.
125 ACCC, 'Australian Competition and Consumer Commission Recommends Reserve Banks Using Powers to Reform Credit Card Schemes' (Press Release, 21 March 2001).

being no submission made by another independent agency in 1976, the scene changed in 1984 when there were nine submissions, many involving capital and financial markets as well as approvals for codes of conduct.[126]

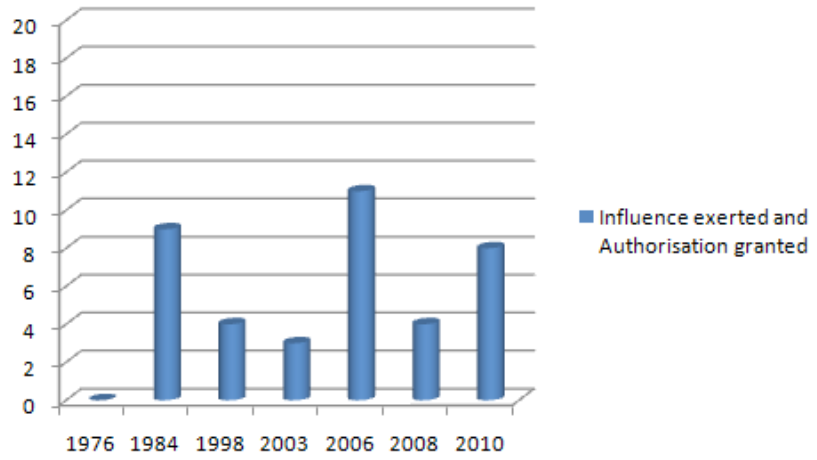

Figure 6.5: Moderately and highly influential submissions by independent groups and authorisation determinations

Source: Author's research.

In Re Australian Associated Stock Exchange — one of the ACCC decisions that engendered a transformation of an economically critical market — the authorisation was for an amendment of the Australian Stock Exchange rules, which resulted in placing restrictions on who could carry on the business of stockbroking. This arrangement had the effect of breaching section 45. The new membership rules had been scrutinised by the National Companies and Securities Commission while the business rules had been drawn up in consultation with the National Companies and Securities Commission. The role of this independent body was noted by the Trade Practices Commission in its determination.[127] Again in 1998, the Re Australian Stock Exchange authorisation was sought for business rules which governed the operation of the Stock Exchange Automated Trading system for the trading of securities in the stock market conducted by the Australian Stock Exchange. Here the Australian Securities Commission's views on the manner in which the facility would meet market efficiency and investor protection were accepted by the ACCC.[128] Likewise, it was the stability of the

126 The 1984 authorisation decisions, where independent bodies made submissions, included *Master Locksmiths Association of Australia Ltd* A90387, A90388, 15 March 1984; *International Air Transport Association*, A3485, A90408, 31 July 1984.

127 *Re Australian Associated Stock Exchange* (1984) 55468.

128 *Re Australian Stock Exchange* (1998) 26–27, 37.

financial market that was important in the EFTPOS authorisation in 2003,[129] the Investment & Financial Services authorisation in 2006,[130] and the Suncorp Metway[131] determination in which both the Reserve Bank and the Australian Securities and Investment Commission supported the application.

Informal Participation

In numerous authorisation cases it is clear that participation and influence can be indirect or informal. This section explores such participation under three headings: indirect influence of policies and past decisions, submissions and discussions following the draft determination, and public consultations and pre-decision conferences which can facilitate participation and influence outcomes.

Indirect Influence Evidenced by Reference to Policies and Past Decisions

Influence can be exerted in both a direct and indirect manner. General government policy is of concern to the ACCC which makes mention of it in its decisions. This has included reference to the Wallis Report,[132] national competition policy (Hilmer Report),[133] government ozone strategy,[134] and Council of Australian Governments (COAG) initiatives.[135] In the Australian Medical Association authorisation, the ACCC discussed the manner in which the medical profession came to be regulated by the Act and so was seeking authorisation here. It referred to the Hilmer Report and the COAG agreement to enact legislation to achieve universal application of competition laws to all businesses throughout Australia.[136] Government policy is clearly being given effect in this process. Another example is in Re Australian Communications Access Forum Inc, where the authorisation dealt with self-regulation via a constitution; the ACCC made reference to the second reading speech which accompanied the Trade Practices Amendment (Telecommunications) Bill 1996: 'It is a clear policy intention that ... both the determination of access rights and terms and conditions of access be the result of commercial processes and industry self-regulation.'[137]

In Re Investment and Financial Services Association the ACCC granted authorisation to the association for its draft policy on genetic testing for two

129 *EFPTOS* A30224, A30225, 11 December 2003.
130 *Investment and Financial Services Association Ltd* A90986, A90989, 8 March 2006.
131 Suncorp Metway Limited & Bendigo & Adelaide Bank Limited A91232, A91233, 13 September 2010.
132 *Australian Payments Clearing Association Limited* A90617; A90618, A90618.
133 *Inghams Enterprises Pty Limited* A90825, 22 January 2003.
134 *Refrigerant* A90829, 7 May 2003; *Agsafe Limited* A90871, 18 September 2003.
135 See *Vencorp* A90646, A90647, A90648, 19 August 1998.
136 *Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Incorporated* A90622, 31 July 1998, 3.
137 *Australian Communications Access Forum Inc* A90613, 22 April 1998, 15.

years. This was to allow the issues surrounding testing to be debated and for the development of government and industry policy, including 'further development of self-regulatory and legislative safeguards'.[138]

While the ACCC also makes reference to its own decisions and investigations from time-to-time, it is worth noting that this has decreased over time, perhaps pointing to the growing sophistication of the decision-making process and the acute awareness of the scrutiny of its decisions by others, including the Dawson Review in 2003. Although the reference made by the ACCC to its own decisions looks particularly large in the 2008 and 2010 determinations, as seen in Figure 6.6, it can be explained by the fact that there were many repeat authorisation applications in which reference to earlier decisions would be expected; the Refrigerant determination in 2008 and the Agsafe determination in 2010 are examples of this.

