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Paradoxes of Independence and Accountability in Commonwealth Regulatory Governance

Colin Scott

1. Introduction

It has often been said that the welfare or provider-state has been substantially displaced by ‘the regulatory state’.¹ This claim refers to a complex set of changes in public management involving: the separation of operational from regulatory activities in some policy areas, sometimes linked to privatization of the operational activities; a trend towards separating purchasers and providers of public services through policies of contracting out and market testing; a trend towards separation of operational from policy tasks within government departments, notably under the Commonwealth Services Delivery Agency Act 1997. Each of these policies shifts the emphasis of control, to a greater or lesser degree, from traditional bureaucratic mechanisms towards mechanisms of regulation.

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A variety of definitions of regulation are in usage in the legal and socio-legal literature. In this paper I adopt a narrow definition of arms-length control by reference to rules. Thus defined the elements of regulatory processes are rule-making, monitoring and enforcement. Regulation is a perplexing topic from an administrative law perspective. First, it frequently involves the establishment of statutory bodies falling outside traditional lines of accountability. Second it is common to find delegation of wide discretion over monitoring and enforcement and sometimes over policy. Third agencies are frequently oriented to operational objectives in which administrative law values play but a small part. Fourth there is delegation of public power to private organisations charged with making rules for, or monitoring and enforcing, self-regulatory regimes. I argue here that regulation is just as problematic, though in different ways, when some or all of the key functions are retained within ministerial departments.

This paper takes as its theme the independence and accountability of commonwealth regulators. The challenges set by new regulatory structures and practices require us to re-evaluate how the concepts of independence and accountability might be made more coherent and useful. These core values relevant to the legitimacy of regulatory activities are in tension with one another. As traditionally conceived a central question of administrative law would be how to strike a balance between the independence necessary to be a legitimate and effective decision maker, as against being sufficiently accountable to command confidence. Within the political economy literature this same tension is expressed in terms of providing sufficient autonomy in regulators that the regimes they administer show credible commitment. This persuades regulatees of the stability and predictability of the regime, whilst inhibiting opportunities for ‘bureaucratic drift’ away

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2 Terence Daintith, Regulation (Chapter 10 of Volume 17 International Encyclopaedia of Compararive Law) (Mohr Siebeck, Tübingen, 1997); Julia Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' [2001] Current Legal Problems 103
from the legislative mandate towards policy ends devised by the agency itself.\(^3\) For administrative lawyers to have purchase on the issue requires recognition that the reformed order deploys non-hierarchical controls which are, on one reading, somewhat antithetical to the core values of public law.\(^4\)

I argue that there are two paradoxes central to the analysis of the contemporary Australian regulatory state. First we start with the observation that the regulatory agencies which we casually think of as independent are in fact interdependent because of the dense web of relationships both of formal and day-to-day accountability to a wide variety of public and private actors. By contrast, where regulatory functions are retained wholly within ministerial departments a lack of transparency and focus on the particular regulatory sub-units renders the department more independent as a regulator. This is the independence paradox. Secondly, we observe the considerable anxiety about the displacement of traditional accountability mechanisms associated with privatization, contracting out, and loosening of traditional controls over statutory authorities and ministerial departments associated with new public management (NPM) reforms. But this general loosening of control is met by an opposite, and perhaps equal, movement in the opposite direction towards the development of renewed and new techniques and institutions of control. This is the accountability paradox.

2. Regulation or Regulatory Regimes

2.1 The US Model

The institutional arrangements for regulation at federal level in the United States have been extremely influential in shaping perspectives in other common law countries, and even in the European Union. Those arrangements typically involve the delegation to independent regulatory agencies of powers to make rules within the Code of Federal

Regulations, to monitor the conduct of regulatees, and to enforce the rules through application of sanctions by administrative law judges employed within the agency, albeit with a degree of insulation. It is no wonder that such agencies are sometimes referred to with the memorable phrase ‘governments in miniature’.\(^5\) It has also been claimed that agencies are a ‘fourth branch of government’.\(^6\) These extensive governmental powers are typically exercised over private actors, businesses and the like.

2.2 Ministerial Departments as Regulators

Within Westminster-style parliamentary democracies regulatory regimes are seldom wholly identified with single agencies.\(^7\) Indeed Australia has a long tradition of regulatory functions being carried out by ministerial departments both at state and commonwealth level.\(^8\) Even with a shift towards a more regulatory style of governance, noted above, many regulatory functions are wholly retained within ministerial


\(^7\) I am aware that the claim that Australia is a Westminster-style parliamentary democracy is a controversial one Marian Simms, ‘Models of Political Accountability and Concepts of Australian Government’ (1999) 58 *Australian Journal of Public Administration* 34, 35. Clearly there are many features of the Australian legal and political scene which render it markedly distinct from other Westminster systems – federalism, the role of the Senate, etc. I am grateful to Roger Wettenhall for alerting me to the use of the term ‘Washminster’ to describe this hybrid governmental structure.

\(^8\) Roger Wettenhall and Peter Bayne, ‘Administrative Aspects of Regulation’ in Tomasic (ed.) *Business Regulation in Australia* (CCH, Sydney, 1984), 75-80
departments, for example in respect of environment, agriculture and consumer safety.11

A further key deviation from the US model in the Westminster systems is that much regulatory effort is devoted not to the control of private businesses, but to the oversight of public sector actors, whether involved in commercial-type activities such as broadcasting, telecommunications and postal services, or in more traditional governmental activities such as surveillance and the provision of welfare and education services.12 While policies of privatization and liberalization have seen a substantial growth in the number and resources of regulatory institutions of various kinds, there has also been a more hidden process of growth in the oversight of these more traditional public service activities, as processes of audit, inspection and grievance handling have been introduced or developed. While many of these reforms are linked to wider changes in public management, some represent responses to particular instances of ‘wayward governance’, as with the establishment of the creation of Inspector General of Intelligence and Security (IGIS) following a Royal Commission inquiry into a secret, illegal and farcical training exercise by the Australian Secret Intelligence Service (ASIS) in Melbourne.13 IGIS is the only external Commonwealth inspectorate – most functions deemed worthy of inspection such as schools, prisons, food standards and occupational health and safety, being allocated to the states and territories. Following an election commitment the government is currently consulting on the establishment of an Inspector-General of Taxation.14 This new statutory officer will be concerned with systematic analyses of the taxation regime and will act as a form of regulator of the ATO. The systematic reviews at the heart of the new regime are

