Introduction to Part 2

The four chapters included in this section provide a general and comparative response to the implications of deregulation for the conduct of commercial enterprise in a 'post-deregulated' environment.

John Braithwaite provides an analysis of 'regulation in flux' as opposed to deregulation *per se*. Among the criteria for assessing the new environment is responsiveness of regulation. Braithwaite explores responsive regulation by examining enforcement arrangements and participatory modes, in particular, tripartism. Kenneth Wiltshire examines the British case to provide a typology of issues inherent within privatisation schemes. He offers a critical analysis of the British record and draws a number of 'lessons for Australia' from his analysis.

Two papers from a New Zealand perspective are provided by Drew Stein and Elaine McCoy. These take a broad view of appropriate government oversight and consider the nature of commercial conduct in a deregulated environment from both business and institutional points of view. Stein, as General Manager, Marketing, of the Electricity Corporation of New Zealand (Electricorp) applauds the boldness of the New Zealand experiment in deregulation and applauds the consequences of both deregulation and privatisation for the economic health of that country. McCoy opposes that view and explores the ideological dynamic behind deregulation and suggests an alternative to wholesale deregulation using public utilities as case material.

3

Policies for an Era of Regulatory Flux

JOHN BRAITHWAITE

Whether the world economy is in an era of deregulation is a matter for serious doubt. It is true locally that the Hawke government has undertaken more significant deregulatory initiatives than the Fraser government, and that we have an opposition promising to outdo both of these governments on the matter of deregulation. But it is also true that the Hawke government has increased regulatory resources in a number of areas — for example, creating the Australian Securities Commission, the National Occupational Health and Safety Commission, the Federal Bureau of Consumer Affairs and new regulatory inspectorates within the Department of Community Services and Health dealing with nursing homes, hostels and medical devices. Environmental protection, corporate tax enforcement and control of defence contracting fraud are other areas of important regulatory growth.

We are not in an era of deregulation any more than North America (Ayres and Braithwaite 1990) or Europe is in an era of deregulation. We are in an era of regulatory flux. That is, this is a period when major changes are occurring in both deregulatory and regulatory directions. In such a period, there are great political opportunities for those who wish to make a contribution to transcending the intellectual stalemate between those who favour strong state regulation of business and advocates of deregulation.

I suspect most practitioners of regulation see a lot of sterility in the great deregulation debate because they know that regulation occurs in 'many rooms' (Galanter 1981; Nader and Nader 1985). A free market can mean that private regulation by cartels will defeat competition; detailed state regulation can be a symbolic exercise that is readily side-stepped by minor realignment of the market.

Practical people who are concerned with outcomes seek to understand the intricacies of interplays between state regulation and private orderings. The empirical foundation for their analysis of what is good regulatory policy is acceptance of the inevitability of some sort of symbiosis between state regulation and self-regulation. This is true of the most basic commercial legal forms:

> The drafting of the [US] Uniform Commercial Code was a self-conscious attempt (by Karl Llewellyn) to synthesize formal law and commercial usage: the formal law would incorporate the best commercial practice and would in turn serve as a model for the refinement and development of that practice. The Code's broadly drafted rules would be accessible to businessmen and would provide a framework

> for self-regulation which would in turn furnish attentive courts with content for the Code's categories. Thus the Code would serve as a vehicle for business communities to evolve law for themselves in dialogue with the courts, operating not as interpreters of imposed law but as articulators and critics of business usage (Galanter 1981: 29–30).

Good policy analysis is not about choosing between the free market and government regulation. Nor is it simply deciding what the law should proscribe. If we accept that sound policy analysis is about understanding private regulation — by industry associations, by firms, by peers and by individual consciences — and how that is interdependent with state regulation, then interesting possibilities open up for steering the mix of private and public regulation. It is this mix, this interplay, that works to assist or impede solution of the policy problem.

Ian Ayres and I have been attempting to develop the notion of 'responsive regulation'. By this, we mean that the nature of regulatory interventions should be responsive to industry structure and conduct. In this chapter I will focus particularly on the need for responsiveness to how effectively industry is making private regulation work.

Responsive regulation is not a clearly defined program or set of prescriptions concerning the best way to regulate. On the contrary, what is the best strategy is shown to depend on context, regulatory culture and history. Responsiveness is rather an attitude that enables the blossoming of a wide variety of regulatory approaches. While our ideas for responsive regulation bear many of the marks of Nonet and Selznick's (1978) 'responsive law' concept, we are sceptical about repressive, autonomous and responsive law being evolutionary stages in legal development. Our attempt to sensitise readers to innovative regulatory possibilities thrown up by thinking responsively is devoid of any grand theoretical pretensions.