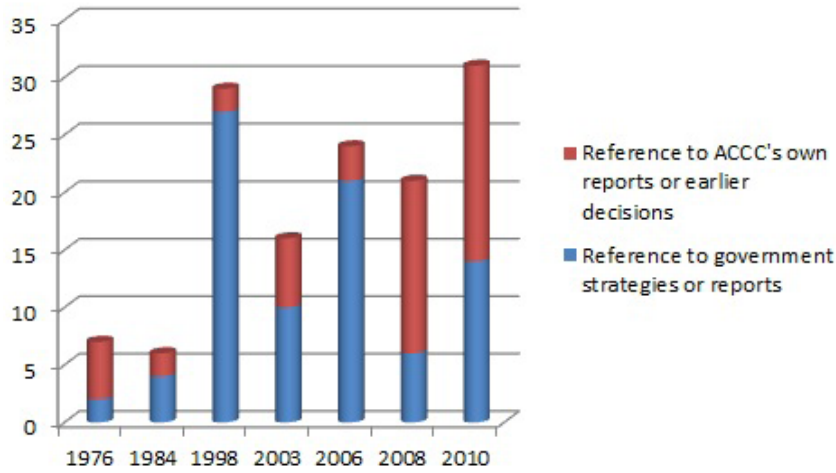

Figure 6.6: Moderately and highly influential reference by ACCC to its own decisions

Source: Author's research.

Submissions, Discussions and Reassessments after the Draft Determination

As discussed earlier, the draft determination is an important step in the authorisation process and the period after the draft determination is one where there can be a dialogue between the applicant, interested parties and the ACCC. This is a useful process for the ACCC, allowing it to discuss the issue with the applicant and other actors at greater length. The important role such

138 ACCC, *2000–2001 Annual Report* (June 2001) 84.

exchanges can have in developing new interpretative communities has been examined by Black in her work on regulatory conversations.[139] In a number of instances, interested parties have only sought to make submissions after the draft determination: Coalition of Major Professional Sports, 1984, FACTS, 1984, Golden Casket Agents' Association Ltd, 2003, Medicines, 2003 and Australian Self Medication, 2003. In the Australian Self-Medication authorisation, which involved gaining approval for a code of conduct, there were 12 submissions from interested parties before the draft decision and three submissions after the draft decision. All the submissions supported the application for authorisation.

In Re Medicines Australia Incorporated, the ACCC had imposed three conditions it had proposed in the draft application. Medicines Australia had accepted two of the conditions that had been proposed. The third condition required members of Medicines Australia to provide the association with various details about educational meetings that were organised or sponsored by these respective members prior to the event . Medicines Australia was required to make these details available to the public through its website.[140] Medicines Australia made a submission containing 10 points stating why this condition could not be accepted by its members.[141] They argued the condition would create a significant anti-competitive effect by requiring disclosure of confidential information. This would: inhibit pharmaceutical companies, reduce new membership, place an onerous administrative burden on Medicines Australia, and be largely irrelevant as most consumers were unaware of the name of the manufacturer of their medication and so unlikely to be able to assess whether their medical treatment may have been influenced by the provision of benefits.[142] The ACCC accepted these arguments and dropped the third condition in its final determination.

Public Consultation and Pre-decision Conferences

In certain complex cases, the ACCC has adopted a long public consultation and negotiation process. This was the case in the authorisations involving the dairy industry, which was being deregulated. Here, a year-long national consultation process was instituted to gain industry information and gauge measures that were likely to be effective. John Braithwaite would see this as developing a shared understanding, and Baldwin and Black would see this as one step toward really responsive regulation because it may constitute an attempt at increasing awareness and compliance and indicates a broader institutional awareness of the

139 Julia Black, *Rules and Regulators* (1997) 172; see also discussion in Chapter 5.
140 *Medicines*, A90779, A90780, 14 November 2003, 23.
141 ibid, 23.
142 ibid, 24.

regulatory regime.[143] Parker may well see this dialogue as nurturing compliance[144] and it may also be viewed as an attempt at developing a commitment to the regulatory agenda, that is, in this case the implementation of deregulatory policies.[145]

The pre-decision conferences are informal: a variety of groups contribute to the decision-making process by attending pre-decision hearings and making oral or written submissions. In the FACTS authorisation, many of the advantages of such a conference were brought to the fore. Here the consumer groups took the view that there were inadequate complaints mechanisms in place. The federation had responded to these objections by stating that complaints bodies were already established in the form of the Australian Broadcasting Tribunal and the Australian Securities Commission. These bodies responded to these comments and a consensus was reached between the parties; the commission altered its proposed conditions accordingly.[146] This highlights the very points made by the proponents of responsive and restorative regulation.[147]

In another such pre-decision conference, in 2004, that I attended, the Qantas Airways and British Airways joint venture,[148] there were representatives of the parties to the proposed agreement as well as representatives from other competitors and state government departments.[149] The meeting had been called by Virgin Airlines, a competitor of the applicants to the authorisation. It was presided over by a Commissioner John Martin who was assisted by two ACCC staff and an aviation consultant employed by the ACCC. The meeting ran for more than four hours, and provided the opportunity for written submissions and oral presentations. Legal representatives of the parties were present but did not make any presentations. Numerous suggestions were raised by Virgin Airlines on alternative approaches, including the possibility of including conditions to the grant of authorisation. Questions by the ACCC officials at the meeting on the different air routes and market share as well as hypothetical scenarios were addressed. Others at the meeting did not participate but did state that they would make written submissions prior to the final determination if they thought it necessary. A representative from South African Airlines commented to me that, although he had not made any submissions, he had found the conference and presentations by Virgin Airlines informative and would inform others in the industry on the developments.

