
**GOVERNANCE
AND
ECONOMIC
EFFICIENCY**

Edited by
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CHAPTER 9 REGULATION

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Everyone agrees that Australia's regulatory processes could be better designed to promote efficiency, effectiveness and equity. But that is about all everyone agrees upon. The diagnoses of our regulatory malaise that enjoy popular currency in Australia are mutually contradictory to a degree that makes it difficult to discern how to move forward. This paper will contend that the dominant ways of thinking about regulation in Australia are myopic and have led to tunnel-visioned policies. The different myopias take turns to prevail in policy debates. My plea will be for a transformation of the business-government-community culture of regulation to defeat this turn-taking. This will be a plea for a regulatory culture that is more genuinely committed to dialogue between competing concerns and to constituting win-win regulatory solutions.

I will identify three myopias which are obstacles to a more constructive regulatory culture in Australia. These are regulatory legalism, deregulatory rationalism and knee-jerk opposition to self-regulation. Most lawyers subscribe to the first credo, most economists to the second and most ordinary citizens of Australia to the third. While all three represent myopic positions that are the fundamental hindrances to efficient, effective and just regulatory design in Australia, lying behind all three are legitimate concerns that must be addressed in a responsive regulatory culture. My contention is that we will all do better by our concerns if we abandon these entrenched positions.

1. Regulatory Legalism

Regulatory legalism construes business regulation as an enterprise that is fundamentally about the just enforcement of laws. The job of regulatory agencies is to enforce the laws that are passed on to them by the parliament. The most extreme of regulatory legalists may view it as an improper activity for a regulator to look behind these laws to the public purposes for which the laws were written and then to pursue those public purposes by means other than law enforcement.

The Commonwealth Attorney-General's Department is an institutional bastion of regulatory legalism. In recent times, some deregulatory rationalists have gained a toehold in some very senior positions in that department. But as I will argue in the next section, we should see that as no great progress. In the darkness of the bureaucratic corridors of Barton, what we mostly see is legalists and rationalists taking turns to throw each other on the mat about questions of regulatory policy.

Trade practices compliance policy illustrates the clash of the myopias. The Trade Practices Commission sees a looming problem that will cause the anticompetitive conduct their act is intended to prevent. To take a currently topical example, they see a risk of the airline duopolists controlling airline booking systems or terminal space, in a way that erects barriers to the entry of a third competitor. The Commission then diverts resources away from enforcing compliance with its act to work on preventive policy measures to protect the competitiveness which is the objective lying behind that act.

When this happens, there is a history of regulatory legalists in the Attorney-General's department complaining to their minister that the Commission is overstepping its mandate. They complain that they don't have the resources to take serious breaches of the act to court, but then they divert their resources into policy questions that are outside their statutory mandate. The Law Council of Australia has been another aggressive proponent of that view, especially in arguing that it is beyond the statutory mandate of the Commission to advocate deregulatory measures to increase the competitiveness of the market for legal services. Partners in some of the major law firms specialising in trade practices law have also been influential advocates of this view.

When the Trade Practices Commission diverts resources into the monitoring and evaluation of self-regulation schemes that operate as an alternative to government regulation, the legalists have, on occasion, joined forces with the knee-jerk opponents of self-regulation within certain public interest groups to sabotage this work. Fortunately, this sabotage has had only limited success and the Commission cannot keep up with the demand to assist with, monitor, and evaluate self-regulation schemes.

Some legalists view regulators as having a duty to enforce the law when significant breaches of the law come to their attention. Some environmentalists and radical criminologists also believe that it is simply wrong to reach the kind of settlement agreement with a corporate environmental criminal discussed elsewhere. It is wrong because it is inequitable enforcement of the law that grants wealthy law-breakers a privilege that is not extended to common criminals. This is a view at one with the stance of certain people that it is wrong not to punish a man who assaults his wife. These views are based on a myopic understanding of how policing common crime works in practice. Very little common crime is dealt with by sending criminals to jail. Consistent adherence to such a policy would be absolutely unworkable. If perpetrators of domestic violence were consistently apprehended and sent to jail, a good proportion of males would have served some time in prison.

