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Regulating Self-Regulation

The ACCC, ASIC, Competition Policy, and Corporate Regulation

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The Australian Competition and Consumer Commission (ACCC)\(^1\) and the Australian Securities and Investments Commission (ASIC)\(^2\) are Australia’s two most significant corporate regulators. Between them they have responsibility for regulating anti-competitive conduct, information disclosure by companies (including financial reports), consumer and investor protection (excluding prudential regulation), corporate fund raising and takeovers, honest and fair conduct by corporate managers, licensing and monitoring of various financial services providers, trading in shares and other securities, and competition and prices in recently privatised industries. Direct regulation of the economy via the state fell out of favour in the Australian polity during the 1980s (see Beeson & Firth 1998; Bell 1997; Quiggin in this volume: ch. 8). Yet policies that promote freer markets and more competition have not led to less regulation. They have, however, adjusted the regulatory load between state authorities (for example, from the executive to independent regulatory agencies) and between state and non-state actors. The embrace of neoliberal policy has changed the roles of ASIC and the ACCC in two main ways.

First, government has relied on independent regulatory agencies, especially the ACCC, to constitute markets, and to legitimate competition policy by setting the conditions for fair play in those marketplaces. Policies promoting privatisation, deregulation, and increased investor and consumer participation in markets have led to expanded roles for both ASIC and the ACCC. As Osborne and Gaebler (1992) put it, the transformation of the public sector from command and control to ‘entrepreneurial government’ involves ‘less government’ (or less ‘rowing’) but ‘more governance’ (or more ‘steering’). Independent regulators frequently took
over governance at arm’s length from an executive that once exercised more
direct control over the economy.

Second, the regulatory styles of ASIC and the ACCC are being transformed. Effective regulation always required regulators to compete for influence among a network of public and private regulatory institutions. Neoliberal policy now encourages even more of a networking approach; it encourages regulators to build alliances, networks, and incentives to work with markets, corporate management, and professional and industry associations. Regulation is increasingly not a unitary, top-down, legal activity. It also involves the coordination and supervision of layers of regulatory activity that blur the public–private boundary—self-regulation, coregulation, and ‘meta-regulation’ by the state. The ACCC acted sooner and with more success than ASIC in using these essentially ‘third-way’ strategies to carve out a position of influence in Australian economic governance.

This chapter considers each of these two aspects of the role of ASIC and ACCC in turn. The first part shows that policies that promote freer markets have actually led to an expanded role for regulators, especially the ACCC. The second part considers the different strategies of regulation that the ACCC has developed (and ASIC is now modelling) in order to be more effective at meta-regulation—the regulation of self-regulation and third party regulation. The conclusion summarises the arguments and briefly considers the potential weaknesses of a focus on meta-regulation in a neoliberal state.

Freer markets—more regulation

The ‘constitutive’ role of regulation

There is nothing new about the fact that regulation (by the state and/or by private actors) plays a major role in constituting markets. The role of a general corporate regulator, such as ASIC, in creating markets for securities (that is, shares, bonds, and options) and other economic activity is so basic that it is mostly taken for granted. It is ASIC’s responsibility to administer and enforce the Corporations Law. This sets out the conditions on which companies are incorporated, how they should be governed, conduct requirements (including duties of care, fairness, and honesty) by corporate managers, conditions regarding licensed dealers and other participants in the marketplace (prohibitions against insider trading and market manipulation), the operation of the securities exchanges, conditions for creating, transferring, and dealing in corporate securities, and conditions for corporate fund raising, takeovers, receiverships, and liquidations. These provisions are derived from the first recognition of incorporation of imperial trading companies by the English parliament, the development of the English Uniform Companies
Acts, and the US New Deal’s radical reforms to securities markets. Legal concepts, such as incorporation itself, are now deeply embedded in our culture and markets. Economic concepts such as the significance of adequate information disclosure for efficient markets are a significant basis for our law. The securities exchanges themselves function on the basis of self-regulation by traders that began in informal meetings in the coffee shops of Wall Street and Europe (Geisst 1997: 10–11, 13), and is now explicitly recognised and enforced in state legislation. Markets and regulation are intertwined in mutually reinforcing (and sometimes destructive) relationships.

Through its responsibility for the administration of incorporation, ASIC helps create and provide information to the public about the major actors and objects of markets themselves, corporations. A recurrent theme in ASIC’s regulatory role is the regulation of the disclosure of information by companies (for example, periodic financial reports, prospectuses, and other fund-raising documents, the documents required in a takeover, and the requirements for certain companies to continuously disclose material information to the markets). This is a regime that helps constitute the basic conditions of fairness and efficiency in the market for securities by ensuring access to reliable information on which investors and analysts can judge the value of securities and plan their market activities (see Blair & Ramsay 1998). ASIC’s role in regulating the honesty and fairness of various actors in the market and the basic rules for the governance of companies is also intended to promote investor participation by promoting confidence in the integrity of the markets and minimising the systemic risk of market collapse. Without these regulatory guarantees, the market as we know it would not exist.

