Better Regulation, Administrative Sanctions and Constitutional Values

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1. Introduction

Neither the financial crisis of 2007-8 or a change of administration appear to have impeded the implementation of the ‘better regulation’ policy agenda in the UK.1 Although variations in the content and contours of better regulation can be identified among regulatory jurisdictions2, Robert Baldwin helpfully identifies two core messages that lie at the heart of the better regulation movement: first, that regulation can be improved by applying rational approaches to policy making, and second, that better regulation involves a ‘predisposition to apply informal, low-intervention control styles rather than old-fashioned command methods’.3 Both these messages resonate strongly throughout the Treasury-commissioned Hampton Report4 which established the UK’s current better regulation programme’s core framework. Hampton’s recommendation that risk assessment should play a central role in regulatory decision-making clearly exemplifies the first of these messages, and has attracted considerable scholarly attention.5 The second message also resonates strongly in the Report, particularly its recommendations to extend the sanctioning powers of UK regulators and exhortations that they adopt a more pro-active role in offering authoritative, firm-specific compliance advice to regulated firms. In making these latter

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3 Baldwin, ibid, 263-4.


recommendations, the Hampton Report effectively called for a significant change in how the role of UK regulators should be understood and a reallocation of power and responsibility between the administrative and judicial arms of government in regulatory enforcement. This ‘diversionary’ approach to the enforcement of regulatory standards has important constitutional implications which policy proponents of better regulation have largely overlooked and which this paper is primarily concerned to identify and interrogate.

In developing Hampton’s recommendations that administrative penalties should be more readily available to UK regulators⁶, the Macrory Report⁷ recommended a series of legislative reforms (now enacted under Part III of the Regulatory Enforcement and Sanctions Act 2008 (‘RESA’)) that confer considerably stronger and more flexible sanctioning powers on regulators to impose various civil sanctions directly on those they believe have violated regulatory laws without any court involvement⁸. These civil sanctions include the power to impose fixed monetary penalties⁹ or ‘discretionary requirements’.¹⁰ The latter include variable monetary penalties, compliance orders (ie orders to bring non-complying conduct to an end) and restoration orders (ie orders to restore the position that would have arisen in the absence of non-compliance). Regulators may also be empowered to accept ‘enforcement undertakings’¹¹, consisting of an undertaking by a person to take certain specified action and to issue ‘stop notices’ requiring a person ‘to take such steps as a regulator may specify...to secure that the offence does not recur’.¹² By extending regulators’ formal sanctioning powers, RESA considerably strengthens the hand of regulatory authorities in their enforcement discussions with those suspected of legal violation by significantly enhancing the credibility of the threat that regulatory sanctions will be imposed. Hence, the sanctioning regime established under RESA is likely in practice to alter regulatory enforcement processes and practices. In particular, it is likely to entail more extensive reliance on the use of negotiation and bargaining between regulator and regulated firms during the enforcement process, and the range of matters over which enforcement negotiations take place. While

⁶ The Hampton Report, para 2.82-2.86.


⁸ Prior to RESA, there were several UK regulators that were empowered under their own legislation to impose variable financial penalties, including the Office of Fair Trading, the Financial Services Authority, the Pensions Regulator and HM Revenue and Customs. Regulators upon whom powers under Part III of the Act may apply are specified in Schedule 5 of the Act (‘designated regulators’), or any other person who has an enforcement function in relation to an offence specified in Schedule 6 of the Act: per s 37, RESA.

⁹ ss 39-41 RESA.

¹⁰ ss 42-45 RESA.

¹¹ s 50 RESA.

¹² s 42(2)(b) RESA.
the pervasiveness of informal bargaining and negotiation within the regulatory enforcement process is well documented, the novelty of RESA Part III lies in the formal institutionalisation of the process of bargaining and negotiation within the regulatory enforcement process, putting it on a legal and systematic footing.