9 Department of Environment and Heritage under the Environment Protection and Biodiversity Act 1999.
10 Department of Agriculture, Fisheries and Forestry.
11 Treasury.
13 Inspector-General of Intelligence Services Act 1986; Peter Grabosky, Wayward Governance: Illegality and Its Control in the Public Sector (Australian Institute of Criminology, Canberra, 1989) , 129-142
to be initiated either by ministerial requests or at the own-initiative of the Inspector General.

2.3 Regulating the Public Sector

The creation and re-vivification of external agencies such as auditors, inspectors and ombudspeople over the last thirty years should not distract us from the reality that for many public services government departments remain key regulators over the public sector. The super-regulator at the heart of government the Department of Finance and Administration (DOFA).\textsuperscript{15} The centrality of this Department has only been slightly diminished by reforms under the Financial Management Accountability Act 1997 which resulted in greater delegation to agency heads. In practice the regulatory activities of DOFA and other ministerial departments are undertaken through units of government departments. Such departments have no separate legal personality from the minister.\textsuperscript{16} DOFA oversees an elaborate system of accounting rules and routine monitoring structures and in particular the schemes of monthly and annual reporting under the Finance Ministers Orders (FMOs) and more general guidance.\textsuperscript{17} Within departments and agencies the accounting officers effectively act as the agent of DOFA and require authorization from a delegate of the Minister for Finance for access to public moneys.\textsuperscript{18} These controls over the purse strings makes DOFA an unusually potent controllers amongst the regulators of the public sector.\textsuperscript{19} The Commonwealth power to regulate extends over the state and territories in a relationship described as ‘the fiery fiscal

\textsuperscript{17} Financial Management and Accountability Act 1997, section 49; Commonwealth Authorities and Companies Act 1997, sched 1.
\textsuperscript{18} Ross Cranston, \textit{Law, Government and Public Policy} (Oxford University Press, Melbourne, 1987), 111.
\textsuperscript{19} It has been observed that public regulators of the public sector generally suffer from weak enforcement powers and that controlling public actors may often be more difficult than regulation of private business: James Q. Wilson and Patricia Rachal, 'Can Government Regulate Itself?' (1977) \textit{46 Public Interest} 3.
furnace’ – a relationship in which the states have *de iure* independence from the Commonwealth government but *de facto* financial dependence.\textsuperscript{20} The Commonwealth essentially has control over taxation, expenditure and borrowing. The requirements of macro-economic policy coordination have, in anything, further cemented Commonwealth dominance of, and regulatory capacity over, Australia’s public finances.\textsuperscript{21}

Taking the example of the higher education sector, the main controls applying to universities are the responsibility of the Department of Education, Science and Training (DEST). Thus DEST has nested within its policy units an extensive apparatus for monitoring the performance of the Australian university sector. It has strong capacities to enforce regulatory policy through its controls over funding.\textsuperscript{22} The review of higher education initiated by the current minister, Mr Nelson, is canvassing proposals for creating agencies to exercise at least some of these controls.\textsuperscript{23} The Australian governments have recently established a non-statutory inter-governmental body – the Australian Universities Quality Agency – to audit quality in the University sector on a five yearly cycle.\textsuperscript{24} Some consultees make reference to the possibility of creating an external agency to fund and regulate the Australian higher education sector, possibly along the lines of the Higher Education Funding Council for England\textsuperscript{25}. The equivalent Australian organisation, the Commonwealth Tertiary Education Commission, was abolished in 1987. The case for such buffer organizations is that their relative independence from ministers provides better guarantees that at least some autonomy from political processes can be maintained for the higher education sector.

**2.4 Regulation by Statutory Authority**

\begin{thebibliography}{9}
\bibitem{20} Michael Coper, *Encounters with the Australian Constitution* (CCH Australia, Sydney, 1987), chapter 5.
\bibitem{22} Higher Education Funding Act 1988 pt 2.2.
\bibitem{24} Ibid., , 6.
\bibitem{25} See also Ibid., , 5.
\end{thebibliography}
The (rather limited) inclination to assign tasks to statutory and non-statutory authorities somewhat external to the ministerial departments, whether labeled, tribunals, commissions, boards or authorities, has been cyclical within Australian government. Furthermore parliaments (no doubt encouraged by the executive), brought up on a doctrine of ministerial accountability, have been reluctant to grant wholesale delegation to statutory authorities, and have typically reserved key powers to ministers. Following the Chadwickian reforms of the 1830s in the United Kingdom Victoria and New South Wales maintained external Inspectors General to operate and regulate the prison system. The late nineteenth century was another period of extensive deployment of statutory authorities. But their use was much restricted for regulatory functions in the middle years of the twentieth century. They returned to vogue prior to the beginning of the NPM revolution, with the creation of such bodies as the Australian Broadcasting Control Board (twice renamed as the Australian Broadcasting Tribunal and now the Australian Broadcasting Authority), and the Trade Practices Commission (subsequently renamed the Australian Competition and Consumer Commission) and the introduction of social regulators in the 1970s subsequently subsumed within the Human Rights and Equal Opportunities Commission (1976). Policies of privatization and re-regulation yielded further new authorities such as the Australian Securities Commission (1991) (subsequently renamed the Australian Securities and Investments Commission) and Austel (1989-1997) and the Australian Communications Authority (1997-). The creation of statutory authorities to carry out regulatory functions is not simply attributable to fashion. In the research he carried out for the Coombs Royal Commission Wettenhall pointed to a wide range of reasons for the use of this form of government. These reasons boil down to a desire to separate the administration of executive or adjudicatory or research tasks from political structures, thus facilitating independence and expertise, or to enhance transparency of or participation in the carrying out of those tasks.

