



**PENN PROGRAM ON
REGULATION**

Responsive Excellence

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Being a responsive regulator means responsiveness to the regulated community and its community of stakeholders (such as consumers of a regulated product or service). More fundamentally it means being responsive to the entire environment in which the regulator swims. Contemporary debates excessively narrow that to responsiveness to the regulator's risk environment.¹ Risk responsiveness is important. For a regulator aspiring to achieve excellence, however, responsiveness to opportunities is more important than responsiveness to risk. The excellent regulator scans for cases that offer strategic, macro opportunities to create public value, potentially by transforming an entire industry, even an entire economy or a crucial aspect of freedom in a society. Put another way, risk management goes to the basics of regulation; seizing opportunities for transformation goes to the heart of regulatory excellence.

Bottom-of-the-class regulation

Consider the U.S. Federal Bureau of Investigation (FBI). In the theoretical terms of responsive regulation, the FBI is a regulator because its mission is to steer the flow of events. Its history is decidedly not as a best-in-class regulator. One reason is that under J. Edgar Hoover it overreached in its quest to grasp opportunities for a transformative impact. It investigated the sex lives of presidents, Hollywood stars and civil rights campaigners, for example. Why this was a transformative overreach is clear. These were not activities that pursued the principles embodied in the FBI's legal mandate. Worse, they were activities that threatened freedom, increased domination. According to responsive regulatory theory (and republican political theory),² the most fundamental overarching test of regulatory excellence is whether the regulator increases freedom and reduces domination in the world. Put another way, J. Edgar Hoover is the archetypal evil regulator because he sought to be transformative by abusing arbitrary power.

Fast forward to the twenty-first century, America has an FBI so chastened by the transformative excess of Hoover that it constrains itself within a narrow criminal law enforcement mandate rather than the pursuit of national security in the way its legal mandate actually requires. So when an FBI agent does his job by reporting trainee pilots asking to be taught how to fly a plane but not how to land it, his supervisors respond in terms of that ethos,³ as they did when another FBI agent warned about Osama bin Laden sending students to the United States for flight lessons.⁴ Sure that is suspicious, but where is the collar? The FBI's priority was to focus on its backlog of more serious criminal files where it had good prospects of putting the criminal in prison for a long time. Or as Condoleeza Rice put it: 'The FBI treated the internal terrorism problem as a law enforcement matter . . . Prevention was secondary to punishing terrorists after they were caught committing a crime'.⁵

The FBI in 2001 had its opportunity to honor its legal mandate by transforming American history onto a better path than the path it followed in the twenty-first century. The War on Terror that ensued was causally implicated in the difficulties of managing the second major geopolitical crisis of the twenty-first century, the Global Financial Crisis. The War on Terror caused the strongest surge yet in the growth of regulatory capitalism. There was a heavy fiscal burden from building the U.S. Department of Homeland Security and other

surveillance bureaucracies. For foreigners, doing business with Americans became much more painful, from big regulatory aggravations like a visa regime in which light touch government was equivalent to treason to small ones like endless shoe removal on each leg of our long journey, grumbling every time that if people can conceal a bomb in their shoes they can conceal it in a body orifice. So international travelers began to minimize trips to the United States. That was great for carbon emissions, bad for the U.S. economy. It was good for the higher education exports of the Australian university system as international students shifted their enrollments to Australian universities, but at the expense of the export of U.S. higher education services. These regulatory impacts were of course not the main challenge for the U.S. economy. The big item was the trillion dollar U.S. military bill for the “War on Terror” campaigns in Afghanistan and Iraq. This fiscal hit was smaller for its European allies in Afghanistan and Iraq, but ultimately more consequential for the world economy because the subsequent debt crisis was deeper in Europe. The U.S. economy and its tax base was ill-prepared for its next big crisis as a result of FBI’s 9/11 regulatory failure.

