COUNTING THE CASUALTIES OF TELECOM: THE ADOPTION OF PART 6 OF THE *TELECOMMUNICATIONS ACT 1997* (CTH)

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INTRODUCTION

The concept of self-regulation in all of its forms[1] has become a foundation stone in the theoretical and practical debates about the role and function of the modern 'decentred' regulatory state.[2] In the decentred state, government, among other things, ceases to rely upon the old tool of 'command and control' regulation to achieve social policy goals.[3] Instead, government relies on alternative systems developed by industry and others and faces the arguably more daunting challenge of trying to harness the internal regulatory capacity of these other regulatory systems, directing and steering them in a way that ensures they deliver the goods and services sought by society in accordance with accepted social values.[4] Although the focus of the theoretical regulatory debate has started to shift to the meta-regulatory potential of law and the ability of

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1 On the absence of a uniform definition of self-regulation, see Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103, 114–22 and 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24, 26–8. See also Colin Scott, 'Self-Regulation and the Meta-Regulatory State' in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (2006) 132–6; Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97, 99–100; Wolfgang Schulz and Thorsten Held, *Regulated Self-Regulation as a Form of Modern Government: An Analysis of Case Studies from Media and Telecommunications Law* (2004) 7–8.

2 Black, 'Decentring Regulation', above n 1, 128.

3 Ibid 108. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 15.

4 See generally David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992) 25–48.

government to 'regulate self-regulation',[5] the question of how and why self-regulatory rule-making regimes actually emerge remains largely unexplored from an empirical standpoint. A better understanding of why self-regulatory rule-making regimes develop and the roles of law and government (if any) in the emergence of those systems is necessary, however, if meta-regulating law is to have any hope of becoming more effective than the blunt instrument of the old-styled regulation of the centred state.

This article considers how self-regulation develops and the role of the state in its emergence in the context of the adoption of Part 6 of the *Telecommunications Act 1997* (Cth) (referred to in this article as Part 6 of the Act or Part 6), which marks the official start of self-regulation by the telecommunications industry in Australia. Part 6 of the Act permits 'sections of the telecommunications industry'[6] to prepare and register codes of practice dealing with a broad range of consumer matters with the Australian Communications and Media Authority (ACMA).[7] Upon registration, a code can be legally enforced by ACMA. Using publicly available materials,[8] the article first traces the historical development of Part 6 of the Act, arguing its adoption was a consequence of the 'Casualties of Telecom' affair which left consumers distrustful of Telecom's[9] customer complaints handling and privacy policies. It then evaluates the public and private interest theories of regulation in light of the adoption of Part 6 of the Act and concludes that neither theory adequately explains why self-regulation emerged. It also argues that an exploration of the historical context in which Part 6 evolved demonstrates that threat of state intervention is not necessarily a precondition for the development of self-regulation, as has been argued elsewhere.[10] Instead, it shows that regulatory culture and adverse publicity were significant factors in the development of self-regulation in the Australian telecommunications sector.

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5 See, eg, Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance: An International Journal of Policy and Administration* 527, 542–6; Parker, *The Open Corporation,* above n 3, 245–91; Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (2004); Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 207–37.

6 This term is defined in s 110 of the *Telecommunications Act 1997* (Cth).

7 Created in 2005, ACMA resulted from the merger of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority. When Part 6 of the Act was first enacted, the power to register codes was bestowed upon the ACA.

8 I requested copies of certain documentation relating to the adoption of Part 6 of the Act, such as submissions made to the government in response to key consultation papers and internal 'option papers' prepared by the Department of Communications and the Arts, in 2007 under the *Freedom of Information Act 1982* (Cth). However, I did not pursue my request after receiving an estimate of applicable charges in excess of A$48 000 (Australian dollars) and a finding by the Department of Communications, Information Technology and the Arts that I was not exempt from the charges because the research project was not in the 'public interest'.

9 Since 1 July 1995, Telecom has traded under the name Telstra.

10 See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) ch 2; Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19 *Law and Policy* 363, 400; Parker, *The Open Corporation*, above n 3, 246, 255–7.

The article then turns to one of the principal normative issues which face the meta-regulatory state — the procedural and substantive legitimacy[11] of industry-generated rules and the accountability[12] of private actors. To date, the legitimacy debate has been largely a theoretical one without much consideration or analysis of the mechanisms which have been used or are being used by the state to validate industry rule-making. Again, Part 6 of the Act serves as an interesting case example, as its adoption was heavily influenced by a policy presumption in favour of non-governmental rule makers and against both primary and secondary legislation. Against this backdrop, it reveals three possible mechanisms to legitimate self-regulatory rule-making: (1) the adoption in whole or part of what Harm Schepel has called 'internal administrative law' or the 'constitution' of private governance,[13] (2) rule choice and (3) a process of registration or vetting of industry-generated rules by an independent regulatory agency or other third party in accordance with overarching policy objectives set by the legislature or other body. These mechanisms also highlight the attempts of the state to use the traditional hierarchical method of accountability to cultivate horizontal accountability between industry participants, government agencies, consumers and the general public. Finally, the article suggests that, while Part 6 of the Act may provide some possible solutions to the legitimacy problem, the limited empirical data gathered to date about these mechanisms and the operation of Part 6 raise a number of significant challenges for the success of meta-regulation.

I THE CASUALTIES OF TELECOM

The so-called 'Casualties of Telecom' (CoT) consisted of a group of small business enterprises which were customers of Telecom. They alleged that intermittent network faults made it difficult for their own customers to contact them. The types of faults experienced varied but included false busy signals, disconnection of calls when the small businesses answered and dropped calls during conversations. The small businesses also complained their phones often would not ring even though their customers were trying to call them. Despite repeated complaints to Telecom, the network faults were not fixed. Concerns were not limited to network faults, however. Serious concerns emerged as to how Telecom dealt internally with customer complaints; one complainant had experienced problems with Telecom's network over a 10-year period.[14]

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11 Procedural accountability is satisfied when procedures are 'fair and impartial'; a system is substantively accountable when the rules generated in accordance with fair and impartial procedures achieve broader 'public interest' goals: see Anthony Ogus, *Regulation: Legal Form and Economic Theory* (2004) 111.

12 Accountability has been defined as 'the duty to give account for one's actions to some other person or body': see Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 40.

13 Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (2005) 6.

14 For further detail of the principal complaints made by the CoT and the duration of their difficulties, see Austel, *The CoT Cases: Austel's Findings and Recommendations* (April 1994) 27–48.

After playing the role of an 'honest broker' between Telecom and the CoT for nearly twelve months without success,[15] the Australian Telecommunications Authority (Austel)[16] formally started to investigate whether Telecom had fundamental network problems and difficulties with its complaints handling procedures in June 1993.[17] Initial progress in Austel's investigation was slow due to a lack of cooperation from Telecom. However, following a Senate Estimates hearing held in early September 1993 during which Telecom's behaviour was severely criticised and cries for a Senate inquiry into the CoT cases were made, Telecom started to address the problems.[18] Around that time, Telecom's fixed line customers were also being asked to pre-select either Telecom or Optus[19] as their preferred long-distance carrier.[20] In an effort to fend off a Senate inquiry into the CoT cases[21] and to deflect bad publicity, Telecom belatedly announced a 'six-point plan', including the development of new complaints handling procedures, to address the concerns of CoT complainants.

When the 'six-point plan' was announced, the general manager of Telecom's consumer division publicly admitted that the credibility of its complaints handling procedures had hit rock bottom and stated that Telecom staff could not address the problems. Telecom then sought the advice of the newly appointed Telecommunications Industry Ombudsman (TIO), who began work on 1 December 1993,[22] on its complaints handling procedures.[23] Telecom also appointed accounting

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15 The 'honest broker' role was adopted in response to legal advice that Austel did not have the power to resolve disputes between Telecom and its customers under the *Telecommunications Act 1991* (Cth).

16 Austel regulated the Australian telecommunications sector from 1 July 1989 until 30 June 1997. Its functions and powers evolved during this period reflecting the gradual introduction of full network and services competition into the sector. Compare ss 16–32 of the *Telecommunications Act 1989* (Cth) with ss 34–54 of the *Telecommunications Act 1991* (Cth).

17 Austel, *The CoT Cases*, above n 14, 49–56, 92.

18 Steve Lewis, 'COT Cases Return to Haunt Telecom', *Australian Financial Review* (Sydney), 10 September 1993.

19 Optus was selected as the second public fixed line carrier in Australia by the government in November 1991: Minister for Transport and Communications, Kim Beazley, 'Government Selects Optus Communications as Second Carrier' (Press Release, 19 November 1991). Along with Telecom, it had a duopoly over the operation and provision of fixed telecommunications networks in Australia until 30 June 1997: see Kim Beazley, Minister for Transport and Communications, *Micro-Economic Reform: Progress Telecommunications* (November 1990) 2–3.

20 See, eg, Innes Willox, 'Public Bludgeoned in Phone Ads War', *The Age* (Melbourne), 2 September 1993; Rochelle Burbury, 'High Stakes, With Our Ears as Trophies', *Sydney Morning Herald* (Sydney), 30 July 1993.

21 Ben Potter, 'Telecom Acts to End Complaints', *The Age* (Melbourne), 17 September 1993.

22 Paragraph 4 of the *Telecommunications (General Telecommunications Licences) Declaration (No 2) 1991* (Cth) mandated that carrier licensees form and participate in an ombudsman scheme to enable the investigation of consumer complaints dealing with service, billing and charging disputes. Service providers were not required to participate in the TIO scheme until the adoption of the *Telecommunications Act 1997* (Cth). The scheme was and remains funded by industry. For further information on the TIO, see Anita Stuhmcke, 'The Rise of the Australian Telecommunications Industry Ombudsman' (2002) 26 *Telecommunications Policy* 69.

firm Coopers & Lybrand to review its existing procedures.[24] It produced a report in November 1993. Fundamentally, the report found that existing procedures did not meet basic requirements of adequacy, reasonableness and fairness.[25] Failure to meet these requirements was due to a number of factors but a common theme was the absence of specificity on a number of issues in employee guidelines. Austel published its own damning report into the CoT cases on 13 April 1994 but elected not to take enforcement action. Instead, it relied on the revised and detailed customer complaints guidelines prepared by Telecom with input from Coopers & Lybrand, the TIO and itself and a request to Telecom to update it regularly on implementation of the additional measures called for in the Coopers & Lybrand report.