26 Roger Wettenhall and Peter Bayne, 'Administrative Aspects of Regulation' in Tomasic (ed.) Business Regulation in Australia (CCH, Sydney, 1984), 81.
Where external agencies are created, standard-setting, monitoring and enforcement capacities are commonly split, the first often retained by elected politicians and the last often reserved to the courts (at least for the application of formal sanctions). Increasingly standard setting and adjudication functions are carried out by private bodies. Accordingly it may be helpful to think in terms of regulatory regimes rather than regulatory agencies. The dispersed nature of regulatory capacity in contemporary governance arrangements in Australia creates interesting and challenging problems of independence and accountability that have the potential to significantly affect both the efficiency and legitimacy of regulatory regimes.

Regulation is challenging for administrative law because of a clear bifurcation in the evaluatory criteria of regimes. Regulatory regimes fall to be evaluated in terms both of how well the regulatory job is done (efficiency and effectiveness) and of the legitimacy of the governance activities. The former consideration is essentially concerned with outputs and the latter with inputs and processes, the more traditional province of administrative law. The requirements of efficiency and legitimacy are frequently in tension within regulatory regimes. Indeed the allocation of tasks to regulatory agencies often represents a prioritization of efficiency over legitimacy considerations, or at least a preference of output measures of legitimacy over process measures. Wettenhall concluded that within the Australian system of government ministerial departments should be the norm and ‘all desires to create statutory authorities should be justified as exceptional cases’. In this view the Royal Commission itself substantially concurred, recommending that ‘greater flexibility be given to departmental operations and structural arrangements should make it possible to reduce the number of independently operating statutory bodies by using instead the established machinery available to departments’.

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The commissioners were particularly concerned that the independence of such authorities removed them from traditional parliamentary accountability structures. This viewpoint is premised upon a faith in the capacity of traditional accountability mechanisms to deliver good government. In the absence of such an assumption the relative virtues of statutory authorities and ministerial departments as regulators might fall to be assessed differently.

3. Independence

3.1 Independence and Accountability

The concepts of independence and accountability are widely deployed as desiderata of administrative decision making. The latter concept has been better defined in the literature, often used to refer to a formal duty to provide an *ex post* explanation of what has been done and why. Independence is an altogether woollier concept. No person or organization is wholly independent. Independence begs the questions: from whom?; and to what extent? It is perhaps more fruitful to ask why accountability and independence are valued. I suggest that accountability is valued and valuable if it has the effect of creating checks or controls on the accountable organization. For this reason I think that a sharp distinction between *ex ante* control (such as the ministerial power to give guidance or directions) and *ex post* accountability (the duty to present an annual report or to appear before Senate committee) is unhelpful. We want administrative decision makers to act reasonably and responsibly and we recognise a variety of mechanisms of control and accountability which increase the likelihood that this will happen. If accountability is defined in this way then it is clearly in tension with the concept of independence to the extent that we are referring to independence from actors who, within the system within which the decision maker operates, form part of the structure of control and accountability.

31 Ibid. 84-85.
3.2 Defining Independence

Independence has at least two dimensions. It refers both to independence from those who are regulated and independence from other arms of government. Few commonwealth regulators have full independence within their regime. A US-inspired literature has focused on independence from regulatees and the risks of capture. Following this, in its Reference Paper on Telecommunications Services, which forms the basis for trade in telecommunications, the WTO specifies

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.\(^\text{32}\)

The emphasis of this requirement lies in the separation of operations from regulation, though it might be inferred that regulation must also be separated from government departments responsible for either promotion of the national telecommunications industry generally or which have an interest in the financial well-being of a publicly owned telecommunications operator.

In political systems like that of Australia the other issue, independence from other branches of government, is arguably more interesting and more important.\(^\text{33}\) A significant proportion of regulatory agencies within Grabosky and Braithwaite’s 1986 case studies of Australian regulation at federal and state/territory level reported political interference in their decision making, for example on prosecutions.\(^\text{34}\) The inference of their argument was that such intervention was undesirable and likely to be against the interests of the community as represented by the regulatory agency. However, ministerial powers in

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\(^{33}\) Though the paradox of independence discussed in this paper has also been identified in the United States case: Cass R. Sunstein, 'Paradoxes of the Regulatory State' (1990) 57 University of Chicago Law Review 407.

\(^{34}\) Peter Grabosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies (Oxford University Press, Melbourne, 1986), 197.
agencies’ fields of operation, formal and informal, can also be conceived of as mechanisms of ‘capture reassurance’, creating a counter-balance to the possibility that regulators may evolve in such a way as to privilege sections of the regulated industry.\textsuperscript{35} Given the conflicting interests that ministers are likely to have in any sector the efficiency and desirability of such mechanisms is far from clear-cut.

Taking the example of telecommunications, government ministers have a range of conflicting duties in respect of the largest player Telstra. The Minister for Communications has responsibility for the promotion of the Australian telecommunications industry, an objective which some would see served by promoting Telstra as a national champion, strong enough to compete in emerging overseas markets. The Treasurer has responsibility for maximizing government revenues, a policy which might best be served by protecting the value of the government’s majority shareholding in Telstra through stifling the uncertainties of competition in the Australian telecommunications market. He also has responsibility for minimizing governmental expenditures and this is reflected in constant downward pressures on the budgets of government departments and agencies such as the ACCC and the ACA. Even the relevant regulatory agencies have somewhat competing rationalities, the ACCC being concerned largely with the generation of a competitive market,\textsuperscript{36} and the ACA being centrally concerned both with regulating and assisting the telecommunications industry.\textsuperscript{37} The ACA has a duty to consult the ACCC prior taking actions that would affect consumer protection or competition.\textsuperscript{38} A number of the cross-subsidies which have, historically supported the policies of the ACA are inimical to the policies of the ACCC.