With the Global Financial Crisis, as with 9/11, street-level agents again did their job. By 2004 the FBI to its credit reported publicly that it was detecting an epidemic of home loan mortgage fraud. It could hardly fail to notice such a disturbing tsunami of little frauds. By 2006, the Federal Financial Crimes Enforcement Network (FinCEN) reported a 1,411% increase in mortgage-related suspicious activity reports between 1997 and 2005, 66% of which involved material misrepresentation or false documents. Then another 44% increase was reported between 2005 and 2006. Then in 2007, BasePoint Analytics analyzed 3 million loans to conclude that 70% of early payment defaults had fraudulent misrepresentations on their original loan applications.⁶ Because they were many little frauds, FBI leaders saw them as lower priority matters than other files in their in-trays that might deliver long prison sentences.

The FBI missed the opportunity to see the big picture of this large pattern of little frauds. They were being sliced and diced, securitized by Wall Street, and sold off to naïve European banks that managed to cripple their economies with the bad debts. Packaged bundles of petty frauds enabled large profits by risk shifting in some cases through major frauds ratcheted upwards by the bonus culture of Wall Street. So the FBI missed the opportunity to save its country from its second major crisis of the 21st century. American banks were finding housing loan fraud attractive because derivatives crafted for them by Wall Street changed their paradigm with their loan portfolios from risk management to risk shifting to banks faraway. Yes, there were many other perhaps more fundamental root causes of the Global Financial Crisis. Most of these are still present in the world economy, however. The business of crisis prevention involves all regulatory players seizing opportunities to eliminate those they can tackle before all those risks come together in another perfect storm. From 2004 aggressive criminal enforcement action, or the threat of it, was needed against the banks that had the highest percentages of fraudulent loans. The FBI showed no criminal justice system leadership to that end.

America should want an FBI that shuns the abuse of arbitrary power, but that takes opportunities to transform American national security for the better within the framework of legally encoded regulatory principles that guide its work. When it prioritizes the narrowed regulatory imagination of locking up the best collars, it fails its citizens.

Transforming the regulatory storybook

How does one go about transforming the regulatory imagination so that regulators cultivate reflective professionalism about what are the opportunities it should seize? How do regulators develop that over-the-horizon imagination about how to transform its regulatory environment to deliver public value⁷ in terms of the principles in its enabling statute? A starting point for answering that is Clifford Shearing and Richard Ericson's insight that regulatory culture is not a rulebook but a storybook.⁸ Sure regulatory organizations have thick volumes of rules and procedures manuals they are expected to follow. So do the universities. But just as street-level academics rarely read them and do not know their content, this is also true of street-level bureaucrats like police and regulatory inspectors. What adept professors and police know is stories about how this or that kind of organizational challenge gets managed. If you want to change how a street-level bureaucracy⁹ behaves you cannot achieve that by changing its rulebook. You must change its storybook. You must change the stories inspectors swap in the lunchroom about how excellent inspection practice has made a difference.

In a better FBI that had been a custodian of a safer and economically stronger America, there would be stories about how that agent in Florida stood up to his supervisors and sent the message right up the line that these trainees may be planning something that is a major threat to our country, then persuading them to take action to prevent what would have been such a major terrorist triumph. The stories would tell of the agent who said that such a massive new micro-pattern of street-level mortgage fraud could not make sense unless it connects up to some dangerous new macro-strategy of finance capital.

Regulatory cultures obsessively oriented to a procedures manual or to risk analytics kill off transformative storytelling. Responsive regulatory organizations act to honor the principles laid down in their enabling statutes; but they are not rule-ish automatons. This ideal is of legal principles that inform a regulatory storybook that can transcend unresponsive regulatory rulebooks. Regulatory excellence eschews timidity. Excellent regulators are entrepreneurial risk-takers in the cause of creating public value. The regulator sees itself as having a respected role in the separation of powers. Its statute should empower it to be semi-autonomous of executive government, a credible part of a fabric of checks and balances. It checks, and it is checked by, other semi-autonomous separated powers; it balances and it is balanced. Who wants a central bank hemmed in by detailed rules about when and how it can adjust the money supply, about when and how it can seize the opportunity to encourage a well-managed bank to take over a group of teetering banks that pose a systemic risk? Who wants a nuclear regulator like the one the United States had at the time of Three Mile Island¹⁰ that cultivates an industry compliance culture of rule-following automatons rather than a culture of diagnosticians who transform safety systems responsively, based on systemic wisdom about safety management systems?¹¹

How do we evaluate whether a regulator is excellent in these terms? We evaluate it by the best stories of transformation the regulator can offer up. Can it recount about how it saved countless lives from domination by terror or domination by fallout from a nuclear meltdown? Can it tell inspiring stories of how it seized opportunities to expand the realms of freedom that citizens enjoy? If it cannot, it may be time to change the top management team, transform staff induction and in-service training, unfetter the constraints its procedures manuals impose, or inspire an opportunity-seizing transformative mentality by redrafting the principles in the agency's legislative mandate.