The traditional view of economic regulation is ‘interference that seeks to control or impede the operation of market forces’ (Shearing 1993: 69). Commentators and politicians from the left and right might argue about whether market ordering alone can accomplish the public interest, or whether it must be controlled by state regulation. But, until recently, all tended to assume that regulation was something that was external to spontaneous market ordering—the question was the appropriate balance. In fact, markets and regulation are intertwined. No markets exist at all unless they are created by regulation (Shearing 1993: 70). This regulation includes both state and private regulation, as I shall argue below.

Nevertheless, both ASIC and the ACCC were under-resourced and under-supported throughout the late 1970s and 1980s, quite soon after their initial creation. Regulation was seen as an inherently undesirable state intervention on the market in an era of increasing respect for competition. In the 1990s, by contrast, the constitutive role of regulation was rediscovered and reinvigorated. Both ASIC and the ACCC were moved from the responsibility of the federal Attorney-General’s Department to the Treasury, as policy-makers recognised that regulation
might have a role to play in creating competition and publicly legitimating competition policy. Both regulators were given greater responsibilities and greater resources; but it is the ACCC that has seen the most dramatic changes in fortune.

The ACCC

The ACCC administers and enforces the Trade Practices Act 1974. Part IV prohibits anti-competitive conduct, including price fixing and cartels, abuse of market power, and various other arrangements for attempting to prevent competition or maintain artificially high prices. One of the ACCC’s primary focuses, and most successful areas of enforcement, has been price fixing and cartels. The second major focus, and the most controversial area of ACCC regulatory activity, was and is mergers. Here the ACCC’s role was to enforce a prohibition against mergers that would result in the merged entity dominating the market (this test was changed later; see below). The main effect of these prohibitions is through the ACCC’s voluntary informal clearance system for mergers and formal notification and authorisation provisions. These provisions allow it to adjudicate whether proposed mergers (and other potentially anti-competitive practices) are in the public interest and provide immunity from court action if they are. Part V of the Trade Practices Act deals with consumer protection, including prohibitions against false and misleading conduct or representations, unconscionable conduct, and the use of coercion and harassment. Part V also includes product liability provisions.

Through the 1980s, there was a general view among legislators, policy-makers, and a powerful big business lobby that the Act could inhibit productive entrepreneurship (Fels 2000; see also Hopkins 1978). The test for prohibited mergers in the legislation was weakened, penalties were very low (maximum of $100,000 in consumer matters and $250,000 in anti-trust matters), the budget allocation was low, and there was a general view among commentators that the Trade Practices Commission was ‘captured and weak’ (see Grabosky & Braithwaite 1986: 91). During the first half of the 1990s, however, the Hawke–Keating Labor government’s microeconomic reform program made the ACCC more and more powerful. The Hilmer Report, the Report of the Inquiry into National Competition Policy (Hilmer et al. 1993), set out a program for microeconomic review and reform by Commonwealth and state government in which the ACCC was given an important role in creating competitive marketplaces through regulation.

As Beeson and Firth (1998: 215) put it, neoliberalism ‘is a convenient shorthand for a range of ideas, practices and approaches to the conduct of government that are associated with a normative preference for small states and reliance on market mechanisms to determine economic outcomes’. Thus neoliberal
governments have corporatised and sold off public-sector monopolies, outsourced other government services, and tried to improve the competitiveness of national industries in the global economy (including through the repeal of unnecessary government regulation). Ironically, however, neoliberal governments quickly find themselves in the position where they have to regulate more to accomplish greater competition. Newly privatised entities, such as prisons, railways, telecommunications companies, and electricity suppliers must be re-regulated to ensure they meet adequate competitive and public service standards (Hood et al. 1999; Ogus 1994: 10; Rhodes 1997: 91–3). Outsourced services require significant contractual oversight. The neoliberal states that originated with Thatcher and Reagan abandoned ‘command and control’ economies, but found themselves in the business of ‘governance’ instead. Indeed, over all of government, policy functions are being separated from operational functions. This mirrors the move in private corporations to less inhouse production of goods and services and greater outsourcing—a move that requires more arm’s-length controls, but a less complex internal management structure (see Osborne & Gaebler 1992 on ‘entrepreneurial government’ in the US; Rhodes 1996: 655–6 on the ‘new public management’ in Britain; and Power 1997: 43–52). Similarly, the federal government relied heavily upon the ACCC to make competition policy work.