In the case of the Trade Practices Commission, 51 454 complaints were received in 1989-90, a fair proportion of them involving likely breaches of the act, but only fourteen new court cases were initiated. Beyond complaints, if the Commission decided to be proactive in its enforcement work, it is easy to prove, with data on the known incidence of certain types of breaches of the act, that, with unlimited resources, the Commission could detect hundreds of thousands and probably millions of breaches of the Act in Australia each year. This empirical reality makes rhetoric about the obligations of the Commission to use its resources to litigate the breaches of the Act that come to its attention unworkable humbug. The obligation of regulatory agencies, I would submit, is to use their resources strategically to find the least costly ways of maximising regulatory objectives while respecting the legal rights of alleged offenders.

It seems to me a useful exercise to confront the myopia of legalism with the perspective of economic rationalism on the same phenomenon. Legalism on questions of law-breaking has a rather stronger grip on US policy than in Australia. The economic rationalist can look at the phenomenon of half a million blacks in American prison and ask: 'What kind of human capital policy is it to have more young black males in prison than in college?'. Then, the economic rationalist might also ask whether it is an intelligent use of human capital to go the same way with white-collar crime, as the Americans have progressively been doing over the past twenty years. When a financial genius like Michael Milkin breaks the law, might it not be better to harness his talents for some public good rather than waste such an extraordinary talent in prison? In

Australia, buckets of taxpayers' money, and the energies of some of our most talented lawyers, have been devoted to unsuccessful campaigns to put some of our most talented but misguided business people in jail.

I would not want to argue for a moment that the human capital perspective on criminal law is a superior one to the justice perspective. Getting criminal convictions of some high profile business malefactors is a top priority for this country. My suggestion is simply that better policies are likely in such an area when one is open to pondering both perspectives (and others as well). The reaction of some economic rationalist critics of the regulatory legalism of the Attorney-General's Department in its oversight of the Trade Practices Commission is to argue that the Commission should be taken away from the Attorney-General and handed to Treasury, for example, or a Ministry of Competition. My argument is that if such a move substitutes a legalism that is oblivious to economic efficiency and pragmatism with an economism that is oblivious to the rule of law, then we just swap one myopia for another.

2. Deregulatory Rationalism

Deregulatory rationalists seek business regulatory policy making that is economically efficient. For the deregulatory rationalists, the issues which are the central concerns of the legalists - the rule of law, justice, respect for rights as constraints that cannot be trumped by considerations of utility - are obstacles in the path of economic efficiency. Deregulatory rationalism, I will argue, is an ideological package prone to defeat its own objectives. One reason is its contempt for the concerns of the legalists. Any regulatory order that does not take justice, rights, and the rule of law into consideration seriously risks rejection by the regulated as procedurally unfair. A regulatory order that is so myopically focused on economic efficiency that it views human life or environmental quality as just commodities on which a price can be placed will be denied legitimacy by the broad mass of citizens. Regulatory orders that are viewed as unfair by the regulated or illegitimate by the community are likely to fail. In these two ways economic myopia sows the seeds of its own failure.

The institutional embodiments of deregulatory rationalism in Australia - business regulation review units in state and federal governments - have tended to exemplify these self-defeating propensities. This is not just because their obliviousness to values other than economic efficiency have made them easy targets for interest groups to discredit.

There is an irony associated with Australian business regulation review units. Their professed mission is to attack regulation; their preferred weapon for achieving this mission is regulation - regulating the regulators. They stand for small government; they advance this stand by making governments bigger - as business regulation review units proliferate across the land. Reducing the paperwork burden of government is a major concern; a remedy is to get governments to fill in returns on the paperwork burdens of their regulation, returns which require business to fill in returns on what the paperwork burdens are. Cost-benefit analysis is a methodological icon for these units; therefore they lobby for rules to require cost-benefit analysis for new regulations. In doing so, they pay no attention to the fact that credible cost-benefit analysis is expensive and they have never been known to produce an analysis of the costs of cost-benefit analysis and whether producing these analyses actually deliver benefits.

