The Legitimacy and Responsiveness of Industry Rule-making

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part in (and in some cases assume responsibility for) the formation, enforcement and/or monitoring of legally binding rules, activities once seen as the exclusive duties of the state.

Advocates of these so-called strategies of 'proceduralization',[10] which trade under the 'banners'[11] of 'reflexive law',[12] 'responsive regulation',[13] 'smart regulation',[14] 'democratic experimentalism',[15] 'collaborative governance'[16] and more recently 'really responsive regulation',[17] argue that 'democratization'[18] of the regulatory process overcomes the limitations of command and control regulation and enhances the ability of regulatory systems to achieve social goals. Permitting private actors and other third parties to participate in regulatory activities, it is said, enables the state to draw on their greater expertise of the underlying industry sectors in question.[19] Harnessing their knowledge and skills leads to regulatory interventions that are more flexible, innovative[20] and cost-effective.[21] Advocates suggest that any rules that are produced are likely to be better targeted to the relevant individual and/or group. These rules are also more likely to be more reasonable. Better targeted and more reasonable rules are two factors that are said to enhance the likelihood of industry compliance with them.[22] Similarly, proceduralization sanctions discussion with regulatory targets that have breached the law before enforcement action is taken. The multiplicity of enforcement strategies it endorses have a better chance of 'constrain[ing] noncompliance',[23] 'build[ing] business cultures of social responsibility'[24] and resulting in 'win-win outcomes'.[25] Moreover, the problems

[10] J Black, 'Proceduralizing Regulation: Part 1' (2000) 20 *OJLS* 597, 598.

[11] ibid.

[12] See, eg, G Teubner, *Law as an Autopoietic System* (Oxford, Blackwell, 1993); G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

[13] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, Oxford University Press, 1992). See also J Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham, Edward Elgar, 2008) and 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475.

[14] N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford, Oxford University Press, 1998).

[15] MC Dorf and CF Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

[16] See, eg, C Ansell and A Gash, 'Collaborative Governance in Theory and Practice' (2008) 18 *Journal of Public Administration Theory and Practice* 543.

[17] R Baldwin and J Black, 'Really Responsive Regulation' (2008) 71 *MLR* 59.

[18] Black, 'Proceduralizing Regulation: Part 1', above n 10, 599.

[19] See, eg, A Ogus, 'Rethinking Self-Regulation' (1995) 15 *OJLS* 97, 97–98; C Coglianese and E Mendelson (eds), 'Meta-Regulation and Self-Regulation' in R Baldwin, M Cave and M Lodge, *The Oxford Handbook of Regulation* (Oxford, Oxford University Press, 2010) 146, 152.

[20] Ayres and Braithwaite, above n 13, 111. See also CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271.

[21] Ogus, above n 19, 98; Coglianese and Mendelson, above n 19, 152.

[22] Ayres and Braithwaite, above n 13, 110–16; Coglianese and Mendelson, above n 19, 152.

[23] Ayres and Braithwaite, above n 13, 20.

[24] ibid 51.

[25] Gunningham and Grabosky, above n 14, 413.

of over and under-inclusiveness, 'indeterminacy' and interpretation inherent in traditional rule enforcement are minimised (if not eliminated).[26]

Lawyers, on the other hand, question whether use of these new instruments of regulation is consistent with the notion of law itself and the underlying formal, substantive, procedural and institutional values[27] that give law its legitimacy. They argue that techniques of proceduralization enhance the risk of arbitrary decision-making because, rather than relying on clearly prescribed rules, they give significant discretion to private entities and/or expand the already considerable freedom that public actors enjoy in the regulatory arena.[28] The absence of such rules makes the law uncertain and unpredictable, making it difficult for citizens and others to know what the law is and how to behave accordingly.[29] Moreover, these new regulatory techniques permit the state to 'differentiate' between regulatees, an approach that is at odds with notions of 'generality' and non-discrimination, both of which are central to formal conceptions of legal equality.[30] Further, they allege that the negotiation between interested parties, which is characteristic of these mechanisms, permits private and public actors alike to ignore human rights,[31] thus posing significant challenges for achieving and preserving 'substantive equality'.[32] The emphasis on agreement also negates the importance of procedural fairness concerns, as parties strive to obtain particular regulatory outcomes.[33] Participating private parties are permitted to act in their best interests and are not legally accountable for their actions before a court of law.[34] While, in theory, state actors remain subject to legal constraints, negotiations are often not conducted publicly, making it difficult to evaluate if they have acted within the limitations of the law[35]—a problem that is exacerbated by the absence of detailed rules that delineate the scope of their authority.

This book considers one of the most legally controversial tools in the expanded regulatory 'tool kit': industry rule-making. The principal aim is to highlight that

[26] On the 'nature of rules', see J Black, *Rules and Regulators* (Oxford, Clarendon Press, 1997) 6–19.

[27] See generally PP Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *PL* 467; J Jowell, 'The Rule of Law and Its Underlying Values' in J Jowell and D Oliver (eds), *The Changing Constitution* 7th edn (Oxford, Oxford University Press, 2011) 11, 16–22; J Waldron, 'The Rule of Law and the Importance of Procedure' in JE Fleming (ed), *Getting to the Rule of Law: Nomos L* (New York, New York University Press, 2011) 3; J Waldron, 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press, 2006) 15.