143 Baldwin and Black (2008) 69.

144 See Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215.

145 Valerie Braithwaite, 'Responsive Regulation and Taxation' (2007) 29(1) Special Issue, *Law and Policy* 3.

146 *Federation of Australian Commercial Television Stations* A11709, A21265, 12 September 1984, ATPR 50-076, 55429.

147 See Baldwin and Black (2008); Black (1997).

148 See *Re Qantas Airways Limited and British Airways Plc* applications for authorisation, A30226, A30227 for pre-decision conference <http://www.accc.gov.au/content/index.phtml/itemId/744636/fromItemId/401858/display/preDecisionConference> at 30 December 2005.

149 The pre-decision conference was held on 1 November 2004.

Martin asked for further information to be provided in writing to the ACCC and agreed to the confidentiality claimed by Virgin Airlines. Overall, the conference was conducted in a semi-formal atmosphere where there was opportunity to ask questions and discuss issues as they arose, providing the right environment for restorative practices to be implemented.

There is a good deal of scholarship on the importance of allowing interested parties to come together to deal with an offence.[150] According to Tom Tyler, procedural justice is important in legitimising legal authority and process-based regulation results in greater compliance, co-operation and empowerment.[151] Tyler emphasises four significant elements of procedural justice: interpersonal respect, where parties are treated with dignity and respect and have their rights recognised and protected; neutrality, which requires decision-makers to be honest, impartial and base their decisions on fact; participation, whereby opportunity to express one's view to the decision-makers is provided; and trustworthiness, requiring decision-makers to treat people fairly.[152] This has been developed by Valerie Braithwaite in her work on motivational postures. These findings support the need for any regulator to consider how democratic principles of inclusion and participation can be incorporated into their processes.[153] In the trade practices area of enforceable undertakings, Parker argued that multi-party deliberation of well-facilitated restorative justice may be able to redress inequalities of bargaining power in a way that cannot be achieved otherwise.[154]

Interviews with ACCC staff suggested that, in certain cases, staff rely on consumer groups to bring specific issues to their attention.[155] Many consumer bodies, however, feel that they are at a disadvantage when faced with complex submissions and time constraints within which to respond. Further, the funding of such bodies is limited and the staff available to concentrate on such issues are few. One interviewee (14) representing a consumer group stated that some authorisation applications are unclear and rather than requiring the applicants to the authorisation to make sense of it, the consumer groups were required to respond.[156] There was a general consensus among consumer groups that the ACCC should provide more information in order to enable better participation. Currently, consumer groups are participating in certain public hearings but interviews with members indicate that there is a fear

150 Braithwaite (2002); 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, 220.
151 Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 316.
152 Tyler, 'Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members want from the Law and Legal Institutions' (2001) 19(1) *Behavioural Sciences and the Law* 215.
153 Valerie Braithwaite (2007).
154 Parker (2004); Christine Parker and Vibeke Nielsen, 'What Do Australian Businesses Think of the ACCC and Does It Matter?', (2007) 35(2), *Federal Law Review*, 187, 187.
155 Interview 4.
156 Interview 14.

that their concerns are dismissed as they 'do not speak the right language in order to get taken seriously'.[157] This is in contrast with consumer groups in the United Kingdom, which have adopted the necessary language only to find that important considerations are being left out of the deliberations.[158] Another interviewee (13) talked of the ACCC adopting a 'slow or stall process', whereby further information could be obtained and put in a digestible form which made it possible for consumer groups to participate in a meaningful way.[159]

Outcomes Weighting Discretion

The decision to grant or refuse an application is a straightforward exercise of power by the ACCC. In a number of cases, however, the ACCC grants the authorisation on certain terms that are incorporated as conditions and, on rare occasions, as undertakings. This section looks at the possible outcomes of an authorisation application that illustrates the exercise of discretion.[160]

Granting or Refusing the Authorisation Application

The ACCC can grant or refuse the authorisation. Authorisations are usually granted for a fixed period after which the parties have to reconsider their positions.

The percentage of successful applications has increased from 25 per cent in 1976 to 94 per cent in 1984, remaining reasonably constant after that, reaching the highest level in 2008 and 2010 at 97 per cent (Table 6.1). This is most likely because the ACCC has matured as an institution since its inception in 1976 and has a clear process in place with adequate staff to deal with enquiries at an early stage. This decreases the number of applications that are not likely to meet the public benefit test. This is evident from the Guide to Authorisation, which encourages people to contact and speak with staff prior to making an application. Further, the inclusion of a checklist in the guide, the payment of a reasonably large fee, as well as a trade practices community — including a legal fraternity well versed in the process — is likely to weed out unsuccessful applications at an early stage.[161]

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157 ibid.

