7. Experiments in Discretion: How Effective is the Regulator?

This chapter acts as a conclusion by bringing together the earlier discussions on discretion and public benefit in the Australian Competition and Consumer Commission (ACCC) and directly addressing the central question of how effective the ACCC has been in exercising its discretion to determine public benefit. The data have been interpreted to reveal two areas where there have been limits to this effectiveness: first, the current ad hoc approach could be improved by developing a broader framework for determining public benefit; second, strategies to increase the participation of non-industry groups in the decision process could be refined and developed. This chapter addresses these two problem areas and proposes a set of nine principles toward a solution. These principles are aimed at thinking about how the ACCC might become a more responsive regulator. The discussion in this chapter is in five parts.

The first part consolidates earlier discussion on the use of discretion by the ACCC in determining public benefit over the last four decades. It concludes that these experiences demonstrate the regulator has been experimental in its use of discretion, often achieving desired outcomes. This is conceived as representing a triumph of practice over theory. The main criticism with the present approach is that there is no overarching set of principles to assist regulators, regulatees and other interested parties. The current ad hoc approach gives rise to numerous concerns. Three main ones are: What is the role of economic efficiency? Does the public benefit have to reach a small or wider group? What weighting is given to the different benefits? It is suggested that a less ad hoc approach to determining public benefit can be conceived from this experience. Currently, the ambit of public benefit remains unclear, with the ACCC relying primarily on a list of non-exhaustive categories that it has recognised.[1] It is proposed that it would be preferable to define public benefit in terms of a principle rather than a list of non-exhaustive categories. Such a principle is best founded on a discourse that is more universal than economic efficiency. It should also take into account the practice of the ACCC to date. The set of heuristics employed in this section aims to identify public benefits using human rights and ACCC practice. This is then articulated as one principle in a set of nine principles.

The second part of the chapter looks at the main challenges facing regulators, such as the ACCC, when making a decision: the regulator has to be responsive to the regulatee and anyone else who may be affected by its decision. This is a wider concept going beyond the confines of traditional or expanded accountability, as

1 See the discussions in Chapters 1 and 3.

discussed in Chapter 5. Here it is argued that the regulator should be responsive to the needs of all stakeholders and to the business community. Two methods for increasing the regulator's use of responsive strategies are explored: it could be mandated by legislative design; or, it could become part of the regulator's practice. It is acknowledged that, given Australia's history and regulatory architecture, legislation can be designed or redesigned to mandate such involvement. The focus of competition regulation in Australia has been the use of responsive practices demonstrated by the creation of a powerful independent agency. Accordingly, this section explores the manner in which the ACCC can become more responsive. A set of seven principles is developed, aimed at increasing the regulator's responsiveness. This is a contribution to grounding the theorising of responsiveness in regulatory scholarship.

The third part brings together the discussion in the first two sections to formulate nine principles, incorporating the eight developed earlier. These principles respond to the need for a less ad hoc approach to identifying public benefits and the need to facilitate greater participation by all stakeholders. The fourth part discusses the need for reflection by the regulator in implementing these principles. The upshot is a principle-based approach to reflective practice for increasing the responsiveness of the ACCC.

The fifth part proposes that a successful regulator has to move far away from lists and rule books to a storybook, which, like all good stories, contains morals that can be called upon time and again to underpin, inform and shape conduct. The nine principles form some of the morals of this storybook. Unlike a rule book, which sets itself up for failure, a supple storybook has wide applicability, where meaning can be extracted by new actors and wider networks, in known terrain and unforeseen crisis.

Experimental Governance

The ACCC was established in 1975 with the aim of linking consumer welfare and competition principles. The legislative design leaves a good deal to the discretion of the commission, allowing for different levels of consultations. These include formal and informal exchanges that are crafted to allow a range of interchanges. The formal exchanges include the submissions of authorisations by applicants, draft determinations by the regulator and pre-decision conferences prior to final determination. The informal discussions and exchanges with affected parties and requests by the regulator for interest groups to make submissions are also part of ACCC practice. This design was no accident. It was part of Australia's distinctive approach to regulating the entrenched, club-like environment in which cartels thrived in Australia's heavily concentrated and geographically

distant market. This distinctive approach has given Australia a number of lasting legacies, one being the creation of a regulator, which, from its early days, has operated in an environment where business was oppositional, and where multiple strategies have been used, including soft and hard approaches such as education and enforcement. The ability to tread softly has been central to the determination of public benefit, where the regulator has demonstrated that it is aware of the need to be open to a range of discourses and interest groups. This pattern was laid down in the early days of the regulator under the leadership of Ron Bannerman, who founded and led the Australian competition regulation regime for 19 years — an unusually long time compared to other domains of Australian public administration and to competition enforcement in other nations.[2]

The ACCC has recognised diverse public benefits over the last four decades (Chapter 4). Efficiency benefits in the form of promotion of cost savings and industry rationalisation have always had a place, as have certain non-efficiency benefits, such as ensuring safety and improving the quality of products and services. The marketplace, however, is becoming more complex and regulation more open-textured. Many more benefits are being claimed by applicants. The role of non-efficiency benefits is increasing and newer benefits are popping up in determinations. These include improved environmental practices, better working conditions, superior information supply to targeted groups and promoting ethical conduct. The ACCC has recognised many of these diverse benefits, both in granting authorisations and in imposing conditions. There has always been a focus on achieving a reasonable outcome and of facilitating workable competition (Chapter 6).

Philosophically, the outsider could characterise the regulatory practice of Bannerman as in the tradition of American pragmatism in the vein of Philip Selznick's responsive law, though no claim to such theoretical terms was made. Integrity, political nuance[3] and being a slave to duty,[4] together with a conversational form of regulation being central to the authorisation process, characterised the practice of this commissioner. Even though subsequent chairmen were associated with different changes in emphasis and different pluralisations of the regulatory conversations, the regime remained fundamentally, conversationally and pragmatically path dependent. Many of the commissioners who followed emphasised different points. For example the Allan Fels and Allan Asher team have been labelled as 'Mr Inside' and 'Mr Outside' and, as chairman, Fels utilised his media skills to communicate

2 Ron Bannerman was commissioner of trade practices under the *Trade Practices Act 1965* from 1965 to 1974 and chairman of the Trade Practices Commission from 1974 to 1984.

3 David Merrett, Stephen Corones and David Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman' (2007) 47(2) *Australian Economic History Review* 194–95.

4 ibid.

the consumer message, Asher as 'Mr Inside' tuned up the 'Commission's enforcement into an outcomes approach'.[5] Similarly, Graeme Samuel was seen as part of corporate Australia, able to talk to business, while Ron Sims is regarded as an experienced regulator, who will operate quietly and efficiently. All these leaders have their own pragmatic approaches that can operate at all levels of the regulatory pyramid and they have been successful in increasing their powers and budget.[6] The path pioneered by Bannerman persisted partly through the agency of many of his protégés, most notably the CEO Hank Spier, who was important in shaping the agency.[7] The agency was continuously shaped by the chairmen and officials that followed.[8]

Simultaneously, as the numbers of benefits claimed was becoming more and more varied, the ACCC was faced with enormous pressure to explain its decisions and account for its actions. Rules such as the total welfare standard or the consumer welfare standard have been mooted as appropriate tools for such accounts. At a time when regulators are facing increasing scrutiny from many sources, the temptation to adopt bright line rules such as the total welfare standard is high, as they are seen as offering answers that are easy to apply. The solution prescribed by the ACT, and closely adhered to by the ACCC, is the public benefit standard, which appears to be a hybrid between the more widely accepted total welfare standard and the balancing weights standard. The public benefit standard is not what can be termed a bright line rule. It calls for the weighing of different benefits, with little guidance about the actual weighing process. This weighing up is left to the commission. Using the definitions of rules and principles, the public benefit standard is best classified as a principle. Julia Black has described the difference between rules and principles: rules are detailed and prescriptive, while principles rely on more high-level, broadly stated standards.[9] I would argue that the public benefit standard is less like a rule and more like a principle, as the weighing-up process, which is central to any examination, is impossible to spell out with precision.

Black has argued that principles can be used to refer to general rules or to rules that are implicitly higher in the hierarchy of norms.[10] Using this definition, the public benefit standard, which involves determining the weight to be given to productive efficiency savings, is a principle or higher-level norm, rather than a rule.[11] John Braithwaite has discussed the circumstances in which principles

5 Fred Brenchley, *Allan Fels: A Portrait of Power* (2003) 119.
6 ibid.
7 Interview 5; see also the role of other ACCC officers and commissioners including Asher, Ross Jones and Sitesh Bhojani in Brenchley 2003 279.
8 See Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (1984).
9 Julia Black, Martyn Hopper and Christa Band, 'Making Sense of Principles-based Regulation' (2007) *Law and Financial Markets Review* 191, 192.
10 ibid, 192.
11 ACCC, *Guide to Authorisation* (2007), para 5.29; see Chapter 6 discussion.

and rules may be appropriate. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules regulate with certainty.[12] But, when the type of actions that are being regulated are complex and occurring in changing environments, where large economic interests are at stake, principles are more likely to enable certainty than rules.[13] Braithwaite's proposals have immediate relevance here. These proposals explain the reason for the difficulties faced by current ACCC staff and the ACT in articulating simple, stable rules to regulate authorisations in a complex changing environment.

Principle-based Regulation

Black's contribution to principle-based regulation brings together much of the earlier debates in the area and is used here to assess whether principle-based regulation can be used to determine public benefit. Black, in her examination of financial services regulation, has pointed out there are eight key pre-conditions for making principle-based regulation work.[14] Many of these are relevant to the discussion on public benefit in ACCC authorisations, as discussed below:

1. *Developing criteria to identify the appropriate balance between principles and rules*. Black argues that there is a place for both rules and principles. Fixed points, which set out in more detailed form the conduct that is required, providing safe harbours from charges of non-compliance can often be just and effective.[15] These concrete fixed points are most likely to be served by rules. Applying this to the determination of public benefit may be appropriate for the ACCC to articulate the categories of public benefits as well as the weighing up of benefits and detriments as principles. Rules may be appropriate to describe the manner in which submissions may be called for, how draft determinations are made, when pre-decision conferences can be called, setting precise expiry dates for authorisations, as well as the manner in which an appeal can be mounted. As discussed in Chapter 3 the ACCC has included a non-exhaustive list of benefits in its guidance documents. The discussion in Chapter 4, however, illustrates that there are many more public benefits that have been recognised in the determinations. These are responses to changing political, global and economic contexts, supporting the notion that the ACCC's approach represents a triumph of practice over theory.

12 John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27, *Australian Journal of Legal Philosophy* 47, 52. For further discussion of the principles of responsive regulation see: John Braithwaite, 'The Essence of Responsive Regulation' (2011), 44, *University of British Columbia Law Review* 474–520.

13 ibid, 53.

14 Black, Hopper and Band (2007) 200–04.

15 ibid, 200–01.

2. *Discipline and restraint in provision of guidance documentation*. Here Black argues that there is a need to strike the right balance between providing useful information and bombarding firms with overly complex, prescriptive and inaccessible material.[16] For example, case studies to illustrate good or bad practice and guidance documentation, where kept concise, can be a useful resource. The ACCC guidance to authorisations does a helpful job of balancing such materials (discussed in Chapter 3).