[28] D Kingsford Smith, 'Beyond the Rule of Law? Decentred Regulation in Online Investing' (2004) 26 *Law & Policy* 439, 453–54, 458.

[29] Yeung, above n 5, 38–39.

[30] See generally P Westerman, 'Pyramids and the Value of Generality' (2013) 7 *Regulation & Governance* 80.

[31] Kingsford Smith, 'Beyond the Rule of Law?', above n 28, 454–55.

[32] Jowell, above n 27, 19.

[33] Yeung, above n 5, 185.

[34] See, eg, Ogus, above n 19, 98; R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice* 2nd edn (Oxford, Oxford University Press, 2011) 142–44.

[35] Yeung, above n 5, 186.

the tension between the 'responsiveness' that regulatory scholars advocate in order to improve regulatory effectiveness, on the one hand, and the law and its formal, substantive, procedural and institutional values, on the other, is not as great as either camp asserts. The book is directed at lawyers, some of the harshest critics of proceduralized rule-making, who believe that the coherence of law is being sacrificed in the quest for enhanced regulatory effectiveness. Drawing on three in-depth case studies of the experience of the Australian telecommunications industry with self-regulatory rule-making in accordance with Part 6 of the Telecommunications Act 1997 (Cth), a form of rule-making that bears the hallmarks of various strategies of proceduralization, it is argued that industry rule-making, which is both responsive and effective in achieving public policy goals, can accord with the values that confer legitimacy in 'traditional' legislative and administrative rule-making contexts. The rules drafted by industry can be incorporated into the existing system of law without undermining its coherence. The book is also directed at regulatory scholars who argue (implicitly if not explicitly) that the need to maintain a coherent system of law should give way to the exigencies of responsiveness and effectiveness. It is argued that, rather than hindering the drive for responsiveness and effectiveness they seek, the principles supporting legal legitimacy can best be seen as regulatory tools that are central to the achievement of both of these objectives and are important in their own right if recourse to the formalised mechanisms of state and administrative law-making is to be avoided.

I. Approach and Scope of Book

A. Empirical Research of Industry Rule-making

Concerns have been raised for decades in a number of regulatory contexts and jurisdictions that industry rule-making is too responsive to the needs of industry to the detriment of consumer and public interests. The initial hostility of the US federal courts in the 1930s towards the delegation of Congressional rule-making authority to private entities, seen in cases such as *Carter v Carter Coal Co*[36] and *Schechter Poultry Corporation v US*,[37] was fuelled, in large part, by scepticism that private actors would act in the public interest.[38] The courts may have subsequently softened their opposition to delegation[39] but the debate about whether industry can formulate rules that go against its interests persists. Assertions that industry fails to formulate rules to address public harms continue to be made.[40]

[36] *Carter v Carter Coal Co* 298 US 238 (1936).
[37] *Schechter Poultry Corporation v US* 295 US 495 (1935).
[38] See generally LL Jaffe, 'Law Making by Private Groups' (1937) 51 *Harvard Law Review* 201.
[39] Donnelly, above n 9, 119.
[40] See, eg, JA Taylor and LT Frey, 'The Need for Industry and Occupation Standards in Hospital Discharge Data' (2013) 55 *Journal of Occupational and Environmental Medicine* 495; LL Sharma,

The rules that self-regulatory organisations draft are perceived to be weak by the general public, a response intensified by reports that industry-formulated rules contributed to the global financial crisis.[41] In the UK, the proliferation of codes of practice during the mid- to late 1970s and 1980s in diverse areas such as industrial relations, consumer protection and insurance brokerage sparked questions of whether industry rule-making worked against the public interest.[42] Industry rule-making may have since become commonplace in Britain[43] but the 2013 horsemeat scandal has renewed apprehension that industry cannot formulate robust rules even within a co-regulatory framework.[44] The same suspicion has arisen in Australia in the telecommunications[45] and broadcasting[46] sectors, the latter of which was beset by the 'Cash for Comment' affair[47] from 1999 to 2005.

However, in contrast to its application in enforcement and compliance,[48] there is surprisingly little empirical research about proceduralization in rule-making and its ability (or otherwise) to account for and address non-industry concerns. Novel means of rule-formulation permitted by the state and the rules they generate have, of course, generated academic attention.[49] However, the ability of industry

SP Teret and KD Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100 *American Journal of Public Health* 240, 240–42; DL Kunkel, JS Castonguay and CR Filer, 'Evaluating Industry Self-Regulation of Food Marketing to Children' (2015) 49 *American Journal of Preventive Medicine* 181.

[41] See, eg, ST Omarova, 'Wall Street as Community of Fate: Toward Financial Industry Self-Regulation' (2011) 159 *University of Pennsylvania Law Review* 411, 413–16.

[42] See, eg, AC Page, 'Self-Regulation and Codes of Practice' (1980) *Journal of Business Law* 24; AC Page, 'Self-Regulation: The Constitutional Dimension' (1986) 49 *MLR* 141.

[43] On the growth of self-regulation in the UK, see, eg, R Baggott, 'Regulatory Reform in Britain: The Changing Face of Self-Regulation' (1989) 67 *Public Administration* 435; M Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford, Oxford University Press, 2003).