\subsection*{3.3 Appointments}

\textsuperscript{36} Telecommunications Act 1997 s(3(1), Trade Practices Act 1974 pts XIB XIC .
\textsuperscript{37} Australian Communications Authority Act 1997 s. 6(a)(b).
\textsuperscript{38} s12A.
In common with agency appointments in most Westminster jurisdictions the power lies with the relevant minister.\textsuperscript{39} Though there is a convention that such appointments will not be partisan, nevertheless ministers are clearly empowered to appoint persons whom they judge sympathetic to the government’s line. A key exception to this is the appointment of the Commonwealth Auditor General. The Minister must have the agreement of the Joint Committee of Public Accounts and Audit before recommending the appointment to the Governor General.\textsuperscript{40}

Incoming governments inherit their agency heads in power at the time of the election. Most agency heads, but not secretaries of government departments, are protected from removal other than for good cause. Amongst the commonwealth regulators the greatest degree of independence, arguably, is accorded to regulators of the public sector, notably the Ombudsman and the Auditor General. The Commonwealth Ombudsman’s office has special protections that mean that its incumbent can only be removed within the fixed term of appointment on the motion of both houses.\textsuperscript{41} This form of protection is, of course, familiar for judges and reflects a perception that the Ombudsman should show the same impartiality as a judge when dealing with grievances between citizen and state. Some statutes specify the fixed term to be given to appointees, others give ministers the discretion to set the term of appointment. In contrast with the discretion over the term of appointment of the Ombudsman, the Auditor General is to be appointed for non-renewable term of ten years.\textsuperscript{42} With regulators of business appointees typically have less protection. For example, the minister is empowered to have any or all members of the Australian Communications Authority removed from office where he judges performance is unsatisfactory.\textsuperscript{43}

\textbf{3.4 Day-to-Day Independence}

\textsuperscript{39} Under the convention in Australia that statutory powers of the Governor General are exercised on the advice of the government of the day: Christopher Enright, \textit{Federal Administrative Law} (Federation Press, Sydney, 2001), 23.
\textsuperscript{40} Auditor General Act 1997 sched. 1.
\textsuperscript{41} Ombudsman Act 1976 s. 28.
\textsuperscript{42} Auditor General Act 1997, sched 1.
The day-to-day independence of regulators is affected by the existence of restrictions on what regulators may do, and on the power of ministers to intervene. In contrast with regimes in some other systems, such as that of the UK, the Commonwealth Ombudsman can investigate matters on his or her own initiative,\textsuperscript{44} and is thus not dependent upon the receipt of complaints, though in practice most investigations do arise from complaints. In the case of commonwealth regulators of business ministers typically possess powers to give guidance or directions.\textsuperscript{45} Legislation may require directions to be in writing and/or to be made public, either through being tabled in Parliament or through being referred to in the body’s annual report. The Coombs Royal Commission found that the practice of reserving to ministers power to give directions to statutory authorities did in general work ‘reasonably well.’\textsuperscript{46} The High Court has indicated that such powers should be explicitly provided for in legislation.\textsuperscript{47} The Royal Commission recommended the adoption of a standard statutory formula for all such directions to be in writing, to be tabled in Parliament and noted in annual reports.\textsuperscript{48} Such powers are less commonly found in the case of regulators of the public sector. The Auditor General has special measures of independence.\textsuperscript{49}

\textsuperscript{43}Australian Communications Authority Act 1997, s.37.
\textsuperscript{44}Ombudsman Act 1976 s5(1)(b).
\textsuperscript{45}For example, Australian Securities and Investment Commission Act 2001, s.12; Australian Communications Authority Act 1997 s.12; Broadcasting Services Act 1992 ss 19(3), 25(3), 36(2), 38B(11), 84, 162, 168.
\textsuperscript{47}\textit{R v Anderson ex p. IPEC-AIR Pty Ltd} (1965) 113 CLR 177. In that case the head of a statutory authority treated the opinion it had sought from the minister as tantamount to a direction. In the absence of any statutory power to give directions the decision was for the Director General of the authority alone to make.
\textsuperscript{49}The independence of the Auditor General is specifically addressed in section 8 of the Auditor General Act 1997 which provides:
the Auditor-General is not subject to direction from anyone in relation to:
(a) whether or not a particular audit is to be conducted; or
(b) the way in which a particular audit is to be conducted; or
Statutory independence is defined in legislation setting out the respective powers of different agencies, government departments and courts. Configurations of power often create relationships of interdependence over key issues such as standard-setting (for example where there are mandatory consultative requirements laid on ministers), monitoring (where ministers retain powers to direct agencies as to what they should examine), and enforcement (where agency powers are commonly restricted by ministerial powers of intervention and requirements of litigation to apply formal sanctions). This picture of interdependence is further qualified by consideration of the capacities of regulated businesses that often, though not invariably, have superior information and financial resources to devote to regulation. In sectors where there are a small number of large, regulated businesses, or where there are powerful groups representative of business, it is likely that businesses may seek to shape not only regulatory agendas, but also the interpretation of the regulatory rules themselves.\(^{50}\)

Rule making for regulation takes a number of forms. It was reported that the Commonwealth government ‘introduced 148 policy proposals (regulatory and non-regulatory in nature) via 169 Bills into Parliament in 2000-01’.\(^{51}\) About one third of the policy proposals were judged to come within the requirements to prepare a regulatory impact statement on the grounds that they affected business. The rules do not extend to legal and quasi-legal instruments that affect public sector bodies which are not businesses (but there is talk of seeking to reduce compliance costs of higher education institutions).\(^{52}\) Although there were many more disallowable instruments (1438) than bills during the same period, only about 5 per cent were judged to have regulatory impact within the rules. Thus parliamentary bills, largely within the control of ministers, are a central form of rule making.