3. *Meeting the needs of different firms*. This recognises that one size does not fit all. Any guidance should target firms of different sizes and with different needs.[17] As discussed in Chapter 6, outcome-based discretion demonstrates the ACCC understands the needs of different-sized firms operating in different, and distinctively Australian, contexts. The use of conditions in granting authorisations is a key example of how this has been done.

4. *Ensuring an appropriate style of supervision and enforcement and a balance between the two*. Black emphasises the importance of dialogue between the firms and the regulator, stating dialogue in turn is shaped by the enforcement context.[18] The authorisation process is strong on dialogue, with preliminary meetings being followed by formal and informal submissions by applicants and other interested parties. Certain informal participation can promote responsive regulatory practices and nurture compliance (discussed in Chapter 6: Procedural Discretion). At the front-end, informal enquiries are encouraged by the commission and, at the back-end pre-decision conferences can be the means of furthering such dialogue. This process of dialogue was initiated very early on, preceding the passing of the legislation. It stands as one of the legacies of the critical juncture (discussed in Chapter 2). In this case, the ACCC has been successful in adopting a balanced style.

5. *Redefining the role of decided cases*. Here Black recognises the important role that precedents can have and calls for greater consideration to be given by the regulator to the status of its own earlier decisions, both enforcements and settlements.[19] My empirical study of authorisation decisions illustrates that the ACCC does make reference to its past decisions, and is doing so increasingly (discussed in Chapter 6). Reference to the status of the tribunal's decisions is less clear, however, with the website recording that the appeal has been finalised and including a statement such as 'On 12 October 2004, the Australian Competition Tribunal granted authorisation for the arrangements between Qantas and Air New Zealand for a period of 5 years commencing on 12 October 2005'.[20] This does not provide further information as to the status

16 Black, Hopper and Band (2007) 202.
17 ibid, 202–03.
18 ibid, 202.
19 ibid, 203.
20 *Re Qantas and Air New Zealand* A90962, A90963, A30220, A30221, 9 September 2003; see also *Re Medicines Australia* A909894, A90995, A90996, 30 November 2005; *Re NSW Pathology* A90754, A90755, 1 November 2000.

of the ACCC decision, or the impact of the tribunal's decision on the ACCC's decision-making process.

6. *Ensuring accountability mechanisms in the regulatory rule-making process are not bypassed*. Here Black warns of the UK Financial Service Authority's intention of relying on industry to produce guidance to elaborate on principles, which could amount to outsourcing, raising concerns about how the guidance may be interpreted, the regulator's accountability and the status of such guidance documents.[21] In the authorisations area, public speeches are made by ACCC staff to industry groups[22] and the wider epistemic community, sometimes called the trade practices mafia,[23] and some guidance documents are prepared by industry bodies.[24] The ACCC acknowledges, however, that it must remain accountable.

7. *Changing the skills and mindset of regulators and firms*. Black has pointed out that the regulator has to change its supervisory and enforcement culture.[25] This includes the regulator adopting an educative role and encouraging firms to adopt a more strategic approach to regulation. Boards of directors have to encourage senior levels of management to develop the firms' business in line with regulatory requirements.[26] The ACCC has been adopting an educative role, focused on encouraging compliance. This is a continuous challenge, however, requiring the ACCC to be reflexive, and assessing its strategies constantly.

8. *Developing and maintaining a constructive dialogue*. Black builds on the contributions of scholars on the importance of trust, arguing it is critical to have an ongoing dialogue between the regulator and firms, which develops shared understandings of what is required by the principles.[27] An extensive study, carried out by Christine Parker and Vibeke Nielsen on the views of Australian businesses of the ACCC, found that the majority of the respondents to their questions 'were moderately positive about the ACCC's level of strategic

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21 Black, Hopper and Band (2007) 203.

22 For example, see Michael Cosgrove 'Regulation and the Australian Broadband sector' (Paper presented at the 3rd Annual Broadband Australia Conference, 24 July 2008) <http://www.accc.gov.au/content/index.phtml/itemId/837276/fromItemId/8973>; see also Peter Clemes, 'The *Trade Practices Act* Implications for the seafood industry' <http://proceedings.com.au/seafood2007/presentations/thursday/Thur%201345%20GB23%20Clemes.pdf> at 30 April 2009.

23 Christine Parker, Paul Ainsworth and Natalie Stepanenko, 'ACCC Compliance and Enforcement Project: The Impact of ACCC Enforcement Activity on Cartel Cases' (Working Paper, Centre of Competition and Consumer Policy, Australian National University, May 2004) 69.

24 See, for example, guidance documents prepared by the Construction Material Processors Association that provides guidance to the members on a variety of matters including standard form contracts: Construction Material Processors Association, 'Cartage Contractors in Extractive Industry' (2008) < http://www.cmpavic.asn.au/downloads/F-PAS-96.pdf> at 30 April 2009.

25 Black, Hopper and Band (2007) 203.

26 ibid.

27 ibid, 204–05; see Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation. Threat, Motivational Postures and Responsive Regulation' (2007) 29(1) *Law and Policy* 137.

> sophistication and how accommodating the ACCC is.'[28] Business executives, however, were most negative about the ACCC's dogmatism, and many saw the ACCC as having an inflexible preference for taking organisations to court, a view that the ACCC did not have of itself.[29] Although this study is extremely useful in gaining an overview of the ACCC's regulatory strategies, it is of limited relevance here as it does not examine authorisations in detail. The authors found the ACCC performed poorly in relation to matters concerning mergers and acquisitions, where it was heavily criticised for lack of transparency and accountability and for adopting a commercially unrealistic application of the law.[30] For reasons that past commissioners would justify in terms of the commercial secrecy sensitivity of proposed mergers, the ACCC has indeed been less transparent and accountable in its mergers than its authorisations work. These complaints were addressed in the amendments made to the legislation via the introduction of a clearance process.[31]

From the above discussion, it is the first criterion that has to be addressed in deciding the applicability of principle-based regulation to determine public benefit within authorisations. This criterion points to the need to have a balance between rules and principles. Here, it is contended that public benefit defies encapsulation as a rule and is better explained as a principle or a set of principles. The ACCC performs poorly on this criterion because it has not developed a broader framework to articulate the concept of public benefits.

The ACCC currently states that both economic efficiency benefits and other general benefits will be considered in the process of granting an authorisation. This is a broad canvas and applicants would need further information before deciding whether the benefits they seek to claim would be accepted. The guidance documents incorporate a non-exhaustive list of public benefits that are important for parties seeking to make such an application. It may have the effect, however, of deterring or confusing parties who seek to claim benefits not included in this list. To date, the ACCC has seen public benefits as it finds them, rightly recognising health, environmental benefits, safety and equitable dealings. This process can best be described as both ad hoc and inclusive in the types of benefits it recognises. This does not provide sufficient guidance for applicants. Likewise, it poses a problem for those who may not be able to predict the kinds of benefits that may be acceptable to the ACCC. Developing a broader framework capable of accommodating the types of non-efficiency

28 Christine Parker and Vibeke Nielsen, 'What do Australian businesses think of the ACCC and does it matter?' (2007) 35(2) *Federal Law Review*, 187, 232.

29 ibid, 233.

30 ibid, 217.

31 See s 50(4) and (5).

benefits as they arise is the challenge. Human rights literature, together with the data collated on the ACCC deliberations, can be combined to develop this framework.

A Broader Framework for Public Benefits

Human rights discourse is being recognised as an important regulatory tool for global corporations.[32] Consumer law scholars, particularly in the European Union where the human rights discourse has always thrived, are emphasising the need for all public regulation undertaken in the consumer interest to be human rights proof.[33] This is a way of ensuring that it does not contravene the European Convention on Human Rights as well as any national legislation. It means that care should be taken in ensuring both business and consumer rights are not compromised, thus striking a balance between economic freedoms of traders and social rights of consumers, both of which are protected by the convention.[34] In Australia, the only relevant legislation is the *Human Rights Act (ACT) 2004*, which provides that, so far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.[35] Although this does not have the same reach or impact as the convention, it does support the need to consider human rights discourse more widely.

As deputy chair of the ACCC, Asher signalled the important role of human rights. He proposed that the UN Consumer Protection Guidelines, an elaboration of the fundamental rights first articulated by US President John F Kennedy in 1962, which call on governments to develop, strengthen or maintain measures relating to the control of restrictive and other abusive business practices that may be harmful to consumers, be extended to include a specific elaboration of competition policy measures that governments can adopt in a way that enhances consumer welfare.[36] Although it may be more obvious to rely on consumer rights

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32 See Amy Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 501; David Kinley, Justine Nolan, and Natalie Zerial, 'Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Company and Securities Law Journal* 30; David Kinley, 'Human Rights Fundamentalisms' (2007) 29(4) *Sydney Law Review* 545; Mary Dowell-Jones and David Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25(2) Ethics & International Affairs 183–210.

33 Geraint G Howells and Stephen Weatherill, *Consumer Protection Law* (2005) 94–97.

34 Article 10 of the European Convention on Human Rights, the fundamental right of the freedom of expression, is now being relied on by businesses to argue that certain advertising restrictions may be void. See Howells and Weatherill (2005) 97.

35 Section 30.

36 Allan Asher, 'Consumers 2000: Updating the UN Guidelines' (5 January 1997) <http://www.accc.gov.au/content/index.phtml/itemId/96009> at 1 November 2004. The four consumer rights articulated by President John F Kennedy were the right to redress, the right to consumer education, the right to a healthy environment and the right to satisfaction of basic needs; see David Edward O'Connor, *The Basics of Economics* (2004) 146.

in dealing with competition issues, it is contended that, as consumer rights is a subset of human rights, the human rights framework is to be preferred. Whereas consumer rights may provide for the right to a safe product, they may not provide for a right to a safe workplace or a right for competitors to receive a fair hearing, or a right for freedom of expression for journalists, for example, in the media regulation cases.[37] The cases studied here have shown that these non-consumer rights issues come up regularly. Human rights would be the starting point, and conduct that enforces human rights would be viewed as a public benefit. Therefore, conduct that concerns the health of patients, the safety of goods, and the right to a healthy environment or the right to a fair trial can be couched in terms of human rights and can be viewed as public benefits. Alternatively, where conduct appears to adversely affect human rights, it should not be approved unless the effect could be remedied via the inclusion of conditions.

The use of human rights will shift the focus away from the current tensions between economic efficiency and non-efficiency factors. Rather than referring to issues of product safety and improved health services in negative terms by calling them non-efficiency factors or other factors, there is much to be gained in viewing them in the positive language of human rights. Asher has examined the types of rights that need to be examined when dealing with the deregulation of utilities to ensure the potential adverse impact of competition is minimised.[38] These include the facilitation of participation by consumers in decisions that affect them, inclusion of accountability measures that provide sufficient information and redress for consumers, and enhancing transparency in decision-making in the utilities sector.[39] This demonstrates the wider applicability of the human rights discourse.

Specifically, human rights can be used as a lens for authorising codes of conduct. When doing so, it is necessary to recognise the right to be heard and ensure consumer groups are represented in the authorisation process and their participation is facilitated in a meaningful way. Likewise, it is necessary to ensure the right to a fair hearing or procedural justice, which may mean appeal processes in the codes should be examined and, where necessary, any adverse effects reduced via the use of conditions. Further, it is necessary that the parties involved, be they consumers or other competitors, be informed on a regular basis; this may be effected by providing monitoring procedures within the codes. As the discussion on codes of conduct in Chapter 6 demonstrated,

37 See *Abbott Australasia Pty Ltd and Nestle Australia Limited* (1992) ATPR (Com) 50-123, *The Textile, Clothing and Footwear Union of Australia and the Council of Textile and Fashion Industries Limited* (2000) ATPR (Com) 50-282, *Steggles Limited and Others* A30183, 20 May 1998, all of which dealt with improved workplace, safer products and the right to appeal respectively.