[44] See, eg, AA Laverty (Imperial College), S Capewell (Liverpool University) and C Millett (Imperial College), 'Letter to the Editor' (2013) 381 *The Lancet* 1901.

[45] K MacNeill, 'Self Regulation: Rights and Remedies—the Telecommunications Experience' in C Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium: Papers Presented at the 2000 National Administrative Law Forum* (Canberra, Australian Institute of Administrative Law, 2000) 249, 257–59, 260–61; S Horrocks and R Hill, 'Protecting the Consumer Interest in Network Standards and Operations Codes in Practice' in Communications Research Unit (ed), *Communications Research Forum Proceedings* (Canberra, DCITA, vol 4, 1999) 527.

[46] See, eg, L Hitchens, 'Commercial Broadcasting—Preserving the Public Interest' (2004) 32 *Federal Law Review* 79; D Wilding, 'In the Shadow of the Pyramid: Consumers in Communications Self-Regulation' (2005) 55(2) *Telecommunications Journal of Australia* 37.

[47] The scandal centred around the practice by leading Australian talkback radio presenters, including John Laws and Alan Jones, of accepting money from commercial sponsors in return for making positive comments about them during radio programmes without adequately disclosing the existence of such arrangements to their listeners.

[48] See, eg, Yeung, above n 5; Parker, 'Restorative Justice in Business Regulation', above n 4.

[49] In Australia, see, eg, W Pengilley, 'Competition Law and Voluntary Codes of Self-Regulation: An Individual Assessment of What Has Happened to Date' (1990) 13 *University of New South Wales Law Journal* 212; D Kingsford Smith, 'Governing the Corporation: The Role of "Soft Regulation"' (2012) 35 *University of New South Wales Law Journal* 378. In the UK, see, eg, Black, *Rules and Regulators*, above n 26. In the US, see, eg, L Susskind and G McMahon, 'The Theory and Practice of Negotiated Rulemaking' (1985) 3 *Yale Journal on Regulation* 133; LI Langbein and CM Kerwin, 'Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence' (2000) 10 *Journal of Public Administration Research and Theory* 599; Michael, above n 3.

rule-making to be a legitimate law-making process has not been a focus for the vast majority of its scholars. Their work, some of which is empirically informed, clearly acknowledges the importance of the procedures used by industry and others to draft rules but is directed to issues such as costs, proposed benefits and capacity to produce 'better' rules—rules that improve outcomes in specific areas of regulation and stimulate change.[50] Only a few scholars have researched industry rule-making and attempted to evaluate if the rules generated can be integrated into the existing legal order without conflicting with its central principles and values. Moreover, as is discussed in more detail below, the data from which these scholars drew their conclusions were limited to a small number of industry sectors. The methodology they used contained some weaknesses or their analysis blurred the issues of rule-making, enforcement and compliance.

Hamilton conducted work in the 1970s on the 'reasonableness' of US federal agencies relying on 'voluntary standards' related to health and safety. While informed by interviews with some participants and observations of some working committees, his work did not contain any specific case studies.[51] Rather the approach adopted was anecdotal. Funk's conclusion that negotiated rule-making undermined the public interest was based on one case study of its use by the US Environmental Protection Agency.[52] It was not informed by direct observation of the process, the documentation exchanged between or interviews with actual participants. MacNeill's suggestion that self-regulatory rule-making by the Australian telecommunications sector does not serve consumer interests, which formed part of a wider discussion of the 'adequacy' of self-regulation to protect Australian telecommunications consumers, was based on brief analysis of the development of a single code of practice. It relied solely on publicly available documentation and comments made by consumer advocates involved in the process.[53] No interviews with industry, for example, were conducted. In the UK, Marsden has suggested that Internet regulation is a 'paradigm of constitutionally responsive co-regulation'[54] but his summary, discussion and analysis of his data are broad brush. They do not clearly distinguish between the rule-making, enforcement and compliance aspects of regulation, a problem also seen in the case studies of 'regulated self-regulation' undertaken by European scholars Schulz and Held[55] and the

[50] See, eg, C Coglianese, 'Assessing Consensus: The Promise and Performance of Negotiated Rule-making' (1997) 46 *Duke Law Journal* 1255; CC Caldart and NA Ashford, 'Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy' (1999) 23 *Harvard Environmental Law Review* 141.

[51] RW Hamilton, 'The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health' (1978) 56 *Texas Law Review* 1329, 1377–86.

[52] W Funk, 'When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest-EPA's Woodstove Standards' (1987) 18 *Environmental Law* 55.

[53] MacNeill, above n 45, 257–61.

[54] CT Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge, Cambridge University Press, 2011) 3.

[55] W Schulz and T Held, *Regulated Self-Regulation as a Form of Modern Government: An Analysis of Case Studies from Media and Telecommunications Law* (Eastleigh, University of Luton Press, 2004) 9–11.

study of industry codes of practice regulating digital media content by Tambini, Leonardi and Marsden.[56]

This book begins the process of filling the empirical gap in our understanding of industry rule-making and its capacity to address consumer and public interests. In doing so, it formulates and applies criteria against which industry rule-making should be evaluated and identifies a number of indicia that suggest when industry rule-making is likely to be simultaneously legitimate and responsive.