In this paper, I seek to demonstrate how the emphasis on bargaining, negotiation and discussions between regulators and those they are responsible for regulating advocated by the UK better regulation movement may antagonise several constitutional values, including transparency, accountability, due process and participation as well as several values typically associated with formal conceptions of the rule of law. To this end, my examination focuses upon three practices that reflect a predisposition to divert regulatory enforcement action away from the courts and which rely on formal administrative sanctioning powers in varying degrees ranging from ‘hard’ to ‘soft’: (1) the use of negotiated penalty settlements; (2) the acceptance of administrative undertakings (‘enforcement undertakings’) and (3) the provision of firm-specific compliance advice by regulators. I examine each of these practices through various analytical lenses which enable the underlying constitutional tensions to be identified and interrogated. Hence negotiated penalty settlements are explored by reference to ethnographic studies of regulatory enforcement officials, legal critiques of plea bargaining within the criminal process, and jurisprudential analysis of the character of legal sanctions, particularly the use of ‘hybrid’ sanctions that display a mix of both civil and criminal characteristics. In contrast, my analysis of enforcement undertakings draws on two quite different strands of literature: policy level analysis of regulatory sanctions and scholarly critiques of different forms of dispute resolution. Finally, Hampton’s recommendation that regulators should be more proactive in offering tailored, firm-specific compliance advice is examined by reference to the administrative law doctrine of legitimate expectations and scholarly analysis of its constitutional underpinnings. Taken together, my analysis of these practices point to inherent tensions between the quest for effective, expeditious resolution of suspected violations of regulatory standards and the values which public lawyers typically espouse as essential in a constitutional democracy. Whether or not these tensions are a serious cause for concern will, ultimately, be highly dependent upon the actual context and practices engaged in by regulatory authorities. Nonetheless, they point to the need for institutional safeguards, caution, and on-going monitoring and evaluation of their use.

2. Negotiated Penalty Settlements

Regulators empowered under RESA Part III may impose fixed penalties or other variable ‘discretionary requirements’ on those they believe have violated the law without recourse to the courts.11 Fixed money

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11 RESA ss 39-41 (fixed monetary penalties), ss 42-43(discretionary requirements).
penalties will normally be capped at £5000\textsuperscript{14} but it will be up to the regulator to determine the size of any variable monetary penalty, although they must develop and publish guidance identifying the factors relevant to determining the size of the penalty.\textsuperscript{15} One of the striking features of the Part III sanctioning procedure is its explicit provision for negotiation and bargaining between the regulator and suspected violator concerning liability and the nature, scope and magnitude of the penalty itself. Before any penalty can be imposed, the regulator must engage in discussions concerning the proposed penalty with the person believed to have committed a relevant offence, giving that person 28 days to make representations, following which the regulator must decide whether to impose the penalty with or without modification, and issue a final notice to that effect.\textsuperscript{16} Where a fixed monetary penalty is proposed, the recipient is entitled to make a ‘discharge payment’ which effectively confers a discount for electing to accept liability rather than proceed to a formal decision.\textsuperscript{17} In the case of discretionary requirements, including variable monetary penalties, the notified person must be given an opportunity to offer alternative undertakings (including the payment of money to affected third parties) in order to secure a reduction in the magnitude and severity of variable penalty to be imposed.\textsuperscript{18} If a discretionary requirement is imposed, the final notice must also state the grounds for its imposition, any applicable early payment discount or late payment penalties, rights of appeal available against the decision and the consequences for non-compliance.\textsuperscript{19}

In other words, the Act explicitly endorses the use of negotiated penalty settlements between the regulator and suspected violator to determine liability for, scope and magnitude of the penalty or other sanction to

\textsuperscript{14} ss 39-41 RESA. Details of fixed penalties will be provided for by the Minister in question. They may be set at a single amount, or they may vary according to certain factors such as the size of the business. The Better Regulation Executive, Department for Business, Enterprise & Regulatory Reform, Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act (July 2008) (hereafter ‘BRE Guidance to the Act’) states that fixed monetary penalties are intended to be used in respect of ‘low level, minor instances of regulatory compliance’.