Since the early 1990s, the federal government has amended the Trade Practices Act repeatedly to give the ACCC new, expanded powers to support competition policy in both the privatisation of former state monopolies and in the micro-economic reform of private industry (see ACCC 1999; Fels 2000). These have included:

- The ‘access regime’ for nationally significant essential facilities such as gas, electricity, and rail lines (Part IIIA, Trade Practices Act). Under this regime, the ACCC can make declarations that providers (other than the former monopolies) should have access to these facilities in order to compete with the former monopolies, and the terms and conditions of that access.

- The ACCC was given special powers to regulate competition in the telecommunications sector (Parts XIB and XIC, Trade Practices Act), including a specific access regime for telecommunications, and enhanced anti-competitive conduct provisions.

- The ACCC was also given powers to determine pricing issues and revenue caps in the gas, electricity, and airport sectors.

- Complementary state legislation to apply anti-competitive conduct provisions to business (including professions and the health sector) within state boundaries and to state and local government.

The deregulated and privatised industry sectors also expanded the traditional role of the ACCC. In 1993, the penalties under the Act were finally increased, up
to $10 million for anti-competitive conduct. Consumer complaints in relation to false and misleading conduct increased significantly as competition intensified and consumers sought to enforce the personal benefits of competition policy. This was particularly true of telecommunications, as Telstra and Optus battled for customers. The microeconomic reform agenda also resparked commitment to preventing monopolisation through mergers, and the Trade Practices Act was amended so that it was sufficient to establish a 'substantial lessening of competition' in order for the merger to be prohibited. The ACCC’s merger role is particularly significant in privatised sectors, such as telecommunications, as providers try to position themselves to take advantage of new markets via mergers. This led to a series of high-profile cases in which permission for merger was refused by the ACCC, where the ACCC proactively intervened to object to a proposed merger or takeover, or where the ACCC negotiated to allow a merger on a conditional basis (for example, the ACCC opposed the proposed mergers of Telstra and Ozemail, and Optus and AAPT; see Schmidt 2000).

The ACCC’s role was now explicitly linked to central government policies. These policies were in turn supported by big business. Indeed, it was business consumers who benefited most from the ACCC’s new regulatory activity in sectors such as communications, energy, and transport, and even legal services. This in turn gave the ACCC more clout in winning political battles for influence (see second part of this chapter below).

ASIC

The legal but also the policy context matters when it comes to the fate of institutions of governance. In this regard, ASIC did not benefit from the Hawke–Keating Labor government’s microeconomic reform agenda in the same way that the ACCC did. ASIC’s role is, however, significantly expanding, as the result of a later phase of regulatory reform in corporate law and the financial services sector. Since the Howard Liberal–National government came to power in 1996, one of the primary focuses of regulatory reform has been to enhance the robustness and international competitiveness of Australia’s financial markets. The Corporations Law Economic Reform Program (CLERP), a Treasury program, began as a project to simplify the Corporations Law, and became a program to improve the performance of the financial system and the entities within that system by reducing compliance costs, increasing certainty, and improving the efficiency and development of the economy. The Financial Systems Inquiry (which resulted in the Wallis Report 1997) expanded this focus to the regulatory reform of Australia’s financial system structure and regulation (including superannuation, insurance, retail banking services, and derivatives, as well as traditional
corporate securities). The Financial Systems Inquiry concluded that Australia's financial system regulation was piecemeal and varied, and was determined according to the particular industry and product being provided ... [which] ... was seen as inefficient, as giving rise to opportunities for regulatory arbitrage [that is, opportunities to use different regulatory conditions applied to different products as an unfair competitive advantage], and in some cases leading to regulatory overlap and confusion' (Draft Explanatory Memorandum, Financial Services Reform Bill 2000: 1). Regulation of the financial sector occurred along institutional lines rather than product lines. Life insurance companies and their products were regulated by the Insurance and Superannuation Commission; banks, and their products by the Reserve Bank of Australia (RBA); managed investments by the ASC; and other financial institutions and their products by the Australian Financial Institutions Commission. The ACCC regulated competition and consumer protection in these sectors. Each operated under different legislation and regulatory requirements.

The 'CLERP 6' papers addressed these issues by proposing a single regulatory scheme for all financial services and financial products, including a single licensing regime, and consistent product disclosure requirements that would be included in the Corporations Law and administered and enforced by ASIC.6 (The Australian Prudential Regulatory Authority (APRA) would take over the prudential regulation of all these institutions, that is, requirements for capital reserves and liquidity.) The new framework was intended 'to create not just competitive markets but competitive markets that are self-regulating within parameters defined by public policy. The aim is to rely on competition between functionally similar markets and products to ensure that markets are efficient, effective and responsive to change' (Corbett 1999: 507, emphasis in original).