B. Part 6 Rule-making

The experience of the Australian telecommunications sector with Part 6 of the Telecommunications Act 1997 (Cth) (Part 6) provides the empirical basis from which the questions of the legitimacy and responsiveness of industry rule-making are explored in this book. Part 6 was selected because it is a form of proceduralized rule-making. Under the Act, 'sections of the telecommunications industry' are permitted to formulate and seek the registration of codes of practice dealing with a variety of matters, including consumer protection, relating to their 'telecommunications activities',[57] with the Australian Communications and Media Authority (ACMA). Upon registration by ACMA, codes acquire the state's 'monopoly of force',[58] ie they are enforceable by ACMA. If industry fails to develop codes that 'provide appropriate community safeguards' or otherwise adequately regulate its participants, then ACMA may, in specified circumstances, adopt an industry standard.[59] The telecommunications sector in Australia (as it does worldwide) also has certain market characteristics common to a number of sectors where the state has deployed strategies of proceduralized rule-making. It is technically complex and is subject to and undergoing rapid change. In addition, the telecommunications industry in Australia has been permitted to formulate (and has, in fact, formulated) numerous codes of practice since 1997 when Part 6 was enacted, thus providing an excellent source of data. Further, controversy has surrounded (and continues to surround) the process by which the industry formulates codes of practice.[60] Consumer and public interest representatives involved in code development have alleged and continue to maintain[61] that industry has far greater

[56] D Tambini, D Leonardi and C Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (London, Routledge, 2007).

[57] Telecommunications Act 1997 (Cth) s 117.

[58] M Taggart, 'The Nature and Functions of the State' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 101, 113.

[59] Telecommunications Act 1997 (Cth) ss 123–25.

[60] On the importance of selecting controversial case studies, see C Coglianese, 'Empirical Analysis of Administrative Law' (2002) 2002 *University of Illinois Law Review* 1111.

[61] See, eg, SETEL, Submission to Taskforce on Industry Self-Regulation, 13 December 1999; CTN, Submission to Taskforce on Industry Self-Regulation, 10 January 2000; Consumer Driven Communications Group, *Consumer Driven Communications: Strategies for Better Representation (Final Report)* (December 2004); ACCAN, Submission to ACMA, *Reconnecting the Customer Inquiry*, 10 September 2010.

bargaining power that it uses to the disadvantage of individual and small business consumers. Finally, Part 6 rule-making has attracted the attention of the Organisation for Economic Co-operation and Development (OECD) and the Australian National Audit Office (ANAO). In its report *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, the OECD cites Part 6 rule-making as an example of how government may promote multi-stakeholder dialogue in industry self-regulation.[62] The ANAO's 'Better Practice Guide' also cites the Mobile Premium Services (MPS) code,[63] the 2009 version of which is the focus of chapter seven, as an example of effective regulation.[64] Therefore, in addition to addressing directly the empirical gap in the academic literature, experience with Part 6 rule-making offers some important insights that could be of benefit to government and other industry sectors where industry rule-making has been deployed or is being contemplated as a solution to identified regulatory problems.

i. The Communications Alliance

The three case studies that inform the analysis of legitimacy and responsiveness in this book examine codes of practice developed by working committees established under the auspices of the Communications Alliance (formerly known as the Australian Communications Industry Forum (ACIF)).[65] It represents 'sections of the telecommunications sector' that have drafted codes of practice that have been registered by ACMA in accordance with Part 6. ACIF was established in 1997. In 2006, it merged with the Service Providers Association (SPAN) to form the Communications Alliance. In 2014, the Communications Alliance assumed the responsibilities of the Internet Industry Association (IIA). Prior to assuming the responsibilities of the IIA, the Communications Alliance was seen as the 'peak' self-regulatory body in the Australian telecommunications sector. Since assuming the responsibilities of the IIA, it is now seen as the peak self-regulatory body in the Australian communications sector.

When data collection for the book commenced, 28 Part 6 codes[66] had been prepared from scratch by working committees convened by the Communications Alliance and registered by ACMA or its predecessor, the Australian Communications Authority (ACA).[67] Most of these codes had also been revised numerous times and earlier versions of them deregistered by either the ACA or ACMA.

[62] OECD, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests* (23 March 2015) 13.

[63] Communications Alliance, *Industry Code C637: Mobile Premium Services* (2009).

[64] ANAO, *Administering Regulation: Achieving the Right Balance* (June 2014) 5–6.

[65] Unless otherwise indicated, a reference to the Communications Alliance in this book includes a reference to ACIF.

[66] This figure, compiled from 'Status Reports' of ACIF and 'Publication Reports' of the Communications Alliance, excludes the Telecommunications Consumer Protections Code (C628) which amalgamated five codes in 2007.