38 Asher, 12.

39 ibid, 11–12.

the ACCC is currently considering such factors, either in the context of public benefit or via the imposition of conditions aimed at lessening the detriment that may flow from such proposed conduct.

Many organisations, such as the NSW Office of Fair Trading, adopt the human rights framework to explain their mandate. In this office, eight international consumer rights are used as a starting point: the right to safety, the right to be informed, the right to choose, the right to be heard, the right to satisfaction of basic needs, the right to redress, the right to consumer education, and the right to a healthy environment. Recently, a former deputy chair, Louise Sylvan, argued for a firmer connection between competition policy and consumer policy and has urged that consideration be given to the outcomes certain types of actions may have on both consumers and competition.[40] Thinking of the manner in which authorisations can benefit consumers may be one way of doing so. Many of the ACCC determinations can be cast in terms of such rights. In *Abbott Australasia Pty Ltd and Nestle Australia Limited*,[41] manufacturers and importers of infant formula applied for authorisation for its marketing obligations, which included exclusionary provisions. The commission granted authorisation and cited the Australian Government's commitment to the World Health Organisation International Code of Marketing of Breast Milk Substitutes, adopted by Australia in 1981. In 1983 Australian manufacturers and importers adopted a voluntary code based on this.

Not all issues involve human rights and this cannot be dismissed in developing an appropriate framework. The *Qantas and Air New Zealand*, the *Port Waratah* and the *Australian Payments Clearing Association* authorisations are three examples where the reasoning of the decisions did not involve human rights.[42] In such cases the benefits cannot easily be couched in terms of human rights, as enunciated in the international covenants. The *Qantas and Air New Zealand* authorisation concerned a proposed alliance between Qantas and Air New Zealand over specific routes as a response to competition from other airlines, in *Port Waratah* the authorisation involved an agreement between producers of coal to establish a distribution system for loading ships for export and, in *Australian Payments Clearing Association*, the authorisation dealt with membership of the body responsible for the implementation of effective payments clearing and settlement systems. Human rights are applicable, however, in the vast majority of cases and, here, the manner in which human rights are understood has to be

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40 Louise Sylvan, 'Activating Competition: The Consumer–Competition Interface' (2004) 12(2) *Competition and Consumer Law Journal* 191. See also Jeremy Tustin and Rhonda Smith, 'Joined-up Consumer and Competition Policy: Some Comments' (2005) 12(3) *Competition and Consumer Law Journal* 305.

41 *Abbott Australasia Pty Ltd and Nestle Australia Limited* (1992) ATPR (Com) 50-123. See also Sitesh Bhojani, '"Public Benefits" under the *Trade Practices* Act' (Paper presented at the Joint Conference: Competition Law and the Professions, Perth, WA 11 April 1997) 4–5.

42 See *Qantas and Air New Zealand* A90862, A90863, A30220, A30221, 9 September 2003, *Port Waratah* A90650, 25 March 1998 and *Australian Payments Clearing Association Limited* A90617–A90619, 1 April 1998.

explored. It is widely accepted that human rights remain an incomplete idea because they are indeterminate and nearly criterion-less.[43] James Griffin points to the example of the right to health, which gives no indication of whether this refers to health or health care.[44] Does it mean it is a right to welfare that supports health, such as antibiotics, or education about medicines and disease-prevention measures. Could it mean, as some argue, every child living in the tropics has a right to a mosquito net to protect them from malaria? What it means will depend on the society in which it is being considered and the other priorities it is being considered alongside.[45] On the other hand, a right to health will universally mean more than a right to health care: for example, it will mean a right to clean air and clean water. Griffin proposes there are two ways to use philosophy to supply a more substantive account of human rights: the top-down and the bottom-up approach:

> There is the top down approach: one starts with an overarching principle, or principles or an authoritative decision procedure — say, the principle of utility or the Categorical Imperative or the model of parties to a contract reaching agreement — from which human rights can be derived. Most accounts of rights in philosophy these days are top-down. Then there is a bottom-up approach: one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists or various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them.[46]

One clarification is required at this point — to distinguish between primary duties and secondary duties. Griffin points to this distinction and proposes that, while primary duties have the same content as the human right, secondary duties are those duties more loosely connected to the human right. The example used by Griffin is the duty to ensure compliance with human rights. Here it is clear that institutions populated by legislators, judges and police are necessary to create a just legal system to ensure compliance with human rights., The duty to create a just legal system, however, is not identical to a primary duty. Griffin calls this a secondary duty. Because this secondary duty is necessary for the primary duty to be given effect, the two duties are close enough to be treated for practical purposes as one. With the determination of public benefits, the duty to ensure that any person whose rights are violated shall have an effective remedy by virtue of Article 2 of the International Covenant on Civil and

43 James Griffin, *On Human Rights* (2008) 14.
44 ibid, 14, 99–101.
45 ibid, 99–100.
46 ibid, 29.

Political Rights (ICCPR) will be a primary duty. But setting up appeals systems within codes of conduct and prescribing the constituency of the appeals panels will be a secondary duty. The setting up of compliance systems to circumvent the breach of this duty is one further step removed from setting up appeals mechanisms. But, it too is linked to the human right and is called a called a controversial secondary duty. The discussion below examines both the primary and secondary (including controversial secondary) duties attached to the human right.

I explore both these approaches to evaluate their applicability to determining public benefits. In the following discussion I have first considered public benefits that have been acknowledged in practice (in Chapters 3, 4 and 6) and categorised them into a list of 22 separate public benefits (Table 7.1). Next, I have looked at how many would be accommodated by the top-down approach to human rights; 13 do not have a place. Then, I have applied the bottom-up approach to human rights, which is more accommodating, but still leaves out 11 public benefits. I then created a set of heuristics, which recognise ACCC practice, while also being faithful to human rights and can accommodate the 15 public benefits contained in the ACCC lists.

Using the Top-down and Bottom-up Approaches

All the public benefits (PB) discussed in Chapters 3, 4 and 6 have been collated and assessed to see if they can be accommodated by Griffin's top-down and bottom-up approach to human rights. Before doing so, I want to briefly refer to the public benefits to be considered. Chapters 1 and 3 noted 15 specific examples of public benefits that the ACCC considers as a non-exhaustive list (Table 7.1, column A).[47] Chapter 4 added seven further public benefits that have been recognised by the ACCC in practice to the non-exhaustive list (Table 7.1, column B). In the discussion on outcome-based discretion in Chapter 6, it was noted that the ACCC imposed conditions related to enhancing compliance; promoting fairness and justice (by requiring increased transparency and incorporating complaints mechanisms within codes of conduct); and related to facilitating deregulation. These were also public benefits recognised by the ACCC when it granted authorisations (Table 7.1, column C). There are three overlaps (indicated in Table 7.1 with data on same row): the right to due process and the right to justice overlaps with promoting fairness and justice, facilitating deregulation is in both columns B and C, and encouraging compliance and self-regulation overlaps with enhancing compliance. Of the 22 public benefits recognised in earlier chapters (Table 7.1), 15 are recognised by the ACCC in its lists (PB1–PB15) and seven are recognised by the ACCC in its practice (PB16–PB22).

47 Note that the category of 'Other' is not included here.

Table 7.1: Public benefits acknowledged in practice

Number of public benefits (PB) discussed	A. Public benefits recognised by the ACCC in its lists and discussed in chapters 1 and 3	B. Public benefits recognised by the ACCC in practice and discussed in chapter 4	C. Public benefits resulting from the imposition of conditions and discussed in chapter 6
PB1	Economic development		
PB2	Industry rationalisation		
PB3	Expansion of employment or prevention of unemployment in efficient industries		
PB4	Expansion of employment in particular areas		
PB5	Attainment of industry harmony		
PB6	Supply of better information to consumers and businesses		
PB7	Promotion of equitable dealings in the market		
PB8	Promotion of industry cost savings		
PB9	Development of import replacements		
PB10	Growth in export markets		
PB11	Steps to protect the environment		
PB12	Fostering business efficiency		
PB13	Assistance to efficient small business		
PB14	Enhancement of the quality and safety of goods and services		
PB15	Promotion of competition in the industry		
PB16		Regulation of illegal activity	
PB17		Health of patients, consumers and worker	

Number of public benefits (PB) discussed	A. Public benefits recognised by the ACCC in its lists and discussed in chapters 1 and 3	B. Public benefits recognised by the ACCC in practice and discussed in chapter 4	C. Public benefits resulting from the imposition of conditions and discussed in chapter 6
PB18		Right to due process and right to justice	Promoting fairness and justice (through complaints mechanisms and increased transparency)
PB19		Facilitation of deregulation of industries	Facilitating deregulation
PB20		Encouraging compliance and self-regulation	Enhancing compliance
PB21		Promotion of ethical conduct	
PB22		Protection of certain vulnerable sectors in society	

Source: Author's research.

Top-down Approach to Human Rights in Determining Public Benefits

Here I use the international bill of rights as constituted by the Universal Declaration of Human Rights 1948, ICCPR 1966 and the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), to derive the main human rights that can be linked to public benefits.[48] I begin with an explanation of the main instruments of international human rights, followed by an examination of how public benefits in practice may fit into the human rights enshrined in these instruments.

The Universal Declaration of Human Rights 1948 provides the starting point for any discussion of human rights. It defines human rights as basic rights that form the foundation for freedom, justice and peace and which apply equally and universally in all countries. The two major instruments of international human rights that derive from the declaration are the ICCPR and the ICESCR. Both have been ratified by Australia. The ICCPR is often referred to as the *first generation of human rights* — such as the right to life, the right to liberty and security, the right to a fair trial, the right to privacy, the right to freedom of thought, conscience and religion, opinion, expression, peaceful assembly and association. The ICESPR is referred to as the *second generation of human rights* and covers such rights as the right to work, the right to an adequate

48 Griffin (2008) 29. See also Tom Campbell, 'Introduction', in Tom Campbell and Seumas Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (2004) 12.

standard of living (food, clothing and housing) and the right to physical and mental health. The *third generation of human rights* that has emerged in recent years covers collective rights, such as the right to self-determination and the right to economic and social development. These rights have been championed primarily by developing nations within the United Nations, but have 'been only cautiously accepted by the mainstream international human rights community because of their challenge to the western, liberal model of individual rights invocable against the sovereign'.[49] While briefly touched on in the ICCPR, these rights have not yet been incorporated into any legally binding equivalent covenant or treaty.

These covenants do not deal with specifics but rather provide the framework for reform agendas within different nation states. They comprise non-exhaustive lists that are criterionless, leaving it to states and other bodies to fill in the details.[50] Some of these rights may not be considered as rights at all. Griffin argues that many statements in the international covenants are unlikely to be human rights and gives the example of Article 12 in the declaration, which deals with the rights to protection against attacks on one's honour and reputation, or Article 20, which states that any propaganda for war shall be prohibited by law.[51] Griffin proposes that practicalities need to inform the content of many human rights. By this he is referring to local conditions in the relevant country, as well as global considerations about human nature, which will inform the content of such rights.[52]

Often, national laws are not cast in terms of human rights even though it may be possible to do so, as illustrated by the development of industrial laws in Australia. Industrial laws could be hung on the human rights hook using articles 6 and 7 of the ICCPR, which are extremely general and provide for the right to work and the right to the enjoyment of just and favourable conditions of work. In many countries, however, including Australia, there has been a tendency to separate the developments in the workplace from the more recent developments of human rights jurisprudence.[53] More recently the focus has turned to the link between global finance and human rights and the need to 'close the gap' so as to ensure that global finance does not undermine human rights protections, but

49 Hilary Charlesworth, 'What are "Women's International Human Rights"?', in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) 58, 75.