This chapter will focus on two of the major policy ideas advanced in my new book with Ayres. These are, first, the desirability of regulatory agencies displaying an enforcement pyramid, and, second, the idea that tripartism may be able to foster an evolution of regulatory co-operation without also bringing about an evolution of corruption (or unhealthy capture).

Enforcement Pyramids

A common plea is that regulatory styles that are co-operative on the one hand and punitive on the other 'may operate at cross-purposes because the strategies fit uneasily with each other as a result of conflicting imperatives' (Rees 1988: 12). Ayres and I contend that both an economic analysis and a social analysis converge on the need to avoid policies of consistent reliance on either punishment or persuasion as the means of securing regulatory objectives. From both analytical viewpoints, Tit-For-Tat (TFT) is the strategy for mixing punishment and persuasion that is most likely to be effective.

TFT is a strategy with three properties: first, it is a co-operative strategy, and

if the business player co-operates as well, the regulator continues this co-operation; second, it is a provocative strategy — when the firm exploits regulatory co-operation by cheating, the regulator gets tough; third, it is a forgiving strategy — when the cheating firm returns to the co-operative fold, the regulator will cancel all grudges.

For rational economic actors it can be shown that TFT is the best way to play the regulatory game for a wide range of plausible assumptions about regulatory payoffs (Scholz 1984a,b; Axelrod 1984). At the same time, Ayres and I argue that a co-operative, provocative and forgiving regulatory strategy is also likely to be the best option when the motivations of regulated actors are other than profit maximisation. Our conclusions are derived after qualifying the assumptions that the regulatory behaviour of firms is rational and unitary. Among the alternative claims advanced are the following:

- to understand regulation, we need to aggregate firms into industry associations and disaggregate firms into corporate subunits, subunits into individual corporate actors and individuals into multiple selves. Regulatory agencies advance their objectives in games at each of these levels of aggregation by moves in games at other levels of aggregation;
- some corporate actors will only comply with the law if it is economically rational for them to do so; most corporate actors will comply with the law most of the time simply because it is the law; all corporate actors are bundles of contradictory commitments to values about economic rationality, law abidingness and business responsibility. Business executives have profit-maximising selves and law-abiding selves; at different moments, in different contexts, the different selves prevail;
- a strategy based totally on persuasion and self-regulation will be exploited when actors are motivated by economic rationality;
- a strategy based mostly on punishment will undermine the goodwill of actors when they are motivated by a sense of responsibility;
- punishment is expensive; persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion (a highly punitive mining inspectorate will spend more time in court than in mines); and
- a strategy based mostly on punishment fosters an organised business subculture of resistance to regulation wherein methods of legal resistance and counter-attack are incorporated into industry socialisation (Bardach and Kagan 1982). Punitive enforcement engenders a game of regulatory cat-and-mouse whereby firms defy the spirit of the law by exploiting loopholes, and the state writes more and more specific rules to cover the loopholes.

If these claims are correct, a strategy for mixing punishment and persuasion must be required. At one level, TFT is the mix that resolves these contradictions. By cooperating with firms until they cheat, the counterproductivity of undermining the good faith of socially responsible actors is averted. By nurturing expectations of responsibility and co-operation within the regulatory culture (Meidinger 1986), the

regulator can coax and caress fidelity to the law even in contexts where the law is riddled with gaps or loopholes. By getting tough with cheaters, actors can be made to suffer when motivated by their rational economic selves, and given reason to favour their socially responsible, law abiding selves. In short, they are given reason to reform, more so because when they do reform they find the regulator forgiving.

I have argued (Braithwaite 1985), however, for a more elaborate strategy for mixing punishment and persuasion than just TFT. My contention is that compliance is most likely when the regulatory agency displays an explicit enforcement pyramid. An example of an enforcement pyramid appears in Figure 3.1. Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance, civil monetary penalties are imposed; if this fails, criminal prosecution ensues; if this fails, the plant is shut down or a licence to operate is suspended; if this fails, the licence to do business is revoked. This particular enforcement pyramid would be appropriate to some regulatory arenas but not others. The form of the enforcement pyramid is the subject of the theory, not the content of this particular pyramid.