[67] When Part 6 was first enacted, the power to register codes was bestowed on the ACA. ACMA was created in 2005 following the merger of the ACA with the Australian Broadcasting Authority (ABA).

ii. Consumer Codes

Each of the three case studies centres on the development of what the Communications Alliance classifies as a 'consumer' code, one of three different types of codes it categorises. 'Network' and 'operations' codes comprise the other two. The criteria the Communications Alliance uses to categorise codes have never been precisely defined. However, as a general rule, consumer codes generally relate to the goods and services that are delivered to consumers—the residential customers and small businesses who enter into contracts with providers of telecommunications services for the supply of those services and related goods—and grant some form of rights or protections to them.[68] Network codes deal with technical matters; operations codes govern the operational relationships, including the 'interworking of … "back office" systems, such as inter-operator billing …' between members of the telecommunications industry.[69]

The distinctions that the Communications Alliance draws between the three types of codes are neither accepted by the consumer and public interest organisations that participate in Communications Alliance code development processes[70] nor are they clear cut. For example, the Communications Alliance classifies codes dealing with matters such as the handling of life-threatening and unwelcome communications;[71] priority assistance for life-threatening medical conditions;[72] and the deployment of mobile phone network infrastructure,[73] as operations codes, not consumer codes. Arguably, consumer and public interest organisations also have an interest in network and operations codes.[74] The Communications Alliance has also formulated and registered many more operations and technical codes under Part 6 than consumer codes. Nevertheless, Communications Alliance consumer codes were selected as the focus of this book because it is undisputed within the telecommunications industry that the general public has a direct interest in their content. Moreover, their development has been the most contentious of the three types of codes. Further, it is accepted that Part 6 rule-making (and industry rule-making more generally) faces its greatest test in the consumer protection arena due to scepticism that industry actors have the capacity to act in anything but their own interests, such as profit maximisation.

[68] ACIF, *Guideline: Development of Telecommunications Industry Operations* Codes (March 1998) 6; ACIF, *Guideline: Development of Self-Regulatory Telecommunications Industry Consumer Codes of Practice* (January 1998) 1.

[69] ACIF, *Guideline: Development of Telecommunications Industry Operations Codes*, above n 68, 5–6.

[70] See, eg, Horrocks and Hill, above n 45, 529.

[71] See, eg, Communications Alliance, *Industry Code C625: Handling of Life Threatening and Unwelcome Communications* (2017).

[72] See, eg, ACIF, *Industry Code C609: Priority Assistance for Life Threatening Medical Conditions* (2007).

[73] See, eg, Communications Alliance, *Industry Code C564: Mobile Phone Base Station Deployment* (2011).

[74] See, eg, K Bowrey, *Law and Internet Cultures* (Cambridge, Cambridge University Press, 2005) 47–79.

C. Procedural and Institutional Legitimacy, Responsiveness and Their Criteria

The book evaluates the three case studies to determine if the Part 6 rule-making process was procedurally and institutionally legitimate. It does not assess, beyond the brief review that follows, whether the formal and substantive requirements of the rule of law have been met.

The formal aspect of the rule of law involves the idea that law should, among other things, be clearly prescribed prior to its application. Prospective prescription is seen as essential because it reduces the potential for arbitrariness.[75] It provides citizens and others with the opportunity to learn the rules that are recognised by the state as law and to alter their behaviour in order to comply with them.[76] It also limits the discretion of those tasked with applying the law.[77] It requires judges and officials to act 'within the powers' they have been given by the legislature.[78] In addition, the formal aspect of the rule of law encompasses the notion of non-discrimination, which dictates that no person is above the law.[79] Everyone, regardless of social status, is subject to the law. The law may differentiate between different groups and types of situations. However, 'like cases' must be 'treated alike'.[80]

The substantive aspect of the rule of law, on the other hand, focuses on the content of the law.[81] Its principal concern is whether the substance of the law conforms to wider notions of justice and morality. Dworkin's 'rights conception', for example, exemplifies a substantive rule of law approach; law is 'just' only to the extent it recognises and is consistent with the moral and political rights of the citizens who are subject to it.[82] However, for the reasons explained below, neither the codes of practice that Part 6 rule-making generates nor the process itself raises concerns that the formal and substantive facets of the rule of law are not satisfied.

Brief analysis of the three codes of practice that are the focus of the book and other consumer codes that have been registered under Part 6 reveals that they easily meet the rule of law's formal demands. They are, among other things, prescriptive. Indeed, a particular concern of Part 6 rule-making expressed by some within the telecommunications sector is that they are needlessly so. Whether codes contain superfluous and unnecessarily inflexible rules cannot be considered

[75] Kingsford Smith, 'Beyond the Rule of Law?', above n 28, 452.
[76] Craig, above n 27, 467; RH Fallon, Jr, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 14.
[77] Jowell, above n 27, 18.
[78] ibid 18.
[79] ibid 19; Westerman, above n 30, 85; Kingsford Smith, 'Beyond the Rule of Law?', above n 28, 452.
[80] Jowell, above n 27, 19.
[81] See, Craig, above n 27, 477–85; Fallon, above n 76, 21–24.
[82] See, eg, R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977).

here but, as will be seen in the three case studies used to explore the question of procedural and institutional legitimacy, detailed rules were often used as a technique to resolve disputes between participants on the working committees that drafted them. Moreover, the codes of practice do not discriminate between industry participants. They impose various obligations on different industry players but they do not differentiate between similarly situated entities. The ethos of the 'level playing field', which pervades the regulation of the telecommunications sector, may explain the absence of any discrimination between industry participants. The precise cause of non-discrimination does not need to be determined here, however. The key point is that the rules the codes of practice contain fulfil the formal requirements of the rule of law.