158 See Business in the Community, 'Response to the Conservative Party Commission on Waste and Voluntary Agreements', December 2008, in which the need for laws to accommodate voluntary agreements among business is discussed and the manner in which laws should be reformed to accommodate this is mooted.

159 Interview 13.

160 It should be noted that at times applications are withdrawn and do not proceed to determination. Such cases are not discussed here and the discussion is limited to those that reach final determination, although it is acknowledged that regulatory discretion is likely to have been exercised in all these instances.

161 See ACCC, *Guide to Authorisation* (2001); ACCC, *Guide to Authorisation* (2007).

Table 6.1: Success of authorisation applications, 1976 to 2006 (total of 35 authorisations studied in each year)

Year	Successful applications	Success rate (%)
1976	9 (out of 35)	25
1984	33 (out of 35)	94
1998	29 (out of 35)	82
2003	31 (out of 35)	88
2006	32 (out of 35)	91
2008	33 (out of 34)	97
2010	34 (out of 35)	97

Source: Author's research.

Granting Authorisations on the Basis of Undertakings

Section 87B gives the ACCC the power to accept a written undertaking in connection with a matter in which it has power, with the exception of Part X.[162] The ACCC has stated that this provision does not give it the power to demand an undertaking, but only to raise it as an option during negotiations with the parties to the conduct or proposed conduct.[163] Generally, this power has been used in the context of mergers and consumer protection offences.[164] The aim of such an undertaking is to reduce the likely public detriment or ensure that there is a net public benefit deriving from th e proposed action.

In the context of mergers, it has been argued that the ACCC's considerable discretionary powers are in practice only constrained by the bargaining power of the merging parties. Although the lack of a merits review and the absence of any obligation to publish clear and comprehensive reasons for accepting the enforceable undertakings could be understood on the basis of allowing a flexible and fast system, it has come at too high a cost, tending to reduce transparency, certainty and accountability in the decision-making process.[165] On the other hand, Parker examined the use of restorative justice in enforceable undertakings. She argued that this gives a place for participation within the formal accountability mechanisms as well as the informal mechanisms:

> Informal, deliberative accountability could include first, participation of, and consultation with, affected parties during and after the negotiation of the undertaking, second, internal decision making processes within

162 Section 87B, *Trade Practices Act*.

163 Section 87B of the *Trade Practices Act*: A guideline on the Australian Competition and Consumer Commission's use of enforceable undertakings, August 1999, 5.

164 See Parker (2004); Parker (1999); Karen Yeung, *Securing Compliance: A Principled Approach* (2004) Chapter 7.

165 Yeung (2004) 227, 228, 232; see also Dawson Report Committee of Inquiry, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* [Dawson Review] (2003).

> the regulator that give the consumer and public interest an adequate voice in deciding whether to accept undertakings, third, making enforceable undertakings publicly available after they are agreed, and fourth, dialogic reviews or audits of compliance with the enforceable undertaking.[166]

In the Air New Zealand authorisation,[167] the members of the Star Alliance applied for authorisation to enter into a joint agreement and a conventions program that were in the form of guidelines, aimed at offering discounts on airfares for employees of the members as well as discount fares for certain convention delegates. Star Alliance had 20 airlines as members and was formed in 1997. Other such entities included One World (with Qantas Airlines as a member), Sky Team and Wings. The ACCC granted an authorisation subject to two undertakings to the effect that Star Alliance would cease entering into similar agreements with Qantas Airlines, which was not a member of this alliance and was a major competitor in the domestic market, with over 75 per cent of market share. These undertakings were proposed in the draft determination on 30 May 2003. The ACCC was of the view that the proposed agreement and conventions program generated a net benefit only if similar agreements were not made with Qantas, thereby ensuring that there was competition from Virgin Airlines and Qantas Airlines in the domestic market. In doing so, the ACCC was exercising its discretion in determining the manner in which to manage adequate competition in the market.

Granting Authorisations Subject to Conditions

Section 91(3) provides for the ACCC to grant authorisations subject to conditions. This power is used when there is uncertainty about whether the authorisation test is met. One example is the Surgeons authorisations, where the ACCC, although satisfied as to the significant public benefits generated, was concerned about the potential public detriments. Here a number of conditions were imposed, aimed at ensuring the public benefits were achieved. These conditions included increasing external involvement in the college's activities and increasing the transparency of the college's processes.[168] The ACT has stated that even in circumstances where a net public benefit results, authorisation can be granted on condition that changes are made to the arrangements so as to remove or lessen the potential for detriment, without impairing their essential

166 Parker (2004) 243.
167 *Air New Zealand* A30209, A30210, A30211, A30212, A30213, 4 September 2003.
168 ACCC, *Guide to Authorisation* (2007) 44.

components.[169] In the past, the ACCC has used the period following release of the draft determination as a period to negotiate amendments to the authorisation application, agree on undertakings, or consider the imposition of conditions.