Australian financial markets had been deregulated in the 1980s, but that was only the last step towards a more robust market regime. The Financial Systems Inquiry/CLERP 6 proposals for reform moved beyond reducing regulatory intervention towards making financial services regulation an important tool in facilitating and constituting a single competitive market in financial products and services. Key features of the proposals included (1) a licensing regime in which adequate industry self-regulation via internal control and compliance systems and external complaints handling schemes are an important factor; and (2) consistent disclosure requirements across all financial products (for retail investors only) to help create better-informed consumers, who in turn create a more competitive marketplace.

This progression reflects international currents in regulation. In response to international pressure and economic agreements, Western governments have engaged in comprehensive attempts to deregulate markets (OECD 1997b). Yet a
variety of studies have shown that the actual measurable amount of legislation or regulations affecting business has not actually decreased in most developed countries. Indeed, it has probably increased (OECD 1997b: 197). The global 'deregulatory' movement has matured into a 'regulatory reform' movement that seeks principles for 'better [that is, more efficient] regulation', rather than less regulation (Ogus 1994: 162–5; OECD 1997b: 191–248). The 'new public management' moved from direct government control of utilities and other functions to arm's-length controls through outsourcing contracts, and expanded powers for independent regulators. Similarly the regulatory reform of private business, and especially financial markets, is focused on finding ways to facilitate the efficient and fair functioning of markets and industry self-regulation, if possible (see below on 'meta-regulation').

ASIC was created in its present form in 1998 to take over sole responsibility for regulating integrity and consumer protection in general insurance, life insurance, superannuation, managed investments, banking, and other deposit products. Thus ASIC gained a tranche of new powers and inherited functions from the ACCC, Australian Financial Institutions Commission, Insurance and Superannuation Commission, and RBA. However, the Commonwealth's difficulties in winning the states' agreement to a referral of the constitutional power to legislate with respect to corporations slowed down the financial services regulatory reform process (in particular, the passage of the Financial Services Reform Bill). ASIC therefore inherited a complicated tangle of unreformed laws that it must administer and enforce until the new reforms are put in place. As a result, ASIC has not yet been able to strongly align itself with government and business concerns about the efficiency of the financial markets in the way that the ACCC was able to do through its powers to regulate competition in telecommunication and other new markets.

Different styles of regulation: 'meta-regulation'

Institutional competition in 'regulatory space'

There is nothing new about regulators, such as the ACCC and ASIC, being in the game of 'meta-regulation'—the regulatory supervision by public agencies of layers of private self-regulation and third-party regulation. The 'regulation' that constitutes markets does not stop with formal, legal regulation and state control. There are a variety of informal and formal regulatory orderings that all influence the way people behave—whether in markets or anywhere else. In relation to business and financial markets, these include internal corporate management, the self-regulation of professional and industry associations, independent regulation by
standards-setting organisations and securities exchanges, private contracts between various market players (including the terms and conditions of credit and insurance), and sanctions of gossip and shame (see Braithwaite 1999). Government regulators have to compete with, form alliances with, or influence these non-state forms of regulation in order to be effective at gaining compliance with public policy goals (whether they be goals of fairness, efficiency, or consumer/investor protection). Legal sanctions rarely take prime legitimacy and efficacy automatically in social and economic life (Hancher & Moran 1989; Shearing 1993; Scott 1998). As Shearing explains:

One way of thinking about this is to imagine regulation as taking place in a space in which different regulatory schemes operate simultaneously. The occupants of this space may change but it is never empty. If one set of regulatory influences diminishes this simply changes the relationship between occupants of this space ... regulatory space is a terrain in which the state must compete for control of regulation with other regulatory entities (Shearing 1993: 72–3).

The move from ‘government’ towards ‘governance’ explicitly recognises what has always been true—that ‘policy outcomes are not the product of actions by central government. The centre may pass a law but subsequently it interacts with local government, health authorities, the voluntary sector, the private sector and, in turn they interact with one another’ (Rhodes 1996: 657). What is new is that there is an increasing emphasis on styles of government regulation that facilitate and enable private regulation, rather than overriding it (see Sparrow 1994; Grabosky 1995; Baldwin 1997; Parker 2000). In this style, government tries to work with the grain of things, to coopt and form alliances with non-state orderings. For independent government regulators, this can mean a normative preference for winning influence through alliances with or cooption of non-government regulatory institutions through strategies that include (Grabosky 1995; Gilboy 1998):

- **enforced self-regulation**: legislation or regulatory action forces industry associations or individual firms to introduce self-regulatory programs that meet certain standards and goals set by the government
- **coregulation**: government and self-regulatory agencies work together to set and enforce standards
- **third-party oversight**: third parties are required to act as whistle blowers to ensure compliance (for example, banks are required to report suspiciously large cash deposits to a regulatory agency) or are required to guarantee or accredit a certain level of compliance with standards (for example, corporate financial reports must be audited to accounting standards by accredited auditors)
• *equipping consumers and competitors to take formal or informal enforcement action*: private parties are encouraged to take action to obtain compensation if a regulatory standard is breached or are given information and standing to enforce public interests.