The deregulatory rationalists have also been closed to the possibility that a great deal of the regulation that we have is economically efficient and serves values other than economic efficiency. When organisations such as the American Enterprise Institute produce their influential studies on the comparative costs and benefits of regulation in the United States, they conveniently exclude from the analysis regulatory agencies that have small costs but near-infinite economic benefits. Some examples of these are small companies and securities regulation and prudential regulation of the finance sector. I say both these regulatory regimes have near-infinite benefits because without them there would be no capital formation, no modern capitalism as we know it. Another (more controversial) exclusion of this ilk from the study is anti-trust regulation. Like companies and securities regulation, anti-trust not only regulates markets; it constitutes markets where markets would not otherwise exist.

Michael Porter's (1990) massive study, *The Competitive Advantage of Nations*, illuminates how strong regulation can actually increase the competitive advantage of advanced economies. Empirically, it is simply not the case that it is the countries with weak business regulation that are flourishing in the world economy. To find the toughest environmental or consumer protection legislation in the world on any given hazard, we will usually find it in the United States, Japan or Germany. Porter provides an account of some of the reasons why this is the case. BHP spent a nine-figure sum during the 1980s on new doors to reduce the hazardous emissions from its coke ovens. The doors were bought from Japan. Why? Japan was the leader in tightening regulatory control over coke oven emissions and, as a consequence, it was Japanese steelmakers that developed the control technology and sold it to the rest of the world. The Japanese Energy Conservation Law of 1979 set demanding standards for energy saving in air-conditioners, refrigerators and cars, resulting in a variety of product improvements that have benefited Japan's international position (Porter, 1990:648). America more than Japan has historically led the world in the export of pollution control equipment and services as a result of their tough environmental regulation. However, when certain deregulatory tendencies in the US allowed Germany, Sweden and Denmark to move ahead of the US on some environmental standards, these countries increasingly came to supply world markets for the relevant technologies. Sweden led the world in regulations requiring special access and aids for handicapped persons. Consequently, Swedish companies dominate world markets in technology to aid the disabled.

Eastern European pharmaceutical producers are quite unlikely to challenge the dominance of the US and European pharmaceutical transnationals. Why? The answer lies not so much in a failure of the market in these countries, but in the failure of regulation. The world's hospitals and health authorities will not buy drugs from them in large quantities, even though they are cheap, because they do not trust Eastern European regulatory systems to provide satisfactory guarantees of product safety and efficacy. Indeed, one of the reasons Australia has a better chance than Bulgaria of being the home of a couple of thriving international pharmaceutical companies is that our regulation has some international credibility.

Porter makes a clear distinction between regulation of standards of the sort I have just been discussing, and regulation of competition. Regulation of competition destroys economic efficiency by placing restrictions on entry, restricting prices, restricting seat capacity in an industry like airlines, and the like. Regulation of standards, on the other hand, can nurture economic efficiency:

Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage. They pressure firms to improve quality, upgrade technology, and provide features in areas of important customer (and social) concern . . .

Particularly beneficial are stringent standards that anticipate standards that will spread internationally. These give a nation's firms a head start in developing products and services that will be valued elsewhere . . .

Regulation undermines competitive advantage, however, if a nation's regulations lag behind those of other nations, or are anachronistic. Such regulations will retard innovation or channel innovation of domestic firms in the wrong direction (Porter, 1990: 647-9).

Unfortunately, for all the rhetoric of the dangers of regulatory capture that we hear from the business regulation review units in Australia, they themselves have tended to be captives of firms who take the short-term view that reducing all regulatory costs is a good thing. These units have been the captives of business interests who want the lowest regulatory costs possible, who want the least pressured, least demanding business environment obtainable. The regulation reviewers have not seen themselves as natural allies of the consumer movement, which is very much in the business of making life more demanding for business by insisting on regulation that requires high product standards, by exposing green marketing claims that are not true, by giving consumers the information to put more pressure on producers through choice, by opposing monopoly and oligopoly and insisting on the deregulation of competition. Rather, the regulation reviewers and the consumerists have each tended to view the other as natural adversaries.