A key mechanism by which both departments and agencies address limits to their statutory powers to make rules is through issuing instruments which are not legally binding but which are intended to have normative effect, variously referred to as soft law, grey-letter law and quasi-regulations. Where such rule-making affects businesses it is caught by the Productivity Commission’s *Guide to Regulation*. Because they are less visible instruments of soft law (and also non-disallowable instruments – the small category of sub-legislative instruments which does not have to be placed before the Senate Legislation and Ordinances Committee and which cannot be disallowed by parliament) the Office of Regulatory Review relies on self-reporting to detect these, and suggests there is significant under-reporting. The main (declared) usage of soft law instruments is by the ASIC, and the ACA. In the case of the ACA the reference was to six industry codes made by the Australian Communications Industry Forum (ACIF). The Productivity Commission has identified a range of undeclared instruments promulgated by a number of agencies and departments which it suggests might by quasi-regulation within the terms of the rules.

Independence is also significantly affected by the configuration of enforcement powers within any given regime. Where regulators have the capacity to apply formal sanctions to regulatees, these powers are commonly dependent on the decision of a court. Within a number of regimes there are powers to seek enforceable undertakings from regulatees which have the effect of enhancing the independence of regulators. These undertakings are bargained for and thus dependence on courts for interpretation is displaced by bargaining with regulatees over interpretation. Furthermore there are some instances

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53 2nd ed 1998. The *Guide* is itself a quasi-regulation and an instrument of soft law, but because it does not impose any regulatory burden on business, only on public sector bodies, it is exempted from the requirement for a regulatory impact statement.
55 Ibid., 55.
56 Ibid., 58-61.
where regulators can apply administrative penalties without reference to courts.\textsuperscript{57} This form of enforcement maximizes regulator independence, though they may be challenged through litigation. Many regulators lack formal powers to apply sanctions. This is particularly true of regulators of the public sector. This is not to say such regulators are powerless. The Commonwealth Ombudsman has a hierarchically ordered set of powers to issues reports. The Productivity Commission uses its annual report on Regulation and its Review to praise the virtuous and to name and shame departments and agencies which comply with guidelines on preparing regulatory impact statements (RIS).\textsuperscript{58}

Interdependence is inevitable as between NGOs, businesses, agencies, parliament and executive. As a consequence independence for agencies is likely to be illusory. Any attempt to make special agencies wholly independent (for example the security services) is like to contravene principles of control and accountability appropriate to a liberal democracy. Furthermore, application of limited doctrines of independence to agencies tends to enhance their interdependence, making them less independent than ministerial departments where regulatory functions are retained wholly by the minister.

\section*{4. Accountability}

\subsection*{4.1 Defining Accountability}

Accountability is generally defined as a duty to explain or justify ones actions to some one else. Within both legal and public administration literature accountability has traditionally been considered in terms of the formal requirements of departments and agencies to account to parliament (by means of ministerial questions, annual reports and appearances before committees) and courts and tribunals.\textsuperscript{59} Accordingly these two

\textsuperscript{59} Marian Simms, 'Models of Political Accountability and Concepts of Australian Government' (1999) 58 \textit{Australian Journal of Public Administration} 34, 34; Ian Thynne
traditional forms are sometimes labeled political and legal accountability. The theory underlying these traditional or hierarchical forms is underpinned by a theory of government within liberal democracies: political accountability is direct accountability to elected representatives while legal accountability holds decision makers to the legal manifestations of the will of the elected representatives. This model of ‘overhead democracy’ continues to exercise a powerful grip over the analysis of models of accountability.

Though traditionally conceived in this distinctive fashion, it has been argued that the ‘mechanisms by which that accountability is sought and secured constitute various elements of control which, along with numerous other elements, act to regulate and limit A’s capacity for action.’ A more recent evaluation has stated more directly that if the core processes are those of accountability ‘the core purpose is control’. Within this analysis parliamentary and legal accountability constitute one element of the external and formal control over public actors. Internal and informal mechanisms are rather more hidden. Formal internal controls include the day-to-day management control, whether wholly internal or imposed by external departments such as the Department of Finance and Administration and administrative provision for internal review of agency decision making. Internal informal mechanisms of control and accountability over ministers, departments and agencies have long been recognized within the Australian system of government as senior public servants are subject to considerations of peer esteem, professionalism and, indeed, advancement. External and informal controls are difficult to

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63 Richard Mulgan and John Uhr, 'Accountability and Governance' in Davis and Weller (eds), Are You Being Served? (Allen & Unwin, Crows Nest NSW, 2001), 153.
examine, though we are all aware of pressures from the public, political parties and the media, and the apparent randomness with which they appear to strike on particular issues.

In the case of some external instruments it is difficult to judge whether they are formal or informal. A key example is provided by the Service Charters policy. The policy originates in a Prime Ministerial statement of 1997, entitled ‘More Time for Business’, of such obscurity that it is not indexed on the Commonwealth government’s websites. The policy has generated a great deal of activity, putting the Special Minister of State in Department of Finance and Administration in the position of regulator over the entire public service. In 2001 responsibility for the policy was transferred to the Australian Public Service Commission. The policy has no statutory basis, and thus can be considered rooted in soft law, but extends to all Commonwealth entities, requiring them to draw up service charter documents in compliance with a set of principles relating to identification of the agency, its purposes, its client base and its services, the facilitation of communication, service standards, feedback and complaints procedures, consultation, appropriate format for clients, monitoring and review and accountability. By the middle of 2000 at least 133 Commonwealth charters were in place. The annual report provided a statistical analysis of the extent of compliance with the principles, praised good performers and offered the possibility of prizes for those who entered a competition for service charter awards. It is possible that such charters would provide a useful adjunct to traditional administrative law mechanisms and facilitate access to internal review processes, while enhancing the transparency and accountability of agencies and departments. An interesting feature of the policy is its indiscriminate application across all Commonwealth bodies – thus even those organizations which do not regard themselves as facing the public, and which are substantially immune from citizen-initiated administrative law grievances, come within the rules.