The idea of the enforcement pyramid has advantages over the bipolar TFT notion of switching between co-operation and deterrence. Defection from co-operation is a less attractive option for a firm when confronted with a regulator armed with an enforcement pyramid than when confronted with a regulator having only one deterrence option. This is true even where the deterrence option is maximally potent. Actually, it is especially true when the single deterrence option is cataclysmic. It is not uncommon for regulatory agencies to have the power to withdraw or suspend licenses as the only effective power at their disposal. The problem is that the sanction is such a drastic one (for example, putting a TV station off the air) that it is politically impossible and morally unacceptable to use it with any but the most extraordinary offenses. Hence, such agencies often find themselves in the situation where their implied plea to 'co-operate or else' has little credibility. Regulators have maximum capacity to lever co-operation when they can escalate deterrence in a way that is responsive to the degree of unco-operativeness of the firm, and the moral and political acceptability of the response.

It follows from the postulate of the theory about an organised business subculture of resistance that we should transcend the view of regulation as a game played with single firms. In some respects industry associations can be more important players. For example, individual firms will often follow the advice of an industry association to co-operate on a particular regulatory requirement because if the industry does not make this requirement work, it will confront a political backlash which may lead to more intervention. Hence, the importance of a pyramid of regulatory strategies pitched at the entire industry (Figure 3.2), as well as a pyramid of sanctions directed at individual firms (Figure 3.1).

To Punish or Persuade (Braithwaite 1985) argued that the state is most likely to achieve regulatory goals at least cost to taxpayers and industry by communicating

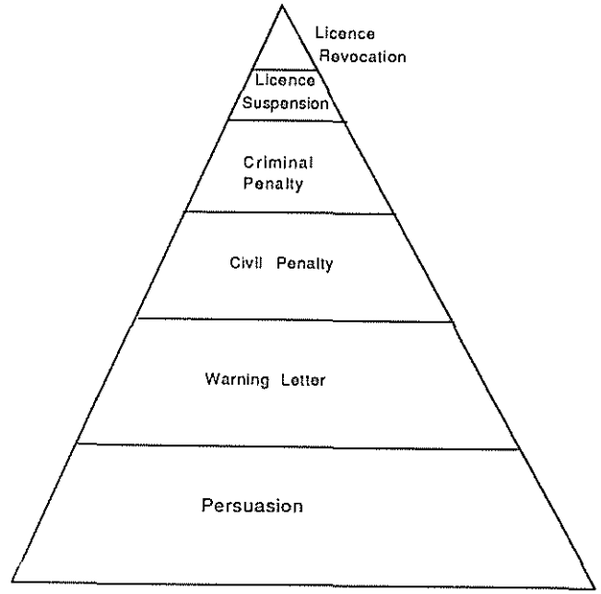

Figure 3.1 *Example of an enforcement pyramid. The proportion of space at each layer represents the proportion of enforcement activity at that level*

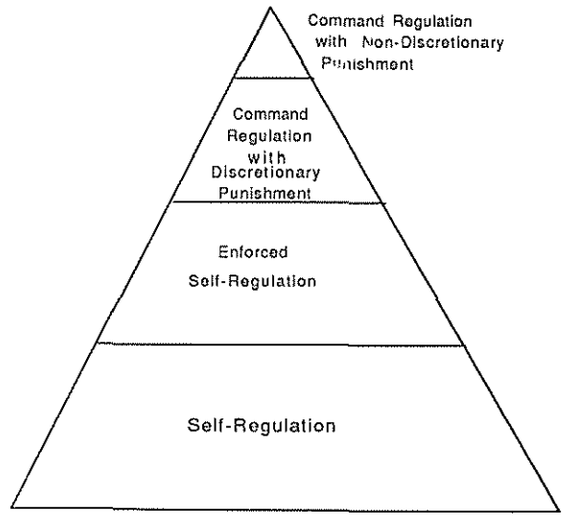

Figure 3.2 *Example of a pyramid of enforcement strategy*

to industry that in any regulatory arena the preferred strategy is industry self-regulation. However, given that industry will often exploit the privilege of self-regulation, the state must also communicate its willingness to escalate regulatory strategy further up the pyramid of interventionism exemplified in Figure 3.2. Again the content of the pyramid (defended in Braithwaite 1985) is not the issue. One could conceive of another regulatory pyramid that might escalate from self-regulation to negative licensing (see Grabosky and Braithwaite 1986), to positive licensing, to taxes on harm (Anderson *et al* 1977).