I could reflect my own bias in all of this by saying that a vital, aggressive consumer movement is much more important to securing regulation that promotes international competitiveness than are business regulation review units. But the message I want to project is a different one. It is that we all should recognise our biases and actively promote the legitimate concerns that lie behind them while struggling for a regulatory culture where constituencies with different biases are put in a constructive dialogue, a creative tension. Hence, we have a better shot at international competitiveness if we have both effective, balanced regulatory review, and effective, balanced consumerism. We have a greater chance of efficient and effective regulation if we have a regulatory culture where regulation reviewers and consumerists actually listen to each other and respect the concerns of the other; we have a lesser chance of cost-effective regulation if these two constituencies see their mission as destroying the other and taking it in turns to win battles without either side winning the war. There is a loser from this war, however, and that is Australia.

I note with interest that the Australian consumer movement, through its representative on the Economic Planning Advisory Council, Louise Sylvan, has put to Australian business and political leaders the proposition that it should consider the advice Michael Porter has to offer. It is a hopeful sign for the kind of dialogue the Australian economy needs that Michael Porter, who was first invited to speak in Australia by the Business Council, got his best hearing from Australian consumer activists. And there is reason for optimism that some in the Australian business community are actually beginning to listen to the consumer movement when they quote Porter's provocative advice on product standards:

Establish norms of exceeding the toughest regulatory hurdles or product standards. Some localities (or user industries) will lead in terms of the stringency of product standards, pollution limits, noise guidelines, and the like. Tough regulatory standards are not a hindrance but an opportunity to move early to upgrade products and processes. Older or simplified models can be sold elsewhere . . .

Find the localities whose regulations foreshadow those elsewhere. Some regions and cities will typically lead others in terms of their concern with social problems such as safety, environmental quality and the like. Instead of avoiding such areas, as some companies do, they should be sought out. A firm should define its internal goals as meeting, or exceeding, their standards. An advantage will result as other regions, and ultimately other nations, modify regulations to follow suit (Porter, 1990: 586, 588).

Recently, we have seen in Canberra a curious alliance of the deregulatory rationalists of the Trade Practices Commission and the Treasury, plus the consumer movement, putting the case to the government that Australia needs a less stringent test before the Trade Practices Commission is able to move to stop mergers. Those on this side of the debate in part were persuaded by Porter's argument that an activist anti-trust policy is needed to dismantle the regulation of competition. International competitiveness, according to Porter, arises when there is vigorous domestic competition between clusters of local firms in an industry. The international success stories are not to be found with the one big local firm that gets economies of scale early, but with the many small local firms that put each other under such competitive pressure that ultimately a few of them succeed in becoming large international firms.

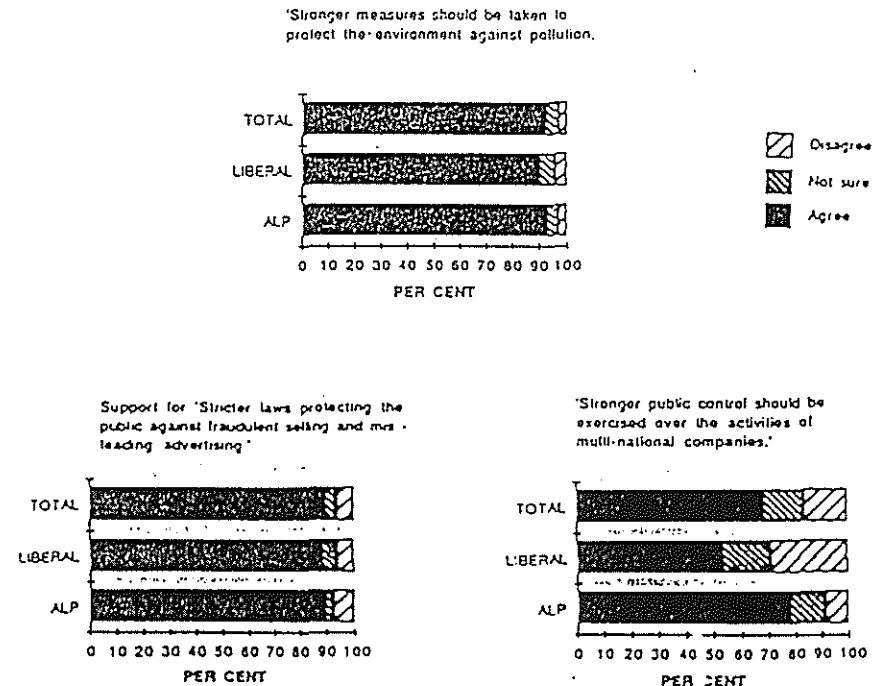
On the other side of that debate were most of the industry groups, including the Business Council. Similarly, while there has been an alliance of the deregulatory rationalists and the consumerists in arguing for a deregulation of markets for professional services in Australia, there are not many doctors and lawyers signing up for this campaign. So when rapprochement between consumerists and deregulatory rationalists has occurred, neither side has been very successful in persuading producers that an unpressured business life of low standards and oligopolistic quietude is not in Australia's interest, nor in the producers' interests in an international economy where the quiet life simply cannot last. If local professional monopolists persist in giving consumers a poor and unaffordable service, one day international firms from the relevant profession will sweep into Australia and snatch their consumers from them. We cannot ask producers to love thine enemy - it is hard for manufacturers to love the consumer movement after their work has been excoriated in *Choice* - but at least we can suggest to business that they would be well advised to listen to thine enemy. While some progress towards the regulatory dialogue we need has occurred, there is still a long way to go. One barrier that remains is some persistent resistance to dialogue with business among public interest movements such as the consumer and environmental movements. To this obstacle to effective and efficient regulation, we now turn.