Stories from the Australian street

The Australian Competition and Consumer Commission (ACCC) has been in various ways an example of an excellent regulator. It is an agency that in U.S. terms combines the functions of the Federal Trade Commission, the Antitrust Division of the Justice Department, and the Consumer Product Safety Commission, and has also embraced some additional functions in domains such as telecommunications regulation, financial regulation affecting consumers, and state regulation of certain prices. This is a broad brief compared to U.S. regulators, but of course in a much smaller economy. ACCC (originally named the Trade Practices Commission) has had a succession of many outstanding Chairs, Deputy Chairs, and top management staff who were in the business of creating a more competitive Australian economy in which consumers were less exploited. It has had a good number of unimaginative leaders as well, and its history has backwards as well as forward steps.¹²

The ACCC storybook is rich. The two stories chosen to illustrate why on balance ACCC should be seen as a regulator that has achieved formidable excellence are not necessarily its best stories. They are simply old, often-told stories of industry transformation that I can tell better because I had some inside involvement.

The Aboriginal insurance scandal

In the early 1990s, widespread frauds were detected by the ACCC (then called the Trade Practices Commission) involving major insurance companies systematically ripping off consumers through misrepresentations about policies that in some cases were totally useless. The worst abuses occurred in 22 remote Aboriginal communities and these were tackled first. Top management from insurance companies visited these communities for days on end at meetings with the victims, the local Aboriginal Community Council, the regulators, and local officials of the Department of Social Security in cases where useless policy premiums were being deducted from welfare checks. It was a regulatory process that was transformatively restorative. Some of the executives went back to the city deeply ashamed of what their company had done.

Back in Canberra, meetings were held about follow-up regulatory reforms with insurance regulators and industry associations and even with the Prime Minister, who was shocked by the exploitation of disadvantaged consumers in the media coverage. The plurality of participants of the restorative dialogue led to a plurality of remedies from the first agreement, with Colonial Mutual Life (CML). CML voluntarily compensated 2,000 policyholders and also funded an Aboriginal Consumer Education Fund to prevent future abuses. It conducted an internal investigation to discover failings in the company's compliance program and to identify officers responsible for the crimes. A press conference was then called to reveal the enormity of the problem. No one recognized quite how enormous until a police union realized that its own members were being defrauded through the practices of another company (in this case, there were 300,000 victims). This case against the AMP insurance company, which was Australia's largest corporation at the time, allowed more robust law enforcement. Police victims were outstanding witnesses who could account very precisely for the misrepresentations made to them.

As a result of the first case, the CML self-investigation, 80 officers or agents of CML were dismissed, including some senior managers and one large corporate agent, Tri-Global.

CML also put in place new internal compliance policies. Some procedures relating to welfare checks changed in the Department of Social Security and there were regulatory and self-regulatory changes concerning the licensing of agents and changes to the law.¹³ This problem-solving was accomplished without going to court (except with a couple of individuals who refused to cooperate with the restorative justice process).

As a Commissioner, I was on the wrong side of the debate on the first case. I argued on the Commission initially that the conduct was so serious that formal criminal charges should be laid. What would have happened had the Commission prosecuted this case criminally? At best the company would have been fined a fraction of what it actually paid out and perhaps there would have been a handful of follow-up civil claims by victims. At worst, illiterate Aboriginal witnesses who had not kept a copy of their policy would have been humiliated and discredited by uptown lawyers, the case lost and no further cases in this sequence of insurance cases taken. Worse still, because of fear of this, the case might have sat in the in-tray of the Director of Public Prosecutions. A bad feature of Australian regulatory design compared to that of many U.S. regulatory institutions, which have their own criminal enforcement units, is that regulators settle for civil enforcement because the journey of persuading the Director of Public Prosecutions with complex corporate cases is too difficult.