50 Griffin (2008) 29–56.

51 ibid, 194–95.

52 ibid, 316.

53 For a discussion of some of the reasons for this in the area of industrial laws, see Peter Bailey, *Human Rights: Australia in an International Context* (1990) 360–62; see also Christine Williams, 'Sexual Harassment and Human Rights Law in New Zealand' (2003) 2(4) *Journal of Human Rights* 573, where it is argued that human rights may provide the appropriate vehicle to regulate sexual harassment.

rather can be used in ways to enhance human rights ends.[54] In support of this argument, it is possible to consider the ICESCR and other initiatives, such as the UN Environment Programme Finance Initiative.

Ratification of international instruments creates the basis for a legitimate expectation that administrative decision-makers will act in conformity with these instruments. Accordingly, the ACCC must take the international covenants into account in its decision-making. There remains, however, the problem of defining the kind of activities that are protected by the covenants.[55] In the past, the ACCC paid attention to what can be conceived of as human rights obligations in its authorisation decisions. In *Association of Fluorocarbon Consumers and Manufacturers Inc*,[56] it was recognised that the commission could consider not only state and national legislation but also international obligations and standards. Here there was no relevant and applicable national or state legislation, and the relevant international standards on emission of ozone-depleting substances had been established under international protocols. The control of hydrocholorofluorocarbon (HCFC) and hydrofluorocarbon (HFC) gases was dealt with by the Montreal Protocol 1987 and Kyoto Protocol 1997 respectively. The Association of Fluorocarbon Consumers and Manufacturers argued that one of the public benefits would be to encourage industrial activity consistent with Australia's domestic ozone protection policies and Australia's international obligations.[57] The commission accepted this proposition and stated: 'a scheme or arrangement which contributes to limiting the risk to human health and the improvement of the environment would benefit the Australian public'.[58] Further rights recognised in the ACCC's decision-making include the right to health and the right to ethical treatment by professionals.[59]

Table 7.2 links recognised human rights, as expressed in the international covenants that Australia has signed, to recognised public benefits detailed in Table 7.1. Public benefits are separated into three categories: public benefits that can be linked to a primary human right; public benefits that can be linked to a secondary human right or controversial secondary human right; and public benefits that cannot be linked to any human right.

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54 Dowell Jones and Kinley (2011) 203–04.

55 See Ian Forrester, 'Modernization of EC Competition Law' (2000) 23 *Fordham International Law Review*, 1028, 1070, for a discussion on how human rights could be used in the European Union in cases of breaches of competition.

56 *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658, 26 August 1998.

57 ibid, 4.

58 ibid, 10.

59 For a discussion of the right to health see the discussion on Health of Patients, Consumers and Workers in Chapter 4 of this book. For an example of professional ethics in codes see *ACT Law Society* authorisation A75 (1977) ATPR (Com) 16,615 where the society adopted a ruling that solicitors were prevented, except in certain circumstances, from acting for both the vendor and purchaser in the sale of land.

Table 7.2: Public benefits linked to human rights

	Human right (where relevant)	Public benefit
Public benefits that can be linked to recognised human rights	ICECSR, Article 7 — the right of everyone to the enjoyment of just and favourable conditions of work	Expansion of employment or the prevention of unemployment in efficient industries (PB3)
	ICECSR, Article 7 — the right of everyone to the enjoyment of just and favourable conditions of work	Expansion of employment in particular areas (PB4)
	ICECSR, Article 12 — the right of everyone to the enjoyment of the highest attainable standard of physical and mental health including the improvement of all aspects of environmental and industrial hygiene. Widely accepted as a third generation right	Steps to protect the environment (PB11)
	ICECSR, Article 12 — the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which can include increased consumer safety	Enhancement of the quality and safety of goods and services (PB14)
	ICECSR, Article 12 — the right of everyone to the enjoyment of the highest attainable standard of physical and mental health including provision of medical service and medical attention in the event of sickness and ICECSR, Article 7 — the right of everyone to the enjoyment of just and favourable conditions of work, including safe and healthy working conditions	Health of patients, consumers and workers (PB17)
Public benefits that can be linked to a secondary or controversial human right	ICCPR, Article 2 — ensure that any person whose rights are violated shall have an effective remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state	Promotion of equitable dealings (PB7) (controversial secondary right)
	ICCPR, Article 2 — ensure that any person whose rights are violated shall have an effective remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state	Assistance to efficient small businesses (controversial secondary right) (PB13)
	ICCPR, Article 2 — ensure that any person whose rights are violated shall have an effective remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state	Rights to due process and justice/Promoting fairness and justice (secondary right) (PB18)
	ICECSR, Article 12 — the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	Protection of certain vulnerable sectors in the society (secondary right) (PB22)

	Human right (where relevant)	Public benefit
Public benefits that cannot be linked to a human right		Economic development (PB1)
		Industry rationalisation (PB2)
		Attainment of industry harmony (PB5)
		Supply of better information to consumers and business (PB6)
		Promotion of industry cost savings (PB8)
		Development of import substitution (PB9)
		Growth in export markets (PB10)
		Fostering business efficiency (PB12)
		Promotion of competition in the industry (PB15)
		Regulation of illegal activity (secondary right) (PB16)
		Facilitating deregulation (PB19)
		Encouraging compliance (PB20)
		Promotion of ethical conduct (PB21)

Source: Author's research.

As seen from Table 7.2, only five public benefits, four that have been included in the ACCC lists and one in ACCC practice, can be linked to recognised human rights, namely Article 7 and Article 12 of the ICESCR. There are seven public benefits that can be termed secondary or controversial secondary rights, all dealing with Article 2 of the ICCPR and Article 12 of the ICESCR. Of these, three can be found in the ACCC lists and four have been recognised by the ACCC in practice.

Of these four public benefits, two are secondary human rights, as they are creating mechanisms or pathways to give effect to the primary human right: right to due process and justice/promoting fairness and justice and the protection of vulnerable sectors of society. The former is creating pathways to the primary

right enshrined in Article 2 of the ICCPR because they can be seen as creating a competent authority for ensuring that any person whose rights are violated has an effective remedy. The later public benefit of protecting vulnerable sectors of society is creating a pathway to the right enshrined in Article 12 of the ICESCR, as it is an attempt to provide for a reasonable standard of mental and physical health.

The two remaining public benefits are less clear-cut than the above four, and are classified as controversial secondary rights: promotion of equitable dealings and assistance to efficient small businesses. All these public benefits are linked to the right to freedom of association. We know restrictions on trade union activities will be clearly an infringement on the freedom of an association. It is not so easy, however, to make the same conclusions about competition law, which at its very core strikes at different types of associations such as cartels. These public benefits recognise that certain forms of association are appropriate — thus the promotion of equitable dealings, aimed at empowering smaller companies and not afforded to companies with market power, should be allowed. They are not constraints and they do not apply to all types of businesses or companies. They are means of facilitating associations by certain businesses or companies and, although controversial, they can be linked to the right to freedom of association. The same logic can be applied to the assistance to efficient small businesses that can engage in conduct that would not be countenanced by businesses with market share. Accordingly they are classified as controversial secondary human rights in Table 7.2.

There are 13 public benefits that cannot be linked to human rights (Table 7.2), nine of which are in the ACCC lists and four that come out of ACCC practice. An argument could be made to classify the regulation of illegal activity, supply of better information to consumers and business, and encouraging compliance, as secondary rights. This would be on the basis that, like the discussion on access to justice, providing countervailing power, enabling equitable dealing and empowering small business, these three above-mentioned rights may be viewed as secondary human rights, as they are necessary to give effect to a primary human right. I have not classified them in this manner, however, because they cannot be as directly linked to recognised human rights. Accordingly, I have placed them under the heading 'Public benefits that cannot be linked to a human right' (Table 7.2).

It is difficult, by any stretch of the imagination, to include benefits flowing from import substitution and the promotion of cost savings into any of the categories of human rights. Some of these may be, however, in specific circumstances, capable of being linked to a human right. For example, economic development in certain circumstances may be linked to the human right of the right to development.[60]

60 This right was proclaimed by the United Nations in 1986 in the Declaration on the Right to Development, which was adopted by the United Nations General Assembly resolution 41/128. The preamble states

It is difficult to see, however, these circumstances existing in Australia, which is generally regarded as a developed nation. Likewise, encouraging compliance, if it is aimed at the provision of an appeal process or improving the safety of goods produced, may be linked to a human right of access to a fair hearing or the attainment of the highest attainable standard of physical health. Compliance is usually encouraged for other purposes, however, such as the promotion of self-regulation or improving consumers access to information. Although, in some circumstances, some of these public benefits may be linked to a human right, this is unlikely to occur often and drawing such linkages is tenuous at best. In conclusion, although the top down approach to human rights can accommodate some public benefits, it does not easily accommodate the majority of public benefits that have been recognised.

Bottom-up Approach to Human Rights in Determining Public Benefit

Griffin's bottom up approach starts with human rights as used in our actual social life by politicians, lawyers and social campaigners and then sees what higher principle to resort to in order to explain their moral weight.[61] This approach may be better suited for the purpose of determining public benefit. It also comports with the real world of philosophical pragmatism in which authorisation evolved. It might be said in the same spirit that the case method of the common law is a device for discovering such benefits in a way that is philosophically bottom-up. The 22 public benefits collated in Table 7.1 are a combination of ACCC lists and practice and I have categorised these benefits under broad headings, which I have called immanent rights. Where relevant I have matched up the public benefit to an existing international covenant, as discussed in Table 7.2.

Of the 22 public benefits, 11 cannot be linked to an immanent right, related to either the functioning of the market or the promotion of ethical conduct (Table 7.3). There are nine dealing with the functioning of the market: economic development, industry rationalisation, attainment of industry harmony, promotion of industry cost savings, development of import replacements, growth of export markets, fostering business efficiency, promotion of competition in the industry, and facilitation of deregulation. There are two public benefits dealing with the promotion of ethical conduct: promotion of equitable dealings in the market and the promotion of ethical conduct. The remaining nine public benefits are linked to six immanent rights: right to quality of life; right to just treatment and just procedure; right to freedom of association; right to security; right to know; and right to securing rights.

'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.'