3. Knee-Jerk Opponents to Self-Regulation

One of the reasons social movements like the consumer and environmental movements get reasonably strong community and political support is that ordinary Australians don't trust business. They tend to view Australian business as greedy, rapacious, irresponsible and including a goodly proportion of crooked entrepreneurs. There are institutions in which the public have less confidence - such as trade unions and the press - but

Australians have less confidence in business than they have, for example, in institutions such as the police and universities (Headey, 1988: 167). As a result of the lack of trust citizens have towards business, they strongly support tougher regulation in areas such as consumer and environmental protection. Repeat surveys by the National Social Science Survey at ANU show that this support is strong among both Labor and conservative voters (see Figure 1).

Figure 1:
Attitudes towards environmental and consumer protection regulation by political affiliation.



Source: National Social Science Survey, urban sample.

These attitudes form the basis for consumer and environmental movement power. Little wonder then, that these constituencies play to community belief that business is untrustworthy. I know of no public opinion data on this, but I am confident that one would find that most Australians believe that industry self-regulation is a joke. So when consumerists and environmentalists attack the naivety of self-regulation, they do no more than reflect community attitudes. One of the interesting changes that occurs in the beliefs of consumer advocates and environmentalists, after a number of years of hands-on dealing with business, is that they begin to conclude that, in some areas of government, regulation is an even bigger joke than self-regulation. For all its limitations, self-regulation sometimes delivers the goods better than government command and control.

Let me illustrate with an example from my own history as a consumer advocate. During the 1980s I devoted quite a bit of energy to lobbying for stronger government regulation of promotional claims made in medical journals and other outlets about the safety and efficacy of pharmaceutical products. In principle, I still actually believe that this is one of those areas that can be more efficiently regulated by government than by industry association. But the experience of the past decade in Australia has proved this hope misplaced. The responsible government regulators - the Department of Health, Housing and Community Services and the Trade Practices Commission - failed totally to enforce the law against misleading promotional claims by pharmaceutical companies. Since 1988 the Australian Pharmaceutical Manufacturers' Association has put in place a self-regulation scheme that has actually done quite a lot to clean up misleading claims in the industry. The scheme is far from perfect, as a recent evaluation of the scheme by the Trade Practices Commission has reported (Trade Practices Commission, 1992). But I do not know any Australian activist, with extensive hands-on advocacy experience in this industry, who would not concede, if only privately, that the self-regulators have achieved more than the government regulators in recent times.

Advocates can respond to this kind of realisation in two ways. They can pat industry on the back, give credit where credit is due, and say publicly that they were pleased to be wrong. Or they can persist with vilifying self-regulation as a scheme to dupe the public. Unfortunately, in these circumstances, public interest groups sometimes go for the latter option. This may be the safest way to cultivate political support within the movement. Advocates hate to be accused of going soft or being captured by business. But public interest advocates have a heavy responsibility in such cases. The fact is that if they say that a self-regulation scheme is a con and the industry says it is a success, it is the public interest group that will be believed by the community and the media. The responsibility is a heavy one because it is terribly dispiriting for socially responsible business people to work hard in a sincere effort to make self-regulation work only to have the press and the community treat their efforts with the same contempt that is heaped on the crooks of the industry.