The industry-wide extensiveness of a pattern of practices may never have been uncovered had the criminal referral approach I advocated on the Commission been followed. That revelation was only accomplished by the engagement of many locally knowledgeable actors in a more conversational process of Aboriginal victims and their representatives sitting in a circle with top management of the insurers. From that engagement there was a dawning of disgrace among top management of insurers for the conduct of their organizations. That disgrace of CEOs communicated through apologies at press conferences convened by the regulator was what catalyzed a transformation in the compliance culture and the ethical culture of an important industry. More generally, while the ACCC has not been the principal financial regulator in Australia, the catalytic role it has played across the decades has helped build a culture of somewhat greater prudence in the finance sector than many other countries endure. Australian finance culture does have its deep ethical flaws, but its comparatively greater prudence helped Australia avoid banking bailouts or bankruptcies this century and steered the economy through the 2008-2012 period of financial crisis with no recession and the highest growth rate of the developed economies.

Passive smoking

Robert McComas was Chairman of the Trade Practices Commission (now the ACCC) from 1985-1987. Many see his actions as setting back the Commission; yet he was a distinguished legal practitioner and his positive contribution was to tighten the legal rigor of the Commission's deliberations. Before he was appointed Chair, he was a director of Australia's largest tobacco company and after his term ended he became Chairman of the Board of that same company. He made an error of judgment that made his minister, the Attorney-General and Deputy Prime Minister, determined not to reappoint him. This is not so much a story of his error as one of the strengths of the regulatory culture and the regulatory community in which the Commission was embedded.

McComas negotiated a remedial advertisement with the Tobacco Institute that was a similar kind of statutory breach to the initial advertisement complained against by an NGO,

Action Against Smoking and Health. The initial Tobacco Institute advertisement claimed passive smoking was not proven to be a danger to health. The Australian Federation of Consumer Organizations (AFCO)¹⁴ appealed the Commission's remedial advertisement for persisting with claims about the safety of passive smoking that were false and misleading. The federal court hearing the appeal found the advertisement approved by the regulator to be in breach of its own statute because the evidence was clear that passive smoking was a danger to health. It was the first time anywhere that a court made this finding. As soon as it did, risk managers across the globe started to advise restaurants, workplaces, discos, and even sports grounds to prohibit smoking for fear of passive smoking suits. Such suits commenced quickly in Australia, citing that federal court decision, and then spread globally. Surprisingly, even in the open air of baseball grounds throughout North America, after new passive smoking laws were enacted, consumer self-enforcement through raised eyebrows quickly achieved 100 percent compliance with these bans.¹⁵ It is hard to think of a case of responsive tripartism in Australian regulatory enforcement that could have saved more lives. It was a case where the grunt of regulated self-regulation came from the consumer movement, but also from within the Commission itself, from staff who asserted sympathies with the consumer movement view (which they saw as the rule of law view) against their Chair.

Robin Brown, the young CEO of AFCO, played a courageous hand in supporting litigation which, had it failed, would have bankrupted the consumer movement through an order to pay the tobacco industry's costs. Brown was well networked with Commission insiders.¹⁶ At that time, the ethos of the Commission and the government was infused with a philosophy of tripartism which values the full engagement of public interest groups in the regulatory process.¹⁷ The Commission was an independent statutory authority run by regulatory professionals but with a Commission balanced by representation from business and consumer backgrounds and expertise. At that time I was the only Commissioner with a background of consumer expertise and engagement from civil society, and only part-time; before and after there had been more than one part-time or full-time commissioner from a consumer background and indeed for two decades there was a tradition of a Deputy Chair from a consumer background.