Any appropriate pyramid of interventionism enables the state to communicate its preparedness to escalate up the pyramid, thereby giving both the industry and regulatory agents incentives to make regulation work at lower levels of intervention. The key contention is that the gradients and peaks of the two enforcement pyramids create downward pressure which causes most of the action to occur at the base of the pyramid — in the realms of persuasion and self-regulation. The irony is that the existence and signalling of the capacity to get as tough as is needed can usher in a regulatory culture more voluntaristic and less litigious than is possible when the state rules out adversariness and punitiveness as an option. Lop the tops off the enforcement pyramids and there is less prospect of self-regulation and less prospect of persuasion as an alternative to punishment.

I now want to suggest that we can build further on the convergent theoretical foundations of Scholz's work and my own. This elaboration was stimulated by the emergence of a 'Benign Big Gun' cluster of agencies from the application of a variety of multivariate techniques to classify 96 Australian regulatory agencies according to patterns of enforcement behavior (Grabosky and Braithwaite 1986; Braithwaite *et al* 1987). The Benign Big Guns were agencies that walked softly while carrying very big sticks. The agencies in the cluster were distinguished by having enormous powers: the power of the Reserve Bank to take over banks, seize gold, increase reserve deposit ratios; the power of the Australian Broadcasting Tribunal to shut down business completely by revoking licences; or the power of oil and gas regulators to stop production on rigs at stupendous cost. The core agencies in this cluster had such enormous powers but never, or hardly ever, used them. They also never or hardly ever used the lesser power of criminal prosecution. The Broadcasting Tribunal's strategy has been characterised by counsel for the Australian Consumers' Association as 'regulation by raised eyebrows'[1] and the Reserve Bank strategy as 'regulation by vice-regal suasion'.

The data from this study are not adequate for measuring the relative effectiveness of these 96 agencies in achieving their regulatory goals. Nevertheless, the empirical association between walking softly and carrying big sticks is an interesting basis for theoretical speculation. Might it be that the greater the heights of punitiveness to which an agency can escalate, the greater its capacity to channel regulation down to the base of the enforcement pyramid? A flat pyramid (with a truncated range of escalations) will exert less downward pressure to keep regulation at its base than a tall pyramid. A tall enforcement pyramid can be used to apply enormous pressure from the heights of its peak to motivate 'voluntary compliance'. Thus, the key

propositions of a Benign Big Gun theory of regulation would be that successful pursuit of co-operative regulation and maximum compliance with the law is predicted by:

- use of a Tit-for-Tat strategy;
- access to a hierarchical range of sanctions and a hierarchy of interventionism in regulatory style (the enforcement pyramids); and
- how extreme in punitiveness is the upper limit of the range of sanctions.

I wish to be clear and provocative about these three interconnected ideas. But I also mean to be tentative. The first need is for fieldwork in the tradition exemplified by Hawkins (1984) to explore whether and how regulators come to be granted the credibility of being Benign Big Guns. Hawkins' work raises questions about how direct the link is between the image of invincibility regulators can sustain and the calibre of their firepower. What are the limits, if any, on the capacity of regulators to bluff their way to an image of invincibility?

The important point concerns the possibilities for convergence between theories derived from rational and normative accounts of human motivation. Analyses of what makes compliance rational and what builds business cultures of social responsibility can converge on the conclusion that compliance is optimised by regulation that is contingently tough and forgiving. For Scholz, forgiveness for firms planning to co-operate in future is part of maximising the difference between the co-operation and confrontation payoffs. In *To Punish or Persuade*, forgiveness is advocated more for its importance in building commitment to comply in future. In Scholz's formulation, punishment is all about deterrence. I place greater importance on the moral educative effects of punishment (Braithwaite 1989), and on the role of punishment in constituting an image of invincibility within a regulatory culture.

Both accounts, from their different premises, move away from the notion of an optimum level of stringency in the law, an optimum level of enforcement, an optimum static strategy, and instead converge toward an optimum way of playing a dynamic enforcement game. Of course it remains to be seen whether the product of this convergence is empirically robust, and whether we can build upon it a Benign Big Gun theory of regulatory power.

Tripartism

In Chapter 3 of *Responsive Regulation*, Ayres and I argue that features of regulatory encounters that foster the evolution of co-operation also encourage the evolution of corruption and capture. Solutions to the problems of capture and corruption — limiting discretion, multiple-industry rather than single-industry agency jurisdiction, and rotating personnel — inhibit the evolution of co-operation. Tripartism — empowering public interest groups — is advanced as a way to solve this policy dilemma. A game-theoretic analysis of capture and tripartism is juxtaposed against an empowerment theory of republican tripartism. The strengths from converging

the weaknesses of these two formulations show how certain forms of tripartism might prevent harmful capture, identify and encourage efficient capture, enhance the attainment of regulatory goals, and strengthen democracy.