There is a problem of demagoguery among environmentalists who cultivate political correctness by denouncing business regardless of the amount of effort they are putting into environmental auditing (Gunningham, 1992) and cleaning up their act. Yet right-wing business ideologues who say that public interest groups are the cause of anti-business attitudes in the community are wide of the mark. The public interest groups are followers, not leaders, of community opinion against business. It is negative encounters that citizens have directly experienced with business that have caused this cynicism. Business should give some credit to consumer and environmental activists who will stand up publicly and congratulate a company for cleaning up its act. This is not the best way for activists to maximise their public profile and cultivate community support. Activists must choose responsibly between maximum public profile and maximum effectiveness in encouraging business and government to become more effective in cleaning up the environment and protecting consumers. Maximum effectiveness, I believe, does come from giving credit to business where credit is due.

Self-regulation schemes often fail, probably they even fail more often than government-regulatory schemes. Self-regulation is frequently an attempt to deceive the public into believing in the responsibility of an irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job. Equally, however, sometimes it does work better than government regulation because the industry is more committed

to it and because it is more flexible than the law. When this is the case, it is the public interest campaigners who are identified in the public mind as responsible for exposing the abuses that the self-regulation scheme is designed to address who are uniquely placed to persuade a cynical public that the scheme is an improvement for which the industry deserves credit.

While public interest groups deserve criticism for sometimes choosing to pander to anti-business feeling in preference to getting runs on the board, they deserve credit for being more constructive in their relationship with business than they would be if their only concern were to maximise their community support. This leads to what I think is the key issue for moving toward more cost-effective regulation in Australia. What is needed is the cultivation of mutual respect among the key constituencies in any arena of regulation. This means each side giving credit when credit is due. It means business giving credit to advocacy groups that pass up a golden opportunity to take a cheap shot against an organisation that is sincerely trying to improve its regulatory performance. It means advocacy groups giving credit to industry and governments when they accomplish regulatory improvements. It also means respecting the obligation of the other to engage in public criticism of one's performance when it has been sloppy. The stakes are too high with questions of business regulation for anyone to expect or demand that the community be cut out of a robust public debate on regulatory standards. A regulatory culture where neither punches, nor pats on the back, are pulled is what a healthy democracy should aspire to.

When such a culture is achieved, what we will have is a 'policy space' where mutually respecting interest groups can really talk to each other about their concerns. Then genuinely creative ways of constituting win-win solutions to the regulatory game can be explored. In Australia, we have a long way to go before reaching such a pass. On the other hand, there are more of the makings of a constructive regulatory culture in Australia than in many other countries. There exists in Australian regulatory communities a kernel of mutual respect and fair play that can be nurtured.

4. Beyond Entrenched Positions

We have seen that regulatory legalists, deregulatory rationalists and knee-jerk opponents to self-regulation suffer from different types of myopia. The formula for a disastrous regulatory order is to have gladiatorial battles among protagonists who 'stick to their guns', defending the purity of their positions. There are three risky outcomes from such battles. One is that the different protagonists win some and lose some, so the community puts up with living with one myopia in this area, another myopia in that. Worse still, regulatory policy oscillates between the ascendancy of one myopia then another. A third disastrous outcome arises where there are two coherent policy packages on offer - ABCD and WXYZ. One constituency lobbies for the first because it likes features A and B of this package. Another constituency lobbies for the second because it likes Y and Z. The politicians then attempt to give everyone what they want by opting for a policy package ABYZ. Unlike the original two policy packages, ABYZ turns out to be totally incoherent. For example, A and Z are mutually contradictory: the purpose of A is defeated when it is put together with Z.

Dialogue between the competing constituencies is what is required to avert such disastrous outcomes. We need, in other words, regulatory institutions which get the conflicting parties around the negotiating table explaining to each other that while A is a preferred option, it is useless in combination with Z; if they have to have Z, X becomes a

better option than A. The beauty of dialogue is that it can oscillate toward a win-win solution or at least away from a lose-lose solution.