61 Griffin (2008) 29.

Table 7.3: Public benefits linked to immanent rights

Number of public benefits (PB) discussed	Public benefits recognised by ACCC	Relationship to human rights	Immanent right
PB1	Economic development	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB2	Industry rationalisation	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB3	Expansion of employment or prevention of unemployment in efficient industries	ICECSR, Article 7	Improve quality of life
PB4	Expansion of employment in particular areas	ICECSR, Article 7	Improve quality of life
PB5	Attainment of industry harmony	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB6	Supply of better information to consumers and businesses	Cannot be linked to a human right	Right to know
PB7	Promotion of equitable dealings in the market	ICCPR, Article 2 (controversial secondary right)	No clear immanent right (related to the promotion of ethical conduct)
PB8	Promotion of industry cost savings	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB9	Development of import replacements	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB10	Growth in export markets	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB11	Steps to protect the environment	ICECSR, Article 12	Improve quality of life
PB12	Fostering business efficiency	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB13	Assistance to efficient small business	ICCPR, Article 2 (controversial secondary right)	Right to freedom of association
PB14	Enhancement of the quality and safety of goods and services	ICECSR, Article 12	Improve quality of life
PB15	Promotion of competition in the industry	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB16	Regulation of illegal activity	Cannot be linked to a human right	Right to security
PB17	Health of patients, consumers and worker	ICECSR Article 12	Improve quality of life

Number of public benefits (PB) discussed	Public benefits recognised by ACCC	Relationship to human rights	Immanent right
PB18	Right to due process and right to justice/ promoting fairness and justice (eg through complaints mechanisms)	ICCPR, Article 2 (secondary right)	Right to just treatment and just procedure
PB19	Facilitation of deregulation	Cannot be linked to a human right	No clear immanent right (related to the functioning of the market)
PB20	Encouraging compliance	Cannot be linked to a human right	Right to securing rights
PB21	Promotion of ethical conduct	Cannot be linked to a human right	No clear immanent right (related to the promotion of ethical conduct)
PB22	Protection of certain vulnerable sectors in society	ICECSR, Article 12 (secondary right)	Improve quality of life

Source: Author's research.

This bottom-up approach (Table 7.3) works better than the top-down approach (Table 7.2) because it is able to link many more public benefits to human rights as they are widely understood in the broader community. Nevertheless, a total of 11 public benefits, related to the functioning of the market and the promotion of ethical conduct, do not have a natural home within an accepted immanent right. It is foreseeable that many more public benefits related to the promotion of ethical conduct are likely to arise in the future. Examples include voluntary agreements between corporations or associations reflecting climate change or environmental concerns, initiatives related to greater corporate social responsibility, increased disclosure of information to the public by corporations, and greater consideration given to specific sectors by corporations. It is possible that corporations decide to adopt a code of conduct that only allows them to deal with corporations that have the backing of the Organisation for Economic Co-operation and Development (OECD) or a non-government organisation (NGO) such as Amnesty International.[62] Likewise, corporations in the post-financial crisis market may wish to incorporate greater disclosure of financial information or make agreements among industry members on salary caps for senior executives. Other corporations, responding to the needs of the neighbouring Pacific states, may decide to give preferential treatment to workers from these states, to the

62 Doreen McBarret, 'Human Rights, Corporate Responsibility and the New Accountability' in Campbell and Miller (2004) 71.

exclusion of all others.[63] Such agreements could require authorisation and bring considerable public benefits. A framework that can accommodate all these benefits is necessary and is explored below.

Creating a Framework Based on Human Rights and Empirics

It is proposed that a set of heuristics can be developed to accommodate all the 22 public benefits. While recognising ACCC practice, these heuristics would be faithful to human rights principles, as generally accepted by the community. This set of heuristics consists of seven groupings: quality of life, market integrity, equitable dealings among market actors, economic efficiency and economic welfare, procedural fairness, increased enforceability and human security (Table 7.4).

Table 7.4: Locating public benefits based on rights and empirics

Public benefit (PB)	Immanent rights or recognised human rights	Heuristic
Enhancement of the quality and safety of goods and services (PB14)	Immanent right (improve quality of life) Also top down human right (Article 12 ICESR)	Improve quality of life
Expansion of employment or prevention of unemployment in efficient industries (PB3)	Immanent right (improve quality of life) Also top down human right (Article 7 ICESR)	
Health of patients, consumers and worker (PB17)	Immanent right (improve quality of life) Also top down human right (Article 12 ICESR)	
Steps to protect the environment (PB11)	Immanent right (improve quality of life) Also top down human right (Article 12 ICESR)	
Expansion of employment in particular areas (PB4)	Immanent right (improve quality of life) Also top down human right (Article 7ICESR)	

63 See Manjula Luthria, 'Guest Workers: A Pacific Solution that Benefits All', *Sydney Morning Herald*, 24 June 2008, 11; see also Allan Fels and Fred Brenchley, 'Black Jobs Gap Still a Chasm After Decades', *Sydney Morning Herald*, 13–14 December 2008, 39.

Public benefit (PB)	Immanent rights or recognised human rights	Heuristic
Promotion of equitable dealings in the market (PB7)	Immanent right (right to freedom of association) Also a secondary right	Provide for equitable dealings among market actors
Assistance to efficient small business (PB13)	Immanent right (right to freedom of association) Also a secondary right	
Attainment of industry harmony (PB5)	No clear immanent right	
Supply of better information to consumers and businesses (PB6)	Immanent right (right to know)	Increase market integrity
Promotion of ethical conduct (PB21)		
Protection of certain vulnerable sectors in society (PB22)		
Economic development (PB1)	No clear immanent right	Encourage economic efficiency and welfare
Industry rationalisation (PB2)	No clear immanent right	
Promotion of industry cost savings (PB8)	No clear immanent right	
Development of import replacements (PB9)	No clear immanent right	
Development of import replacements (PB9)	No clear immanent right	
Growth in export markets (PB10)	No clear immanent right	
Fostering business efficiency (PB12)	No clear immanent right	
Facilitating competition (PB15)	No clear immanent right	
Regulation of illegal activity (PB16)	Immanent right (right to security) Also a secondary right	Provide human security
Right to due process and right to justice/promoting fairness and justice (eg through complaints mechanisms) (PB18)	Immanent right (rights to just treatment and just procedure) Also a top down right (Article 2 ICCPR)	Enhance procedural fairness
Encouraging compliance (PB20)	Means of securing rights ACCC practice	Increasing enforceability

Source: Author's research.

These groupings make it possible to express public benefit as a principle in the following terms:

> *Principle: A public benefit can fall into one of the following categories: secure a basic human right, improve quality of life, provide for equitable dealings among market actors, increase market integrity, encourage economic efficiency and economic welfare, provide for human security, enhance procedural fairness and increase enforceability.*

It is proposed that this framework for public benefits, based on both the empirical data as well as the recognised human rights, will work more effectively than the present ad hoc approach, which has been described as a triumph of practice over theory. This framework is grounded on a widely accepted discourse as well as reflecting practice; it is inclusive while providing greater guidance to applicants and all stakeholders; it will allow both efficiency-based benefits as well as non-efficiency benefits; it will be flexible enough to accommodate new public benefits as they arise without adding to the existing list of public benefits; and it will reflect an approach which is universally understood both by applicants as well as all other interested parties.

Promoting Responsiveness

The manner in which regulatory agencies have changed the way in which they function reflects the changes in the wider society including the role of governments and the increasing importance of local and global networks. Chapter 6 examines the manner in which regulatory agencies today do the complex business of regulating. It also discusses the strategies available to these agencies and ties them to the theory underlying the strategies. The ACCC has been an innovative regulator, using a great variety of strategies from its inception, as demonstrated in the discussion in Chapter 2 on the distinctive trajectory that is the authorisation process. The ACCC has been quick to adapt to the changes in the wider society, as demonstrated in Chapter 6 by the manner in which it has used its discretion to facilitate desired outcomes. As one of Australia's main corporate regulators, the ACCC has faced considerable scrutiny (discussed in Chapter 5). It has been conscious of the scrutiny and has addressed it, sometimes with military precision, illustrated by the format closely followed in the determinations,[64] the consistent references to accountability[65] and the websites which have been redesigned to provide minutes of all meetings.[66] This

64 See the section on Causal Link — The Benefit Must Flow from the Conduct, in Chapter 3.
65 See the discussion on Accountability in Chapter 5.
66 See the discussion on Procedural Discretion in Chapter 6.

is further supported by a recent study that points to overall business satisfaction with the ACCC's strategic sophistication and how procedural and substantive justice is accommodated.[67]

As discussed in Chapter 6, however, there remains at least one important criticism — the participation by certain non-industry groups has fallen. This issue becomes more important in a deregulated market and a decentred regulatory environment, where there is an important role for non-industry groups to bring relevant information to the regulator and to contest settlements that are 'cosy' for the regulator and regulatee but not for civil society. It is connected to the notion of procedural justice and how the regulator is perceived (discussed in Chapter 6).

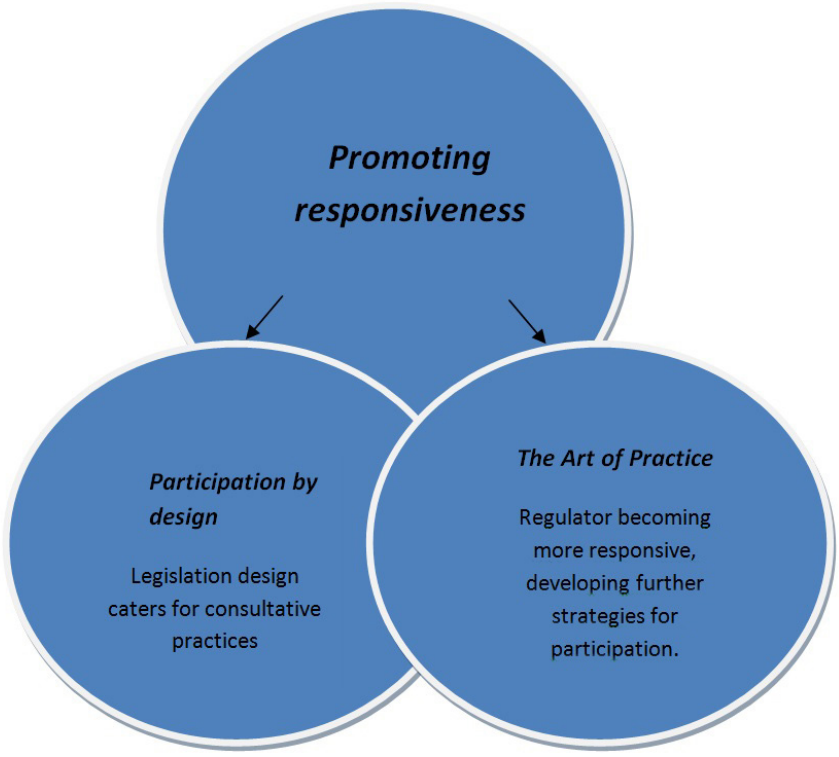

Figure 7.1: Two methods for promoting institutional responsibility

Source: Author's research.

Advocates of responsive regulation and restorative justice would see the importance of welcoming the voice of dissidents, engaging in an ongoing dialogue and incorporating mechanisms for facilitating participation, all of

67 Parker and Nielsen (2007).

which foster principles of democracy.[68] Here, I want to canvas two methods to improve responsiveness of the regulator in increasing participation: participation by design and the art of practice (Figure 7.1). These methods are not mutually exclusive; rather they work together and the catalytic mix will depend on the conduct and the context, as discussed below.

Participation by Design

One way to increase the regulator's responsiveness is through legislative design. This is a top-down process where the legislature allows for a new and more consultative process of administration. Law that enables consultative process, as does the *Trade Practices Act*, will provide a sound foundation for the institution to develop channels of communication with the groups it seeks to regulate. Law that relies more on broad principles rather than concise rules, providing the regulatory institution with the fiat for formulating specific policy in consultation with regulated groups, may be more successful in allowing the institution to assume responsibility for its actions.