While it was investigating the underlying causes of the complaints of the CoT cases, Austel discovered evidence that Telecom had been recording phone calls of CoT customers without their consent. Despite denying claims early on, Telecom admitted the truth of the allegations to the newly appointed Minister for Communications, Michael Lee, in early January 1994.[26] Telecom's confession provoked responses on a number of different levels. First, until Telecom's admission, Austel had principal responsibility and involvement in this aspect of the CoT investigation.[27] Austel's investigation continued after Telecom's announcement;[28] however, following Telecom's admission, the Privacy Commissioner who was responsible for monitoring compliance with the *Privacy Act 1988* (Cth)[29] and the TIO became involved. Secondly, and perhaps most importantly, consumer privacy was placed firmly on the political agenda. Within days of Telecom's admission, Minister Lee asked the Attorney-General to determine whether Telecom had breached provisions of the *Telecommunications (Interception) Act 1979* (Cth),[30] which prohibited the interception of communications carried over telecommunications networks. In addition, Lee requested Telecom to review its internal procedures to avoid a recurrence of unauthorised recording and monitoring.[31] Lee was, however, also concerned about the underlying weaknesses of

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23 Ben Potter, 'Telecom Says it is Working Hard to Remedy Deficiencies', *The Age* (Melbourne), 22 September 1993.

24 Ben Potter, 'Telecom Rapped Again on Disputes', *The Age* (Melbourne), 29 September 1993; Steve Lewis, 'Telecom Draws More Fire From Austel', *Australian Financial Review* (Sydney), 29 September 1993.

25 Ben Potter, 'Telecom under Fire over Complaints', *The Age* (Melbourne), 25 November 1993.

26 Anne Davies and Mark Riley, 'Police Asked to Rule on Telecom Phone Taps', *Sydney Morning Herald* (Sydney), 2 February 1994.

27 Michael Dwyer, 'Telecom Hit by Bugging Claims', *Australian Financial Review* (Sydney), 6 January 1994.

28 See Austel, *The CoT Cases*, above n 14, 201–14.

29 In 1994, the provisions of the *Privacy Act 1988* (Cth) did not extend to Telecom.

30 Austel had no jurisdiction over matters arising under the Act, which has since been renamed the *Telecommunications (Interception and Access) Act 1979* (Cth).

31 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1994, 1263, 1264 (MJ Lee, Minister for Communications and the Arts). The guidelines were revised even though Telecom had well established rules which prevented staff from recording calls without customer consent: see, eg, Tom Burton and Steve Lewis, 'Police Inquiry as Telecom Admits Bugging', *Australian Financial Review* (Sydney), 2 February 1994. Telecom's group manager of media relations Keith Anderson was quoted as saying, '[a]ny such taping was a "last-resort thing" . . . Telecom's policy is that the company "must have customer consent before any taping takes place"'.

the regulatory regime in respect of the privacy of telecommunications consumers and directed significant political energy to these issues. The Attorney-General was later asked to evaluate if the *Telecommunications (Interception) Act 1979* (Cth) needed to be amended in light of the CoT cases.[32] Lee also pushed Vodafone and Optus to adopt monitoring and recording guidelines similar to the revised guidelines adopted by Telecom.[33]

Despite the active involvement of the Minister, privacy concerns did not abate. Consumer groups and the TIO were also actively calling for a number of additional privacy measures to deal with a number of consumer concerns, including calling number display,[34] nuisance calls and telemarketing,[35] brought about by the deployment of digital technology which used calling line identification (CLI) technology. The technology permitted the generation of significant call data[36] which in turn gave the industry scope to introduce new consumer services. Lee responded to the mounting political pressure by requesting Austel to establish a Privacy Advisory Committee (PAC) on 16 August 1994.[37] He identified protection of customer personal information, caller identification and telemarketing as top priorities.[38] The irony of the Minister's request was that Austel had called for the establishment of a Telecommunications Privacy Committee (TPC), which would play the role of central coordinator in a voluntary self-regulatory model, to deal with these issues nearly two years earlier when it published *Telecommunications Privacy: Final Report of Austel's Inquiry into the Privacy Implications of Telecommunications Services* in December 1992. Austel complied with Lee's request,[39] and the terms of reference of the new PAC[40] prepared by Austel drew heavily on the rule-making framework Austel had recommended in its final report on the TPC, which was never established.[41]

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32 Davies and Riley, above n 26; Michael Lee, 'Minister Promises Lower Prices and Better Service' (1994) 2 *Telecommunications Law and Policy Review* 103, 103.

33 Steve Lewis, 'New Rules for Telecom', *Australian Financial Review* (Sydney), 2 May 1994.

34 Calling number display allows called parties to identify the telephone number from which a call is made.

35 Helen Meredith, 'Ombudsman Calls for Telecom Privacy Policy', *Australian Financial Review* (Sydney), 10 June 1994. See also Warwick Smith, 'Ensuring a Consumer Voice Beyond 1997' (1994) 44(3) *Telecommunications Journal of Australia* 25.

36 Examples included the phone number of the calling and called parties, the time of the call, its length and the path the call took through the relevant carrier's network: see Austel, *Telecommunications Privacy: Final Report of Austel's Inquiry into the Privacy Implications of Telecommunications Services* (December 1992) 65.

37 Minister for Communications and the Arts, Michael Lee, 'Minister Asks Austel to Set Up Telephone Privacy Body' (Press Release, 16 August 1994).

38 Ibid. See also Lee, above n 32, 104.

39 Austel established the Privacy Advisory Committee pursuant to s 53 of the *Telecommunications Act 1991* (Cth).

40 See Attachment B in Austel Privacy Advisory Committee, *The Protection of Customer Personal Information: Silent Line Customers* (June 1995).

41 Implementation of the proposed TPC stalled because of Austel's concerns that the TPC be 'with but not of Austel'. The proposed remit of the TPC needed, for example, to be broader than Austel's to address telemarketing practices used by companies in other business sectors. Telemarketing raised general fair trading issues which were the responsibility of the fair trading offices of each of the States and Territories. Austel had suggested that the

Dissimilar to the TPC, the PAC was not a body independent of Austel; its purpose was to assist Austel in carrying out its functions under the *Telecommunications Act 1991* (Cth). Its work centred on consumer privacy issues and it was assigned the task of developing general privacy principles applicable to the sector as a whole and preparing specific guidelines if needed. Moreover, it could offer specific advice on particular codes of conduct as well as give general advice to industry participants and community organisations on code preparation.[42] Unlike the TPC, the role of the PAC was not to monitor or enforce codes. However, it was unclear if and how Austel or another body would enforce any codes adopted by industry with input from the PAC.[43] Presumably the monitoring and enforcement framework used would have drawn on Austel's 1992 privacy report but the PAC's terms of reference and reports do not address this issue. In any event, monitoring and enforcement of industry codes prepared with the PAC's assistance quickly became moot in light of the government's review of the policy and regulatory framework needed for industry after the duopoly over the operation and provision of fixed telecommunications networks in Australia, enjoyed by Telecom and Optus, ended on 30 June 1997.[44]

On 13 October 1994, the government published a detailed paper identifying the issues for consultation on the post-duopoly regulatory framework (the Issues Paper).[45] In it, the government acknowledged that 'special arrangements' may be needed for residential consumers with some protections extended to small and larger businesses.[46] The focus of the paper was therefore identifying and soliciting comments on regulatory mechanisms, including self-regulation, best able to protect consumers.[47] Any regulatory mechanism, however, had to be consistent with a number of 'guiding principles' central to the review. Three of these principles identified in the Issues Paper were relevant to the choice of regulatory mechanisms. First, regulation was not to be an end in itself. It was a means to achieve a result. Secondly, reliance on general legal principles as opposed to industry-specific legislation was preferable. Thirdly, if industry-specific legislation was necessary, it had to comply with the principle of 'least cost' to industry.[48] Each of these principles closely mirrored the recommendations of the Independent Committee of Inquiry on National Competition Policy (the Hilmer

TPC should be chaired by a person independent of Austel, although Austel would 'service' it: Austel, *Telecommunications Privacy*, above n 36, 46, 111–16.

42 Ibid.

43 Holly Raiche, 'A Telecomms Privacy Committee at Last' (1994) 1 *Privacy Law and Policy Reporter* 101.

44 The introduction of full infrastructure competition from 1 July 1997 had been announced by the Labor government in November 1990 as part of its microeconomic reforms for the telecommunications sector: see Beazley, *Micro-Economic Reform,* above n 19, 2, 14. Although there was evidence that the degree of competition to emerge during the duopoly period was significantly less than the government had expected, the government remained committed to its self-imposed 30 June 1997 deadline: see Austel, '*Convergence, Competition and Consumers': Austel's Submission to 'Beyond the Duopoly' – Review of Post 1997 Telecommunications Policy* (1994) and Austel, *Service Provider Industry Study: Final Report* (March 1995) 2–4.

45 Michael Lee, Minister for Communications and the Arts, *Beyond the Duopoly: Australian Telecommunications Policy and Regulation Issues Paper* (September 1994).

46 Ibid 63.

47 Ibid 63–9.

48 Ibid 21–4.

report),[49] and the choice to adopt the industry rule-making framework in Part 6 of the Act to address consumer problems was without doubt heavily influenced by the response of the Commonwealth government and each of the Australian States and Territories to the Hilmer report.[50]

The Hilmer report broadly defined 'competition policy' to encompass 'all policy dealing with the extent and nature of competition in the economy'.[51] Competition policy encompassed the rules limiting the anti-competitive conduct of firms as well as all regulatory restrictions limiting competition in statutes and regulations. Regulatory restrictions included government-owned monopolies and mandatory licensing requirements restricting market entry. To ensure that regulatory restrictions were kept to a minimum, the report argued that government had to satisfy a 'public interest' test[52] before any regulatory restriction could be imposed. In other words, the government could overcome a presumption that a restriction was unnecessary only if the 'public interest' test was satisfied. The report recognised that regulation may be necessary to protect consumer welfare, for example; however, any regulatory restriction imposed could be 'no more than necessary in the public interest'. The benefits of a restriction also had to outweigh the 'likely costs'. Although the Commonwealth and state governments did not embrace all of the suggested reforms of the Hilmer report,[53] they did accept that regulatory restrictions should meet a public interest test.[54]

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49 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (August 1993). The chair of the committee was Frederick Hilmer. The Independent Committee of Inquiry was initiated by the Prime Minister on 4 October 1992 following an agreement reached between the leaders of each of the Australian States and Territories in November 1991 that a new integrated, national competition policy was needed. For further information on the adoption, implementation and significance of Australia's National Competition Policy, see Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (2003).