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Even along the external formal axis mechanisms of control and accountability extend well beyond the traditional legal and parliamentary forms. The proliferation and reprogramming of public agencies charged with the oversight of the public sector has made regulatory accountability more complex. In some instances reforms have been designed specifically to grant some degree of operational autonomy to the governmental unit concerned, for reasons related to its functions, regulatory or otherwise.\textsuperscript{67} More generally the new public management (NPM) revolution in government is associated with a loosening of certain controls over public sector bodies for example in respect of pay and conditions and certain aspects of accounting. Thus, the processes by which certain formal mechanisms of accountability have been loosened are no mere by-product of public management reform, but rather at the core of its purposes. There is official recognition within the Commonwealth government that these reforms require ‘the development and strengthening of effective accountability systems within the public service’.\textsuperscript{68}

This accountability paradox creates the possibility of ‘mirror-image’ developments as loosening of one set of controls is matched by reinvigoration of others. NPM reforms have been accompanied by a proliferation of organizations charged with overseeing other parts of the public sector. Thus regulatory actors typically have to account for themselves periodically to public sector auditors, ombudspeople, and the Office of Regulation Review and the Productivity Commission. There are additionally a growing number of public sector regulators targeted at particular fields of activity. The newest proposal amongst these is that for the creation of an Inspector General of Taxation, noted above. These various innovations create pressures of ‘horizontal accountability’.\textsuperscript{69}

\textbf{4.2 Alternatives to Formal Accountability}

\textsuperscript{67} Ian Thynne and John Goldring, \textit{Accountability and Control: Government Officials and the Exercise of Power} (Law Book Company, Sydney, 1987), 7.

\textsuperscript{68} Management Advisory Board and Management Improvement Advisory Committee, \textit{Accountability in the Commonwealth Public Sector}, Australian Government Publishing Service (1993), 3.
A further key aspect of the neo-liberal turn in public management is the attempt to create ‘downwards accountability’ to citizens and consumers operating in markets through giving choices over such matters as which telecommunications services provider and which school they choose for their families. Arguably Australia’s administrative law reforms of the 1970s created considerable potential for stronger accountability of state institutions to individuals, with the intermediation of courts, tribunals and the Ombudsman. It is a peculiarly Australian conception of administrative law which identifies a single package embracing judicial review, administrative appeal tribunals, freedom of information, privacy, the Administrative Review Council and ombudspeople. Relatedly the freedom of information regime has, in practice, been heavily used by individuals dealing with grievances against public agencies. Official secrecy was found by Grabosky and Braithwaite to be a major obstacle to effective accountability of state and territory regulatory agencies in their 1986 case study. Later market reforms can be seen as accentuating the emphasis on accountability to individuals, albeit through different mechanisms. It is a contested issue whether greater market responsiveness can be treated as an enhancement of accountability.

The Australian federal system of government has within its very structure alternatives to formal accountability and hierarchical control. In a number of domains there is an overlapping jurisdiction, as with consumer protection matters, between the commonwealth departments and agencies and those of the states and territories. This

71 Corporations Act 1989 (Cwlth) s4(1); Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in Taggart (ed.) The Province of Administrative Law (Hart, Oxford, 1997) 53.
overlap gives rise both to an element of policy or regulatory competition and, in certain fields also to varying degrees of cooperation. The main forum for co-operation is the Council of Australian Governments, and its subsidiary ministerial councils which address particular domains. There is provision within these arrangements both for mutual recognition, as provided for in the Mutual Recognition Act 1992 and the Arrangement Relating to Trans-Tasman Mutual Recognition (nd), and for elements of harmonization.

Thus cooperation on the Ministerial Council on Consumer Affairs gives rise to a national consumer credit code in the form of state and territory statutory implementation of nationally agreed rules. This process of uniform legislating has the potential to dilute ministerial and parliamentary accountability for law-making as the protocols for governmental and/or parliamentary approval from the participating governments are extremely loose. The COAG principles state:

‘it is the responsibility of Ministers to ensure that they are in a position to appropriately represent their Government at Council meetings. Therefore, to the greatest extent possible, Ministers should obtain full government agreement on matters which may involve regulatory action before they are considered at Ministerial Council level.’

There is no mechanism for checking compliance with this principle.

In the case of corporations law and securities regulation COAG invoked the provisions of the constitution that permit the states and territories to refer legislative power to the Commonwealth in order to create national legislative regime. This new scheme, which resulted in the Corporations Act 2001 and the Australian Securities and Investments

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75 Details of the code can be found at www.creditcode.gov.au.
77 Australian Constituitions, s.51 (xxxvii)) Ian Govey and Hilary Manson, 'Measures to Address Wakim and Hughes: How the Reference Powers Will Work' (2001) 12 Public Law Review 254, 259-261.
Commission Act 2001, was created as a response to successful constitutional challenges
to the use of other instruments of cooperation and coordination. The condemned
techniques were the adoption by the states of template legislation enacted by one of the
jurisdictions and the conferring of power by the states on a regulator established by the
Commonwealth.\(^78\) The various legislatures have additionally adopted legislation to
protect other co-operative arrangements.\(^79\) With higher education the state and territories
agreed in 1974 to refer responsibility for financing, and thus the substantial measure of
control to the Commonwealth.\(^80\)

These cooperative arrangements involve 29 ministerial councils in addition to the
Council of Australian Governments itself, the Treaties Council and the Australian Loan
Council (established in 1929) and extend beyond Australia and may incorporate the
governments of New Zealand (and do so in the case of food safety and minerals and
energy) and Papua New Guinea.\(^81\)

The National Competition Policy provides mechanisms for review both of state and
territory regulatory measures and the decision making of ministerial councils.\(^82\) In this
dimension a key objective of the policy is to facilitate the creation of a single market in
goods and services in Australia. In practice it has put considerable pressure on state and
territory governments not only in the review of new measures, but also in reviewing long
established regimes such as existed for infrastructure monopolies.\(^83\)

\(^78\) Cheryl Saunders, 'A New Direction for Intergovernmental Arrangements' Ibid. 274,
275-6.
\(^80\) Brendan Nelson, *Higher Education at the Crossroads*, Department of Education,

\(^81\) Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial
Councils: A Compendium*, Department of the Prime Minister and Cabinet (1999).