\textsuperscript{15} Regulators may impose ‘discretionary requirements’ pursuant to s 42(3) of the Act which ‘can include ‘a requirement to pay a monetary penalty to a regulator of such amount as the regulator may determine’ if satisfied beyond reasonable doubt that the person has committed a relevant offence: s 42(2). Examples of possible aggravating and mitigating factors relevant in determining the size of the penalty are provided in The BRE Guidance to the Act at 31.

\textsuperscript{16} s 43 (discretionary requirements) and s 40 (fixed monetary penalties) RESA. The making of a payment of a sum lower than or equal to the original penalty may be made before the expiry of the 28 day representation period thereby stopping proceedings from progressing further.

\textsuperscript{17} s 40(2)(b) RESA.

\textsuperscript{18} s 43(5) RESA. The BRE Guidance to the Act provides an example of a business committing to pay compensation to persons affected by the offence in question, with the variable monetary penalty reduced to take into account the compensation offered at 39. If a discretionary requirement is imposed, final notice must also state the grounds for its imposition, any applicable early payment discount or late payment penalties, rights of appeal available against the decision and the consequences for non-compliance: s 43 RESA.

\textsuperscript{19} s 43(6) RESA. Rights of appeal against the decision are only available if there is an error of fact, error of law or if the decision is unreasonable: s 43(7) RESA.
be imposed. This entails a significant shift away from the formal process of adjudication undertaken by a court in hearing evidence and representations from opposing parties that has typically applied when UK regulators have sought to impose significant legal sanctions on suspected regulatory violators. The resulting move towards administrative bargaining to determine legal sanctions has significant constitutional implications, which this section seeks to interrogate. These are illuminated by contrasting the insights arising from ethnographic studies that have observed how enforcement officials rely extensively on bargaining and negotiation when responding to suspected non-compliance with regulatory rules, with legal critiques of the use of plea bargaining within the criminal process. While the latter body of scholarship typically express stinging condemnation of criminal plea bargaining, the former tends to portray bargaining in the regulatory enforcement context in a positive light. These apparently contradictory views can, however, be reconciled. By examining the slippery character of regulatory wrongs and their associated sanctions, the underlying tension between the constitutional values which criminal law scholars tend to emphasise and the benefits of negotiated enforcement which ethnographic researchers observe as necessary and desirable for securing future compliance is brought to light.

2. Bargaining and Negotiation in Law Enforcement

According to the constitutional doctrine of separation of powers, the role of formally determining whether a violation of the law has occurred, and the appropriate legal sanction to be imposed for violation, lies with the courts. The role of administrative officials in law enforcement is in theory confined to investigating and collating evidence concerning suspected legal violations, and, where appropriate, instituting legal proceedings against the suspected violator for judicial determination and the imposition of sanctions. Yet in practice, the use of bargaining and negotiation between administrative officials and those suspected of legal violations is pervasive and well-established across a range of legal contexts, forming the focus of considerable scholarly attention.

2.1 Ethnographic Studies of Regulatory Enforcement Officials

One well-known strand of regulatory compliance scholarship documents the findings of a large and varied range of ethnographic studies that have sought to investigate, understand and explain how regulatory enforcement officers seek to secure compliance.20 Many of these studies have identified a

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notable reluctance on the part of enforcement officials to rely upon formal prosecution in responding to observed non-compliance, favouring an accommodative, conciliatory approach involving counselling, negotiation and bargaining with those under investigation. Resort to the formal legal process is perceived by many officials, at least in the UK context, as a strategy of last resort, to be called upon only when attempts to cajole and counsel the suspect into compliance have failed.\footnote{Hawkins (2002) \textit{ibid}; Vogel, D., \textit{National Styles of Regulation - Environmental Policy in Greater Britain and the United States} (1980) Cornell University Press, New York.} This conciliatory approach, referred to by Hawkins and others as a ‘compliance’ strategy, is often contrasted with a more formal, adversarial approach that relies more heavily on invoking the legal process by seeking to punish and deter contraventions through the imposition of penalties for non-compliance.\footnote{Hawkins (1984), \textit{supra} n 20.} This ‘sanctioning’ or ‘deterrence’ strategy, as it has been variously described, is often claimed to be less effective in securing compliance because it is thought to generate greater resistance from regulated firms, undermining the importance of generating a culture of shared commitment to regulatory goals between regulator and regulated which is claimed to provide the necessary foundations for compliance. Hawkins is even more emphatic. In his view, not only is a compliance strategy likely to be more effective in achieving compliance, but it is ‘morally compelled’ because the authority of regulatory officials is not secured on a perceived moral and political consensus about the ills they seek to control. A strategy of bargaining and negotiation is therefore considered essential in order to sustain the support of the regulated.\footnote{\textit{Ibid.}}