50 See generally Kirsten Harley and Mark Armstrong, 'Waiting for the Convergent Regulator' (Paper presented at the Communications Research Forum, Canberra, 2 October 2002) 6. The telecommunications framework was the first Commonwealth regulatory legislation to be reviewed after the Hilmer inquiry and the subject-matter fell within the exclusive jurisdiction of the Commonwealth: see Michael Lee, above n 45, 23. However, it was not vetted by the National Competition Council, the body responsible for ensuring compliance with National Competition Policy. See generally National Competition Council, *Legislation Review Compendium* (5th ed, 2004).

51 Independent Committee of Inquiry into Competition Policy in Australia, above n 49, 6.

52 The Hilmer report does not define the term 'public interest'. For analysis of factors relevant to 'public interest' in the communications context, see Christina Hardy, Michell McAuslan and Julia Madden, 'Competition Policy and Communications Convergence' (1994) 17 *University of New South Wales Law Journal* 156, 171–6. See also Morgan, *Social Citizenship in the Shadow of Competition*, above n 49, 69–70.

53 Industry Commission to the Council of Australian Governments, *The Growth and Revenue Implications of Hilmer and Related Reforms: A Report of the Industry Commission to the Council of Australian Governments* (March 1995) 512–13. For example, the government ignored the committee's recommendation that regulation which restricted competition should automatically lapse at the end of five years: at 513.

54 See cl 5(1) of the Competition Principles Agreement signed by the Coalition of Australian Governments on 11 April 1995.

The Hilmer report did not expressly mention or consider self-regulation, co-regulation or alternatives to government rule-making in its report. Nevertheless, the consideration and potential use of alternative mechanisms was a logical (but not a necessary) consequence of the Hilmer committee's recommendations.[55] Indeed, the principle of alternative mechanisms was supported by the Commonwealth and each of the Australian States and Territories.[56] If the same or better results could be achieved by means less intrusive and costly to the market place, they were preferable. The logic of the Hilmer report dictated that alternative mechanisms had to be followed in those circumstances. Otherwise, any proposed government regulation would be more than necessary and would fall foul of the public interest test.

The results of the government's duopoly review were published on 1 August 1995 in a detailed press release containing 99 high-level policy principles.[57] Although no reasoning was given in the press release, it endorsed the use of industry self-regulation to address consumer affair concerns and identified the need for a legislative framework that would support the development of industry codes. The development of Part 6 of the Act took approximately another 18 months and went through a number of iterations,[58] some of which were prompted by a change of government[59] on 2

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55 Jeannette McHugh, Minister for Consumer Affairs (Labor), was quoted as saying, 'Professor Hilmer threw up a major challenge to our thinking — not so much for what he said outright, but for what he implied': see Hardy, McAuslan and Madden, above n 52, 168 (citing McHugh's address 'Consumers and the Reform of Australia's Utilities: Passing on the Benefits', 18 March 1994).

56 See cl 5(9)(e) of the Competition Principles Agreement dated 11 April 1995. The *Competition Policy Reform Act 1995* (Cth), the Competition Principles Agreement, the Conduct Code Agreement dated 11 April 1995 and the Agreement to Implement the National Competition Policy and Related Reforms dated 11 April 1995 collectively implement the Hilmer recommendations agreed to by the Commonwealth and each of the States and Territories.

57 Minister for Communications and the Arts, Michael Lee, 'A New Era in Telecommunications' (Press Release, 1 August 1995). The government's policy for technical regulation post 1997, which also endorsed self-regulation, was published four months later: see Minister for Communications and the Arts, Michael Lee, 'Australian Telecommunications Technical Regulation for Post 1997 Environment' (Press Release, 20 December 1995).

58 The first formulation of the legislative framework for industry rule-making was released on 20 December 1995 for public comment. See Minister for Communications and the Arts, Michael Lee, *Telecommunications Bill 1996, Trade Practices Amendment (Telecommunications) Bill 1996: Exposure Drafts and Commentary* (20 December 1995). On 14 May 1996, Senator Richard Alston, then Minister for Communications and the Arts, released a discussion paper on the post 1997 telecommunications legislation proposing a number of changes to the detail of the 'co-regulatory' mechanism suggested by Labor: see Senator the Hon Richard Alston, Minister for Communications and the Arts, *Telecommunications Working Forum: Discussion Paper Post 1997 Telecommunications Legislation* (14 May 1996). These proposals were later incorporated into a second draft of the Telecommunications Bill published on 1 October 1996: see Department of Communications and the Arts, *Exposure Drafts and Commentary: Telecommunications Bill 1996, Telecommunications (Universal Service Levy) Bill 1996, Telecommunications (Numbering Charges) Bill 1996, Telecommunications (Carrier Licence Charges) Bill 1996, Telecommunications (Carrier Licence Fees) Termination Bill 1996, Radiocommunications (Receiver Licence Tax) Amendment Bill 1996, Radiocommunications (Transmitter Licence Tax) Amendment Bill 1996* (October 1996). Further changes were made as a result of the review of the Telecommunication Bill 1996 by the Senate Environment,

March 1996,[60] and the decision of the newly elected Coalition government in 1996 to sell its ownership in Telecom's successor, Telstra, before the *Telecommunications Act 1997* (Cth) was adopted on 26 March 1997.

II THE EMERGENCE OF SELF-REGULATION

Proponents of public interest theories of regulation assert that self-regulation emerges when some form of market failure occurs and it is more efficient for industry to self-regulate.[61] Greater efficiency arises when industry either has more expertise than government to address the problem or can perform the same tasks as government at less cost.[62] Although private actors become engaged in the process of regulation, the state nevertheless remains central in public interest theories. It determines the broad economic and non-economic goals[63] that should be pursued and elects to use industry self-regulation as a tool to achieve them.[64] For many who, if not explicitly but implicitly adopt a public interest model of regulation, the state also remains an essential driver or impetus for industry to self-regulate. In other words, absent the continual threat of direct intervention by the state either in the form of prescriptive legislation or enforcement, self-regulation will not materialise. The enforced model of self-regulation proposed by Ayres and Braithwaite,[65] for example, is underpinned by a regulator with strong enforcement powers to be deployed against recalcitrants or those who cannot be persuaded to see the moral force behind compliance with a regulatory rule. The 'big guns' of the regulator are 'benign' in the sense they should be used rarely but they are omnipresent. Although Gunningham and Rees[66] conceptualise a three-dimensional regulatory pyramid with roles for business, the state and third parties, the role of the general law is to create incentives in part through sanctions for the self-regulated to comply.[67] Christine Parker's notion of 'meta-regulation' also relies on

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Recreation, Communications and the Arts Legislation Committee between December 1996 and March 1997 and later the full Senate.

59 The new Coalition government remained committed to the 30 June 1997 deadline for introducing full infrastructure competition in the sector and expressed in principle support for the use of industry rule-making and codes of practice: see Richard Alston, 'Telecommunications Policy' (14 May 1996) 49(8) *Canberra Survey* 2.

60 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of the Inquiry into All Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto* (June 1997) 1.

61 Ogus, *Regulation*, above n 11, 107; Ogus, 'Rethinking Self-Regulation', above n 1, 97–8; Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) 126–8.

62 Ibid.

63 Ogus, *Regulation*, above n 11, 29–54. See also Stephen Breyer, *Regulation and Its Reform* (1982) 15–35.

64 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007) 26.

65 Ayres and Braithwaite, above n 10, ch 2.

66 Gunningham and Rees, above n 10, 404–5. See also Neil Gunningham and Darren Sinclair, 'Integrative Regulation: A Principle-Based Approach to Environmental Policy' (1999) 24 *Law and Social Inquiry* 853, 866–8.

67 Gunningham and Rees, above n 10, 400–2.

'formal law', which includes enforcement action, to encourage corporations to engage in the self-reflection needed to become better citizens.[68]

Supporters of the public choice (or economic) theory of regulation and its variants, on the other hand, argue that the laws of supply and demand determine if government enacts regulation.[69] The demand for regulation is set by the private interests of various groups, including industry, consumers and administrative bureaucrats, who compete with each other for advantageous legislation. Lawmakers, in turn, supply regulation to secure and retain the rewards of elected office. However, the playing field in the legislative market is rather uneven. Industry has stronger incentives to lobby politicians than individual consumers have, as typically the costs of procuring advantageous regulation for industry are far outweighed by its benefits. Industry also has more resources to outbid its political rivals who may campaign for legislative change. Under public choice theory, self-regulation emerges therefore when industry decides self-regulation is in its interests, such as when there is a credible threat of less favourable state intervention. However, unlike the public interest theories of regulation, the threat of intrusive intervention is advocated by interest groups rather than the state, presumably in the rare circumstance where the benefits of acquiring regulation for industry's competitors exceed their campaign costs and there is a realistic possibility they can outbid industry participants. The adoption of industry self-regulation may or may not best promote the public good or be more efficient than intervention by the state but it is often seen as less than optimal by public choice advocates for two reasons. First, the views of other interest groups, many of whom will rationally decide not to participate in the lobbying process because of cost, are not heard. Secondly, lobbying wastes industry resources.

Advocates of 'neopluralism'[70] or what has been described as a 'political private interest approach'[71] also envisage a market for regulation; however, they argue that the end result of regulatory bargaining is not the interests of one group.[72] Rather it is a political compromise which the state believes will satisfy the interests of most groups. Under this approach, self-regulation emerges if it balances the needs of most regulatory actors. As for public interest and public choice theories of regulation, threat of state intervention also plays some role in the adoption of self-regulation in this model. However, the threat serves to frame the parameters of interest group debate from which compromise is to emerge.

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68 Parker, *The Open Corporation*, above n 3, 246, 255–7. See also Colin Scott, 'Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit' (2003) 25 *Law and Policy* 203, 213.