Design alone is not sufficient to allow for participation. Discretion exercised in interpreting the provision is also necessary. For example, lodging authorisation applications previously incurred a standard fee of $7500, which was particularly onerous for not-for-profit organisations.[69] Following an amendment to the Act, the ACCC is now provided with the power to waive the lodgment fee if it is satisfied that its imposition would impose an undue burden on the applicant.[70] Schedule 1B of the regulations lists the concessional fee for these non-merger applications at $1500, and the ACCC *Guide to Authorisations 2007* provides that the fee for such groups will be $2500, illustrating the effect of practice within a minor rule.

Designing specific pathways for non-industry groups to participate is one way of creating a level playing field where all the parties affected by a decision are heard. The main pathways are represented in Figure 7.2. While the first and second pathways are relevant to ACCC determinations of authorisations, the third pathway is less so. It has been included to provide a complete picture of how participation can be incorporated via legislative design.

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68 Valerie Braithwaite (ed), 'Responsive Regulation and Taxation: Introduction' (2007) 29 (1) special issue *Law and Policy* 5; see also Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 40; John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 10; Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59.

69 See Committee of Inquiry, Commonwealth of Australia, *Review of the Competition Provisions of the* Trade Practices Act [Dawson Review] (2003) 113, for discussion on waiver of such fees for particular types of applicants.

70 Regulation 75, Trade Practices Regulations 1974.

The first pathway is to equip the general regulator with the power to take the interests of different parties into account. The main interest considered is the consumer or the public. As discussed in Chapter 2, the design of the *Trade Practices Act* provides for consultation and participation. It requires the commission to take into account submissions made by the applicant, Commonwealth, state or any other person.[71] The legislation also prescribes that a draft determination has to be issued,[72] that an interested party may call a pre-determination conference,[73] and the procedure for such conferences.[74] The legislation also provides a place for the National Competition Council, which is required to promote competition in the public interest, thereby giving effect to the Competition Principles Agreement.[75] As discussed in Chapter 5, the paradox of discretion is that it can exist within strict rules as well as vague phrases. The interpretation of the vague phrase 'public benefit' has given the ACCC considerable scope to exercise its discretion. This reiterates the point made above, that design alone may not be sufficient to ensure participation. The regulator has to use the discretion well.

Creating specific regulators for certain areas and empowering them to consider the interests of other groups that may be poorly represented is also an option. Such regulators gain an understanding of the industry and its participants, which is important in decision-making. As discussed in Chapter 6, such bodies make submissions and are part of the expanded accountability model that is recognised by the ACCC. For example the Australia Energy Regulator, which was created in 2005, is responsible for the regulation of the wholesale energy market. It prepares market reports and analysis on energy issues which informs the ACCC in its decisions. Likewise, the Australian Communications and Media Authority, a regulator of the Australian communications industry, also formed in 2005, performs a similar role informing debate. Through its Consumer Consultative Forum, the authority gains understanding of the manner in which consumers are affected by its functions. It consults with the ACCC about the possible impact new technology may have on its determinations. Such bodies are able to participate by making a formal submission (discussed in Chapter 6), or more informally, particularly when the ACCC gives effect to broader government objectives.

Legislation can be focused on a specific group. One example of legislation that provides such a direct legislative mandate to consider the wider interest is the UK

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71 Section 90A(2).
72 Section 90A(1).
73 Section 90A(2).
74 Sections 90A(7) and 90A(8).
75 See National Competition Commission mission statement <http://www.ncc.gov.au/> For a discussion on the interpretation of the phrase 'public interest' in the context of this commission see John McDonald, 'Legitimating Private Interests: Hegemonic Control Over "the Public Interest" in National Competition Polity' (2007) 43(4) *Journal of Sociology* 349.

Communications Act 2003. Ofcom, the telecommunications regulator established by this Act, is mandated to represent consumers. This legislation provides that it shall be the principal duty of Ofcom, in carrying out their functions, to further the interests of citizens in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition.[76] In 2006 after an assessment of the manner in which consumer interests were addressed, Ofcom established a consumer policy team to address the manner in which it can improve its performance, illustrating the recognition given to the consumer voice.[77] This English regulator has a more specific mandate than its Australian counterparts.

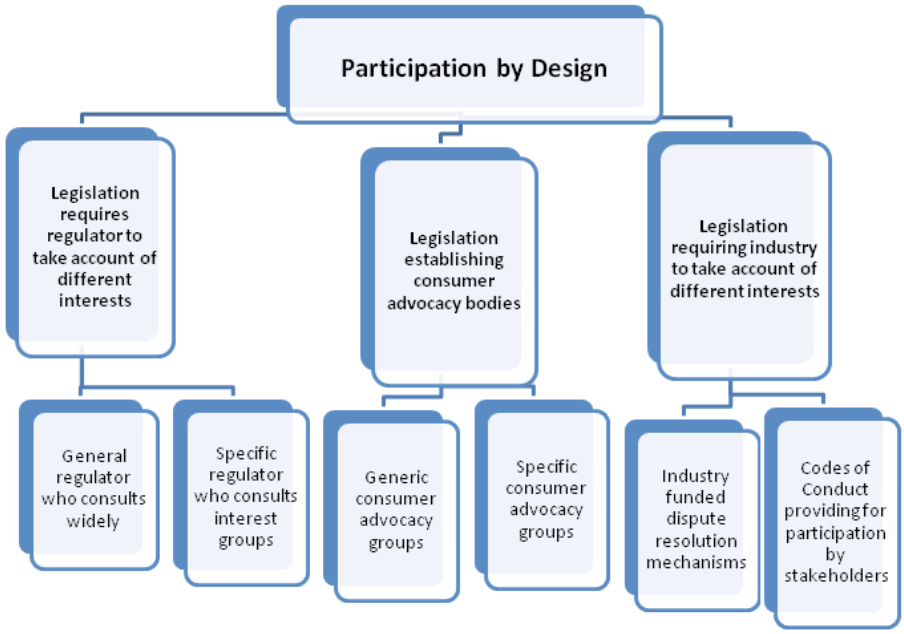

Figure 7.2: Participation by design

Source: Author's research.

The second pathway in Figure 7.2 is for legislation to create consumer advocacy bodies. Consumer advocacy groups historically have given voice for underrepresented and disadvantaged groups, enabling their interests to be considered as part of the consultative process. The Productivity Commission has recognised that consumer advocates have a role in providing a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to

76 Section 3(1) Communications Act 2003 (UK).
77 Ofcom, 'Taking Account of Consumer and Citizen Interests' <http://www.ofcom.org.uk/about/accoun/interests.pdf> at 28 February 2007.

higher prices, reduced service quality or less market innovation.[78] Establishing consumer advocacy bodies to actively participate in decision-making requires political commitment and funding. The *Trade Practices Act* made a conscious link between consumer protection and competition issues (discussed in Chapter 2). Although the Australian Consumers Association (Choice) was started in 1963, many other groups originated later, in the 1970s. The government of the day solicited consumer involvement, giving impetus to the consumer movement, which continued to play an important role until the mid 1990s. Funding for such groups dried up and their role has diminished over the last decade. This is in contrast, however, to the numerous interest groups representing large consumers, such as the *Business Council of Australia* and small businesses, such as the Energy Users of Australia, that have been started. Such groups feel that their interests are ignored and have been actively participating in the authorisation process (discussed in Chapter 6).

The diminishing role of consumers has been acknowledged in the energy industry where user participation is much lower than supplier participation.[79] Currently, the chief consumer advocacy group is the Consumers Federation of Australia, which consists of more than 100 member groups, including: community legal centres, health rights groups, local consumer organisations and public interest bodies.[80] Although previously funded by government, it now relies on donations and voluntary work , hence its role has decreased. Its participation is restricted to making submissions in relation to key authorisation determinations.[81] Another body that is considered a leader in national consumer debate is the NGO Choice, which is funded by its membership. It too has made a number of submissions to the ACCC on authorisation determinations. It is second to the Australian Consumers Federation in making submissions on authorisation determinations included in the empirical study.[82] Other bodies exist at state level and include: the Public Interest Advocacy Centre in New South Wales, Consumer Utilities Advocacy Centre Ltd in Victoria and the Consumer Law Centre in Victoria. Some states, such as Victoria, have increased funding for advocacy bodies, including the Consumer Law Centre, the Consumer Credit Legal Service and the Financial

78 Productivity Commission, Commonwealth of Australia, Review of National Competition Policy Reforms — Discussion Draft (2004) 301.

79 Ministerial Council on Energy, (Department of Resources, Energy and Tourism), Commonwealth of Australia, *Reform of Energy Markets* (Report to the Councils on Australian Governments, 11 December 2003) 11.

80 See Consumer Federation of Australia <http://www.consumersfederation.org.au/> at 1 November 2008.

81 See Chapter 6 for a discussion of the instances where submissions were made by Consumers Federation of Australia or its predecessor. They include *United Permanent Building Society* (1976); *Re Surgeons* A90785, *Re EFTPOS* interchange fees A30224, A30225. Also see *Cash Convertors Pty Ltd* N70435 for a detailed submission to the ACCC <http://www.consumersfederation.org.au/documents/CLCV-FAsub171105reACCCauthorisation.pdf> at 30 April 2009.

82 See the discussion on Submissions by Non-industry bodies in Chapter 6.

and Consumer Rights Council. Smaller bodies dealing with specific issues, such as the Communications Law Centre, Consumers Health Forum of Australia and the Breast Cancer Action Group, have made submissions in their areas.

Unlike Australia, consumer advocacy groups have had a resurgence in the United Kingdom and the European Union. Specific bodies include energywatch, Postwatch and the National Consumer Council. These bodies were all merged, however, to form one, well-funded, national consumer council with extensive legislative powers called Consumer Focus.[83] The concern that the expertise that industry specific regulators have built up may be lost in this unified body has been voiced by energywatch.[84] The powers it has been given include the right to investigate any consumer complaint if they are of wider interest, the right to publish information from providers, the power to conduct research and the ability to make an official super-complaint about failing services.[85] Perhaps the strongest power of this body, which was also possessed by its predecessors, is the power to make a super-complaint. This power is given to specific consumer bodies via the *Enterprise Act 2002* (UK) and it is intended to provide a fast track process of resolution.[86] To date, six such complaints have been filed, demonstrating the role of such organisations in participating in enforcement and monitoring the market. The European approach has also been to provide financial support for the activities of consumer organisations.[87] It is important to acknowledge the advantages of having well-funded consumer bodies that can participate in consumer policy debates and advocacy and have a research facility with the expertise to make submissions on highly technical issues. To streamline such participation, the European Union has started a register of lobby groups.[88] Unlike the United Kingdom and the European Union, consumer and citizen representation is left in the hands of regulators in Australia. This places greater responsibility on the regulator to be responsive to the needs of such groups, and to be facilitative.

The third pathway in Figure 7.2 is a legislative requirement to incorporate participation by industry. This is usually via a variety of mechanisms, such as dispute resolution or complaints systems being included in codes of conduct.

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83 This body is created by virtue of the *Consumers, Estate Agents and Redress Act 2007* (UK).

84 Asher, 'The National Consumer Congress; In Pursuit of World-class Consumer Policy', paper presented to Third Annual Consumer Congress, Consumer Affairs Victoria, Melbourne, 15–17 March 2006.

85 See Consumer Focus website <http://www.consumerfocus.org.uk/en/content/cms/About_Us/About_Us.aspx> at 1 December 2008.