While the simplifications involved in modelling regulation as a game between two players with unproblematic interests are transparent, such simple models, with their elegance and clarity, can be the foundations on which we build more subtle and complex accounts. Moreover, simple prisoner's dilemma models of regulation do have some capacity to explain regularities in regulatory outcomes. These are models that construe regulation as a game between two players, each of which can choose between co-operating or defecting from co-operation with the other player. For the firm, defection means law evasion; for the regulator, defection means punitive enforcement. Whatever the other player does, defection results in a higher payoff than co-operation. The dilemma is that if both defect, both do worse than their joint co-operation payoff.

Let us illustrate this explanatory capability. Grabosky and Braithwaite's (1986) study of 96 Australian business regulatory agencies found that agencies were more likely to have a co-operative (non-prosecutorial) regulatory practice when they regulated:

- smaller numbers of client companies;
- in a single industry rather than in diverse industries;
- when the same inspectors were in regular contact with the same client companies; and
- where the proportion of inspectors with a background in the regulated industry was high.

Grabosky and Braithwaite interpreted these findings as support for Black's (1976) notion of formal law increasing as relational distance between regulator and regulatee increases, and more ambiguously as support for capture theory. But equally these findings are just what would be predicted from the theory of Axelrod (1984) and Scholz (1984a) on the evolution of co-operation. This theory shows that the evolution of co-operation should only occur when regulator and firm are in a *multi-period* prisoner's dilemma game. Repeated encounters are required for co-operation to evolve because the discount parameter which crucially determines the evolution of co-operation is a product of 'the perceived probability in any given round that there will be another round' (Scholz 1984a: 189). Thus co-operation should be more likely when the same inspector is repeatedly dealing with the same firm. Similarly, when the agency regulates a small number of firms in a single industry the chances of repeated regular encounters are greater than with an agency that regulates all firms in the economy. And indeed an inspectorate recruited from the industry may be in a better position to secure an evolution of co-operation because they are enmeshed in professional networks which give more of an ongoing quality to their relationship.

Yet the fact that such findings can be interpreted either in capture or evolution of co-operation terms goes to the heart of our dilemma. The very conditions that foster the evolution of co-operation are also the conditions that promote the evolution

of capture and indeed corruption. A revolving door simultaneously improves the prospects of productive co-operation and counterproductive capture. Where relationships are ongoing, where encounters are regularly repeated with the same regulator, corruption is more rewarding for both parties: the regulator can collect recurring bribe payments and the firm can benefit from repeated purchases of lower standards. Moreover, ongoing relationships permit the slow sounding out of the corruptibility of the other, and of their trustworthiness to stand by corrupt bargains (and at minimum risk and cost because an identical small number of players are involved each time).

This is why if one is looking for corruption in a police force, one looks for those areas where there is regular contact between police in a particular squad and long-term repeat lawbreakers — prostitution, illegal gambling, other vice squad targets, and organized drug trafficking (Simpson 1977: 88–108). It is less likely to be found in police dealings with robbers, burglars and murderers. The 96-agency Australian regulation study found (via highly speculative data) that corruption was more likely in agencies that had two qualities: they were both agencies that maintained close co-operative relationships with the industry, but also agencies that engaged in regular sanctioning of the industry (Braithwaite *et al* 1986). Co-operation corrupts; co-operation qualified by the possibility of defection corrupts absolutely!

Classically, enforcement agencies deal with the risks of corruption and capture by regular rotation of personnel (Kaufman 1960; Grabosky and Braithwaite 1986: 198). Contrary to the policy prescription required for the evolution of co-operation, the anti-corruption policy is to ensure that the suspect confronts different law enforcers on each contact. Officers are rotated between regions and among sites within regions.

Another variant of the same policy dilemma arises with discretion. Wide discretion 'presents a real danger of corruption and capture' (Handler 1988: 1027; Davis 1969; Lowi 1969). But narrow discretion results in rulebook-oriented regulation that thwarts the search for the most efficient solutions to problems like pollution control (Scholz 1984b; Ackerman and Hassler 1981; Bardach and Kagan 1982). When the reward payoff for co-operation is low as a result of such confining discretion, then the evolution of co-operation is unlikely. But might it be possible to allow discretion to be wide, but to replace narrow rule-writing to control capture with control via innovative accountability for the exercise of wide discretion?