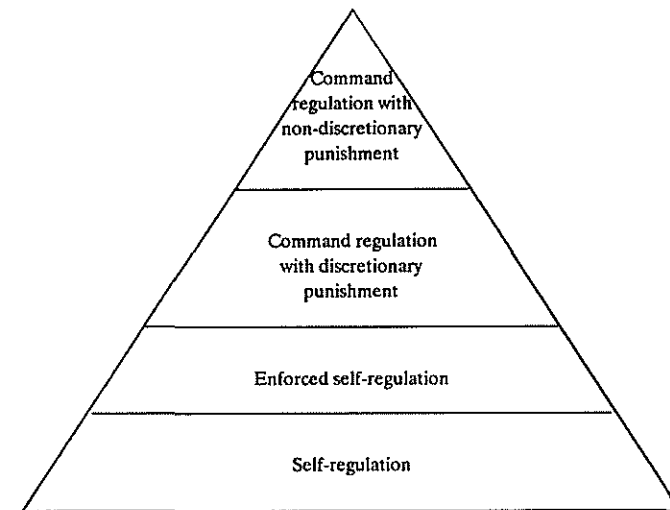
While the regulatory legalists, deregulatory rationalists and knee-jerk opponents to self-regulation all promote myopic positions, lying behind each position is a legitimate concern that should be weighed in any regulatory deliberation. The proper concern of the regulatory legalist is to protect the institutional integrity of the rule of law, to protect rights and justice. The legitimate concern of the deregulatory rationalist is economic efficiency. The reasonable concern of the knee-jerk opponent to self-regulation is suspicion that trust will be abused. Dialogue among these parties is needed to enable each to come to an understanding of the legitimacy of the concerns of the other.

Ian Ayres and I have completed a book in which we argue that once we establish a regulatory culture where dialogue exists, a variety of responsive regulatory solutions can be crafted that shatter the divide between the proponents of regulation and deregulation (Ayres and Braithwaite, 1992). By responsive regulatory institutions, we mean, among other things, responsiveness to how responsibly others are playing the game. Our hope is that in a dialogic regulatory process, deregulatory rationalists might engage opponents of self-regulation by saying, for example: 'This self-regulatory regime can be conducted with twice the flexibility and half the cost of government regulation. But we understand your concern that the self-regulatory standards will be unenforceable and ignored. Therefore, we propose to respond to your doubts by (a) supporting representation of your organisation on the self-regulatory body that makes enforcement decisions if you want it, and (b) agreeing on performance indicators for the self-regulatory program that are clear and easily monitored by you, so that (c) if the self-regulation scheme does not meet those performance indicators, we will agree to support your advocacy of a shift to a government regulatory scheme'.

In a dialogic regulatory culture, we suggest that the participants will talk to each other in terms of regulatory pyramids. Figure 2 is an example of a regulatory pyramid. It takes into account that participants, the most important of which is the state, will accept that self-regulation is a preferred mode of regulation, but only if it can be made to work. Because it cannot be trusted to work, regulatory institutions should be designed to build in incentives for it to work. Incentives for effective self-regulation come from other players (the state, the environmental movement), signalling to the industry that they will press for an escalation of regulatory intervention up the pyramid if self-regulation is not implemented with energy and achieves results. What the different stages are that one rises through is no great concern here. They will be quite different in different regulatory arenas. The important thing is that there be signalling to the industry of a commitment to escalate regulatory intervention whenever lower levels of intervention fail. This signalling gives the industry an incentive to make regulation work at lower levels of intervention.

The key to cost-effective regulation is this kind of mutual signalling in a regulatory culture where punches are not pulled, but nor are there congratulations for voluntary goal attainment. Public interest groups and the state signal that if the industry is sincere, self-regulation will be given a chance. There will be no knee-jerk opposition to self-regulation. At the same time, the state and the industry signal to the public interest group that their reward for cooperation with trying self-regulation is an assurance that documented self-regulatory failure will be responded to with escalating state regulation.