The primary objective of conditions is to address anti-competitive detriment or to increase the likelihood of the public benefit claimed.[170] This remains the purpose for which the power under section 91(3) was granted. In the Application by Medicines Australia Inc appeal, the ACT stated that the purpose of the condition is to increase the likelihood that the public benefit claimed for the code is realised in respect of the provisions dealing with the conferral of such benefits to doctors.[171] Therefore, authorising a collective bargaining arrangement, on the condition that the parties can only make limited use of the shared information, is aimed at addressing potential anti-competitive practices, such as price-fixing.[172] Further, with respect to the limits on the discretion to impose conditions, the tribunal stated:

> There is no express limit upon the kinds of conditions that may be imposed. This does not mean that there is an unconfined discretion to impose whatever conditions the ACCC or the Tribunal on review, considers appropriate. The power to impose conditions is constrained, like the discretion discussed above, by the subject matter, scope and purpose of the statute.[173]

One of the persons interviewed expressed concern about the manner in which the ACCC has used conditions to manipulate the market, often only guessing at the effects that the conditions are likely to have on the market.[174] The North West Shelf Project authorisation was cited as an example where onerous conditions, which intruded into the market unnecessarily, were incorporated into the grant of authorisation.[175] These conditions included the price at which the product was to be marketed.[176] Dorf and Sabel may well see this as an example of democratic experimentalism where the regulator is setting standards for actors in the market, while others may be critical of the use of such powers on the grounds of certainty and accountability.[177]

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169 *APRA* (1999) ATPR 41-701, 42997; See also ACCC, *Guide to Authorisation* (2007) 45.

170 See *Medicines* A90779, A90780, 14 November 2003.

171 Application by *Medicines Australian Inc* [2007] Australian Competition Tribunal 4 (27 June 2007) 7.

172 See *Australian Hotels Association* (2006) A90987; Inter-hospital agreement between *Friendly Society Private Hospital Bundaberg* etc. A50019, 1 September 1999.

173 *Medicines Australian Inc* [2007] 31.

174 Interview 9.

175 Interview 9.

176 See *North West Shelf Project* application by participants in relation to coordinated marketing, determined on 29 July 1998, 35.

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

At times, conditions fulfil other collateral objectives, such as setting up external and voluntary regulatory structures that allow appeal processes, complaints mechanisms, external monitoring and reviews of business practices or codes of conduct, and independent representation on industry committees. These types of conditions do more than address anti-competitive conduct. They are steps in managing markets, market conduct, and the actions of individual market actors. Below, I examine three collateral purposes served by conditions that go to managing the market.[178]

Enhancing Compliance

Compliance is addressed through increased monitoring, auditing and participation of conduct by business. Often this is in the context of codes of conduct and examples include: T imber and Building Materials Merchants Association,[179] FACTS,[180] Re Australian Self-Medication Industry,[181] Australian Performing Rights Association Limited (APRA)[182] and Re Australian Direct Marketing Association,[183] in which codes were authorised by the ACCC. In these cases, the ACCC considered whether the code of conduct is likely to provide a public benefit that might exist beyond authorisation.[184] The role of co-regulation and the manner in which voluntary codes regulate areas of conduct beyond the scope of law has been widely acknowledged by a variety of sources including the ACCC, which has published guidelines for the development of such codes.[185] In Re Australian Direct Marketing Association, the ACCC stated that it is appropriate for self-regulatory codes to replicate or exceed legislative requirements if they encourage better practice and behaviour from industry members.[186]

The adoption of a code does not, however, in itself guarantee effective compliance or enforcement and may require regular review and monitoring of how the codes operate. At times, the ACCC has been able to use conditions to improve compliance and incorporate review. In Re Australian Direct Marketing Association, the ACCC granted authorisation on the basis that the association

178 For further detailed discussion of this see Vijaya Nagarajan, 'Co-opting for Governance: The Use of the Conditions Power by the ACCC in Authorisations' (2011) 34 *University of New South Wales Law Journal* 785–810.

179 *Timber and Building Materials Merchants Association* A3483, 16 August 1976.

180 *FACTS* A11709, 1984.

181 *Re Australian Self-Medication Industry* (2003).

182 *Australian Performing Rights Association Limited (APRA)* (2006).

183 *Re Australian Direct Marketing Association* (2006).

184 *Re Australian Direct Marketing* A90876, 29 June 2006.

185 See ACCC, *Guidelines on Codes of Conduct* (2005); See also *Medicines* ACT 58–60; Australian Law Reform Commission (ALRC), Parliament of Australia, Compliance with the *Trade Practices Act 1974*, Report ALRC 68, (1994) at 3.7, Introduction of Part IVB of the *Trade Practices Act* in 1998.

186 *Australian Direct Marketing* A90876, 29 June 2006, 17–18.

conduct regular internal reviews of its code of practice. It also required the association to obtain an annual assessment of the findings of its internal reviews from an appropriately independent legal advisor.

In the Re Medicines Australia authorisation, the Australian Pharmaceutical Manufacturers Association sought authorisation of a code of conduct seeking to regulate the promotion of prescribed medicines by pharmaceutical companies, which was likely to breach section 45 of the Act. This code included the provision of information about prescribed medicines to health care professionals and the public by pharmaceutical companies and the regulation of the provision of financial and other benefits to health care professionals by pharmaceutical companies. The ACCC pointed out that for the code to work effectively and generate public benefits, appropriate enforcement would be required. It expressed concerns about how effectively the enforcement procedures were implemented, stating that seven relevant complaints over the past three years appeared very low.[187] It imposed a number of conditions on the grant of authorisation, including an expanded role for the association's monitoring committee. This condition required each member company of the association to provide full details of all educational symposia and meetings held by the company; the details of any hospitality or entertainment offered; the number, description and professional status of attendees; and, a copy of the material provided to attendees. It also provided for the monitoring committee to, in certain circumstances, make a complaint to the conduct committee, for example, where the code may have been breached. Further it required that details of this report, including the concerns raised and the manner in which there concerns were dealt with, be published on the Medicines website and in the association's annual report.[188] The ACT upheld the imposition of this condition and stated that it was designed to enhance compliance with and enforcement of the relevant provisions of the code consistent with the statutory scheme for authorisations, and with the objects of enhancing the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection within section 2 of the Trade Practices Act.[189]