\textbf{2.2 Plea Bargaining in Criminal Proceedings}

The use of bargaining and negotiation by law enforcement officials is also the subject of considerable academic critique by legal scholars concerned with analysing the use of ‘plea bargaining’ in the criminal process. Although plea bargaining refers to a variety of practices sometimes used in criminal proceedings,\footnote{A more comprehensive discussion of bargaining and negotiation in the context of Australian competition law enforcement is provided in Yeung, K., \textit{Securing Compliance} (2004) Hart Publishing, Oxford, Chapter 5.} its central feature is that the person alleged to have violated the law is offered some form of inducement or benefit by the enforcement authority in exchange for a plea of guilty in a criminal case.\footnote{This definition excludes agreements that involve the grant of immunity from prosecutor to the accused.} Plea bargaining offers several benefits, which are primarily concerned with the swift resolution of proceedings and the cost savings associated with the avoidance of trial.\footnote{JUSTICE, \textit{Negotiated justice : a closer look at the implications of plea bargains} (Justice, London 1993)} From the state’s perspective, the benefits of plea bargaining arise primarily from the cost savings arising from the avoidance of trial to determine the alleged violator’s guilt or innocence. Within legal regimes where liability and penalty are
determined in court proceedings, it may also enable the state to secure a conviction without enduring the hazards of trial whose outcome is uncertain. Hence, plea bargains can be seen as promoting the public interest in the early settlement of disputes and the prompt resolution of conflict. Similarly, for the guilty, the benefit lies in a reduction in sentence than would otherwise have been imposed had the accused contested the allegations, whilst avoiding the costs associated with contested litigation. For the innocent, however, the benefits are more amorphous: an innocent accused might accept a plea bargain rather than seeking to establish her innocence at trial to avoid the prospect that she may fail to do so, with the consequent imposition of a more severe sentence than would otherwise have been imposed had she pleaded guilty. ie the benefit lies in exchanging the risk of being found guilty and subject to a heavier sentence for the certainty of a more lenient sentence by accepting a plea bargain.

Unlike ethnographic studies of regulatory enforcement officials, which have tended to emphasise the benefits of bargaining within the law enforcement process, academics working from within the criminal law tradition have typically expressed strenuous objections to plea bargaining in criminal proceedings, at best expressing grudging tolerance of such practices in the interests of pragmatism and expediency. Their objections are rooted in concerns that plea bargaining practices may antagonise several constitutional values, particularly those of due process, transparency, accountability, legality, and legal principles associated with the fair treatment of persons, such as proportionality, consistency and rationality. For example, they fear that plea bargaining undermines the procedural rights of the accused by imposing institutional pressure on the innocent persons to plead guilty rather than avail themselves of their fundamental right to trial, thereby forgoing the prospect of acquittal. Not only does this create indisputably grave risks associated with pressuring the innocent to plead guilty, but by enabling variation of sentence for reasons unrelated to the accused’s wrongful conduct, it departs from the right to fair treatment reflected in principle that the sentence should be proportionate to the gravity and seriousness of the criminal conduct in the particular case. The resulting injustice arising from inaccuracy or inappropriateness of outcomes in criminal cases is also difficult to detect, owing to the secrecy of plea bargaining discussions. Only the end result is open to public scrutiny, with little or no judicial supervision except in the actual imposition of sentence or penalty. This can lead to sloppy practice, resulting in abuses such as charge reduction unwarranted by likely trial or sentence, or facts concealed from the court to ensure an agreed outcome. Hence overall transparency and accountability in the criminal process is diminished, and may erode public confidence in the enforcement process.