Substantive rule of law concerns also do not arise. The Telecommunications Act 1997 (Cth) (the Act) specifies numerous public policy objectives that the process of Part 6 rule-making is designed to achieve. There are too many objectives to list all of them here. However, the three principal goals specified by the Act are the promotion of the long-term interests of end-users of 'carriage services' or of services provided by means of carriage services; the efficiency and international competitiveness of the Australian telecommunications industry; and the availability of accessible and affordable carriage services that enhance the welfare of Australians.[83] Consumer and public interest advocates involved in the process of Part 6 rule-making have repeatedly argued that industry involvement in rule-making has made promotion of the long-term interests of end-users and the enhancement of the welfare of Australians much harder to achieve. However, concerns about the effectiveness of Part 6 rule-making raise a series of questions that are different from the concerns that underpin the many substantive conceptions of the rule of law. The latter are directed to the issue of whether the broad (and rather nebulous) objectives of the Act are unfair. However, scholarly criticism of Part 6 rule-making has not been directed toward the fairness of the aims of the Act. Rather, criticism has been directed to the means by which those ends are to be achieved, ie whether the process of Part 6 rule-making conforms to the procedural and institutional values of law.

As Part 6 rule-making appears to satisfy the formal and substantive requirements of the rule of law, the issue which has generated controversy is the focus of this book: whether the process followed by the Communications Alliance to develop the three consumer codes of practice discussed in the case studies was procedurally and institutionally legitimate. This question is determined in the book by reference to the four principles of deliberation, impartiality, transparency and accountability. These are the principles, it is argued in chapter three, that give procedural and institutional legitimacy to rule-making by legislatures and

[83] Telecommunications Act 1997 (Cth) s 3(1).

administrative bodies. If they underpin the institutional design of legislative and administrative bodies that formulate what is readily recognised as law and the procedures by which it is made, so too should they ground rule-making by industry bodies. However, it is recognised that Part 6 rule-making challenges the traditional understanding of impartiality, transparency and accountability. As discussed in chapter three, many of the mechanisms that are thought to ensure that rule-making by legislatures and administrative bodies is procedurally and institutionally legitimate are absent from Part 6 rule-making. For example, the public cannot attend meetings of the working committees of the Communications Alliance, which are not transcribed or published. It has no rights to access minutes and other documentation exchanged between working committee members. No participant in the code development process is impartial. The courts do not review the codes of practice or the process by which they are made. Parliament does not scrutinise their content and the public is not given an opportunity to vote for or against them. It is therefore argued in chapter eight that Part 6 rule-making necessitates some adjustment to the formulation of these principles to accommodate the aims of proceduralized rule-making while also remaining compatible with the rationales supporting their use in traditional law-making processes. It is for that reason that transparency is adapted to mean the disclosure by industry to working committee members, including consumer and public interest representatives, and others of information necessary to hold industry to account. Impartiality is reframed as a question of whether industry genuinely considered the relevant concerns of others before it reached its decisions. It is suggested that accountability should be a search for 'real-time' mechanisms that achieve the same goal of accountability in traditional rule-making—ensuring that industry answers for its decisions or explains itself to others—rather than a quest for processes that operate retrospectively.[84] Along with deliberation, which retains its traditional definition—the exchange of 'information and opinions' and taking into account 'public regarding reasons',[85] these three principles (as modified) are applied to evaluate if Part 6 rule-making was procedurally and institutionally legitimate.

The four principles of deliberation, impartiality, transparency and accountability (as defined) are also used to evaluate the 'responsiveness' of the Part 6 rule-making process for reasons that are more complex. There are now many well-developed theories of responsive regulation.[86] However, the argument made here, which is developed in detail in chapter nine, is that what makes the process of industry rule-making responsive (and therefore more likely to be effective in

[84] Industry's compliance with code rules is an additional criterion of accountability but is outside the scope of this book.

[85] A Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford, Oxford University Press, 2007) 5.

[86] See, eg, the sources cited in nn 12–17.

meeting public policy goals set by the state) is better understood (at least in a domestic, state-based context) as an alternative formulation of the question of procedural and institutional legitimacy. In other words, it is suggested that, in the 'decentred' state, the concept of responsiveness has subsumed the concerns that procedural and institutional legitimacy is intended to address. If that is correct, then the principles of deliberation, impartiality, transparency and accountability (as amended) illuminate the meaning of responsiveness, which has not yet been clearly defined in the regulatory literature. Applying these principles has merit for two reasons. First, it acknowledges the objectives and limitations of law, as it is conceived in this new regulatory state. Second, and more importantly, it binds the objectives of regulatory regimes set by the state—the desire to render disparate systems less insular to each other—and law's indirect methods of procedural regulation to certain normative principles in a way that permits decentred regulation to retain its moral frame. In developing this argument, no one theory of democracy is endorsed. Rather, it is suggested that the principles of deliberation, impartiality, transparency and accountability resonate in each of a number of theories that could provide a normative basis for law in the 'fragmented' state. If responsiveness is understood in this way, the principles of procedural and institutional legitimacy, often seen as barriers to the achievement of regulatory goals, are transformed into important regulatory tools that facilitate the overall effectiveness of regulatory systems.

D. The Wider Context of Industry Rule-making

Industry rule-making is, of course, not limited to the innovative means of rule-formulation envisaged by strategists of proceduralization. Industry actors also draft rules when they engage in purely voluntary self-regulation within the geographical boundaries of nation states. Moreover, industry actors formulate rules and other norms in the transnational sphere[87] where, for example, they set technical[88] and other[89] standards for global markets; and establish governance

[87] For an overview, see C Scott, F Cafaggi and L Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 1; F Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 20.