Figure 2: Example of a pyramid of enforcement strategy



There are some interesting paradoxes for all the players when regulatory pyramids are being displayed. I believe that as a general proposition government regulation of pharmaceuticals' promotion is likely to be more cost-effective than self-regulation. Yet by propounding this belief as I enter a regulatory negotiation in which I grudgingly accept that the industry should be allowed a three-year trial of self-regulation, I maximise the chances of my general belief being proved wrong.

An industry lobbyist wants to avoid a regulatory regime where draconian penalties like corporate capital punishment (licence revocation) are imposed on law-breakers. The best way to achieve this objective may be to accept the terms of a regulatory pyramid that includes escalation to 'corporate capital punishment' and throwing executives in jail if regimes based on lower levels of intervention fail. This is because the way to get the government and public interest groups to agree to self-regulation may be to be accepting dire forms of escalation should self-regulation fail. This is the paradox of the pyramid. Lop the top off the pyramid and one might destroy the capacity of the pyramid to channel the regulatory action down to the cooperative base of the pyramid.

There is no standard or optimal pyramid I would want to advance as providing a simple model for solving all our regulatory problems. Standard answers will lead us astray when we are dealing with the regulation of changing technologies and an international economy in constant flux. The pyramid is just an example of an aid to thinking more interactively, responsively, any dialogically, about solving regulatory problems. The important conclusion is about the need to move our regulatory institutions away from the mechanistic models of economic rationalism, legalism and government command and control. This means genuine empowerment of all the stakeholders in a regulatory dialogue where each stakeholder comes to understand the concerns of the other and stands ready to respond positively to them so long as their own concerns are responded to positively by others.

Only then will creative, workable, economically efficient Australian solutions to Australian regulatory problems be devised. For too long, Australia has allowed itself to be buffeted back and forth by the pre-packaged regulatory and deregulatory solutions fashioned in the US and England. Our national interest is in a fair-minded dialogue to find our own ways of transcending the sterile debate between regulation and deregulation. It might be that we have a culture with sufficient elements of fair play and pragmatism to fashion win-win solutions better than others. (On the other hand, we suffer from being a culture that expects an easy fix and an unpressured life. For business, this means state nurturance of an orderly market where competition is not allowed to have overly destructive effects. For public interest groups, this means the comforting illusion that governments actually solve problems by writing laws.) The alternative is to allow our economic and environmental futures to slide from under us as we see-saw between deregulation and re-regulation, forever pushing up and down, never settling on a direction for moving forward.

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CHAPTER 10 THE NEXT STEP FOR COMPETITION POLICY IN AUSTRALIA: UNIVERSAL APPLICABILITY OF PART IV OF THE TRADE PRACTICES ACT

Allan Fels

"We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise."

Trade Practices Act Review Committee (Swanson Committee);
Report to The Minister for Business and Consumer Affairs,
August 1976

1. Introduction

The basic aim of Australian economic policy, particularly at the microeconomic level, is efficient performance of markets. There is a widely accepted view that vigorous and effective competition provides the best means of promoting economic efficiency and the welfare of consumers. However, the unrestrained operation of market forces will not always produce competition or the best possible economic and social outcomes. For effective governance there is sometimes a need for competition policy measures which have the aim of overcoming distortions in the competitive process. Economic efficiency is generally brought about by having competitive structures and competitive market conduct.

In Australia the *Trade Practices Act 1974* (Cwlth) is the main instrument of competition policy. This Act has two broad objectives: to prevent anticompetitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers.

In recent years, the momentum of the debate and discussion about the limited coverage of the Trade Practices Act has increased. There is a growing acknowledgment that the Act, a cornerstone of competition policy, does not apply to some of the most important areas of the economy. Some areas immune from the operation of the Act have the potential for large gains from greater efficiency resulting from more competition.

The partial or full immunity enjoyed by some Commonwealth enterprises, state public sector businesses, agricultural marketing boards, and a significant area of the private sector including professional markets, is the result of historical accidents, the protection of entrenched interests in a variety of markets and until recently, inertia. The call for change to a national application of Commonwealth law has prompted the writing of this paper which has the purpose of exploring some issues relating to the universal applicability of Part IV (restrictive trade practices provisions) of the Trade Practices Act. The fair trading and consumer protection provisions of the Act (contained in Part V)