\(^82\) Bronwen Morgan, 'Regulating the Regulators: Meta-Regulation as a Strategy for
\(^83\) Rex Deighton-Smith, 'National Competition Policy: Key Lessons for Policy-Making
Rule-making by ministerial councils is subject to similar scrutiny as that for Commonwealth rulemaking, under a process set out in a COAG soft law instrument. These rules are constructed to assert a narrow interpretation of legitimate grounds for regulatory activity. They assert that the only legitimate basis for regulatory activity is market failure. Accordingly measures targeting unfairness or inequity that are not a product of market failure are illegitimate within this regime.

The Productivity Commission detected 21 instruments that should have complied with the COAG Principles and Guidelines on RIS in 2000-2001 but were not so scrutinised. These instruments include the transnational Food Standards Code for Australia and New Zealand and the extension of the Consumer Credit Code. Whilst the ORR has no enforcement powers, there is nevertheless provision within the for linkage of Commonwealth payments to states and territories with their performance under the Competition Policy. Thus in 2001-2002 the Treasurer decided to withhold $270,000 (of a total for all states and territories of $7333.3M) from Queensland because of what was presented as persistent ‘failure to objectively analyse the cost effectiveness of two-part tariffs in relation to water reform’ by Townsville City Council. These financial powers do not apply to decisions made by the Australia and New Zealand Food Standards Council. When that ministerial council agreed new provision on the labelling of genetically modified foods the Commonwealth Parliamentary Secretary for the Minister

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for Health and Aged Care was reduced to the publication of critical comments on the
costs to business of the measure in a press release.\(^89\)

Competition and community as alternative bases of control are also evident in other areas
of commonwealth jurisdiction. Thus policies of liberalization create competitive
pressures within markets such as telecommunications, both retail and wholesale, creating
new disciplines for incumbent operators. Policies of privatization tend to put service
providers into competition for their finance within more regular financial markets.
Inevitably both these elements of competitive pressure tend to work rather imperfectly
and one might question how effective they are as alternatives to more traditional
controls.\(^90\)

Policies of contracting out create competition for the field, thus applying a new form of
discipline at particular moments. While the invocation of contracts might lead us to think
of the classical model of contract, premised upon equality of bargaining power, public
lawyers have long rejected the classical contract myth.\(^91\) As long ago as 1979 Daintith
referred to ‘Regulation by Contract’ as the ‘New Prerogative’, highlighting the way that
public bodies use their substantial purchasing power to impose regulatory requirements
on private sector contractors.\(^92\) Policies of contracting out might similarly be used by
public purchasers to assert hierarchical control with more tightly specified service
requirements and penalties for breach. However, it is equally likely that, as with business
contracts, the terms and remedies become largely irrelevant to the operation of power
relations.\(^93\) Abuse of public or hierarchical power by public authorities within contractual
settings has presented considerable difficulties to the courts in a number of jurisdictions.

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\(^90\) Colin Scott, 'Privatization, Control and Accountability' in McCahery, Picciotto and
Scott (eds), *Corporate Control and Accountability* (Oxford University Press, Oxford,
1993).
\(^91\) Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in
\(^92\) Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 1979 *Current
Legal Problems* 42.
The decision of the *Hughes Aircraft* is well known for the honesty with which Finn J indicated the difficulties he faced in reviewing a ‘formally “non-governmental”’ action of a statutory corporation (ie entering into a “commercial” contract) and in particular asking whether the arrangement should be treated as a hybrid of public and private law. The Administrative Review Council has recommended overlaying private law principles governing contracted out contracts with external public law controls.

An alternative possibility to the need to curb public abuse of contractual power, latent within the extensive network of defence contracts, is that the private sector provider uses the contract as an instrument of control over the public purchaser, locking government into long term arrangements, effectively dictating the operational possibilities of the defence force. Whilst we might think of this as a possibility its discovery is substantially inhibited by the disciplines of the ‘commercial in confidence’ clause, which is accorded a privileged position within freedom of information legislation. Schedule 2 of the 1982 Act additionally provides exemptions for a wide range of agencies generally or in respect of particular classes of document. Accordingly there are many matters about the nature and operation of these contracts that we are never likely to discover. Section 45 reflects the common law and the Australian Law Reform Commission has recommended that it be retained in current form. The ALRC withdrew its initial proposal that the application of section 45 should be made subject to the public interest test that applies to some other exemptions. The Joint Committee of Public Accounts and Audit is extremely

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94 *Hughes Aircraft System International v Airservices Australia* [1997] 558 FCA
97 Freedom of Information Act 1982 (Cwlth) s.45.
100 para 10.33.
concerned about the exemption for contractors from coverage by the Auditor-General Act 1997 and has recently resolved that descriptions of all contracts must be disclosed by government purchasers in their annual reports together with an explanation if the standard term giving access to the Auditor General (and thus restricting any relationship of confidence) was not incorporated in the contract.\textsuperscript{101} There is additionally a statutory requirement on agencies and departments to reveal such details of contracts as are not confidential to the public.\textsuperscript{102}

In telecommunications the responsibilities of the Minister for Communications and the Australian Communications Authorities are supplemented by important self-regulatory bodies such as the Telecommunications Industry Ombudsman (TIO) and the Australian Communications Industry Forum (ACIF).\textsuperscript{103} These officially sanctioned developments create rivals to the governmental power, diluting the state’s monopoly over authority, while at the same time creating a community of interested public and private organizations. The creation of competition within the regulatory apparatus was taken further in the case of the Victorian Auditor-General. An official report recommended putting out all public sector audits to tender, leaving a core Auditor General officer as a purchaser of audit reports and hiving off its audit capacities to a business enterprise called Audit Victoria. The author of the report claimed to be applying the National Competition Policy.\textsuperscript{104} The move was unpopular and, once implemented through legislation, short-lived and Audit Victoria was abolished and its services reintegrated into the Auditor General’s office in January 2000.\textsuperscript{105} A quite different mechanism for introducing


\textsuperscript{102} Public Access to Government Contracts Act 2000, s.6.