Brown's view was that McComas had cut a deal for a remedial advertisement with the tobacco industry in a "smoke-filled room." (McComas was formidable as a smoker as well as a tobacco industry crony!) Especially in light of his background with that industry, Brown's view was that a meeting of the Tobacco Institute with the Chair to negotiate the text of a controversial remedial advertisement should not have occurred in the absence of the Commissioner from a consumer background also in the room. That was my view as well, and I confronted the Chair with the view that the matter should have gone to a meeting of the full Commission. Other staff also dissented robustly to the Chair. The level of angst within the Commission over both these procedural concerns and the fear that the Chair had approved a remedial advertisement that was in breach of his Commission's own statute hit the front page of the *Canberra Times*. Public airing of this contestation of the decision delivered to Brown the confidence of his nervous Board to risk AFCO's financial future on the case.

Some years following the AFCO victory in court, a meeting at ANU's University House was initiated by Brent Fisse to discuss crafting statutory provisions for enforceable undertakings that were susceptible to public checks and balances ratified or modified by a court to replace the kind of deals "in smoke-filled rooms" exemplified by the initial passive smoking decision. This meeting had been preceded by years of advocacy of the need for such provisions, not only by Brent Fisse but by many ACCC insiders. So again, this was an

example of the larger regulatory community being responsive as a network, even as the government of the day was unmoved to legislate for many years. Some of the best regulatory minds from the bureaucracy, the ACCC, and the academy were in attendance at the meeting at University House that day. Today, most of Australia's important regulatory agencies have incorporated into their statutes the enforceable undertaking provisions discussed at that meeting.

The journey toward more meaningful meta-regulation in Australia continues to take steps backwards and forwards.¹⁸ Regulatory capture would be the best way to characterize a great many enforceable undertakings that have been negotiated in Australia. At the same time, the enforceable undertaking laws created following the University House meeting were a creative and powerful option in the hands of the entrepreneurially excellent regulator, a "soft option" in the hands of the captured regulator, and simply a different intermediate option in the middle of the regulatory pyramid for others. Yet the strengths of Australian meta-regulation are encapsulated by this story of greater engagement of the street level of regulatory bureaucracies, greater publicness, and potent third-party contestation and engagement with meta-regulation than can usually be seen with U.S. prosecutors negotiating deferred prosecutions or corporate integrity agreements.

Nurturing transformative excellence

Through the lens of these stories of transformative responsiveness, what attributes can be discerned to distinguish the truly excellent regulator?

- Excellent regulators are those with the most impressive stories about the opportunities its staff have seized to advance their statutory objectives;
- These stories reveal that the *risk management* orientation of the agency is complemented by an *opportunity* orientation for advancing its statutory objectives;
- The stories reveal a culture of leadership from below in seizing innovative opportunities to advance its objectives;
- The stories reveal innovative networking, outside-in rather than inside-out regulatory design,¹⁹ to advance the regulator's statutory objectives.
- Transformative opportunities seized by excellent regulators transform ethical cultures and cultures of compliance, engaging the kind of self-enforcement that the American public executes against passive smoking in open-air sports stadiums.

How should regulators measure and improve their performance in these terms? On the view of excellence articulated here, KPIs (Key Performance Indicators) and risk reduction metrics can be deeply dangerous things. They have a place but must be kept in their place. In a May 2015 Australian Senate committee hearing into human rights abuses in immigration detention centers for asylum seekers who arrive in Australian waters on boats, a Senator asked if there were problems of women being sexually assaulted by staff when they walked to the washroom, as had been widely alleged? The private operator of the detention center replied that he did not know whether this was the case or not, but what was important to say

in reply was that his company had consistently met all the KPIs for the detention center set by the government! Of course there was no KPI about making it safe for women to walk to the washroom.

KPIs risk the more measurable driving out the more important. If that contractor and its regulator had a storytelling culture, the regulatory culture they share would be abuzz with dialogue about what its biggest problems were. This would allow them to do well at Malcolm Sparrow's regulatory craft, to "pick important problems and fix them."²⁰ The output would be a story about how well problems were fixed and what wider learnings were applied as a result of the journey of fixing them. This is Eugene Bardach and Bob Kagan's old story of the virtues of "diagnostic inspectorates."²¹