86 Section 11 of the *Enterprise Act 2002* (UK).

87 See Article 2(b) Decision 283/1999/EC and 2003/C 132/04. Also see the *Enterprise Act 2002* (UK). The Dawson Committee looked at the possibility of introducing a super complaints procedure designed to enable consumer bodies to make complaints about conduct that may be significantly harming consumers; see [Dawson Review] (2003) 175. A super complaints body is looking at the role of consumer groups in enforcement rather than participating in the process of decision making on authorisation.

88 Leigh Phillips, 'Major Lobby Firms set to join EU register', *EUobserver* <http://euobserver.com/9/26744> at 30 October 2008.

Such measures are usually funded by a levy on industry members and it has been important in Australia, with examples including the Energy and Water Ombudsman of New South Wales[89] and the Banking and Financial Ombudsman. The main issue here is that such bodies can have difficulty balancing the competing interests of the industry that appoints its members and the consumers that make the complaint. Although this pathway is important to understanding the regulatory picture, it does not directly affect participation within the authorisation process and is not discussed further. It can, however, indirectly create accountability networks, which take better care of consumer and public interests.

In conclusion, there are numerous ways of designing legislation to provide for participation. The two main options relevant to this study are to design legislation mandating the regulator to consider the interests of all stakeholders or, alternatively, to give this power to government-funded consumer advocacy groups. The former is preferred in Australia, whereas both have a role in the European Union and the United Kingdom. There have been numerous calls for a national consumer council in Australia. Such a council would be expected to be funded by government but remain independent from it, while being a centre for a network of consumer advocacy and service agencies to connect in initiating debate, carrying out research and advocating policies.[90] These calls have not received any support from government to date in Australia. Thus, it is the Art of Practice, discussed below, that offers greater scope for increasing responsiveness in the current Australian socio-political environment.

The Art of Practice

As concluded in Chapter 6, the ACCC has exercised its discretion in an experimental manner, accommodating a variety of interests and giving effect to changing objectives at different times. This is perhaps best demonstrated by the manner in which it has used the conditions power in granting authorisations, and developing networks of governance structures among the private actors in the market. It has also been reasonably inclusive in its decision–making, demonstrated by its use of formal and informal mechanisms for participation. The major query raised in Chapter 6 is whether it has been responsive enough to non-industry groups. Three main tactics for becoming more responsive were canvassed in earlier chapters. First, interpreting the term 'public' to include the interests of a variety of constituencies, including consumers and community, will increase inclusivity. Second, processes that encourage participation by all groups should be facilitated. Third, a variety of benefits going beyond

89 See <http://www.ewon.com.au/> at 30 March 2008.

90 David Tennant, 'Australia's Desperate Need for a National Consumer Council' <http://www.consumersfederation.org.au/documents/NCCPaperbyDavidTennantMarch05.doc> 15 October 2008.

efficiency-based benefits have to be recognised. Another strategy that should be added to the above three is that the ACCC should set in motion a reflective process whereby it examines its own performance, makes an assessment and revises its approach as a result.

Chapter 4 discussed the meanings that can be attached to the term 'public' and the manner in which the ACT and ACCC had tackled this issue. It has a direct impact on the type of public benefits that will be accepted. The ACCC has made it clear that it will accept benefits accruing to a sectoral group, or to a wider group. This approach could be articulated as three principles in the following manner:

> *Principle: Anticompetitive conduct may be authorised if it results in a benefit to a specific group.*
>
> *Principle: Anticompetitive conduct may be authorised if there is some consumer benefit.*
>
> *Principle: These benefits will be weighed by the ACCC, bearing in mind the size of the benefits and the parties who are likely to benefit.*

The empirical findings demonstrate that the manner in which the state and federal governments influence ACCC decisions has changed over the last four decades. Rather than directing the institution, these governments now participate in a more reserved manner, making written submissions like any other private actor, indicating their views on the matter under consideration. State and federal governments also send representatives to attend pre-decision conferences, and ministers have frequently commented on draft decisions. Particularly extensive submissions were made in relation to deregulated industries and the *Australian Wool Exchange Limited* authorisation. The Commonwealth Department of Primary Industries and Energy supported the self-regulating scheme that the deregulated industry was seeking to implement. In many of these cases, government departments and ministers see their role as one of assisting the ACCC to reach its decision rather than relying on it to cater to their interests.[91]

The empirical findings also illustrate that business groups and industry bodies have harnessed this consultative process most effectively. Formal written submissions by such groups to the ACCC have increased considerably from 1976 to 1998 when deregulatory policies were given effect. They have remained stable since. The ACCC had been able to facilitate business involvement in the authorisation process. There has been an attempt by the commission to reinforce the value of business involvement by clearly stating the influence such

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

submissions had on its decisions. Such practices became important in gaining business confidence and support. As has been noted, lore can be as important as law and often agency practice becomes embodied in law.[92] The ACCC must, however, attend to accusations of capture and safeguard its independence. The following principle would have such an effect:

> *Principle: Assessing public benefits in authorisations involves assessing total welfare, while being mindful of the risk of concentrated business interests capturing debate to undervalue consumer welfare.*

The empirical study demonstrates that participation by business groups, industry bodies as well as state and federal governments has risen steadily. It also demonstrates, however, that participation by the not-for-profit groups has not been similarly and consistently increasing. Here, participation varies significantly. Whereas the participation by some not-for-profits, such as those representing specific interest groups, has increased, this has not been the case across the board. For example, representatives of consumer interests or the economically disadvantaged have not increased. Many of the NGOs that were funded during the 1970s and early 1980s have not retained government funding and their participation has dwindled. Furthermore, the discourse has become more technical, relying significantly on econometrics and expert views. Even though the ACCC has not mandated quantification of public benefits, parties are regularly making use of such methods. This has increased the need to participate using the same language, thereby increasing the cost of participation. This technocratic factor has adversely affected participation by such groups, which find written submissions take too much time and quantification of benefits that rely on expert reports are too expensive to compile. These groups feel that many important benefits are not adequately considered because they either cannot be measured or have not been measured. While acknowledging the need to incorporate efficient processes, the ACCC must ensure that it considers the position of all interested parties and allows them the chance to put their views forward. The following two principles provide a proper place for quantification, while asserting the commitment of the ACCC to consider all benefits, including those that can be measured and those that cannot. These two principles could be phrased as follows:

> *Principle: Benefits should be quantified where this can be done validly and cost-effectively.*

> *Principle: The more measurable should never be allowed to drive out the more important in assessing public benefit.*

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92 Marshall J Breger and Gary J Edles, 'Established by Practice: The Theory and Operation of Independent Federal Agencies' (2000) 52 *Administrative Law Review* 1111, 1115.

Scholarship on procedural fairness and restorative justice point to the importance of incorporating mechanisms allowing for participation by affected groups. Without the presence of well-funded, active advocacy groups to bring the views of consumers and citizens to the attention of the regulator, the task lies with the ACCC to become responsive to the broader institutional environment of the regulatory regime.[93] The call is for the ACCC to be 'really responsive' to the need of all the stakeholders in the market, including consumers. Becoming a responsive regulator can be both a top-down and a bottom-up process. The top-down strategy would call for the ACCC to incorporate more responsive measures into its existing practices, by instigating the changes necessary to nurture greater participation and involvement. Alternately, it can also be a bottom-up process: the ACCC can be more responsive to criticisms and protest from other sources including the media, the public and advocacy groups, re-evaluating its practices as it opens its doors to critics.

One domain in which the ACCC incorporates top-down responsive practice is the pre-decision conference. These multi-party deliberations facilitate a limited form of restorative justice, redressing inequalities of bargaining power and allowing for a more inclusive decision-making framework. Within the authorisation process, the inability of disadvantaged groups, such as consumer groups, to participate could also be addressed by changing the process and language of the discourse which currently constrains participation. Rather than relying exclusively on quantification of benefits as a matter of course, it may be fruitful to include more general notions that introduce factors, such as increased product safety, improved access to justice, enhanced environmental policies or enhancing ethical practices, into the equation when they are relevant. The seven public benefit principles based on rights and empirics, discussed earlier in the chapter, encompass this proposition. Using universally accepted language, by its very nature, changes the rules of the game, creating a more inviting playing field. As discussed earlier this could be phrased as follows:

> *Principle: A public benefit can fall into one of the following categories: secure a basic human right, improve quality of life, provide for equitable dealings among market actors, increase market integrity, encourage economic efficiency and economic welfare, provide for human security, enhance procedural fairness and increase enforceability.*

Further, it is crucial to nurture meaningful participation. This may be achieved by accepting informal submissions from consumer groups rather than requiring written submissions in all cases. It may also be achieved by allowing such groups to have discussions with corporations and other interested bodies in a process of consensus-building. The current Consumer Consultative Committee

93 Baldwin and Black (2008) 59, 61. See also John Braithwaite (2011) 476.

is one step along the road towards such consensus-building.[94] Another example of such top down practices is the UK Office of Fair Trade, which has stated that all its actions are guided by whether consumer welfare will be optimised. While there is the possibility that such statements are bald assertions with little follow through, there is also the possibility of them being much more.[95] By doing so, it can also be placing the consumer interest at the centre of any decision, including all enforcement activities.

As discussed earlier, the bottom-up process, where change is called for by outsiders, requiring the regulator to really respond by listening to different points of view, reflecting upon them and re-evaluating its own practices, is also relevant here. Braithwaite calls for the regulator in such circumstances to engage those who resist with fairness; show them respect by construing their resistance as an opportunity to learn how to improve regulatory design.[96] Such calls from outsiders can be either suppressed by the regulator or can lead to a shift in the regulator's position.[97] The *Medicines* authorisation was one in which there was such a shift in position.[98] Here, authorisation was sought for a code of conduct, developed by Medicines Australia, the industry's national association which governs the activities of pharmaceutical companies when they promote prescription medicines to doctors. This code regulates matters such as drug company sponsorship of medical conferences, the payment of travel and accommodation expenses of doctors attending such conferences, and the provision of other forms of hospitality. The code had been subject to considerable media scrutiny and criticism on the basis that it did not provide sufficient safeguards against potential abuse.[99] The ACCC gave due consideration to these complaints and granted authorisation on the basis of a number of conditions. The aim of the conditions was to assist scrutiny of sponsorship activities of pharmaceutical companies by the general public. The ACCC was responding to concerns and enlisting others to its regulatory project. This bottom-up process requires the regulator to be humble and open. It expands on the current notions of procedural justice and accountability and it demands a regulator that has been reasonably responsive to be even more responsive. It has

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94 The Consumer Consultative Committee was established in 2001 by the ACCC as way of providing an opportunity to comment on issues affecting consumers that fall within the scope of the ACCC administration. See <http://www.accc.gov.au/content/index.phtml/itemId/800732> at 30 May 2008.

95 Office of Fair Trade, 27.

96 Braithwaite (2011) 476.

97 For an example of such a call to shift position see *Choice*, 'Choice opposes CBA's move on Bank West', 3 November 2008 <http://www.choice.com.au/viewArticle.aspx?id=106593&catId=100570&tid=100008&p=1&title=Calling+for+BankWest+buyers> at 3 November 2008.

98 <http://www.accc.gov.au/content/index.phtml/itemId/744908/fromItemId/278039> at 4 January 2008; also see Elisabeth Sexton, 'Papers Must Be Released, ACCC Told', *Sydney Morning Herald*, 1 April 2008, 2.