[88] See, eg, T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World* (Princeton, Princeton University Press, 2011); T Büthe, 'Engineering Uncontestedness? The Origins and Institutional Development of the International Electrotechnical Commission (IEC) (2010) 12 *Business and Politics* 1; H Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford, Hart Publishing, 2005).

[89] See, eg, KT Hallström, 'ISO Enters the Field of Social Responsibility: Construction and Tension of Global Governance' in GF Schuppert (ed), *Global Governance and the Role of Non-State Actors* (Baden-Baden, Nomos, 2006) 117.

frameworks designed to address worldwide regulatory problems related to matters as diverse as food,[90] financial products and services,[91] consumer protection[92] and the Internet.[93]

However, these forms of industry rule-making fall outside the scope of this book because the rules they generate ordinarily acquire authority in a way that is fundamentally different from the rules that are the product of the type of proceduralized rule-making that is of interest here. When the state authorises industry to assume responsibility for its rule-making functions, it incorporates the industry-drafted rules into its existing body of law—law which has authority because it can be enforced via the mechanisms of the state. Rules drafted by industry actors in purely self-regulatory and transnational contexts, on the other hand, typically acquire authority from 'sociological legitimacy'—their acceptance by members of society[94] or relevant 'legitimacy communities'.[95] Acceptance turns on a variety of factors, including, for example, reasons of pragmatism, morality, other normative values or cognition.[96] Unlike legal legitimacy, sociological legitimacy is a wholly 'empirical phenomenon'.[97]

Where the state actively incorporates purely voluntary self-regulatory and transnationally-made rules into its law, questions of their legal legitimacy and coherence with law also arise. In those situations, the criteria of deliberation, impartiality, transparency and accountability (as refined) may provide a useful way of thinking about whether voluntary self-regulatory and transnational rule-making processes satisfy those aspects of the rule of law. Decoupled from the mechanisms that are said to confer procedural and institutional legitimacy in traditional rule-making contexts, they make it at least theoretically possible for a wide range of mechanisms—mechanisms that may be present in the purely

[90] See, eg, N Hachez and J Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P' (2011) 14 *Journal of International Economic Law* 677.

[91] F Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 20, 33; GV Rauterberg and A Verstein, 'Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA and the Future of Financial Reform (2013) 54 *Virginia Journal of International Law* 9; J Biggins and C Scott, 'Public-Private Relation in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform' (2012) 13 *European Business Organisation Law Review* 309.

[92] C Scott, 'Beyond Taxonomies of Private Authority in Transnational Regulation' (2012) 13 *German Law Journal* 1329, 1332–33.

[93] See, eg, I Brown (ed), *Handbook on Governance of the Internet* (Cheltenham, Edward Elgar, 2013).

[94] A Peters, L Koechlin and GF Zinkernagel, 'Non-state Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion' in A Peters, L Koechlin, T Föster and GF Zinkernagel, *Non-state Actors as Standard Setters* (Cambridge, Cambridge University Press, 2009) 1, 18.

[95] See J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

[96] See, eg, MC Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571; Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', above n 95, 144; D Casey and C Scott, 'The Crystallization of Regulatory Norms' (2011) 38 *Journal of Law and Society* 76, 87–88; P Paiement, 'Paradox and Legitimacy in Transnational Legal Pluralism' (2013) 4 *Transnational Legal Theory* 197, 211–17.

[97] Casey and Scott, above n 96, 87.

voluntary self-regulatory and transnational spheres—to facilitate the achievement of procedural and institutional legitimacy. Detailed empirical study of those rule-making processes is also needed in order to begin to evaluate if they can be procedurally and institutionally legitimate as a matter of practice, but such a study awaits another day.

II. Terminology

A. Consumer and Public Interests

The concepts of consumer interest and public interest are referred to throughout the book and require some explanation. They are treated as two distinct concepts because they reflect more accurately what is at stake in Part 6 rule-making—the potential displacement of either or both consumer and public interests by telecommunications providers (thereby providing a more useful analytical tool). The accommodation of both interests also sets a high standard that must be satisfied if the codes of practice produced by the Part 6 process are to be recognised as 'law'. It is acknowledged that 'the consumer interest' is increasingly equated with 'the public interest' by governments in a number of areas of regulation[98] and there has been academic criticism that the distinction between 'the consumer interest' and 'the public interest' is not as stark as is frequently argued.[99] However, the view taken here is that industry rule-making must accommodate both the interests of consumers—buyers of goods and services offered by commercial providers participating in the market[100]—and the interests of citizens living in a wider political, social, and cultural community[101] if it is to be deemed legitimate.

The meaning of each term as used in the book is explained below.

i. Consumer Interest

A wide definition of consumer interest (any measure needed to preserve the purchasing autonomy of consumers) is adopted. Its breadth reflects the difficulty of

[98] See, eg, M Schudson, 'The Troubling Equivalence of Citizen and Consumer' (2006) 608 *The Annals of the American Academy of Political and Social Science* 193; S Livingston and P Lunt, 'Representing Citizens and Consumers in Media and Communications Regulation' (2007) 611 *The Annals of the American Academy of Political and Social Science* 51; S Livingston, P Lunt and L Miller, 'Citizens and Consumers: Discursive Debates During and After the Communications Act 2003' (2007) 29 *Media, Culture & Society* 613.