69 For further discussion of the economic theory of regulation, see, eg, Ogus, *Regulation*, above n 11, 58–73; Stephen Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98 *Columbia Law Review* 1, 34–56; George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *The Bell Journal of Economics and Management Science* 3; Richard A Posner, 'Theories of Economic Regulation' (1974) 5 *The Bell Journal of Economics and Management Science* 335, 343–55; Robert Britt Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (1989) 34–8.

70 Croley, above n 69, 56.

71 Morgan and Yeung, above n 64, 44.

72 For further discussion of neo-pluralism, see Croley, above n 69, 55–65 and Gary S Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98 *Quarterly Journal of Economics* 371.

The case study illustrates three instances of self-regulation eventuating in response to the problems of the CoT. The first two examples of self-regulation — Austel's decision not to take formal enforcement action against Telecom for failure to comply with a condition of its licence[73] requiring it instead to adopt guidelines for customer complaints and Austel's establishment of the PAC at the request of Minister Lee — can be classified as 'sanctioned self-regulation'[74] with state approval taking the form of public endorsement of self-regulation by Austel and the government minister. However, Austel and Lee did more than 'approve' self-regulation in the second case. They also sponsored self-regulation and actively worked with industry to see its fruition, even though they lacked any legislative power.[75] The third instance of self-regulation — the adoption of Part 6 of the Act — is even more difficult to categorise. As drafted and in practice, the legislation manifests the characteristics of a number of different types of self-regulation.[76] It is 'delegation'[77] or 'mandated self-regulation'[78] in all but name. During the passage of the *Telecommunications Act 1997* (Cth),[79] the government stressed the importance of shifting the burden of and responsibility for regulation, including rule-making, from the state to industry. However, in order to comply with restrictions of Australian constitutional law,[80] the legislation was drafted in a way which gives it the appearance of 'sanctioned self-regulation' and, due to the possibility of state intervention in Part 6 of the Act if industry fails to regulate itself, 'enforced'[81] or 'coerced'[82] regulation. The entire telecommunications regime, of which Part 6 forms a part, has also been classified by Anita Stuhmcke as a 'co-regulatory regime', with government and industry equally sharing the regulatory load and with government participating directly in self-regulatory processes while retaining back-up

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73 *Telecommunications (General Telecommunications Licences) Declaration (No. 2) 1991* (Cth) para 5.1.

74 Colin Scott and Julia Black define 'sanctioned self-regulation' as regulation which has been prepared collectively by a group and is then formally approved by the state: see Scott, 'Self-Regulation and the Meta-Regulatory State', above n 1, 137–8; Black, 'Constitutionalising Self-Regulation', above n 1, 27.

75 The coaching element present in this case is not adequately captured in the definitions of sanctioned self-regulation or other types of self-regulation as enumerated by Colin Scott and Julia Black: see Scott, 'Self-Regulation and the Meta-Regulatory State', above n 1, 136–9; Black, 'Constitutionalising Self-Regulation', above n 1, 26–28.

76 This problem raises broader questions about the utility of the definitions Colin Scott and Julia Black have proposed which are outside the scope of this article.

77 Scott, 'Self-Regulation and the Meta-Regulatory State', above n 1, 136–7.

78 Black, 'Constitutionalising Self-Regulation', above n 1, 27.

79 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 1996, 7799–7801 (Warwick Smith, representing the Minister for Communications and the Arts, Senator Alston); Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 941 (Senator Campbell, Parliamentary Secretary to the Treasurer).

80 Case law suggests that the Commonwealth legislature cannot delegate rule-making authority to private bodies absent some mechanism permitting legislative oversight: see *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 119–21 (Evatt J). Evatt J states, 'The further removed the law-making authority is from continuous contact with Parliament, the less likely it is that the law will be a law with respect to any of the subject matters enumerated in secs 51 and 52 of the Constitution': at 120.

81 Scott, 'Self-Regulation and the Meta-Regulatory State', above n 1, 138.

82 Black, 'Constitutionalising Self-Regulation', above n 1, 27.

powers in the event of industry failure.[83] However, this particular definition of co-regulation overlooks the complex web of interdependent actors with roles (at least in theory) for consumers and the general public as well as government and industry which Part 6 arguably provides.[84] It also assumes that industry is united and speaks with one voice when in fact, as explained in Part IV below, some industry participants are excluded on a de facto basis. However, regardless of how the three instances should be classified, an analysis of why self-regulation was adopted in each case highlights that neither public interest nor private interest theories of regulation fully capture or explain why self-regulation did emerge. An historical review also suggests that self-regulation, and self-regulatory rule-making, in particular, may occur even if threats of regulatory intervention by the state are absent.

A The adoption of industry guidelines for customer complaints

If one accepts public interest theory, Austel's decision to avoid enforcement action against Telecom must be explained by the presence of a market failure and a conscious resolution that industry was either better able than Austel to correct the deficiencies in its customer complaints guidelines or could do so for less cost. The first requirement of market failure is satisfied here. The CoT had clearly drawn attention to imbalances in negotiating power. Small-business customers had legitimate grievances against Telecom for poor service, and Telecom had treated those customers with contempt. Moreover, competition was limited with Telecom retaining a dominant position in relevant markets.[85] However, self-regulation cannot be justified on the basis of industry expertise. Telecom's general manager had admitted publicly that Telecom staff was incapable of addressing the weaknesses of its own complaints handling procedures. Similarly, the lesser cost rationale is difficult to support in the absence of any express cost benefit analysis and significant doubt as to whether Austel had the ability to undertake such evaluation. Any costing or economic analysis about the pros and cons of enforcement versus self-regulation would have forced Austel to construct entirely fictitious counterfactual regulatory scenarios.

Instead, other causes or triggers were at play. The first factor was Austel's own failures to champion the consumer cause more actively and to enforce the relevant condition of Telecom's licence. Austel did not have a dedicated customer complaints division until 1994 and this division was established only after the Minister for Communications requested it in response to the concerns raised by the CoT complainants.[86] The Coopers & Lybrand report into the CoT affair (as extracted throughout Austel's April 1994 report on the issue) also identified a number of clear breaches of the licence condition — the failure to have complaints guidelines other than for billing disputes before November 1992, the years of delay in making available to customers its complaints handling procedures, the failure to specify the periods during which disputes would be resolved and the failure to provide quality of service

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83 Stuhmcke, above n 22, 74–8.

84 See Part III of the article below. This definitional problem is not unique to the term 'co-regulation'. Most manifestations of self-regulation have been defined solely by their relationships to the state.

85 See generally Austel, *Convergence, Competition and Consumers* and *Service Provider Industry Study*, above n 44.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, above n 31, 1263 (MJ Lee).

information to customers[87] — many of which Austel should have been able to identify on the face of Telecom's old guidelines. Consequently, Austel may have been left on the back foot with the result that others, including Telecom, could initiate change without formal regulatory enforcement. A second factor may have been a realistic appraisal by Austel that enforcement action simply would not have achieved as good an outcome as the one that would emerge through collaborative rule-making with Coopers & Lybrand, the TIO, Telecom and Austel participating in the exercise of redrafting the guidelines, regardless of its cost. However, since adoption of the *Telecommunications Act 1989* (Cth), Austel had a long-established culture of persuasion, preferring to discuss with and encourage Telecom to adopt policies in response to individual consumer concerns.[88] Moreover, the response Austel negotiated with Telecom was endorsed at a political level.[89] Finally, the fact that the government owned 100 per cent of Telecom must also have played some role in the approach Austel and the Minister adopted.

Assuming there is market competition for regulatory decision-making and the 'revolving door'[90] provided sufficient incentives to Austel to reward industry accordingly, the adoption of the revised customer complaints guidelines was clearly in Telecom's interests. However, why it was in Telecom's interests cannot be explained by any credible threat of state intervention for a number of reasons. Again, Austel had a culture of persuasion. Secondly, any formal enforcement action would have been limited to the issuance of a direction to Telecom asking it to rectify a breach of a licence condition, which was arguably less onerous and prescriptive than what emerged from the collaborative exercise of redrafting Telecom's customer complaints guidelines. Had Telecom failed to comply with an Austel direction, Austel could have brought proceedings in an Australian federal court but compliance with a direction would have been enough to avoid the imposition of any financial penalty. Instead, Telecom was threatened by the prospect of further adverse publicity if Austel were to issue a regulatory direction and the ability of Optus, which was emerging as a competitive threat to Telecom, to capitalise on customer dissatisfaction. Given this context, it is also difficult for a neo-pluralist to conclude that self-regulation emerged as a compromise. Such a conclusion rests on the assumption that CoT complainants and others lobbied for more invasive changes to Telecom's procedures than they did or the existing regulatory framework could in fact provide.

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87 Austel, *The CoT Cases*, above n 14, 113–14.

88 This was, in part, due to the fact that the government intended the Commonwealth Ombudsman to investigate and resolve individual consumer complaints with Austel responsible for the policy and regulatory issues which arose from consumer complaints: see Austel, *Annual Report 1990–1991*, 3, 41–42 and House of Representatives Standing Committee on Transport, Communications and Infrastructure, House of Representatives, Parliament of Australia, *Telecom's Handling of Customer Complaints* (1991) 3.32–3.34.

89 Speaking in Parliament, the then Minister for Communications Michael Lee stated, 'Clearly there is room for improvement in Telecom's relations with its customers. A positive, non-adversarial approach is obviously preferable': Commonwealth, *Parliamentary Debates*, House of Representatives, above n 31, 1263 (MJ Lee).

90 See generally Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998) 173.

B The creation of the Privacy Advisory Committee

Further difficulties with the ability of public and private interest theories of regulation to predict the adoption of self-regulation are seen in the establishment of the PAC. As was the case when Austel decided not to enforce Telecom's licence condition, a market failure or at the very least the possibility of market failure was manifest. Expectations of privacy had been infringed when Telecom recorded the calls of its customers without consent. Technological developments were making it easier for all carriers to obtain and use private customer information, and strong commercial incentives existed to exploit the new technologies. The possibility of new infrastructure providers entering the market and the anticipated growth of service providers meant the problem would only increase in the future. Again, similar to the enforcement scenario, industry expertise and cost grounds were not cited or contemplated as the bases for self-regulation. Rather, when Minister Lee requested Austel to establish the PAC and Austel agreed, speed of response was an imperative in its own right. He and Austel could no longer wait for legislative intervention which was not forthcoming and had not been since 1991–92 when Austel had first tried to address privacy concerns when it called for the adoption of the TPC. Regulation was needed now and self-regulation was better than no regulation.