99 David A Newby and David A Henry, 'Drug Advertising: Truths, Half-truths and Few Statistics' (2002) 177(6) *The Medical Journal of Australia* 285; Viola Korczak, 'The Pharmaceutical Industry's Code of Conduct is Not Working', July 2006, Edmund Rice Centre, *Newsletter*, <http://www.erc.org.au/goodbusiness/page.php?pg=0607inprofile0> at 4 January 2008.

suggested that this can be done by the regulator improving existing practices to be more inclusive, and being more receptive to criticism as an opportunity for reflexivity. The commitment to responsiveness can be expressed as follows:

> *Principle: Openness to all public benefits, even where they are complex public benefits that have not been considered in previous authorisations, should be assured by an ACCC culture of dialogue with stakeholders.*

The Nine Principles for Determining Public Benefit in Authorisation Determinations

The two main concerns expressed about the public benefit test within the authorisation process are that the approach is ad hoc and does not facilitate sufficient participation by non-industry groups. This chapter has proposed that principle-based regulation might be useful in addressing these criticisms. It goes about addressing the first concern on the current ad hoc approach, proposing a principle of immanent rights, which is based on an amalgam of recognised top-down human rights, accepted bottom-up human rights and ACCC practice. It proposed that this principle could be framed as follows:

> *Principle: A public benefit can fall into one of the following categories: securing a basic human right, improving quality of life, provide for equitable dealings among market actors, increase market integrity, encourage economic efficiency and economic welfare, provide for human security, enhance procedural fairness and increase enforceability.*

Then the chapter addressed the second criticism on the need to facilitate participation by non-industry groups. Here it assessed the manner in which this could be done: by design or by practice. It is concluded that the design is unlikely in the Australian regulatory climate and context. The preferred and more pragmatic option is the art of practice whereby the regulator becomes more responsive to the needs of such groups and adopts strategies for inclusion. Such strategies will deal with the types of people consulted, the variety of information considered, the manner in which the dialogue that may start at the beginning of an authorisation determination can continue, and the stakeholders who can be co-opted into the regulatory game. Earlier chapters have discussed the different ways in which discretion can be exercised for inclusivity. This includes the need to look beyond measurable public benefits to consider all types of public benefits using a widely accepted language. It also includes the incorporation of practices that encourage participation by stakeholders: both formal and informal submissions and pre-decision conferences. Further, it points to the need to clearly acknowledge the expanded accountability model which

sees the ACCC being accountable to a variety of stakeholders and give effect to it by including their views in deliberations. And it acknowledges that there may be a variety of experimental ways in which such stakeholders can become part of the process. Accordingly a set of nine principles that can be put into practice by the ACCC has been developed as discussed. These principles take on board current ACCC practice, the need for providing fixed points to the applicants and the importance of developing and maintaining a constructive dialogue. They also increase the participation of all stakeholders in decision-making. These principles are aimed at making the ACCC more effective in exercising its discretion to determine public benefit within the authorisation process.

These are broad principles that have to be brought to life by concrete examples by way of authorisation determinations by the ACCC, which can then become part of the shared understanding among the members of the trade practices community.[100] The use of public speeches; guidance documents; the public registers on authorisation applications, submissions and determinations; informal meetings; the pre-decision conferences; and, the soliciting of views from NGOs are all examples of how the ACCC has nurtured the trade practices community. But, as demonstrated in this study, the regulator could become even more responsive by adopting an inclusive language to define public benefit that can accommodate a range of future potential benefits; by providing access to past decisions going back before 1999 online, and by giving greater direction on the status of the Australian Trade Practices Tribunal's decisions.

The Place for Reflection in the Art of Practice

As discussed in Chapter 5, the manner in which rules are interpreted or discretion is exercised is constrained and influenced by multiple factors that come from both within and outside the regulator. A list of nine principles can be nothing more than a list of rules that can be read either up or down, producing radically distinct outcomes. They can become either bald assertions without substance, or they can do what they are intended to — they can make the regulator more responsive. We can consider this in the context of Principle 4, which requires the ACCC to weigh benefits, bearing in mind the size of the benefits and the parties likely to benefit. This principle means nothing unless the regulator adequately explains the weighting used. The explanation will articulate how the weighing-up practice works, making the regulator accountable to all stakeholders for its actions. The explanation has to be clear, simple and, most importantly, understood by all those to whom it matters. It cannot simply be

100 See Parker, Ainsworth and Stepanenko (2004) for a discussion on the understandings of the trade practices community on the cartel leniency policy and the cartel cooperation policy, 69–70.

speaking to some with the technical knowledge to interpret the information, and it cannot be obscured by professional mystique.[101] Likewise Principle 8, which states that the more measurable should never drive out the more important, means little unless there is commitment by the regulator to the values this principle embodies, namely that all types of public benefits will be considered, irrespective of whether they have been measured or not. It embodies inclusivity both by considering all types of public benefits and by being open to different types of exchanges and communication. Similarly, Principle 9, which promises a culture of dialogue with stakeholders, is pointless if it is interpreted to be no more than talking to all the parties that are routinely consulted. What is required of the ACCC is that it should become a reflective regulator that examines its own performance and learns from it. This type of reflective regulator will be able to engage in single loop, double loop and triple loop learning.

'Single loop' learning is the act of giving effect to the written word rather than the underlying values inherent in the principles.[102] It is an operationalised act rather than one that is thought about, questioned and then undertaken. As discussed earlier, giving effect to rules, without a commitment to the underlying values, may introduce new processes without having any effect on the end result. For example, making available all the submissions in an authorisation determination on the ACCC website may make it clear that the views of different stakeholders have been considered. A commitment to the underlying values means that the ACCC will take on the responsibility of determining whether there are other stakeholders who should be considered and actively pursuing them prior to making a decision. Thus, where the institutional values and norms haven't changed, the end result won't either.

Double loop learning requires a further commitment by the regulator to the principles and its underlying values. Double loop learning occurs when an error is detected and then corrected in ways that involve modification of the organisation's underlying norms, policies and objectives.[103] It requires a regulator to consider the success of the strategies it has employed and evaluate its performance and failures. As Parker has stated, it involves 'being able to detect and correct errors in policies, procedures, cultures and traditions of the whole organisation'.[104] Here, the regulator commits to the values embodied in the principles and will take it on itself to consider how the principles are applied. If required it may have to re-evaluate the strategies used and reconsider the best processes to adopt in order to give effect to these values. Consequently, the institutional values and norms are changing, leading to a change in outcomes.[105]

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101 Donald Schon, *The Reflective Practitioner; How Professionals Think in Action* (1995) 301.
102 Chris Argyris and Donald Schon, *Organizational Learning II* (1996) 20.
103 Argyris and Schon, *Organizational Learning: A Theory of Action in Perspective* (1978) 2–3.
104 Parker (2002) 239.
105 ibid, 21; see also Braithwaite (2011) 514.

In authorisation determinations, the ACCC may seek to check whether the conditions it attached to a grant of authorisation are delivering the outcomes sought. If such conditions are successful, the ACCC may seek to use them as a standard clause in similar determinations. Conditions are a flexible and useful tool, as discussed in Chapter 6. They can be used to manage markets by providing information and processes to stakeholders who can then use them to hold corporations to account. Currently, however, conditions are rarely monitored by the ACCC.[106] By doing so, the ACCC will be evaluating its own performance.

Where submissions in relation to an authorisation application are scant, the ACCC may seek to investigate the reasons for this further. It may then seek to consider how the policies could be varied: Should officials be given the responsibility to speak with representatives of all stakeholders? Should telephone conversations be substituted for written submissions in certain circumstances? Should non-industry groups be consulted as a matter of course? If there were systematic performance evaluation, the ACCC would be bound to consider whether pre-decision conferences are effective and why? Such evaluations would tell us if, as discussed in Chapter 6, such conferences present the possibility of encouraging the development of a shared ethos and opens channels of communicating between stakeholders.

Triple loop learning goes even further, requiring the regulator to be able to assess the manner in which it functions and change as necessary; this is likely to include the creation of new structures and strategies. Parker's examination of triple loop learning and the regulator in the context of self-regulation is also relevant here. She has proposed that regulators must collect information on the problems they are supposed to solve and evaluate their performance by reference to impacts on those problems; they must report the data to all stakeholders including government and industry; and use the information and feedback to adjust regulatory strategies and objectives.[107] There is much in common between triple loop learning and really responsive regulation, which sees the need for performance sensitivity through assessment procedures and fostering the capacity of regimes to change regulatory direction.[108] All this is possible only where the regulator has an on-going dialogue with stakeholders and a shared understanding of what is required. Trust is the essential ingredient for any such dialogue and understanding to flourish. Using the universally accepted language of human rights to determine the meaning of public benefit is one step in developing such a dialogue. Developing this trust involves the

106 See ibid, 251 for a discussion of similar issues in the context of undertakings under section 87B of the *Trade Practices Act 1974*.

107 Parker (2002) 290, Also see: Braithwaite (2011) 514.

108 Baldwin and Black (2008) 75.

accommodation of all stakeholders and being accountable to all interested parties. Accommodating such diverse interests leads to more complex deliberations, such as consultation with consumers and community groups, on how public benefits can flow through to them, including the kinds of conditions that may be needed to ensure such flow through.

Once there is this trust, the regulator can be innovative in how it regulates, engaging in democratic experimentalism.[109] For example, the regulator may see a greater role for the presence of civil society on the boards of industry associations, acting as scrutineers on how codes of conduct, which have been authorised, are working in practice. The regulator may also be experimental enough to set up benchmarking by making one industry association's practices a benchmark for all other industry associations to compare against, with the aim of improving governance practices in the market generally. This benchmarking may be aimed at increasing accountability and self-reporting and could include the use of websites for greater disclosure to all interested parties, inclusion of consumer and NGO representatives on boards of the association, regular monitoring and annual reporting to the ACCC of the resulting public benefit and the parties whom it reached. These strategies would continue changing, co-opting all the stakeholders in regulating through changing times.

Conclusion

The ACCC has, in general, been a responsive regulator. It has performed reasonably well in determining public benefit within the authorisation process. There are, however, two main areas that require re-evaluation: first, the current approach of the ACCC lacks a theoretical foundation; and, second, as this study over three decades reveals, there has been an increasing inclusivity deficit.

This study has addressed these criticisms in proposing that the ACCC should develop a set of overarching principles founded on a combination of human rights and immanent rights recognised by the regulator in practice, which is immediately more universal than the language of economic efficiency. This book addresses the manner in which the principles, informed by responsive regulation and restorative justice, addresses the inclusivity deficit.

This approach relies on creating a shared understanding, founded on these principles among the trade practices regulatory community, which will continue to shape and reshape these principles. The regulator will need to nurture these understandings, bringing on board as many members of the community as it

109 Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267, 345; also see the discussion on Regulatory Theories and Regulators in Chapter 6.

can. These principles will not be a rule book, but, rather, valued objectives that all commit to. These principles will not be fixed, but, rather, flexible, being able to bend and reshape themselves while always loyal to the core objectives. When faced with a new type of challenge, whether a global financial crisis or a new environmental dilemma, these members of the regulatory community will be able to break from the past and engage their community in a new solution to the problem, while still being committed to these principles. They will know that the regulator will be predictably responsible when faced with a fresh challenge in terms of the principles. The regulator will be accountable to all these members with shared sensibilities on human rights, competition policy and the meaning of public benefit as they all collaborate within this shared space.