Compliance can also be enhanced by the involvement of other interest groups and close analysis of the determinations show that the conditions incorporate different forms of external oversight: changing the composition of decision-making committees within the corporation to include parties outside the corporation, thereby increasing external oversight; mandating independent review and reporting on processes internal to the corporation; and, requiring the corporation to consider and implement the recommendations of the independent

187 *Medicines* A90779, A90780, 14 November 2003, 37.
188 ibid, 40.
189 ibid, 69.

review. Often the ACCC requires that it be informed of the outcome of the reviews. It is clear that each of these types of review is aimed at encouraging the participation of wider stakeholders while, at the same time, accompanied by a less direct involvement by the regulator. The regulator is choosing to regulate indirectly by co-opting others in regulation.

Altering the composition of committees by involving external stakeholders can bring about a cultural shift in decision-making, which was what was clearly articulated in an early decision of FACTS authorisation where the ACCC noted that the likelihood of achieving effective self-regulation by industry organisations is improved 'where consumer or consumer groups are drawn into the consultation process so that not only is the result better-tailored but there is less risk of resentment'.[190] In this authorisation the ACCC imposed a condition requiring annual consultations with consumer organisations and other relevant health and safety authorities in order to decide whether to extend or revise the guidelines.[191] In the Medicines authorisation, the ACCC noted that the members of the monitoring committee included industry, professional and consumer representatives, which added a level of independence to its decision-making.

Conditions have directed the corporation to conduct an independent review. In the Australian Associated Brewers authorisation, conditions imposed required an independent review to be conducted of the effectiveness of the Retailer Alert Scheme, which was a system for regulating the entry onto the market of inappropriately named or packaged alcohol products. The ACCC noted that this scheme was weak because it did not contain a mechanism to enforce compliance, and required the association to report on the findings of the review.[192] In Australasian College of Cosmetic Surgery, a condition required that the code be amended to allow for the appointment of an independent auditor to report findings of annual audit checks including the manner in which the complaints panel of the college dealt with complaints. The results of these audits are to be reported to the ACCC as well as the college's code administration committee.[193]

Some of the conditions go further by getting companies themselves to be reflexive about the way they consider and internalise compliance, and the manner in which they relate to both internal and external stakeholders. In a number of determinations, the reviews were directed at evaluating the level of compliance among the participants after consultation with stakeholders and making the results available to both corporation and the ACCC. In Grain Corp Operations, the corporation, in conjunction with an independent person, was required to develop and implement measures that ensured confidential information was not

190 *Federation of Australian Commercial Television Stations* (1984) A11709, 55427.
191 ibid.
192 *The Distilled Spirits Industry Council of Australia* A91054 & A91055, 31 October 2007, 34–35, 48.
193 *Australasian College of Cosmetic Surgery* A91106, 18 June 2009, 57, 79.

used improperly.[194] Similarly, in the International Air Transport Association authorisation, the independent consultant had to view the standard form contracts (that were the subject of authorisation) and consider whether these contracts could be improved in any way and the company was required to act on the recommendations of this review and report to the ACCC.[195]

Promoting Fairness and Justice

The ACCC has also used conditions to introduce independent and effective appeal processes or complaints mechanisms. These will have the effect of ensuring that anti-competitive practices will be scrutinised through the appeal or complaints process and these may also have the effect of introducing specific types of just practices and ethical conduct into specific sectors of the market.

In Re Allianz Australia Insurance Limited, the ACCC granted authorisation to three large insurance companies to set up a single co-insurance pool specifically for the provision of public liability insurance to not-for-profit organisations, which would otherwise contravene section 45. The conditions included a complaints-handling procedure consistent with the Australian standard AS4269-1995, as well as a requirement that all complaints and their outcome/s are reported to the ACCC on a quarterly basis.[196] In the Australian Payments Clearing Association authorisation, similar conditions were required for fair treatment of both members and non-members of the association, as well as providing equal access to facilities.[197]

Appeal mechanisms have been introduced via conditions since 1984, when there were numerous codes of conduct being authorised. For example, in Mercury Newsagency System,[198] NSW and ACT Newsagency System,[199] Master Locksmiths Association of Australia Ltd[200] and Royal Australian Institute of Architects,[201] the commission required the inclusion of an appeals process. In Re Australian Stock Exchange, the ACCC granted authorisation on the condition that the exchange provide an adequate appeal mechanism for individuals whose registration as a trading representative was refused, suspended or withdrawn by the exchange board. It required that the constitution be amended to make provisions for such a procedure.[202] In the Surgeons authorisation, the conditions addressed the composition of the appeal committee. The condition required that

194 *Grain Corp Operations*, AWB and Export Grain Logistics A30233, A30234, A30235, 15 April 2005, 80.
195 *International Air Transport Association* (2008) A91083, 28 August 2008, 20.
196 *Allianz Insurance Ltd, QBE Insurance (Australia) Ltd, NRMA Insurance Ltd* A30217, A30218, 24 March 2004, 55.
197 ibid; See also *Re Australian Payments Clearing Association* A30176, A30177, A90620, 24 March 2004; *Australian Direct Marketing* A90876, 29 June 2006.
198 *Mercury Newsagency System* 9 May 1984.
199 *NSW and ACT Newsagency System* 26 April 1984.
200 *Master Locksmiths Association of Australia Ltd* 15 March 1984.
201 *Royal Australian Institute of Architects* A58, 7 September 1984.
202 *Re Australian Stock Exchange* (1998) A90623, i–ii.