Interestingly, expediency and the absence of credible legislative threat were equally factors in Austel's decision to recommend the creation of the TPC. Given experience in the US, Europe and elsewhere had demonstrated that deployment of CLI had increased consumer concerns about privacy and fears that the introduction of competition was only likely to increase concerns as personal data had to be exchanged between multiple carriers and service providers in order to provide communications services,[91] Austel believed it had to be 'proactive'.[92] Yet it had (or believed it had) a limited number of regulatory options available to it. Despite suggestions from Austel, government was reluctant to extend the core provisions of the *Privacy Act 1988* (Cth) to private companies.[93] Moreover, even if carriers and service providers were made subject to the central privacy provisions of the *Privacy Act 1988* (Cth), Austel argued that additional industry response was necessary given the type of personal data collected and the speed with which the sector could collect it.[94] Austel also recognised that it did not have entire or partial jurisdiction over privacy issues under the *Telecommunications Act 1991* (Cth), and there was a general dislike for amending s 88 of that Act[95] to extend the application of privacy principles to carriers and service

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91 Austel, *Telecommunications Privacy*, above n 36, 23–5.

92 Ibid 15.

93 Government's wariness arose for several reasons. First, when the *Privacy Act 1988* (Cth) was enacted, the government concluded it had no legal capacity under the *Australian Constitution* to extend national privacy legislation to private entities. Secondly, privacy was seen by government as 'bigger' than telecommunications; privacy concerns were not limited to telecommunications providers: see Margaret Jackson, *Hughes on Data Protection in Australia* (2nd ed, 2001) 23, 93. For consideration of the constitutional basis of national privacy laws, see generally Jackson, at 22–5 and Greg Tucker, *Information Privacy Law in Australia* (1992) 63–8.

94 Austel, *Telecommunications Privacy*, above n 36, 34.

95 Ibid 40–1. Section 88 of the *Telecommunications Act 1991* (Cth) prohibited employees of carriers from disclosing or using data acquired in the course of employment, subject to a number of exceptions, including performance of job responsibilities.

providers. Breach of s 88 of that Act could lead to the imposition of criminal penalties, and extending the scope of s 88 to include carriers and service providers would have had the effect of criminalising privacy breaches which attracted only civil penalties under the *Privacy Act 1988* (Cth). Coupled with Austel's perception that a quick response was needed, the lack of enthusiasm for legislative measures from politicians left Austel no choice but to pursue a voluntary scheme at least in the short term.

Applying public choice theory, again it can be argued that self-regulation emerged because it was in industry's interests. During Austel's consultation on privacy, Telecom and Optus believed some regulatory response was necessary. Indeed, Telecom voluntarily postponed the deployment of its calling number display services pending resolution of anticipated privacy concerns, despite a successful consumer trial of the service.[96] Optus and Telecom were also willing to commit resource to the temporary and voluntary TPC initiative.[97] Subsequently, Vodafone and Optus voluntarily agreed to revise their privacy and monitoring guidelines using Telecom's revised guidelines as a model. Privacy restrictions may have limited their use of network assets to some extent but the adoption of new revenue-generating services may have been hindered if customers did not use them to avoid invasions of privacy. However, as in the previous example, why self-regulation either in the form of the TPC or the PAC was in industry's interests cannot be explained by any credible threat of intervention from the state or other groups. In both cases, the Labor government had been resolutely against extending privacy legislation to telecommunications carriers. If any regulation were to emerge, industry, with or without other interest groups, would have to develop it. As in the enforcement context, the adoption of self-regulation in this situation also cannot be explained by neo-pluralism. Self-regulation was a compromise for a number of interested parties but it was not a position 'aggregated'[98] by Lee or Austel. It was more akin to a default position because of the government's stance on legislative amendments to the *Privacy Act 1988* (Cth).

C The enactment of Part 6 of the *Telecommunications Act 1997* (Cth)

Public interest theory also cannot explain why Part 6 of the Act was adopted. As has been argued earlier, the CoT affair had revealed that market failures were occurring and consumers needed some regulatory protection. However, evidence of any analysis demonstrating that Part 6 of the Act led to greater efficiency either in the form of industry expertise or lower cost is missing. Instead, the genesis for self-regulation was the Commonwealth's commitment to the 'reform agenda'[99] of public choice ideology, which underpinned the Hilmer report on national competition policy and the intergovernmental documents agreed to by the Commonwealth and each of the States and Territories which implemented it. The responses to the weaknesses of Telecom's complaints handling procedures and privacy guidelines did provide a plausible alternative to government regulatory intervention which the Commonwealth was obliged to consider. However, Austel and industry's experience developing a code of practice on the transfer of mobile service customers between carriers and service providers also provided evidence that self-regulation was not the panacea for all

96 Ibid 64–5.
97 Ibid 45.
98 Croley, above n 69, 58.
99 Ibid 40.

regulatory ills.[100] Yet the experience did not provoke fundamental re-evaluation of self-regulation as a mechanism to protect consumers. Some changes were made to the framework to address concerns but, absent the commitment to Hilmer, it is debatable if the permission to self-regulate in Part 6 of the Act would have been so widely granted.

The ability of public choice theory to account for the adoption of Part 6 also falters. No doubt, self-regulation offered some benefits to industry which it could exploit, such as the ability to postpone the adoption of measures when delay suited its needs.[101] However, not all aspects of the Part 6 regime can be said to have been in industry's interests. The Act, for example, gave the Australian Communications Authority (ACA)[102] a broad general power to issue standards relating to a non-exhaustive list of consumer protection topics, many of which were not previously the subject of sector specific legislation. Similarly, the preparation of industry codes clearly was not intended to be a de-regulatory initiative.[103] The envisaged industry codes were a mechanism to fill in identified gaps or to add specificity to the substantive rules set out in the legislative framework. However, even if one assumes the advantages to industry outweighed any costs, public choice theory does not adequately account for the government's ideological commitment to Hilmer. Industry did lobby government about the contents of the package of legislation which implemented

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100 Work on a code of practice governing the transfer of mobile service customers between carriers and service providers had started in 1995 following a complaint by Telecom that customers were being transferred from Telecom's network without their consent. However, efforts by Austel and industry faltered, and Austel grew increasingly frustrated by the process. No code was adopted before the new legislation went into effect: see Austel, *Annual Report 1994–1995* (1995) 15; Austel, *Annual Report 1995–1996* (1996) 28; Austel, *Annual Report 1996–1997* (1997) 29. See also an interview with Neil Tuckwell (Austel's outgoing chairman) who described Austel's experience with industry code development as 'disappointing' in 'Austel – Evolution or Devolution?' (October 1995) *Australian Communications* 49, 51. The Australian Communications Industry Forum (ACIF) published what was described as an 'interim guideline' on the transfer of mobile service customers in January 1998: see ACIF, *Interim Guideline: Mobile Telecommunications Industry Change of Service* (January 1998). A code has never been adopted.

101 The presence of advantages may explain why there is little evidence suggesting industry objected to this aspect of the policy principles. Concern was raised that industry would need to respond to the regulatory challenge but the principle of self-regulation was not challenged: see, eg, Frank Blount (CEO, Telstra Corporation), 'Post-1997 Challenges' (October 1995) *Australian Communications* 58 and Helen Meredith, 'Now, It's Time for the Real Issues', *Australian Financial Review* (Sydney), 30 October 1995 (quoting Alan Horsley, executive director of the Australian Telecommunications Users Group).

102 The ACA was responsible for Part 6 of the Act prior to its merger in 2005 with the Australian Broadcasting Authority to form ACMA.

103 Indeed, in the second reading speech of the Telecommunications Bill, it was stated:

> This package of legislation provides the framework for the telecommunications industry to take responsibility for key areas of regulation over and above the legislative guarantees provided. . . . The codes regime will supplement and enhance the fundamental consumer protection arrangements established in this bill . . . Codes can address areas of concern to consumers that are currently unregulated.

Commonwealth, *Parliamentary Debates*, House of Representatives, above n 79, 7800-1 (Warwick Smith). These statements were repeated in the Senate when the Bill was read the second time: see Commonwealth, *Parliamentary Debates,* Senate, above n 79, 941, 943 (Senator Campbell).

telecommunications reform. However, the decision in favour of self-regulation was taken by government early on, which largely explains why the debate from all interest groups concentrated on the specifics of the self-regulatory rule-making framework Part 6 adopted rather than the principle of self-regulation.

Why the precise framework in Part 6 was eventually adopted can be best explained by neo-pluralism and reflects the efforts of the state to adopt a legislative compromise acceptable to all interest groups. The experience of various parties in redrafting Telecom's customer complaints procedures, serving on Austel's PAC and developing a code of practice on the transfer of mobile service customers between carriers and service providers set expectations that were eventually reflected in the rule-making parameters in Part 6. Government made a number of concessions to consumer groups. Provisions permitting the ACA to intervene and establish industry standards if industry failed to develop a code or if a code did not 'provide appropriate community safeguards' were inserted. The ACA could also ask industry to revise existing codes, provided they were 'deficient'[104] in some respect. Codes became legally enforceable upon registration and the potential subject matter of codes was pared back significantly during consultation. Government responded to industry by curtailing Austel's powers of intervention. For example, the regulator could make a standard only if certain criteria were satisfied.[105] The ACA could set a maximum time limit within which industry had to develop codes but industry first had to be given an opportunity to draft or amend codes.[106] It also had to give industry a minimum period to cure any deficiencies in existing codes it identified. A statement of regulatory policy directed the ACA to address public interest considerations in a way that did not impose 'undue financial and administrative burdens' on industry.

D Conclusion

The exploration of the three examples of self-regulation highlights glaring weaknesses in the ability of public interest theory to predict when self-regulation comes into existence. Although actual or potential market failures were present when Telecom revised its guidelines for customer complaints, the PAC was formed and Part 6 of the

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104 A code is deficient if: '(a) the code is not operating to provide appropriate community safeguards in relation to that matter or those matters; or (b) the code is not otherwise operating to regulate adequately participants in that section of the industry in relation to that matter or those matters': *Telecommunications Act 1997* (Cth) s 125(7).