2.3 Regulatory Wrongs, Punitive Civil Sanctions and Procedural Fairness

The preceding objections may be traced, at least in part, to concerns that the negotiation process may fail to respect the constitutional demands of the right to due process (or ‘procedural fairness’), which is protected under Article 6 of the European Convention of the Human Rights and given domestic legal expression under the Human Rights Act 1998. Yet concerns for due process do not feature in the findings of ethnographic studies of regulatory enforcement officials. How then, do we explain these rather polarised critiques? Some clues can be found in disagreement between Keith Hawkins, who claims that a compliance approach to regulatory enforcement is ‘morally compelled’ due to the lack of moral and political consensus about the ills which regulators seek to control, and the views of Pearce and Tombs. The latter claim that a compliance approach merely reflects a conservative political ideology that illegitimately perceives corporate illegality as morally and qualitatively different from more traditional crimes. For them, a punitive strategy is a necessary, practical and desirable response to corporate wrongdoing. This disagreement points to difficulties in characterising the quality or nature of regulatory wrongdoing, particularly given the extensive variation in the kinds of activities that may amount to regulatory violations, ranging from trivial infractions of regulatory standards which pose no real risk of harm to others, through to violations causing serious harm that involve intentional, reckless or a grossly negligent lack of concern for the well-being of others. Many regulatory infractions lie in the shadowy middle-ground, not as serious and worthy of moral censure and condemnation as brutalising offences to the person sanctioned by the criminal law, yet nor are they directly analogous to essentially private law wrongs that ground causes of action in tort or contract that generate civil liability for damages.

If the fundamental principle that a legal sanction should be proportionate to the seriousness and gravity of the offence is applied to regulatory violations, then the character and severity of the sanctions which they appropriately attract would also fall into this middle-ground. Within western legal systems, the starting point for unpacking the nature, character and severity of sanctions rests on the distinction between civil and criminal liability which serves both to generate and encapsulate a series of normative standards or ideals typically associated with the commission of legal wrongdoing, possessing both a substantive and procedural dimension. The ‘hybrid’ character of many regulatory sanctions, reflecting a mix of


features that are characteristic of civil and criminal liability, is illuminated by contrasting civil and criminal law paradigms of liability:

a) The criminal law paradigm: At least four central features are typically associated with the criminal law paradigm of liability. First, the imposition of liability primarily concerned with censuring the wrongdoer for activity considered morally blameworthy. Secondly, the sanction for wrongdoing entails serious consequences for the wrongdoer (including restrictions upon, or deprivation of, individual liberty) and carries a significant degree of moral stigma. Thirdly, in response to the seriousness of criminal liability, the ‘responsibility’ principle is of considerable importance: hence the standard of liability paradigmatically requires proof of culpability (whether intention or recklessness). Finally, the suspected wrongdoer is entitled to a full range of procedural safeguards within the enforcement process.

b) The civil law paradigm: The above four features associated with the criminal law paradigm can be contrasted with those typically associated with the civil law paradigm of liability. First, the civil law is primarily concerned to impose obligations of repair on the wrongdoer (compensation and restitution to the victim) rather than condemnation. Secondly, financial liability is incurred towards the victim, not the state. Thirdly, civil liability typically lacks the degree of moral stigma accompanying criminal liability. Finally, the consequences of liability for the wrongdoer are less serious than those associated with the criminal law paradigm, hence proof of culpability is not essential and the procedural rights of the wrongdoer are considerably weaker.