the appeal committee be comprised of a majority of members, including the chairman, be nominated by the Australian health minister, and only a minority of members be fellows of the college.[203] Likewise, in the Victorian Egg Industry Cooperative authorisation, the conditions provided an independent appeal mechanism for producers in addition to the procedures provided under the Commercial Arbitration Act 1984 (Vic).[204]

At times, these dispute-resolution processes are in addition to those that are available under the law. They offer, however, cheaper, quicker and less formal alternatives with more flexible remedies. In the Australian Amalgamated Terminals Pty Ltd authorisation, the ACCC required the incorporation of a dispute-resolution process, with provision for mediation and, ultimately, expert determination which can be accessed by end-users of AAT's terminals.[205] This process was in addition to the dispute resolution process that may be available to the parties to the contract, as well as those available to port authorities' dispute-resolution processes and were not intended to compromise the operation of these existing processes.[206] Likewise, in the Victorian Egg Industry Cooperative authorisation, the conditions provided an independent appeal mechanism for producers in addition to the procedures provided under the Commercial Arbitration Act 1984 (Vic).[207]

Another means of incorporating fair practices into an industry is by requiring independent review. In the Surgeons authorisation, the ACCC was concerned with the exclusive role of the college in setting the standards for accrediting hospitals and training positions within hospitals. The conditions imposed included a requirement that the college establish a public independent review of the criteria for accrediting hospitals for the provision of various surgical-training positions.[208] This condition was supplemented by others involving the participation of the state health ministers in the nomination of hospitals for accreditation.[209] Another condition required the college to establish an independently chaired committee to publicly review the tests that medical colleges use to assess overseas trained surgeons.[210]

Providing information to interested parties and increasing transparency of decision making is also a way of promoting ethical conduct. A number of conditions are directed at making information widely available. In Re Medicines

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203 Surgeons A90765, 30 June 2003.
204 *The Victorian Egg Industry Co-operative* A40072, 13 September 1995, 29.
205 *Australian Amalgamated Terminals Pty Ltd* A91141, A91142, A91181, A91181, 3 December 2009.
206 ibid, 36–37.
207 *Victorian Egg Industry* (1995) A40072 29. This authorisation determination is not part of the empirical study.
208 *Royal Australasian College of Surgeons* A90765, 30 June 2003, 166.
209 ibid, 167–68.
210 ibid, 172.

the information was required to be posted on the association's website and, in Re Surgeons, the college was required to publish annually a range of information about its selection processes, training and examination processes.[211]

The information gathering process has been used to check on the rate and quality of compliance. In the Generic Medicines Industry Association, discussed above, the ACCC stated that it would seek further information from the association on how the code had been enforced and whether the association had been effective in encouraging compliance.[212] In Phonographic Performance Company, the ACCC required the company to monitor compliance with the guidelines it had developed, and to report to the ACCC the manner in which licensor's complied with the guidelines.[213] The ACCC is steering companies to enforce the law, sometimes with the help of independent consultation and staying informed about the process through the discretionary power granted under section 91(3). The threat that non-compliance may lead to litigation is always present in the grant of authorisation.[214]

Facilitating Deregulation

Conditions have been included in authorisation decisions involving both deregulated and other industries. Deregulatory policies took effect in Australia in the mid 1990s. In the 1998 authorisations, six applications from such groups were responded to with conditions. This was the highest number of authorisations in which conditions were imposed. This illustrates the important role of the regulator in giving effect to policies, which can be a difficult exercise where the outcomes may not be always predictable.

Four of the six applications were from previously government-owned and run service providers: National Electricity Code,[215] United Energy Limited,[216] Vencorp[217] and Gas Services Business Pty Ltd.[218] State-run businesses came under the jurisdiction of the Act in 1995.[219] There was one application from the Australian Medical Association, which became regulated by the Act as a result of amendments in 1995,[220] and another from the chicken industry, seeking authorisation for collective bargaining.[221]

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211 Medicines A90779, A90780, 14 November 2003; Surgeons A90765, 30 June 2003, 177–80.
212 *Generic Medicines Industry Association Pty Ltd* (2010) A91218 & A 91219, iv.
213 *Phonographic Performance Company of Australia Ltd* (2007) A91041, A91042, 54-55.
214 For example see: *The State of Queensland Acting through the Office of Liquor and Gaming Regulation* (2010) A91224 and A91225.
215 *National Electricity Code* A90652, A90653, A90654, 19 October 1998.
216 *United Energy Limited* A90665, A90666, A90670, 25 November 1998.
217 *Vencorp* A90646, A90647, A90648, 19 August 1998.
218 *Gas Services Business Pty Ltd* A90630, A 90631, 19 August 1998.
219 See sections 13–15 of the *Competition Policy Reform Act 1995*.
220 See section 8 of the *Competition Policy Reform (New South Wales) Act 1995*.
221 *Steggles Limited and Others* A30183, 25 May 1998.

Immunity Discretion

Many enquiries about anti-competitive conduct never proceed to an authorisation application. They may be circumvented, with the parties satisfied that there is unlikely to be any prosecution should they follow the proposed course of action. Alternatively, discussions with the ACCC may present other pathways previously not considered. In other words, enquirers may receive a form of 'de facto' immunity, granted in an informal manner and demonstrating the exercise of discretion.