This then is the policy nut we seek to crack. How do we secure the advantages of the evolution of co-operation while averting the evolution of capture and corruption? Our answer lies in a republican form of tripartism. Tripartism is a process in which relevant public interest groups (PIGs) become the fully fledged third player in the game.[2] As a third player in the game, the PIG can directly punish the firm. PIGs can also do much to prevent capture and corruption by enforcing what Axelrod (1986) calls a meta-norm — a norm of punishing regulators who fail to punish non-compliance. Here the effect of the PIG on the firm is mediated by the PIG's effect on the regulator — instead of directly punishing firms, it punishes regulators who fail to punish firms. Axelrod's (1986) simulations show how the introduction of

meta-norms can dramatically increase the prospects of stable compliance. The fully fledged tripartism we consider, where PIGs are empowered to punish firms directly, is a more radical option that has been conspicuously unanalysed, in spite of incipient instances of its implementation in many countries (for example, Carson and Henenberg 1988).

Tripartism raises the question of who guards the guardians (M. Shapiro 1988). The problem of guardianship, as eloquently formulated by Susan Shapiro (1987), is that we tend to deal with failures of trust by accumulating more and more layers of guardianship. The untrustworthiness of *n*th order guardians is monitored by *n*+1th order guardians, and so on in infinite regress. In the present case, who will guard the PIGs? PIGs can be captured and corrupted; history is littered with cases of PIGs caught with their snouts in the trough.

Ayres and I try to show that this way of setting up the problem entails a rather too mechanistic conception of guardianship. What we put in its place is a notion of contestable markets for guardianship. The idea of contestable markets arises where there are such a small number of producers in a market as to provide little direct guarantee that they will vigorously compete to hold each other's prices down. According to the theory, firms will nevertheless hold prices down because, so long as there are not formidable barriers to entry, they will fear that high prices will cause the entry of a new competitor who will seize their market share with lower prices (Baumol *et al* 1988).

The trick of institutional design to deal with the problem of regulatory capture is to make markets for guardianship contestable. This is no easy matter, just as it is no easy matter to render economic markets contestable.[3] What is required is a regulatory culture where information on regulatory deals is freely available to all individual members of a multitude of PIGs. Also required is a vital democracy where PIG politicians are always vulnerable to accusations of capture by competing PIG political aspirants who stand ready to replace them. If talk of competition for PIG influence seems unreal, it is only because we are thinking of arenas where PIGs are powerless; where PIGs are empowered, aspirants emerge to contest the incumbency of PIG politicians.

Tripartism is defined as a regulatory policy that fosters the participation of PIGs in the regulatory process in three ways. First, it grants the PIG and all its members access to all the information that is available to the regulator. Second, it gives the PIG a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the PIG the same standing to sue or prosecute under the regulatory statute as the regulator.[4] Tripartism means both unlocking to PIGs the smoke-filled rooms where the real business of regulation is transacted and allowing the PIG to operate as a private attorney-general.

Generally Ayres and I refer to the simplest model of tripartism where a single PIG is selected by the state (or by a peak council of PIGs) as the most appropriate PIG to counterbalance the regulated actors. That PIG then elects its representative to participate in that regulatory negotiation. The simplest model will not always be the most appropriate — that is an historically and institutionally contingent

matter. However, the simplest model has definite attractions: it should minimally delay decision-making in arenas where no decision is the worst possible decision. And it should maximize the prospects of genuine dialogue around the table leading to a discovery of win-win solutions, instead of a babble of many conflicting voices talking past each other. Tripartism is here considered as a strategy for implementing laws and regulations that have already been settled. If one wanted to extend its application to the rule-making process itself, an extension that may have merit, then clearly the simple tripartism model would mean too narrow a basis for PIG participation.

But who are the PIGs? Here it is best to resist pleas for a clear definition of the public interest and who represents it. One reason is that what we ultimately favour is a contested, democratic theory of the public interest rather than an account that can be neatly packaged in advance of the operation of democratic process. Another reason is what we urge democratic polities to do is identify, on an arena by arena basis, the group best able to contest (rather than 'represent') the public interest embodied in a particular regulatory statute. They are thrust into the breach to fight for the public interest the legislature intended to be protected by a regulatory statute; but in fact they will more often than not be private interest groups.