105 Under s 118 of the *Telecommunications Act 1997* (Cth), ACMA must first give bodies or associations representing industry sectors an opportunity to draft a code of practice, and it must be satisfied that a code is 'necessary or convenient' to provide 'appropriate community safeguards' or otherwise deal with the performance or conduct of industry participants. A request can be made only if industry is unlikely to develop a code but for ACMA's request. Similar provisions give ACMA powers to determine standards if an industry body or association does not exist.

106 The initial minimum period of 90 days proposed was later extended to 120 days with the ACA retaining discretion to extend the period. This change was requested by the Australian Telecommunications Users Group in its submission to the Senate Legislation Committee. This suggestion was not endorsed by the Senate Legislation Committee but government agreed to the change in any event: see Evidence to Senate Environment, Recreation, Communications and the Arts Legislation Committee, Parliament of Australia, Canberra, 16 January 1997, 397 (Alan Horsley (ATUG)) and Supplementary Explanatory Memorandum, Telecommunications Bill 1996 (Cth) 31.

Act was adopted, evidence of industry efficiency was missing. In its place, several other factors were identified, including, but not limited to, protection of administrative backsides, regulatory culture, efficacy, political expediency and ideology. Public choice theory fared somewhat better than public interest theory. In each of the three cases, self-regulation was arguably in the interests of industry, although it should be noted that it was not necessarily the most advantageous solution for industry or the least costly. For example, legislative intervention may have produced a privacy framework much faster than the PAC could, given it developed rules by committee consensus. However, while the simple criterion of industry interest was present, the forms of self-regulation which came about cannot be attributed solely to industry interests, given the cultural context, the motivations of the decision-makers and the limitations imposed by the state on the parties. Equally, it is difficult to credit threats of intrusive state intervention as the impetus for industry's willingness to embrace self-regulation. On the contrary, regulatory threats were absent in the revision of Telecom's guidelines for customer complaints and the PAC. Regulation of some form was in industry's interests but self-interest arose primarily from fears of adverse publicity, competitive market threats and recognition that a privacy framework was necessary to secure uptake of new digital telecommunications services by consumers. It is also difficult to characterise the adoption of Part 6 as a response to an intrusive threat, given the commitment of both Labor and Liberal governments to Hilmer. For similar reasons, neo-pluralism also cannot explain the adoption of self-regulation, especially in the first two instances reviewed here. As has been shown, self-regulation was not adopted by the state; it emerged despite the state.

III LEGITIMATING SELF-REGULATORY RULE-MAKING

Speaking in the context of the debate as to whether judicial review should be extended to self-regulatory bodies,[107] Jody Freeman has commented:

> the challenge [of self-regulation] is ensuring that . . . measures designed to yield authority to private parties, do not eviscerate the public law norms of accountability, procedural regularity and substantive rationality that administrative law has labored so hard to provide.[108]

However, while the enormity of the task of legitimising self-regulation in the decentred state can be so clearly identified, a solution to the problem and the precise role (if any) of the state in the process have proved more elusive.[109] Although theoretical arguments can be made that greater participation by members of industry

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107 See, eg, Peter Cane, 'Self-Regulation and Judicial Review' (1987) 6 *Civil Justice Quarterly* 324.

108 Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 331, 353.

109 See, eg, Black, 'Constitutionalising Self-Regulation', above n 1; Kate MacNeill, 'Self Regulation: Rights and Remedies — the Telecommunications Experience' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium: Papers Presented at the 2000 National Administrative Law Forum* (2000) 249, 261–4; Alan C Page, 'Self-Regulation: The Constitutional Dimenson' (1986) 49 *The Modern Law Review* 141; Norman Lewis, 'Regulating Non-Government Bodies: Privatization, Accountability, and the Public-Private Divide' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (2nd ed, 1989) 219.

in regulatory rule-making actually enhances democracy,[110] there remains scepticism that private actors will act in anything but their private interests with consequential detriment to the public good and minority concerns. The problem is particularly acute when industry is expected to engage in rule-making, which continues to be seen (even if this view is not borne out in actual practice) as a core public function of a democratically elected legislature or an administrative agency held accountable via judicial review and other generally accepted mechanisms, even if the legitimacy of the latter has also been questioned.[111]

Colin Scott has suggested that no one solution will solve legitimacy concerns in the meta-regulatory state, given the various ways in which state and non-state actors interrelate.[112] While this may be true, the various possible methods of legitimacy which are used in the self-regulatory rule-making context have yet to be fully inventoried and their implications assessed.[113] The response to the CoT and the debate in the lead up to the adoption of Part 6 of the Act highlight three possible mechanisms which could be used to legitimate self-regulatory rule-making: (1) the adoption in whole or part of what Harm Schepel has called 'internal administrative law' or the 'constitution' of private governance, (2) rule choice and (3) a process of registration or vetting of industry-generated rules by an independent regulatory agency or other third party in accordance with over-arching policy objectives set by the legislature or other body. Legitimacy in both the regulatory response to the CoT and Part 6 of the Act was established and accepted by those involved using each of the three grounds, although the process and effect of registration varied in each case. Collectively, the mechanisms seek to instil the value of procedural fairness while trying to ensure that broader public policy considerations are addressed. Most interestingly, the state attempts to use the traditional hierarchical method of accountability to cultivate horizontal accountability among industry participants, government agencies, consumers and the general public. Tracing the historical development of Part 6 also suggests 'competitive self-regulation' is unlikely to address legitimacy concerns in rule-making, despite its theoretical appeal. Each of the three legitimacy mechanisms is described below, followed by a brief discussion of competitive self-regulation and its absence in the legislative debate surrounding Part 6 of the Act.

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110 See, eg, Ayres and Braithwaite, above n 10, 3–18; Grabosky, above n 5, 543. For critical assessment of these arguments as a basis for self-regulation generally, see Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 84–98.

111 See, eg, Giandomenico Majone, 'Regulatory Legitimacy' as extracted in Morgan and Yeung, above n 64, 254–9.

112 Scott, 'Self-Regulation and the Meta-Regulatory State', above n 1, 140.

113 Drawing on a number of case studies in media and telecommunications law, Wolfgang Schulz and Thorsten Held have identified a number of 'instruments' to regulate self-regulation, including the use of code registration. However, they do not expressly raise or consider the normative issue of legitimacy in industry rule-making or the procedural or substantive criteria for registration the state should adopt. They also do not assess in any great depth the implications of the instruments they identify: see Schulz and Held, above n 1, 60–81. Some preliminary work identifying alternative mechanisms of accountability for regulatory rules developed by industry and adopted in the US has also been done: see Jody Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543, 592–664.

A Internal administrative law

The first mechanism is the adoption of elements of the 'internal administrative law',[114] which adopts a 'proceduralist' approach to rule-making and has obvious parallels to what Robert Baldwin has called the 'due process claim' in the context of administrative agency rule-making.[115] Part 6 of the Act stipulates certain consultative requirements must be satisfied before a code can be registered. For example, bodies or associations representing sections of industry must publish codes in draft, they must also give industry participants and members of the general public not less than 30 days to submit comments on draft codes and they must demonstrate due consideration of their submissions. Industry bodies or associations also have to consult with each of the TIO, the Australian Competition and Consumer Commission and the Privacy Commissioner (if a code relates to privacy). Moreover, the legislation requires industry sectors to consult at least one body or association representing the interests of consumers about the development of an industry code before it can be registered.[116] While ensuring some degree of fairness in the rule-making process, these various consultation requirements and the ability of the independent telecommunications agency to enforce them also demonstrate an effort by the state to promote industry accountability via the creation and promotion of 'relationships of interdependence'.[117]

Part 6 of the Act does not impose an obligation that rules must be developed by consensus, which is a central aspect of the concept of 'thick proceduralisation' as coined by Julia Black[118] and internal administrative law. However, the Labor government did toy with the idea. In the December 1995 draft of the legislation, if a

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114 The internal administrative law, which is based on processes which have been used at the transnational level to develop technical standards, has five aspects: (1) development of standards by a committee representative of interested parties; (2) a committee's use of consensus in the preparation of draft standards; (3) an opportunity for the public to comment on draft standards and an obligation on the committee to consider any comments received; (4) a formal vote by committee members to adopt standards once the period for public comment has closed and comments (if any) are considered and addressed; and (5) a duty to keep standards under review from time to time: see Schepel, above n 13.

115 Robert Baldwin, *Rules and Government* (1995) 44.

116 Although this provision certainly acknowledges some role for consumers in the rule-making process, it does not precisely define what that role should be. During committee debate in the Senate, concerns were raised that consultation with only one consumer organisation would occur with the result that not all consumer issues would be adequately identified. Imposing an obligation to consult more widely was rejected to keep the rule-making scheme workable. However, government acknowledged (albeit implicitly) that interpretation of the consultation requirement would require good faith on the part of industry if the spirit of the amendment was to be followed: see Commonwealth, *Parliamentary Debates*, Senate, 20 March 1997, 1952–4 (Senators Margetts, Alston and Schacht).

117 Scott, 'Accountability in the Regulatory State', above n 12, 50. See also Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 329. Jody Freeman uses the term 'negotiated relationships' but the concept is the same. See Freeman, 'The Private Role in Public Governance', above n 113, 571–4.

118 Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597, 607. See also Colin Scott, 'The Proceduralization of Telecommunications Law' (1998) 22 *Telecommunications Policy* 243, 243; Robert Baldwin, 'Legislation and Rule-Making' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 727, 741.

section of industry wanted to register a code, it had to be able to demonstrate to Austel[119] that industry had agreed to the code by 'general consensus'.[120] The requirement of consensus was later dropped but the expectation that code rules would be developed by 'industry consensus' significantly influenced the internal rule-making structure of the Australian Communications Industry Forum (ACIF), its successor the Communications Alliance[121] and the Internet Industry Association (the only other industry association or body in the telecommunications sector to have a code registered under Part 6). The government clearly anticipated that industry would use consensus to formulate code rules, and the possibility that consensus may not be achievable in all instances further supported the government's decision early on to grant Austel power to impose standards if codes could not be developed.