One of the distinctive and problematic features of regulatory wrongdoing is that the character of liability and sanction for such wrongs may be located in the shadowy twilight falling between the civil and criminal paradigms. This may help to explain the polarisation between critiques of bargaining in the law enforcement process: while criminal scholars typically focus attention on plea bargaining where the charges in issue relate to offences that are central to the criminal paradigm, regulatory enforcement scholarship may tend to view liability for regulatory violations as more closely aligned with the civil paradigm. Hence the former typically emphasise the dangers of negotiated enforcement in undermining the procedural rights of the accused, while the latter may see such practices as largely akin to the processes of consensual settlement that are actively encouraged in the resolution of civil liability disputes between private litigants. Differences in the terminology which these scholars adopt reflect their underlying assumptions: while ethnographic researchers have tended to refer to those suspected of regulatory violations in neutral terms (such as ‘the regulated’ or ‘the firm’), criminal law scholars

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typically refer to those suspected of criminal wrongs in somewhat starker terms, (such as ‘the accused’ or ‘the suspect’). Yet the character of many legal wrongs, and their associated sanctions, fall somewhere between these two paradigms of liability. The practice of modern western legal systems has shown an increasing tendency towards the hybridisation of sanctions displaying a mixture of features, some characteristic of criminal sanctions, others more reminiscent of civil sanctions. This tendency is especially prominent in the regulatory sphere, with the growing popularity of punitive civil sanctions – their primary purpose is punitive in nature, seeking to deter conduct thought to impede the collective goals underpinning the regulatory regime, but in which liability is formally characterised as civil and is imposed in the context of civil rather than criminal proceedings.\footnote{Mann, \textit{ibid.}} The civil sanctions introduced under Part III of RESA provide fine examples. The existence of this middle-ground between the civil-criminal divide suggests that, just as traditional crimes and regulatory violations may be situated along a continuum, depending on the extent to which an offence is morally reprehensible and thus subject to social condemnation and censure, so also sanctions can be situated along a sliding scale.

What, then, are the implications for procedural fairness arising from the hybrid character of such sanctions? In one sense, procedural fairness refers to an administrative law doctrine more commonly referred to as natural justice, comprised of two limbs: decisions by public officials should be made in an unbiased manner, and that those affected by such decisions should be given an opportunity to participate in the decisions that affect them. In a broader, constitutional sense, it refers to the values justifying the legal rules of procedure, rather than the specific rules themselves. While procedural fairness can be justified on several grounds, one important justification lies in the importance of accuracy in legal decision making.\footnote{Galligan, D., \textit{Due Process and Fair Procedures} (Oxford University Press, Oxford 1996).} Because mistakes are unavoidable in the process of legal decision-making (due to human frailty and the incompleteness and imperfections of information) we can never been certain that the correct outcome has been reached in all cases. Hence in establishing the requirements of procedural fairness, we must ensure that no person is exposed to an unacceptable risk of a mistaken outcome, and that this risk is distributed fairly among possible victims.\footnote{Ibid.} The more serious the consequences of mistake, the graver the resulting moral harm. So while there is undoubted moral harm in wrongfully imposing civil liability on a person for breach of contract, the mistaken conviction and punishment of an innocent person for a serious crime generates much graver moral harm. The demands of procedural fairness therefore vary in relation to the seriousness and gravity of the wrongdoing and the associated sanction: hence the procedural demands of the criminal law process are much more extensive than those of the civil process. It follows, then, that the requirements of due process in relation to punitive civil sanctions...
sanctions, such as monetary penalties arising under Part III of RESA, sit somewhere in the middle-ground: the hybrid quality of such sanctions requires greater procedural protections than those applicable to the paradigm civil process, yet less extensive than those adopted for paradigm criminal wrongdoing. When determining the demands of procedural fairness the formal label attached to a sanction as civil or criminal is not conclusive, but a matter of substantive characterisation, as the voluminous litigation and case law surrounding Article 6 of the ECHR vividly demonstrates.34