[99] See generally D Lewinsohn-Zamir, 'Consumer Preferences, Citizen Preferences and the Provision of Public Goods' (1998) 108 *Yale Law Journal* 377.

[100] C Scott and J Black, *Cranston's Consumers and the Law* 3rd edn (London, Butterworths, 2000) 8.

[101] C Graham, *Regulating Public Utilities: A Constitutional Approach* (Oxford, Hart Publishing, 2000) 87; G Born and T Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' (2001) 64 *MLR* 657, 671.

III. Structure of the Book

The book is divided into three parts.

Part 1 provides the background for the three empirical case studies of Part 6 rule-making that form the heart of the book. Chapter two explores why Part 6 was enacted and frames the regulatory problem that the Commonwealth legislature sought to address by permitting industry to formulate codes of practice. Chapter three explains the rule-making framework of the Communications Alliance. It identifies the principles used to determine if traditional rule-making—rule-making by legislatures and administrative bodies—is procedurally and institutionally legitimate. The chapter then sets out the theoretical challenges raised by industry's reliance on a confidential, consensus model of rule-making to formulate law. The findings of this chapter serve as the hypotheses that will be tested in the three case studies.

Part 2 comprises the empirical study of Part 6 rule-making. Chapter four explains the conceptual approach used to characterise Part 6 rule-making and sets out other background information to assist an understanding of the case studies. The following three chapters focus on the development of three consumer codes of practice prepared by working committees established under the auspices of the Communications Alliance and registered by the ACA or its successor ACMA. They are presented in the order in which they were completed by the relevant working committees. Chapter five concentrates on the Consumer Contracts code,[122] drafted between May and December 2004. Chapter six examines the Information on Accessibility Features for Telephone Equipment code,[123] prepared between April 2004 and November 2005. Chapter seven focuses on the Mobile Premium Services (MPS) code, developed between April 2008 and March 2009. Drawing on Schattschneider's theory of the scope of political conflict,[124] the approach used by Page in his study of the making of statutory instruments by ministers and related government departments in England and Wales,[125] each case study seeks to identify the 'politic'—the 'conflict and controversy'[126]—behind each code. Each looks at the roles and motivations of the various participants of the process, the strategies working committee participants from industry and elsewhere used in an attempt to advance their interests in the process, how conflicts were resolved and the biases (if any) that the rule-making process produced or permitted.

[122] ACIF, *Industry Code ACIF C620: Consumer Contracts* (2005).

[123] ACIF, *Industry Code ACIF C625: Information on Accessibility Features for Telephone Equipment Code* (2005).

[124] EE Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (New York, Holt, Rinehart and Winston, 1960).

[125] EC Page, *Governing by Numbers* (Oxford, Hart Publishing, 2001).

[126] ibid 2.

Part 3 provides a substantive analysis of the case studies. Chapter eight evaluates if the process of Part 6 rule-making was procedurally and institutionally legitimate, ie if it satisfied the principles of impartiality, accountability, transparency and deliberation that characterise traditional rule-making. It revisits the meaning of the principles of transparency, impartiality and accountability and suggests that they need to be modified for the purpose of evaluating the procedural and institutional legitimacy of industry rule-making. It asserts that the definitions proposed for each of the three principles are compatible with the rationales supporting their requirements in traditional law-making and accommodate the aims of proceduralized rule-making, and explores why all four principles of procedural and institutional legitimacy were met. It is argued that the 'politic' that Part 6 rule-making generated, in conjunction with certain elements of the Communications Alliance's rule-making framework, ensured that consumer and public interests were at a minimum taken into account. Hence the codes it produced can be legitimately integrated into the wider system of case law, statutes and regulations that comprise the 'law.'

Chapter nine considers whether the process of Part 6 rule-making was responsive to the 'practices and norms'[127] of the various stakeholders. It is argued that questions of responsiveness should be determined by reference to the four principles of procedural and institutional legitimacy, as defined in chapter eight, to facilitate the achievement of the 'collective goals of the community'[128] set by the state. The means used to satisfy these principles will, of course, be different from the mechanisms that are used by the state to legitimate traditional legislative and administrative rule-making. However, responsiveness and legitimacy share in common the rationales that underpin the four principles of procedural and institutional legitimacy. Chapter nine concludes that the process of Part 6 rule-making was responsive to the needs of consumer, public interest and private sector stakeholders for the same reasons the process was procedurally and institutionally legitimate: the politic of Part 6 rule-making and certain elements of the rule-making framework of the Communications Alliance.

Chapter ten sets out the 'state of play' with respect to our knowledge of activating and sustaining legitimate and responsive industry rule-making. It discusses the mechanisms observed in the three case studies that contributed to the procedural and institutional legitimacy of the Part 6 rule-making process and its responsiveness to the public interest and the interests of all relevant stakeholders. It identifies a number of indicia that suggest when industry rule-making is more likely to be procedurally and institutionally legitimate and responsive. It also highlights a number of issues that require further empirical investigation.

[127] Parker and Braithwaite, above n 1, 128.
[128] Yeung, above n 5, 49.