The key idea is that government leverages its resources by facilitating activity in markets and civil society to help accomplish public policy objectives. These forms of regulation can be characterised as 'third way' governance mechanisms; not solely state regulation, not solely market ordering.

It would be wrong to assume that this style of governance is a harmonious management of 'self-organizing networks' built up through 'reputation, trust, reciprocity and mutual interdependence' (Rhodes 1996: 658-60). Proponents of neoliberal governance sometimes forget that there will also be inevitable conflicts between legitimate government policy goals and private interests. Influence in regulatory space will depend on strategic shows of strength through enforcement action, and the outcomes of political battles over policy and legislation. Therefore the success of regulatory agencies will depend on strategy and on leadership (see Sparrow 1994, 2000) as well as the institutional context for competition.

The ACCC and ASIC had quite different levels of success throughout the last decade and a half in this game. Compare the following two openings from articles in two editions of the Business Review Weekly only six weeks apart:

> After eight years as the nation's corporate sheriff, Alan Cameron, chairman of the Australian Securities and Investments Commission (ASIC) will hand in his badge on December 31 and ride into the sunset. His legacy? Gossip, frustration and bitter disappointment about the job he and ASIC have done in terms of company regulation and enforcement (Ferguson 2000: 58).

He is the man who forced the Olympics Minister, Michael Knight to apologise—16 times in 40 minutes. He cost the building companies Pioneer, Boral and CSR $21 million in fines for price fixing. He stopped Telstra from taking over OzEmail, he prevented Cable and Wireless Optus buying AAPT and he declared Telstra's local-call network open to competitors. He has forced cigarette and oil companies to sell parts of their business to rivals. He even dared to take on the Maritime Union of Australia during the 1998 waterfront dispute, threatening the union with prosecution for secondary boycotts. Meet Allan Fels, chairman of the Australian Competition and Consumer Commission (ACCC) and Australia's most powerful regulator (Schmidt 2000: 68).

The differential performance of ASIC and ACCC (and their leadership) in the strategic battle for influence in regulatory space is a fruitful way to understand and explain these differential success rates.
The ACCC

Since Allan Fels became Chair of the ACCC and Allan Asher Deputy Chair in 1991, the ACCC has successfully developed a variety of innovative strategies to win influence in regulatory space. The ACCC uses a fivefold strategy:

- selectivity about the cases it pursues, by identifying recurrent patterns in the complaints it receives and strategic priorities for enforcement because of industry conditions, for example, consumer complaints about misleading conduct in the recently deregulated telecommunications sector in the mid 1990s
- the use of publicity, the threat of enforcement action, and the settlement of investigations and court actions to motivate industry self-regulation initiatives, and the implementation of internal corporate compliance systems to correct and prevent breaches of the law
- backing up the threat of action and the willingness to facilitate self-regulation with a demonstrated capacity to win quick injunctions and big penalties in court, when necessary
- networking, education, and advice, especially through voluntary industry standards and professional associations
- continuously lobbying for and (eventually) receiving legislative amendments to improve the organisation's ability to pursue these strategies under the Trade Practices Act.

These strategies use credible threats of enforcement to coopt industry self-regulation and internal corporate management to accomplish regulatory goals. The shadow of credible threats of enforcement extends the ACCC's influence far into regulatory space to catalyse private actors to help accomplish public policy goals through (1) industry self-regulation; (2) internal corporate compliance programs; and (3) professional expertise.

First, the ACCC used threats of enforcement action on recurrent complaints to back up requests to industry to develop effective self-regulation to resolve and prevent complaints. The ACCC then used the potential of enforcement to make sure those codes worked (Tamblyn 1993: 20–3). Thus fruit juice manufacturers, for example, were 'encouraged' to set up a voluntary independent scheme that tested whether drinks labelled '100% juice' had water or sugar added. Since 1998, Part IVB of the Trade Practices Act (added at the instigation of the ACCC) allows the ACCC to register voluntary industry codes so that a contravention automatically becomes a contravention of the Trade Practices Act, and gives the Commission power to mandate an industry code if a voluntary one is not put in place.