An environmental group empowered as the third party in environmental regulation may be a PIG largely devoid of private interest. But we include as PIGs trade unions empowered to defend the interests of their members in occupational health and safety regulation. Indeed it could even be that a suitable group to contest the public interest in a consumer protection statute to guarantee the quality of motor cars could be the industry association of car rental firms. The most knowledgeable group to intervene in a cosy regulatory arrangement that maintains oligopolistic prices for wheat may be the industry association of flour millers.

As Meidinger (1987) cogently argues, there is no touchstone, no objective standard, by which we can separate the public interest from private interests. Social life seems 'almost always to involve a combination of pecuniary interest-pursuit and citizenship'(Meidinger 1987: 30). In practical terms, citizen concerns about themselves motivate their identification of public concerns: 'reason is most likely to be applied by passion — in the form of interests' (Meidinger 1987: 31). This is not to support the crude 'deals thesis' of some law-and-economics writing (Stewart 1983). Regulation is largely contested in a public-regarding discourse; it is a shallow analysis to view interest groups as unashamedly using the state regulatory apparatus as no more than a vehicle for advancing their private interests. Certainly, our conclusion is that this latter form of discourse should be discouraged by our regulatory institutions. Public-regarding discourse, which is already encouraged in many ways by regulatory agencies and the courts, should be further encouraged. As Baar (1989) points out, achieving regulatory effectiveness through a balance of control is not about simply striking a compromise of interests. It is about understanding each other's needs and then sharing ideas in the pursuit of risk-management strategies that deliver acceptable protection at acceptable cost. As the negotiation experts have instructed us, we will all do better if we focus less on positions and more on designing new solutions which

are responsive to mutually understood needs, new solutions which may bear no relation to initial bargaining positions (Fisher and Ury 1981).

An assumption implicit in our analysis is that for most business regulatory statutes in a democracy, there will be an appropriate PIG. We assume this because we think it unlikely that statutes that threaten the interests of business would ever have been enacted in the absence of an interest group pushing for them. This assumption will not always be true, however, even after empowerment has increased incentives for PIG formation (see Walker 1983).

The simplest arena to understand how tripartite regulation would work is with occupational health and safety. Assuming a unionised workplace, the elected union health and safety representative would have the same rights to accompany the inspector in the workplace as the company safety officer. She would have the right to sit in on and ask questions at any exit conference at the end of the inspection and at any subsequent conference. She would receive copies of the inspection report and of any subsequent correspondence between the parties. If she perceived an unwarranted failure to prosecute, to shut down a machine or to take any other enforcement action, she would have the same standing as the government inspector to pursue that enforcement action herself. With minor variations, this has been the thrust of recent occupational health and safety reform in some Australian states.

Of course, one could usefully grant the same rights to a non-union safety representative elected at a non-unionised workplace. But that raises issues of where this individual would turn for technical assistance and for legal assistance in going to trial. These problems are remediable in principle by public funding of legal aid, hazardous chemical information bureaus and the like. Where there is not a power base and an information base for the weaker party, tripartism will not work. The tripartism idea is fundamentally about transcending the shallow liberal notion that all you need to do to solve the problems of weaker parties is to give them legal rights (Unger 1987; Handler 1988).

Tripartism may also allow us to move to a regulation model from a prohibition model for some areas of the black economy. Corruption has always been the fear in allowing co-operation to evolve in *de facto* police regulation of prostitution. But if conditions are imposed on brothel licences by a tripartite committee, we might secure an evolution of co-operation in the battles against AIDS, declining amenity for neighbourhoods, assault of prostitutes and ensnarement of teenage girls, while forestalling the evolution of police corruption. A variety of third players might perform this role — the women's movement, the church, a prostitutes' union.

Using simple algebra, Ayres and Braithwaite (1990) show how, assuming the players are rational actors, the introduction of a PIG as a third player in the regulatory game can encourage the evolution of co-operation while preventing the evolution of corruption and harmful forms of capture. However, the book goes on to criticise the limitations of such a narrowly economic analysis of regulatory tripartism. A complementary theory of tripartism is developed, an empowerment theory, to address the deficiencies of the economic model.

The empowerment theory is first distinguished as one that assumes inequality

of power and seeks to remedy it. This contrasts with the game-theoretic model where there is an implicit and erroneous assumption of equality of power. Second, Ayres and Braithwaite (1990) argue that tripartite empowerment gives regulatory players an interest in building trust, co-operation and dialogue within regulatory communities. This is so because, under conditions of tripartism, trust builds power.