\textsuperscript{103} Kate MacNeill, ‘Self-Regulation: Rights and Remedies - The Telecommunications Experience’ in Finn (ed.) \textit{Sunrise or Sunset? Administrative Law in the New Millennium} (Australian Institute of Administrative Law, Canberra, 2000) .


regulatory competition would be to permit auditees to choose which of the designated public auditors they wished to audit them.\textsuperscript{106} In Australia such a proposal would sit uneasily with the federal governance structure, as it would require that auditees had choices between their ‘home’ auditor and at least one other (either from another state or territory jurisdiction or from the Commonwealth).

We could take the analysis further and suggest that the interdependent relations within regulatory regimes create a complex system, having some functional equivalence to traditional accountability, but which is not specifiable in the manner of more traditional mechanisms.\textsuperscript{107} For one commentator there is the possibility of ‘anarchic accountability’ through networks of co-ordination.\textsuperscript{108} For another it suggests we

\begin{quote}
[a]bandon the idea of achieving ‘Accountability in Australian Government’ in favour of securing accountability of public-private governance in the framework of a ‘new regulatory state’.
\end{quote}

For a third it suggests the potential for ‘collaborative governance’.\textsuperscript{110} For a fourth it suggests recognizing the virtues of ‘fuzzy accountability’\textsuperscript{111}

If a regulator cannot introduce a new rule without consulting with business and NGOS and then recommending that a minister act on its advice then that regulator lacks independence, but may be said to have a day-to-day requirement (if not actually a legal duty) to account for what it does. With regulatory monitoring some regulatory activities,

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\textsuperscript{111} Peter Wilkins, 'Accountability and Joined-Up Government' (2002) 6 \textit{Australian Journal of Public Administration} 114.
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notably those of the ACCC, are subject to close scrutiny both from business and the media. Australian big business has been complaining that ACCC investigations are being conducted too much in public – that stories that a firm is being investigated are causing the public to assume them guilty of breaches of the applicable legislation. However if the ACCC’s investigations are all attracting considerable press attention then some journalists might begin to engage in systematic oversight and evaluation of the ACCC’s work. Such media scrutiny might constitute an additional layer of accountability. This in turn is liable to reduce the risk that the regulator might diverge from its publicly set mission or begin to serve special interests irrelevant to that mission.

5. Conclusion

Limited doctrines of independence, transparency and regulatory review apply to all of the Commonwealth statutory regulators of business. The application of these doctrines is much more varied with regulators of the public sector. Strong doctrines of independence apply to the Commonwealth Ombudsman and the Commonwealth Auditor General while the financial regulators within the Department of Finance and Administration and the regulators of higher education have no independence. There is no doctrine of regulatory review applying to burdens placed on the public sector.

It is not surprising to conclude that, the independence doctrine notwithstanding, Commonwealth regulators possess little real independence in the regimes within which they operate. New right policies on economic and social matters were hardly going to cause conventions about retention of power by ministers to be dismantled. Regulators do have capacities to make independent judgments. Whether they do so is rather dependent on the vision that ministers and their advisers bring to the appointments process.

This is not to say that the independence doctrine is without its beneficial effects. Bodies like the ACCC, ASIC, the ACA and the ABA are highly visible, relatively transparent in their operation, and closely scrutinized to justify the regimes they operate – to parliament, government, stakeholders and the media. Thus the application of the independence
doctrine, with linked measures, puts these commonwealth regulators into a position of interdependence that increases their day-to-day accountability. Indeed, there is a paradox lying within this analysis of independence. In those domains where the independence doctrine has not been applied to the regulatory function (eg higher education, agriculture, environment and finance) the result is that the responsible ministries are *qua* ministry more independent than the independent regulatory agencies. Ministries that persist with a traditional model combining policy and regulatory functions generate less interdependence and arguably less day-to-day accountability. Formal accountability mechanisms are thus of greater importance.

Formal accountability requirements placed on public bodies remain an important part of the architecture of the administrative state. However, there are a number of reasons why an expanded notion of what it means to be accountable might make us more comfortable about the health of the accountability doctrine. Internationalisation is taking regulatory decision making out of the hands of national authorities. Policies of privatization and contracting out have removed certain once-public activities from the public accountability regimes. Thus key elements of power are being exercised by private and supranational actors.

It would be futile to attempt to chase after this re-located power with parliamentary and legal accountability of the traditional sort. I suggest it is more profitable to look at relations of interdependence, and the networks of day-to-day accounting required within any given regime. Using this analysis we may still find the regime lacking, of course, and conclude that there is inadequate accounting for key decisions on rule-making, monitoring and enforcement as they affect Australians.

The question is how to build up scrutiny or interdependencies in such a way as to provide a counterweight and thus a new form of checking. This might be through attending to the corporate governance regime, for example promoting virtue in regulatory matters

\[\text{112} \text{ Richard Mulgan, 'Comparing Accountability in the Public and Private Sectors' (2000) 59 Ibid. 87.}\]
through mandating separate internal compliance officers, perhaps requiring them to account to specified non-executive directors.\footnote{Christine Parker, \textit{The Open Corporation: Self-Regulation and Democracy} (Cambridge University Press, Melbourne, 2002)} We might look to the NGO sector and find a committed but under-resourced group which, with better resourcing, could carry out a regular scrutiny of key decision making whether exercised by business, regulators, ministers or supranational bodies.
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