Second, since the 1980s the ACCC has had a policy of settling potential enforcement actions on the basis that the alleged corporate offender would rectify the damage done and put in place an internal compliance management system to
prevent further breaches (or at least identify and correct breaches early). This strategy worked for two reasons. First, companies were willing to do more than was strictly necessary under the penalty provisions of the Act to save the costs and diversion of litigation, and the scandal of a trial. Second, since 1979 the Federal Court has seen the extent to which an individual corporation has put in place internal compliance management systems as an important factor in assessing the amount of criminal and civil penalties when breaches do occur (Fisse 1989). In 1993, s. 87B was added to the Act (at the instigation of the ACCC itself), making these settlement undertakings enforceable in court (see Trade Practices Commission 1995). The ACCC relies on third-party auditors (approved by the ACCC, but chosen and paid by the company) to monitor progress in the implementation of undertakings. Amendments to the Act in 2000–01 (again at the instigation of the ACCC) have given the court in contested matters the power to make probation orders aimed at achieving a change in organisational culture to prevent repetition of the conduct and ensure internal self-regulation in the future (including orders requiring the company to develop a compliance plan, provide education and training for employees and managers in relation to compliance obligations, and/or requiring the company to undertake a revision of its internal operations and control systems).

Third, the ACCC has equipped external compliance and consumer affairs professionals to influence regulatory compliance. The Society of Consumer Affairs Professionals in Business was started in 1993 with heavy ACCC involvement and subsidy. The Association for Compliance Professionals Australia (ACPA) was begun in 1996 in the hope of emulating its success, also partially at the instigation of the ACCC. Each association now has well over 300 members, and holds highly successful conferences and other events each year. In 1995, the ACCC was involved in the development of a Standards Australia standard on complaints handling (AS4269). Following that, the ACCC, together with the Association for Compliance Professionals of Australia, instigated the Australian Standard on Compliance Programmes (AS3806 1998). These standards have been cooperatively formulated by regulator, business, non-government organisation, and professional representatives working together. They move away from governance of compliance by legal rules alone. Rather, they can be privately ‘enforced’ by practitioners and consultants who use them to guide their advice and by third party accreditation (like quality assurance accreditation). Yet both the ACCC and ASIC also use these voluntary standards as guides to compliance with legal regulation (for example, as a standard for implementation of systems required by enforceable undertakings and licensing requirements).

The ACCC, under the leadership of Fels and Asher, has excelled at using a strategic mix of state and non-state regulation that transcends the regulation—
deregulation dichotomy (see Parker 1999). Ayres and Braithwaite's (1992) theory of 'responsive regulation' provides the best-known and most elegant explanation of how regulators can maximise internal compliance and self-regulation by the strategic use of the deterrent value of legal sanctions and regulatory monitoring. Their 'pyramid' of enforcement strategies is a schematic representation of the idea that, instead of using their most drastic regulatory strategies first, regulators should trade on the goodwill of those they are regulating, encouraging them to comply voluntarily, using more drastic regulatory measures only when that fails, and reverting to a trusting demeanour when these strategies achieve their goal. (The same theory can also be applied to whole regulatory regimes.) By encouraging dialogue, persuasion, and encouragement at its base, the pyramid creates the space and the motivation for cooperative compliance and self-regulation to occur in the shadow of the threat of state regulation or sanction.

Figure 12.1 A pyramid of regulatory strategies used by the ACCC
Figure 12.1 represents the way that the ACCC has used a pyramid of regulatory strategies to promote industry self-regulation and internal corporate compliance systems. The regulatory ‘pyramid’ need not consist solely of government regulation, but may also involve regulation by second parties (that is, regulated enterprises themselves) and third parties (commercial and non-commercial, including civil society). The paradox is that this would be necessary anyway. State regulatory action will not be effective if it fails to motivate self-regulation and compliance at grassroots level. The main progressive innovation of the neo-liberal state is its explicit analysis of and reliance on the possibility of working with non-state regulation to improve the effectiveness and efficiency of state regulation.

ASIC

Historically, ASIC’s leadership has found it more difficult to find a strategic enforcement approach that conveys an image of invincibility while maximising self-regulation and compliance. ASIC has been regularly criticised by scholars and commentators for its lack of enforcement action and its lack of success or strategy in enforcement (see Dellitt & Fisse 1994; Gilligan et al. 1999: 437; Goldwasser 1999; Ferguson 2000). Few businesses regard it as an aggressive regulator (see Ferguson 2000). Nor, at least until recently, has ASIC been actively involved in lobbying for policy and legislative changes that would make its regulatory role stronger (in contrast to the ACCC). On the whole, ASIC has not yet managed to create the image of invincibility in tough enforcement action (at the tip of Ayres and Braithwaite’s pyramid) that can motivate preventive self-regulation and compliance in private regulatory space (at the base). There are several reasons for this.