The elements of proceduralism and horizontal accountability incorporated into Part 6 of the Act were not, however, novel. They had been important components in the de facto collective rule-making structure which had emerged to address the chaos of the CoT affair in the absence of direct agency enforcement or legislative response. Moreover, it was the participation of various parties in redrafting Telecom's customer complaints procedures and on Austel's PAC that set expectations that were eventually reflected in the rule-making parameters in Part 6 of the Act.[122] When revising its complaint handling procedures, Telecom voluntarily sought the assistance of a large, international accounting firm to remedy its failings and acted on its recommendations. The TIO and Austel suggested improvements to Telecom's procedures and Telecom amended them to their satisfaction. Similarly, the review of Telecom's privacy monitoring guidelines by the TIO, the Privacy Commissioner and Austel demonstrated that extensive consultation could improve the quality of Telecom's rules. Telecom's decision to seek voluntarily input from consumer groups gave its rule-making exercise greater legitimacy. The work of the PAC, although established under Austel's auspices, drew heavily on the operating principles of the TPC which had emphasised consultation and discussion among all interested parties. Each of the three reports[123]

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119 The term 'Austel' as used in the December 1995 draft referred to Austel and the Spectrum Management Authority following their proposed merger. Austel was renamed the ACA in subsequent drafts.

120 The meaning of 'general consensus' was not defined.

121 ACIF merged with the Service Providers Association Inc (SPAN) to form the Communications Alliance in 2006.

122 In fact, in the commentary which accompanied the first draft of what became Part 6 in December 1995, the Department of Communications and the Arts asserted that it had modelled the telecommunications industry code provisions on Part 9 of the *Broadcasting Services Act 1992* (Cth): see Minister for Communications and the Arts, Michael Lee, *Telecommunications Bill 1996, Trade Practices Amendment (Telecommunications) Bill 1996: Exposure Drafts and Commentary* (20 December 1995) 19. It is true that the rule-making models in the *Broadcasting Services Act 1992* (Cth) and the draft Telecommunications Bill share some similarities. However, the rule-making structure eventually adopted in Part 6 of the *Telecommunications Act 1997* (Cth) differs in significant ways from the broadcasting model.

123 Austel Privacy Advisory Committee, *The Protection of Customer Personal Information: Silent Line Customers* (June 1995); Austel Privacy Advisory Committee, *Telemarketing and the Protection of the Privacy of Individuals* (October 1995) and Austel Privacy Advisory Committee, *Calling Number Display: Third Report of the Austel Privacy Advisory Committee* (December 1995).

on privacy-related matters produced by the PAC was the output of 12 representatives drawn from industry, consumer groups and regulators.

B Rule choice

Rule choice was the second mechanism used to validate industry rule-making. In Austel's report on telecommunications privacy, there was tremendous emphasis on codes containing 'detailed guidance'. Use of detail avoided accusations that industry rules were 'mere window dressing or a device to deflect more formal regulations.'[124] In order to avoid such problems, Austel set out a list of eight issues which a code had to address. For example, codes had to include statements demonstrating a commitment to the general high-level principles in guidelines developed and adopted by the TPC, while at the same time had to be tailored to the specific company and/or section of the relevant business sector. Although detailed, the rules had to be written in language easily understood by industry participants and consumers. Codes had to address measures publicising the existence of a code. Moreover, Austel used the requirement of 'detail' to impose more substantive requirements on industry, mandating implementation plans, periodic review of codes and industry enforcement procedures[125] before codes could be registered with the TPC. Implicit in Austel's argument was the belief that detail served as evidence of a good faith attempt to think about the concrete measures an industry participant could take to comply with the principles developed by the oversight body. The emphasis Austel placed on the TPC developing a set of guiding principles through consultation which industry would then apply to the peculiarities of its business is consistent with this view. Part 6 of the Act does not define the elements of a 'code'; however, it is quite clear that codes of practice were intended to be (and are) detailed documents which supplement obligations imposed via legislation and/or licence conditions or which adopt new rules in the absence of legislation and licence conditions. They supplement by setting out in detail how existing legal and regulatory principles are to be implemented by members of industry or by adopting new prescriptive rules.

C Code registration

The third mechanism of legitimacy consisted of the process of vetting industry rules by a third party to evaluate the substance of codes against policy objectives it set[126] and/or to verify compliance with the procedures of the internal administrative law. Although the TPC cannot be said to have been truly independent of the specific industry participants concerned, the TPC was primarily expected to vet and comment on codes in light of any privacy guidelines it had developed. In appropriate cases, it would 'approve' codes, even though the TPC or Austel did not have any legal power to approve codes, to compel carriers to seek code approval or to enforce them. However, given the diverse membership of the TPC, vetting was intended to foster horizontal accountability among a wide variety of participants, including consumer groups, the

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124 Austel, *Telecommunications Privacy*, above n 36, 57.

125 On the importance of enforcement and self-regulation, see Parker, *The Open Corporation*, above n 3, 252–63; Ayres and Braithwaite, above n 10, ch 2; Derek Wilding, 'In the Shadow of the Pyramid: Consumers in Communications Self-Regulation' (2005) 55(2) *Telecommunications Journal of Australia* 37, 45–8.

126 This mechanism serves a similar purpose as Robert Baldwin's 'legislative mandate claim' in the agency context: see Baldwin, *Rules and Government,* above n 115, 43.

state and industry regulators. Moreover, even though the PAC's central function was to develop general privacy principles applicable to the telecommunications sector as a whole, it could offer specific advice on particular codes of conduct and give general advice to industry participants and community organisations on code preparation[127] and thus vetted industry rule-making to some extent.

The process of registration is broadly similar in Part 6 even though the effect of code registration gives industry rules the effect of law and accountability is achieved via traditional hierarchical means. In addition to checking that the relevant industry body or association had complied with specified elements of the internal administrative law, the ACA was obliged to evaluate proposed codes against two different public-interest type tests set by the legislature. If a code dealt with 'matters of substantial relevance to the community', the ACA had to be satisfied that the code provided 'appropriate community safeguards'.[128] If a code dealt with matters which were not of 'substantial relevance', the code had to deal with them in 'an appropriate manner'.[129] The potential breadth of administrative discretion these tests provided was mitigated, however, by a statement of regulatory policy incorporated into Part 6 of the Act, which required the ACA to act in such a way so that measures taken to address 'public interest considerations' did not subject industry participants to 'undue financial and administrative burdens'.[130] The types of non-exhaustive factors which the ACA had to consider when making this assessment included the number of customers who stood to gain from a code or standard,[131] if these customers were residential or small business users,[132] the 'legitimate business interests' of industry[133] and the 'public interest' which required consideration of the 'efficient, equitable and ecologically sustainable supply of carriage services, goods for use in connection with carriage services, and services for use in connection with carriage services'.[134] In addition, the ACA's evaluation of relevant factors had to be consistent with the 'legitimate expectations of the Australian community.'[135]

D Competitive self-regulation

If the CoT affair and the evolution of Part 6 of the Act reveal anything about when industry-made rules acquire legitimacy or when people view industry rule-making as legitimate, the regulatory discourse also indicates that competitive self-regulation is unlikely to satisfy underlying procedural and substantive concerns embodied in the notion of legitimacy. Anthony Ogus has argued that 'competitive self-regulation' is one way in which industry could be forced to develop standards which meet consumer concerns or broader public interest concerns.[136] In a competitive self-regulatory model, multiple self-regulatory agencies are allowed to compete with each other on the basis of the standards they adopt and how those standards are made. Industry participants

127 See above n 40.
128 *Telecommunications Act 1997* (Cth) s 117(1)(d)(i).
129 *Telecommunications Act 1997* (Cth) s 117(1)(d)(ii).
130 *Telecommunications Act 1997* (Cth) s 112(2).
131 *Telecommunications Act 1997* (Cth) s 112(3)(a).
132 *Telecommunications Act 1997* (Cth) s 112(3)(b).
133 *Telecommunications Act 1997* (Cth) s 112(3)(c).
134 *Telecommunications Act 1997* (Cth) s 112(3)(d)(i)-(iii).
135 *Telecommunications Act 1997* (Cth) s 112(3).
136 Ogus, 'Rethinking Self-Regulation', above n 1, 102–7.

and consumers with or without assistance can then select the standards appropriate for their requirements. Part 6 of the Act certainly does not create any legislative barriers to the formation of competing bodies or associations representing particular sectors. It does not stipulate which bodies or associations representing sectors of the telecommunications industry may develop codes and the Act does not give any particular body or association a monopoly to develop codes. However, there is little evidence in the response to the CoT and the evolution of what became the Part 6 rule-making framework that regulatory competition will satisfy legitimacy concerns. The focus of the debate and the modifications to the draft legislation sought by opponents of Part 6 concentrated on objective procedural and substantive controls, which no degree of market competition may be able to ensure. The absence of discussion may have been because the number of industry participants at the time Part 6 was adopted was small but the overall purpose of the *Telecommunications Act 1997* (Cth) was to introduce greater sector competition at the network and retail levels which had the likelihood of increasing the possibility of competing self-regulatory agencies. Whatever the precise reason, the lack of debate does suggest that there has to be a firmer legitimacy framework at the outset for any self-regulatory competition in rule-making to flourish. Market competition may reinforce legitimacy mechanisms for rule-making but more is needed before 'the public accepts [industry-generated rules] without having to be coerced.'[137]

IV THE TROUBLES AHEAD

While at first blush the three possible mechanisms identified above may appear to solve the problem of legitimacy, the limited empirical data about the operation of Part 6 gathered to date raise a number of concerns for industry and consumers, which have broader ramifications for the design of self-regulatory frameworks in particular and meta-regulation more generally. The first and the most significant challenge, which also raises issues for transnational governance, is ensuring the horizontal mechanisms of accountability that Part 6 seeks to stimulate are meaningful in practice. The role of consumer groups within the consensus rule-making framework of industry, the meaning of 'adequate' representation of those groups and the effect (if any) their contributions should have on the content of industry rules have been particular areas of controversy.[138] Not all industry associations or bodies which have registered codes with ACMA permit consumers to participate in industry working committees which prepare codes but, where they do, significant power imbalances in negotiating power between industry and consumer groups have arisen due to structural weaknesses in operating procedures[139] and a lack of resources.[140] Adequate funding of consumer groups is an area of great importance, even more so given the Communications

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137 Freeman, 'Private Parties, Public Functions and the New Administrative Law', above n 108, 335.

138 See, eg, Wilding, above n 125; MacNeill, above n 109, 260–1.

139 Wilding, above n 125, 43. The Communications Alliance has since taken measures to address these concerns. For example, the Communications Alliance now requires equal representation of consumer and industry groups on working committees when 'consumer' codes are being prepared. The rule, however, does not apply when 'technical' or 'operational' codes are drafted.