The best regulators tell the best stories of how they pick the most important problems from an ever-changing regulatory landscape, how they diagnose them, fix them and apply wider lessons from the story. Strategically selected single cases can acquire the profile to ripple out widely, as illustrated by an advertisement in an Australian newspaper ultimately catalyzing bans on passive smoking in the Northern hemisphere. Excellent regulators have a record of plucking twenty dollar bills from the sidewalk that others walk past. Who could see in 2001 that huge opportunities to make America safer and stronger were about responding to suspicious flight training and minor mortgage frauds? Who could foresee the opportunity an Australian environmental regulator had in 2009 to respond to an oil spill caused by Halliburton concreting of a drilling rig that spilled oil into the Timor Sea for 74 days? The answer is that an excellent regulator might have foreseen an opportunity that could have prevented the Deepwater Horizon spill for 86 days in the Gulf of Mexico a year later.²² The transformative response that was missed would have required Halliburton, as part of the Australian regulatory settlement, to retain engineering consultants to report on what it had done to initiate remedies of this problem across the dozens of rigs it had cemented around the world in this defective fashion. Excellence is about over-the-horizon vision at seizing such strategic opportunities.

A limitation of the transformative vision may be that it expects a lot of a regulator or an observer of regulation to foresee: on the positive side, that a regulatory decision on passive smoking in Australia could make Americans attending sporting events safer, or on the negative side, that a regulatory response to an Australian oil spill would miss an opportunity to prevent an American spill. On the other hand, we do expect public health officials and street-level physicians to distinguish one-off treatments for patients from responses that might identify a new virus and contain its spread. In fact, it is a core competency of health professionals to improve their ability to distinguish routine one-off treatments from opportunities to prevent an urban contagion or a global epidemic. My hypothesis is that this could and should also become part of our imaginary of regulatory excellence.

In addition, the globalization of disease has transformed health professionalism toward a cosmopolitan imaginary of transformation. This means health professionals in all countries are on the lookout for opportunities to transform global food and medicine in positive ways, and to disrupt negative global epidemics. A cosmopolitan regulatory imagination was what was lacking in Australia's response to the Timor Sea oil rig catastrophe. The regulators felt no responsibility beyond their national horizon. Both a transformative imagination and a cosmopolitan regulatory imagination are virtues regulatory communities can cultivate just as well as health professionals have, although also with many false positives and false negatives in their judgments about transformation. Social movement

actors – like the consumer movement and Action Against Smoking and Health in the passive smoking case – are the yeast to the dough of regulatory cosmopolitanism. Social movement actors can be critical friends of regulators who relish the role of firing the imagination of regulators about where transformational opportunities might lie.

We want environmental regulators who foster transformative technologies and collaborations to make energy renewable, regulators who transform the stewardship of a powerful industry toward disadvantaged consumers, who transform the lives of children previously afflicted with cancer caused by passive smoking. Methodologically, excellent regulators tell transformative stories that social scientists would call causal process tracing.²³ They are stories of a sequence of regulatory dialogues, diagnoses, and networked regulatory responses that credibly account for a transformation that enhances safety, justice, or a better future for our children.

Notes

¹ See, for example Anthony Saunders, Marcia Millon Cornett, and Patricia Anne McGraw. *Financial Institutions Management: A Risk Management Approach*. Vol. 8. (New York: McGraw-Hill/Irwin, 2006); Sidney A. Shapiro and Robert L. Glicksman. *Risk Regulation at Risk: Restoring a Pragmatic Approach*. (Palo Alto: Stanford University Press, 2002).

² Philip Pettit, *Republicanism* (Oxford: Oxford University Press, 1997).

³ The 9/11 Commission, *9/11 Commission Report* (New York: Norton, 2004).

⁴ Condoleeza Rice, *No Higher Honor: A Memoir of my Years in Washington* (New York: Broadway Paperbacks, 2011), p.68.

⁵ *Ibid*, p. 68.

⁶ See Tomsen H. Nguyen and Henry Pontell, “Mortgage origination fraud and the Global Economic Crisis”, *Criminology & Public Policy*, vol 9, pp. 591-612; William K. Black, “Bill Moyer’s journal.” 2009 PBS.org: pbs.org/moyers/journal/04032009/transcript1.html

⁷ Mark Moore, *Creating Public Value: Strategic Management in Government* (Cambridge: Harvard University Press, 1995).