First, ASIC has a huge administrative function to perform. It administers the incorporation of, and maintains public databases on, all Australian companies. It returns more than twice its own operating expenses to consolidated revenue because of this function (that is, $331 million in fees for company searches and registrations; see ASIC 1999: 6). ASIC has a larger official role than the ACCC in providing guidance and advice on the interpretation of the legislation for which it is responsible. To date, ASIC has issued 163 Policy Statements and 70 Practice Notes to guide business compliance. It also has a significant role in providing relief from the black letter of the law through its powers to exempt or modify the law as it applies to particular companies or classes of company. For example, in 1998–99 ASIC processed 1598 applications from companies for relief from the full vigour of the regulatory requirements for prospectuses (ASIC 1999: 6). These functions as corporate service provider make its attempts to cultivate an image of aggressive regulation ambiguous. The pure size of its administrative functions also
makes it a much more cumbersome body to manoeuvre strategically. Its extensive functions have also not been adequately resourced by the federal government.

Second, ASIC and its predecessors' constitutional and political legitimacy as a national regulator has been insecure since inception because of the lack of a clear basis for federal corporations legislation in the Australian Constitution (see Redmond 2000: 54–5, 61–4). The National Companies and Securities Commission was accountable to the states through the Standing Committee of Attorneys General. While ASIC no longer faces this problem, constitutional uncertainty about the role of ASIC as a national regulator in enforcing the Corporations Legislation remains.

Thirdly, ASIC has also been unsuccessful in attempts to win influence in competitions with other government institutions. Most notably, ASIC is required (by a Memorandum of Understanding reinforced by a Ministerial Direction) to gain the Federal Director of Public Prosecutions' (DPP) cooperation and/or approval for any criminal or civil enforcement actions (see Dellitt & Fisse 1994: 594–5, 599, 606–7; Simmonds 1995: 52; Gilligan et al. 1999: 444–7). It is only the DPP who can take criminal enforcement action in relation to ASIC’s jurisdiction, and that office has an independent discretion in doing so. In relation to civil penalties (introduced to enforce directors’ duties in 1993), the DPP must first review the case and satisfy itself that a criminal action was not more appropriate (since civil proceedings would preclude later criminal proceedings). DPP review of both criminal and civil cases causes a delay in the commencement of enforcement proceedings, and subjects ASIC’s strategies to another agency’s enforcement priorities (for example, the DPP’s decision not to prosecute Yannon after a four-year investigation by ASIC; see Ferguson 2000) that has hindered ASIC’s ability to pursue its own enforcement priorities strategically. The relationship between ASIC’s regulatory functions and the functions of other financial regulators (most notably now the APRA, and in the past the ACCC’s role in investor protection) have not always been clear. For example, in 2001, after the voluntary liquidation of HIH Insurance (one of Australia’s largest insurers), APRA was accused of a ‘light touch regulatory approach’ (Cleary 2001a) to ensuring that financial institutions have adequate capital and risk management practices. ASIC was partially embroiled in the controversy because the ASIC Chairman sits on the APRA Board. This meant that the ASIC, in turn, was hampered in its efforts to adequately investigate potential corporate governance and insolvent trading and market disclosure breaches (Breusch 2001). The investigation was handed to a Royal Commission.

Fourth, ASIC has rarely succeeded in high-profile criminal enforcement actions. It is often too late to collect credible evidence and call reliable witnesses by the time ASIC is in a position to commence an investigation or proceeding.
Nor have ASIC prosecutions been very successful at conquering the delaying tactics and the complex appeals to the demands of procedural fairness that wealthy defendants have been able to manipulate to ensure their cases are never heard (see Gilligan et al. 1999: 451). The potential for constitutional challenge to ASIC enforcement action has exacerbated this situation. The possibility of success in civil penalty proceedings to enforce directors’ duties has been too uncertain, and the process of bringing such actions too slow (because of the involvement of the DPP) for ASIC to use them in more than a handful of cases (14 civil penalty applications relating to 10 case situations between 1993 and 1999; Gilligan et al. 1999: 437). ASIC has preferred to use ‘real-time’ civil actions, including freezing of assets, prevention of foreign travel, and transfer of assets and appointment of trustees and receivers (Gilligan et al. 1999: 447–9; see also Dellitt & Fisse 1994: 585). These remedies deliver important immediate results to investors. However, it means that ASIC has not built a reputation for swift, successful enforcement action resulting in big penalties. It has therefore failed to cast a threatening, deterrent shadow in regulatory space that would motivate greater business compliance in the same way that the ACCC’s price-fixing cases have accomplished.