2.4 Practical Implications: The Need for Safeguards

What does this imply for negotiated penalty settlements? It suggests that although their use may impose significant strain on the constitutional values of procedural fairness, accountability, transparency, consistency and proportionality, there may nevertheless be scope for instituting various safeguards to reduce the risk of unduly pressuring innocent defendants to settle and to promote transparency and accountability in the negotiation process whilst allowing the benefits of settlement to be reaped. Given that these benefits are considerable, if adequate safeguards are in place, concerns about their use do not appear to be so weighty as to render them illegitimate. Although identification of the appropriate safeguards will depend on the risks of abuse in specific contexts, several constitutional values should be borne in mind. Arguably, the greatest risk associated with the institutional framework in which civil sanctions are established under RESA lies in failing to respect the demands of due process. Within the criminal justice process, the functions of investigation, prosecution and adjudication are vested in three separate and distinct authorities: the police, the Crown Prosecution Service and the courts. Under RESA, however, all three functions are vested in a single authority. Hence regulators with RESA civil sanctioning powers wield extraordinarily broad discretionary powers of enforcement which thus carries a significant risk of prosecutorial overreaching that can result in a failure to adhere to the requirements of due process. To reduce these risks, institutional self-restraint provides an important safeguard, particularly when supported by published guidelines which identify the parameters of acceptable enforcement practices to inform and constrain the exercise of the regulator’s discretionary powers.35 These should include, for example, guidance on the terms upon which the regulatory authority will be willing to engage in sanction negotiations, such as the quality of the evidence supporting the offence which the regulator will require before issuing a final penalty notice, the scope, nature and magnitude of the proposed penalty (including its adherence to the proportionality principle) when making sanctioning

34 Article 6 of the European Convention on Human Rights expressly confines a set of specified minimum procedural rights (such as the presumption of innocence, the right to legal assistance and so forth) to criminal proceedings, so that the European Court of Human Rights has often been called upon to classify offences as civil or criminal for the purposes of determining the range of procedural rights available in particular cases. See Ozturk v Germany (1984) EHRR 409; Maligne v France (1999) 28 EHRR 578; Escobet v Belgium (2001) 31 EHRR 46.

35 Crispin, K., ‘Prosecutorial Ethics’ in S. Parker and C. Samford (eds), Legal Ethics and Legal Practice (1995). s 63 RESA.
decisions, whether it is willing to accept a discharge payment or settlement in circumstances where the suspected offender denies committing any offence, and limits on the size of the ‘sentence discount’ which a suspected offender can expect by early acceptance of liability.36

Although professional self-restraint embodied in ethical guidelines should assist in reducing the risk of administrative overreaching in the sanctioning process, it may not be adequate to safeguard constitutional values. The requirements of accountability and transparency also require that the public should be able to scrutinise the actions of public authorities. Although s 65 of RESA requires that a regulator must publish reports specifying the cases in which civil sanctions under Part III have been imposed, or where a person has discharged liability, it leaves considerable discretion to the regulator concerning how detailed its reporting should be. In order to ensure adequate transparency and accountability of its sanctioning powers and decisions, it is important that regulators should provide a thorough account of the reasons for imposing a sanction, clearly stating that it had obtained sufficient reliable evidence to satisfy the statutory thresholds for triggering its sanctioning powers, any objections lodged by the defendant, and why it declined to accept those objections. At the same time, accountability also requires that those who are adversely affected by regulatory decisions can challenge the validity of those decisions. Hence it is of vital importance that the appellate oversight established under RESA is provided on a robust basis, enabling proper scrutiny of the regulator’s reasons and actions, and the evidential basis upon which it proceeded.37

3. Enforcement Undertakings as Administrative Settlements

Enforcement negotiations under RESA extend beyond matters concerning the defendant’s legal liability and the imposition of penal sanctions. As numerous studies of regulatory enforcement attest, the vast bulk of the complaints received by regulators concerning alleged violations are ‘settled’ with only a small minority of complaints subject to detailed investigations, let alone formal enforcement proceedings. I use the term ‘administrative settlement’ to refer to situations where enforcement action is actually being ‘settled’ in consideration for concessions or commitments provided by the suspect, thereby excluding investigations which are discontinued without the regulator extracting such concessions. Unlike negotiated penalty settlements, which result in an official determination of liability and the imposition of punitive sanctions, administrative settlements do not. Although informal administrative settlements have long been used by regulators in resolving enforcement proceedings, RESA s 50 now empowers regulators to accept ‘enforcement undertakings’ (‘EUs’) from those whom the regulator has ‘reasonable

36 For a more extensive discussion of potential safeguards that appropriately circumscribe enforcement negotiations, see Yeung, supra n. 24 at 135-149.