The Guide to Authorisation states that the ACCC encourages applicants to contact the ACCC for informal discussion and guidance before lodging an application. It also states that the ACCC will provide guidance on whether the proposed conduct is likely to raise concerns under the competition provisions of the Act, the type of public benefit claims that might be considered by the ACCC, the type of detriment, including anti-competitive detriment that might be taken into account, and the overall authorisation process.[222] This includes hypothetical scenarios, which companies may be considering, that the ACCC will discuss off the record. Clearly, this is cost effective and, further, it is acknowledged by the ACCC that these negotiations may themselves facilitate a commercially satisfactory outcome.[223] Further, the ACCC may ask the potential applicant to raise such issues in the relevant industry forum and gauge whether there may be any opposition to the proposed conduct before proceeding with the application. Alternatively, the ACCC may direct the organisation to consult non-industry bodies to ascertain their views on the proposed conduct. By doing so, the ACCC is doing what scholars have described as nodal governance or partnerships approaches to governance.[224]

In certain instances, the ACCC has held prolonged consultation in order to increase familiarity with the legislation and its effect on different sectors of industry. One such example was in relation to the medical profession, which became subject to the Act. Here, the ACCC undertook a long consultation process, which, while sharing many features with a pre-decision conference, was a distinctive strategy — not prescribed by the Act — and was aimed at encouraging awareness and compliance with the law. The advantages of nurturing compliance, increasing institutional awareness, and being responsive

222 ACCC, *Guide to Authorisation* (2007) 6; see also ACCC, *Guide to Authorisation* (1999) 2–3.

223 T Thomson and H Croft, 'Authorisations in Australia and New Zealand: Neighbours with Different Backyards' (2003) 19(4) *Australian and New Zealand Trade Practices Law Bulletin* 37, 38.

224 See Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77(2) *Temple Law Review* 401; 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> at 18 December 2007.

are discussed earlier in the public consultation and pre-decision conference section and apply equally here. By so doing, the ACCC would be granting a period of grace or immunity from prosecution.

In summary …

This chapter has illustrated the complex task of the authorisation process and the manner in which discretion is used in practice. Discretion is like the tube of toothpaste — when squeezed it simply shifts to another place. This chapter has illustrated that the ACCC has exercised its discretion in many ways — by giving informal immunity guarantees to parties; by the choices of quantification methodologies it prefers; the parties it has consulted in the determination process and how much weight it has attached to their participation; and, the conditions under which authorisation has been granted. These bring to life the 'tube of toothpaste' analogy about discretion: discretion cannot be controlled — it simply is squeezed to another area in the tube.

Second, the chapter makes a link between current regulatory theories and how they can be used to explain the practice of this regulatory agency. The need to assure the applicants and members of the trade practices community and the officials within the regulator of the ways in which the regulator is both predictable and accountable, saw the description of public benefit in the form of a list. This was always viewed by the regulator, however, as a non-exhaustive list. The ACCC has used its discretion by operating at multiple levels of the regulatory pyramid (Figure 5.1). The draft determinations, public consultation processes and the use of pre-decision conferences aimed at facilitating wide participation can be termed restorative justice practices that fall within the base of the pyramid. Promising immunity from authorisation in certain circumstances, prosecuting those who continue with unlawful conduct without seeking authorisation, granting authorisation on the basis of undertakings not to engage in anti-competitive conduct, or the granting of authorisations on the basis of conditions that enhance self-regulation or incorporate procedural regulation of self-regulation can be classified as deterrence strategies that fall within the middle tier of the regulatory pyramid, as they are aimed at preventing future breaches of the Act. Finally the revocation of authorisation or the denial of authorisations fall into the top tier of the pyramid and can be considered as punitive because it is banning conduct that has either been taking place (in the case of revocation) or suspending plans for conduct which was the objective of the authorisation application.

In conclusion, the ACCC has been an innovative regulator from its inception, using its discretion in an experimental manner with an eye on the outcome,

which has always been to create workable competition in the market. This is illustrated during the early days of the Act, where significant energies were expended in educating business, activating consumer advocacy and informing the wider public. More recently, it is illustrated by the manner in which the ACCC has used conditions to enhance compliance, promote fairness and facilitate deregulation. The ACCC itself has been reasonably responsive to the needs of industry, governments, independent bodies and non-government bodies. By not mandating quantification, it has been sensitive to the manner in which it has exercised epistemological discretion. It has used its discretion inclusively by having prolonged consultations to implement sensitive policies, such as those involving professional groups that came within the Act as well as effecting deregulatory policies in primary industries. The manner in which the ACCC has functioned can be best explained by the expanded model of accountability. This expanded model involves the ACCC being accountable to a wide trade practices community, including lawyers, economists, compliance officers, non-government organisations, other regulators, ministers, governments, the media and other networks, which makes for a diffused network of accountability.

As the regulatory scholarship on responsive regulation and restorative justice suggests, however, procedural justice requires that people are aware of their rights and given the opportunity to participate. The empirical study shows that participation by state governments and the federal government has increased significantly since 1984, demonstrating the changing nature of the market and regulation. The participation by independent groups, too, has increased, although not to the same extent as involvement by government. The participation by non-independent groups, however, has not increased in the same manner — Figure 6.6 shows that there were six submissions in 1976 and seven in 2006 in the sample studied for those yeas. Although the ACCC consistently refers to its consumer-oriented focus to regulation, this is not reflected in the authorisations arena. Although the ACCC has been experimental and outcome driven, it must give greater consideration to furthering procedural fairness by encouraging participation, to notions of restorative justice by enhancing inclusivity, and becoming really responsive by reflecting on its own performance.