There is, however, nothing inevitable about ASIC’s relative lack of success in gaining leverage through meta-regulation. ASIC has no lack of capacity to work with business and private regulators in facilitating and motivating self-regulation. ASIC has always worked closely with the Australian Stock Exchange to regulate traders and listed companies. ASIC has a new Chair, a range of aggressive enforcement tools (including new powers to refuse or revoke licenses for most financial services providers), and an expanding range of possibilities to use those tools to promote self-regulation. In recent times, ASIC leadership has begun to develop a more strategic approach to its role (see ASIC 2000: 12–13), often via strategies that are modelled on those of the ACCC, including:

- a more selective approach to determining which consumer complaints to pursue
- greater reliance on, and arm’s-length supervision of, financial services industry complaints-handling schemes
- powers to require and supervise internal corporate compliance and control systems as a condition of licenses (most notably, under the regime for regulation of managed investment schemes introduced in 1998; see Hanrahan 1998). The financial services reform proposals would require ASIC to take this further by cooperating with industry to develop guidelines on how to comply with broadly drafted laws, to introduce self-regulatory codes, and to supervise at arm’s length self-regulation via corporate compliance plans, internal and external consumer dispute resolution schemes, and product disclosure documents.
• the power to enter into enforceable undertakings in settlement of potential
  enforcement action (modelled on the ACCC’s enforceable undertaking power)
• the use of publicity to educate investors and to maximise the deterrent effect
  of successful enforcement actions (and in some cases investigations; see ASIC

There is no inherent reason why ASIC could not follow or overtake the
ACCC’s success in developing new regulatory styles.

**Conclusion**

Neoliberalism seems to promote deregulation. However, its result is a complex
process of regulatory reform in which the role of the state as regulator changes
from direct command and control of the economy and of business to a metaregulatory role of constituting markets and supervising non-state regulation
(Grabosky 1995: 543). This recognises that independent government regulation
always involves interactions with other regulatory orderings. This change is clear-
est where industries have moved from government monopoly control to private
ownership and/or competitive markets. It is in this area that the ACCC, in par-
ticular, has taken on an expanded role as creator and supervisor of new markets,
most notably in telecommunications. Regulatory reform is less thorough in rela-
tion to private businesses and financial markets. Yet here, too, the ACCC and
ASIC are adopting a meta-regulatory role in which the aim is to regulate self-
regulation, that is, to supervise industry self-regulation, internal corporate com-
pliance management systems, and third-party regulation, rather than to do all the
regulation via government. Jessop (1998: 42–3) describes the state’s role in ‘meta-
governance’ in the following terms: ‘States have a major role here as the primary
organizer of the dialogue among policy communities, as an institutional ensemble
charged with ensuring some coherence among all subsystems, as the source of reg-
ulatory order in and through which they can pursue their aims, and as the sover-
eign power responsible “in the last resort” for compensatory action where other
subsystems fail’.

However, as we have seen, this is not all harmonious coordination. As Ayres
and Braithwaite’s (1992) pyramid suggests, the success of moral suasion, coopera-
tion and self-regulation depends on the state’s capacity for legitimate coercion.
In the 1990s, the ACCC was better at linking these capacities than ASIC. This was
because of the ACCC’s strategic prioritisation of issues that should be addressed
(among a plethora of consumer complaints), success in tough enforcement
actions, and the ability to secure changes in the law to build up the ACCC’s
regulatory capacity.
As the neoliberal state relies more on a substratum of private regulation, there are two main dangers for regulators such as the ACCC and ASIC.

First, in focusing on cooperative, 'third-way' strategies of governance, they might forget to use the tip of the pyramid to exercise adequate control and oversight over private regulation. Government regulation will fail to help constitute competitive, fair markets where regulators lack the strategy and leadership to use state coercion to win significant battles in regulatory space. This is a failure in the fundamental responsibility of the state for regulating self-regulation by being aware of patterns of abuse, injustice, or neglect arising from private regulation; and taking coordinated and concerted action to address them. That action might include regulatory enforcement, the enactment of new rights and liabilities, legal aid funding for test case litigation, and the promulgation or clarification of regulatory standards.

Second, regulators might exercise too much unaccountable discretion in meta-regulation. Decisions that facilitate and encourage private regulation will often not be made subject to democratic priorities and evaluation. This is a failure of the central task of the meta-regulatory state to connect the private capacity and practice of regulation to public dialogue and justice. Crucial state capacities in meta-regulation will include (a) the ability to evaluate how public policy goals are interacting with private interests in regulatory space (with strategic regulatory action to be based on that learning); and (b) the ability to open out that evaluation to public debate and dialogue so that responsive regulatory action is not decided solely in the discretion of government officials.