⁸ Clifford Shearing and Richard Ericson, “Culture as Figurative Action”, *British Journal of Sociology*, vol. 42 (1991), pp. 481-506.

⁹ Michael Lipsky, *Street-Level Bureaucracy* (New York: Russel Sage, 2010).

¹⁰ After Three Mile Island, U.S. nuclear safety regulation became more responsive and effective. SCRAMS (automatic shut-downs for safety reasons) today in the U.S. industry run at less than one-tenth their rate before the time of Three Mile Island. For a diagnosis of the nuclear regulatory pathologies before the disaster and improvement after, see Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago: University of Chicago Press, 1994).

¹¹ Cary Coglianese and David Lazer “Management-based Regulation: Prescribing Private Management to Achieve Public Goals”, *Law and Society Review*, vol. 37 (2003), pp.691-730.

¹² There is a huge critical literature on what its critics see as its backwards steps at every stage of its history, starting with the first few years in George Venturini’s, *Malpractice: The Administration of the Murphy Trade Practices Act* (Sydney: Non Mollare, 1980). For a recent distinguished contribution, see Caron Beaton Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge: Cambridge University Press, 2011).

¹³ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 235.

¹⁴ A declaration of interest is due here: I served in the early to mid-1980s both as CEO and Chair of the Australian Federation of Consumer Organizations.

¹⁵ Robert A. Kagan and Jerome Skolnick, “Banning Smoking: Compliance without Enforcement”, in R Rabin and S Sugarman (eds.), *Smoking Policy* (New York: Oxford University Press, 1993).

¹⁶ I was one of those, though far from the most important one, as Brown’s predecessor as CEO of AFCO, who after that service served for 10 years as a part-time Commissioner of the Trade Practices Commission (now known as the ACCC).

¹⁷ Ian Ayres and John Braithwaite, “Tripartism: Regulatory Capture and Empowerment,” *Law and Social Inquiry*, vol. 16 (1991), pp. 435-496.

¹⁸ For a classic discussion of meta-regulation, see Christine Parker, *The Open Corporation* (Cambridge, Cambridge University Press, 2002).

¹⁹ Inside-out design means the regulator designing a regulatory strategy and saying to stakeholders: “Here are the new requirements.” Outside-in design means regulators saying to stakeholders: “We think this is a problem. Do you agree, and if so, how do you think we should respond to it?” John Braithwaite, *Markets in Vice, Markets in Virtue* (New York: Oxford University Press, 2005).

²⁰ Malcolm K. Sparrow, *The Regulatory Craft* (Washington, D.C.: Brookings, 2000).

²¹ Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

²² See the discussion of this story in John Braithwaite, “Flipping Markets to Virtue with Qui Tam and Restorative Justice,” *Accounting, Organizations and Society*, vol. 38 (2013), pp. 458-68.

²³ See Andrew Bennett, “Process Tracing and Causal Inference,” in H. Brady and D. Collier (eds.), *Rethinking Social Enquiry* (Rowman and Littlefield, 2010), available at <http://philsci-archive.pitt.edu/8872/>; Andrew Bennett and Jeffrey T Checkel, *Process Tracing: From Philosophical Roots to Best Practices* (Simons Papers in Security and Development 21/2012) (Vancouver: Simon Fraser University, 2012).

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About the Author

John Braithwaite is a Distinguished Professor and Founder of RegNet, the Regulatory Institutions Network, at the Australian National University. Since 2004, he has led a comparative historical project called *Peacebuilding Compared* – with the most recent book from the project being *Networked Governance of Freedom and Tyranny* (2012), with Hilary Charlesworth and Aderito Soares. He also works on business regulation and the crime problem. His best known research is on the ideas of responsive regulation (for which the most recent book is *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008)) and restorative justice (for which the most useful book is *Restorative Justice and Responsive Regulation* (2002)). Reintegrative shaming has also been an important focus (see *Shame Management through Reintegration* (2001), with Eliza Ahmed, Nathan Harris, John Braithwaite and Valerie Braithwaite). Braithwaite has been active in the peace movement, the politics of development, the social movement for restorative justice, the labor movement and the consumer movement, around these and other ideas for 50 years in Australia and internationally.