140 Ibid 52.

Alliance's[141] push to 'professionalise' consumer participation within its organisation. It is also an issue which has resource implications for government and industry to whom government has turned[142] and will continue to turn for financial assistance.[143] Less attention has been paid to the interaction of the general public with self-regulatory rule-making bodies, but it should be noted that, on the whole, few responses are received from the general public, for example, when the Communications Alliance calls for comments on draft codes. Difficulties stimulating public participation are not new for independent administrative agencies.[144] However, satisfactory public engagement acquires greater significance in the self-regulatory context, where horizontal accountability is a mechanism of legitimacy.

Moreover, although representation is seen by many as a 'consumer issue', the absence of participation by and the under-representation of smaller carriers and service providers in the working committees of the Communications Alliance remains a central concern for the industry body and the legitimacy of the rules it produces. Consensus rule-making is resource intensive, requiring time and money which smaller players cannot afford and expertise which they may not have. Coupled with limited consumer influence, lack of industry participation creates the risk that industry rule-making becomes what has been described as a 'dialogue of technical elites'.[145] Some have argued that the dialogue has already eventuated. If so, it is an ironic outcome of the Hilmer reforms, given one of their principal aims was to minimise the possibility of capture of regulatory policy by special interest groups.[146] Bronwen Morgan has argued that the adoption of Hilmer's 'public interest' test has led to an 'economisation of politics',[147] such that legislative policy decisions are now made solely on the basis of notions of economic productivity, with the effect that broader social values, in particular, society's redistributive goals, are overridden by arguments of economic

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141 The Alliance is viewed as the 'peak' self-regulatory body in the Australian telecommunications sector.

142 Following the adoption of the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Act 2005* (Cth) and the *Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Act 2005* (Cth), self-regulatory bodies, such as the Communications Alliance, may apply to ACMA for reimbursement of certain costs associated with the development of consumer codes, including associated costs of permitting consumer representatives to participate in code preparation. Funding for the scheme is provided by an additional levy on carrier licensees.

143 As of the time of writing, work is underway to establish an Australian Communications Consumer Action Network (ACCAN) to be funded by the Commonwealth government. However, it remains unclear what (if any) effect the formation of ACCAN will have on consumer participation in industry self-regulation.

144 See, eg, Mariano-Florentino Cuéllar, 'Rethinking Regulatory Democracy' (2005) 57 *Administrative Law Review* 411, 424.

145 Paddy Costanzo, Manager Policy, Optus Communications, 'How is the Regulatory Jigsaw Fitting Together?' (Paper presented at the 4th annual IIR Conference on Telecommunications In an Era of Open Competition, Sydney, 31 July 1997) 6.

146 Bronwen Morgan, 'Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia' (1999) 1 *Public Management: An International Journal of Research and Theory* 49, 54.

147 Bronwen Morgan, 'The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality' (2003) 12 *Social & Legal Studies* 489, 509–16. See also Morgan, *Social Citizenship in the Shadow of Competition*, above n 49.

rationality. However, Hilmer may also have resulted in a 'double whammy' of exclusion with the private interests of Telstra, Optus and Vodafone dominating sector regulatory debate. Perhaps even more fundamentally, such a 'dialogue of technical elites' undermines one of the rationales cited by government and others for self-regulation: if industry writes its own rules, then participants will 'buy into' the rule to a much greater degree and hence be more compliant with rules they adopt.[148]

Linked closely to the issue of consumer participation and the influence consumer views should have on rule content is the vetting of codes by the industry regulator to preserve the public interest. Contrary to what Kate MacNeill has argued,[149] the ACA had (as has ACMA) significant power to force industry to revise the substantive content of industry-generated rules if needed to address 'community benefit' under the Act, in addition to powers to police procedural aspects of industry rule-making. However, with some exceptions,[150] there has been a general reluctance by both agencies to exercise these powers, particularly with respect to content, even though consumer advocates have repeatedly highlighted substantial weaknesses as codes were being prepared.[151] Concerns about regulatory capture are not new but academic discussion has focused on identifying and mitigating its effects in the context of regulatory enforcement[152] rather than rule-making. The precise reasons for agency hesitation need to be explored further and, in particular, if any structural aspects of Part 6 of the Act or self-regulation more generally facilitate agency inaction. Whatever the cause, it cannot be assumed that involvement in industry-driven code development by the new horizontal accountants, especially under-resourced consumer advocates, will be able to sufficiently guard the 'public interest'. Rather, the difficulties faced suggest that the tripartism model proposed by Ayres and Braithwaite needs to be adapted. For example, public interest groups arguably need a right to propose[153] and register codes in their own right, especially codes involving consumer protection-type matters, to overcome agency inertia. Such a proposal may also create further incentives for industry to regulate, especially if, as argued above, threats of state intervention may be of limited value.

Greater thought also needs to be given to the emphasis on detailed codes if the hazards of legal formalism[154] are to be avoided, especially in Part 6 type situations when rule-making authority has in all but name been delegated to industry. Julia Black has argued, in an agency context, that some flexibility in rule type is important because rule type can influence the ability of a regulator to enforce and the willingness of companies to comply with regulation.[155] For example, prescriptive rules may facilitate enforcement but they can also lead to lower standards and industry unwillingness to

148 Ayres and Braithwaite, above n 10, 113; Wilding, above n 125, 50.
149 MacNeill, above n 109, 253, 260.
150 In February 1999, the ACA blocked the registration of ACIF's Customer and Network Fault Management Code on substantive grounds: see ACIF, *Annual Report 1999*, 47.
151 Wilding, above n 125, 43.
152 Ayres and Braithwaite, above n 10, ch 3.
153 The Communications Alliance permits consumers to propose new codes but they cannot initiate work.
154 Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *The Modern Law Review* 848, 850–51.
155 Julia Black, '"Which Arrow?": Rule Type and Regulatory Policy' (1995) *Public Law* 94, 100, 104.

accept them.[156] Historically, the requirement of detail in the Part 6 rule-making framework can be explained but does such detail continue to be needed when the registration process makes codes legally enforceable? The inability of industry to be able to select among different types of legally enforceable rules may explain some of the difficulties ACIF experienced (and the Communications Alliance continues to experience) when developing codes of practice. First, many of ACIF's codes have been criticised by some industry participants and others as being far too detailed, often contextualising existing law in the telecommunications sector[157] and adopting policies and procedures which smaller players did not have the resources to adopt or which did not reflect the day-to-day operations of those businesses. Secondly, the emphasis on detailed codes has arguably kept the number of industry participants becoming code signatories[158] low and has contributed to drawn-out negotiations by working committees responsible for developing rules by consensus. The Communications Alliance has responded by placing increasing emphasis on more purposive rules, such as guiding principles. Yet such a shift has been seen by consumer groups as evidence of industry's efforts to circumvent enforceable codes of practice.[159] Thirdly, the emphasis on detail appears to have important consequences for the regulator in terms of policy formation and enforcement. A study of one of the Communication Alliance's codes of practice has queried whether its provisions force ACMA to become bogged down in regulatory minutiae, such as envelopes and font sizes, with less time for 'steering'.[160] Similarly, focusing on detailed codes drafted on a case-by-case basis often results in losing sight of the need to find mechanisms which force industry participants to engage in what Christine Parker has described as 'meta-evaluation',[161] a process whereby individual telecommunications companies internally assess and reassess their compliance with whatever rules legislatures, regulators and industry adopt. A more supple self-regulatory rule-making framework which allowed for greater trade-offs between flexibility and certainty in the types of legally enforceable rules industry could adopt may not avoid some of these problems. However, the experiences of ACIF and the Communications Alliance indicate, at the very least, that policy makers should be mindful of the difficulties legal formalism can introduce to models of self-regulatory rule-making.

V CONCLUSION

The study of the adoption of Part 6 of the *Telecommunications Act 1997* (Cth) again highlights a number of significant and remaining difficulties for the decentred state and meta-regulation. The first challenge is to find a reliable indicator of when self-regulation is likely to occur. The size of the task for the decentred state is great if, as

156 Ibid 114.
157 MacNeill, above n 109, 258, 265.
158 A code signatory is an industry participant who has acknowledged to the Communications Alliance that it complies fully with the provisions of a code and has agreed to participate in the administration and compliance scheme of the Alliance. Participation is agreed on a code-by-code basis. However, as the Alliance and ACMA repeatedly stress, a small number of code signatories does not mean that industry is not compliant with the terms of codes.
159 Wilding, above n 125, 50.
160 Karen Lee, 'Public Engagement and the Installation of Wireless Facilities Exempt from Local Planning Requirements' (2007) 13 *Local Government Law Journal* 131, 158 (fn 151).
161 Parker, *The Open Corporation*, above n 3, 277–88.

has been argued, the validity of public and private interest theories of regulation is questionable and, as Hancher and Moran have argued in the broader context of economic regulation by the state,[162] the adoption of self-regulation is contingent upon the confluence of so many variables. The case study does, however, confirm the findings of Hall, Scott and Hood in their study of the UK's Office of Telecommunications (Oftel) in the mid-1990s[163] in which they concluded that Oftel encouraged alternative rule-making models, such as codes of practice, because of a 'mixture of ingrained culture preferences and lack of formal authority'.[164] Collectively, they indicate that government may need to reassess its role, at least in the telecommunications sector, as threatener and adopt the role of facilitator, concentrating its efforts on establishing the underlying conditions, cultural or otherwise, which reward and motivate industry to self-regulate. The second major hurdle for the decentred state is finding ways to legitimate the rules industry produces. Although the response to the CoT debacle and the evolution of Part 6 of the Act provide examples of some techniques which the state can use when industry rule-making occurs under the broad auspices of an independent regulatory agency and in more formal settings where the state delegates legislative authority to industry, these mechanisms appear to raise more difficulties than answers. Although Harm Schepel paints a rosy picture of the internal administrative law as a solution to the legitimacy problem, more than a façade of horizontal accountability is needed. Ensuring self-regulation does deliver public interest objectives is equally critical. However, there is also a need to avoid the pitfalls of legal formalism which led the state down the path of self-regulation in the first place.

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162 See generally Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Baldwin, Scott and Hood, above n 90, 148.

163 Clare Hall, Colin Scott and Christopher Hood, *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (2000).

164 Ibid 204.