A communitarian tripartism of this sort can solve the problems left unsolved by the pure economic interests model of tripartism. It can address problems that are not best understood as an outcome of the rational pursuit of interests; it can advance compliance by engendering a commitment to the rightness of the law and to the unthinkableness of breaking the law; and it can engage in dialogue with the firm for whom the question is not 'should we do the right thing', but 'what is the right thing to do?' (Schelling 1974).

Whether tripartism will work is culturally, institutionally and historically contingent. All Ayres and Braithwaite (1990) have done is show that there are some plausible theoretical reasons of a general kind as to why tripartism might foster the evolution of co-operation while preventing the evolution of inefficient capture and corruption. We have not packaged a practical proposal ready for implementation; for that, there is no escape from detailed empirical investigation of the relevant institutional arena, and of the implementation modalities it enables and forestalls.

Conclusion

When we break the shackles of the conventional terms of debate between regulation and deregulation, the creative possibilities for regulatory forms which leave both business and the community better off become apparent. It is the real possibilities for win-win solutions in an era of regulatory flux that make innovation politically feasible. Here we have discussed just two directions for innovation — pyramids of regulatory strategies and tripartism. Self-regulation need not be a dirty word to those on the left, nor need government intervention be anathema to those on the right, if these are contextualized within a responsive regulatory framework.

Notes

1. There is certainly no suggestion implied here that this eyebrow raising has been effective. Moreover, since this study was completed the Australian Brodcasting Tribunal has attempted to fire its big gun for the first time against Mr Bond, with a notorious lack of success.
2. This differs from the role that Scholz (1984a: 216–17) considers for interest groups — influencing regulators as factors in the external environment.
3. Few markets in modern economies could be characterised as 'contestable'. For example, while some commentators have suggested that American airline routes might be contestable markets (Bailey and Panzar 1981), several studies have rejected the empirical implications of contestability (Ayres 1988; Call and Keeler 1986).

4. This is the idea of the *qui tam* suit relied upon heavily in England during the fourteenth and fifteenth centuries. *Qui tam* private prosecutions continue to be available under a number of American statutes. The US Congress has recently revitalised the idea under the False Claims Act (31 USCA §§3720–3731 9West. Supp. 1989)). The result has been a rash of private prosecutions largely of defence contractors suspected of defrauding the Federal Treasury (Caminker 1989). Crumplar (1975) has supported the *qui tam* idea in the domain of the Securities and Exchange Commission, and Fisse and Braithwaite (1983: 250–4) have done so more generally.

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Privatisation, Regulation and the Public Interest: Britain and Australia

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Britain has had only minimal experience of the kind of regulation of economic activity common in the United States and, to a lesser extent, Australia. There is, it is true, some regulation aimed at competition, for example the Monopolies and Mergers Commission; some aimed at fair trading, for example in the securities area; and a measure of activity in standard setting as with broadcasting and censorship.

The reasons for this phenomenon are not clear. It may be that public ownership has been seen as the better alternative to regulation of private interests and there is some evidence from the privatisation debate of the past decade in the United Kingdom to suggest that, in the minds of the policy-makers, public ownership equals private ownership plus regulation. Or it could be a more philosophical distaste for regulation *per se* as symbolic of state intervention in private affairs stemming from the impact of the grand *laissez faire* political economy writers from the18th century onwards. It may also be simply foreign to British culture as expressed so poignantly by the poet John Milton:

> If we think to regulate printing thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man (*Concise Oxford Dictionary of Quotations*).

The British legal tradition also reflects this dilemma. Norman Lewis, in a recent perceptive article, puts it this way:

> Britain . . . lacks a tradition of public law that conceptualises the functions of the State and the institutions and forms through which its activities are carried out. Instead, reliance has been placed on the continuity of institutions and of symbols of legitimate authority, especially Parliament and the Courts. However, our Courts have avoided any general responsibility for ensuring that 'rule of law' values permeate the sphere of discretionary executive power (Lewis 1988: 59).

Lewis goes on to point out that it has been constitutional orthodoxy that has acted as a protection of private autonomy in a context where the growth of state functions has transfused much of that autonomy into public autonomy, and so freedoms are guaranteed through private law, and public actors are controlled through private forms which are aimed at maximising autonomy. There is no separate public law to demand that the state 'act as an honest man — only as a "free" man' and so the state apparatus has enjoyed extended powers subject to the 'ordinary law' which,