37 Contrast the very light-handed scrutiny by the Australian Federal Court in competition penalty proceedings discussed in Yeung, supra n 24, 144-151.
grounds to suspect’ have committed a regulatory violation, thereby giving them statutory recognition and institutionalising their use. In the following discussion, I explore the constitutional implications of administrative settlements in regulatory enforcement by drawing upon several different strands of literature, beginning with the Macrory Report’s understanding of enforcement undertakings as a type of ‘intermediate’ sanction. Their character is then explored through an examination of the underlying bargaining process by which they are secured, public law constraints on the exercise of administrative power, and analyses of forms of social ordering and dispute resolution.  

### 3.1 Administrative Settlements as Regulatory Enforcement Instruments

The Macrory Report described EUs as ‘legally binding agreements between the regulator and business, under which the business agrees to carry out specific activities to rectify its non-compliance’. It recommended the introduction of EUs to overcome the existing regulatory sanctioning system’s undue reliance on criminal penalties. Hence the Report called for the introduction of ‘intermediate’ sanctions (including EUs) understood in terms of the degree of legal formality and coerciveness which they entail, stating that:

‘Regulators have access to informal sanctioning through advice or warning letters, or extremely serious sanctions such as criminal sanctions, but there is a gap relating to intermediate sanctions. Regulators have limited sanctions for cases that are not serious enough to be prosecuted and too serious just to receive an informal warning. For this reason I am suggesting the addition of some sanctions to fill this gap.’

The Report noted that the use of such settlements in other jurisdictions, especially Australia, had provided a ‘quicker and more cost effective’ mechanism for resolving non-compliance. In this respect, the Report’s depiction of EUs reflects the kind of characteristics that are often emphasised in the ‘tools of government’ literature, which seeks to understand the nature and variety of policy tools available to the governments when seeking to secure their policy objectives. Within this literature, different regulatory enforcement instruments are often characterised and ordered according to the level of formality (or informality) which they entail, and the degree of coerciveness (or voluntariness) underpinning them. So, for example, Ayres and Braithwaite depict enforcement tools and strategies according to a ‘pyramid of

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38 A more comprehensive discussion of the use of administrative settlements in the context of Australian competition law proceedings is provided in Yeung supra n.24, Chapters 6-7.

39 The Macrory Report, 65. Enforcement undertakings are defined in s 50(2) RESA as “an undertaking to take such action as may be specified in the undertaking within such period as may be so specified.”

40 Ibid, 7.

41 Ibid, 65.

42 Ibid 63.
enforcement’, characterising and ordering regulatory tools and sanctions by reference to their coercive backing, associated formality and expense.\textsuperscript{43} Informal, co-operative solutions between the regulator and regulated lie at the base of the pyramid, constituting the most numerous, most timely and least costly means by which the regulator may secure compliance. As the pyramid ascends, the sanctions become increasingly severe in terms of their legal, coercive and deterrent effect on the regulated and the costs to both the regulator and the regulated in using those sanctions to secure compliance. In this way, the static pyramid of enforcement represents sanctions in a hierarchical fashion, reflecting a cost/benefit trade-off involved in regulatory compliance.

While Ayres and Braithwaite’s pyramid of enforcement model has been criticised on various grounds\textsuperscript{44}, one of its limitations arises from its tendency to overlook the distinct social purposes served by different enforcement tools. In this respect, the Macrory Report provides welcome recognition that there are various social goals that regulatory sanctions may properly pursue, including changing the offenders’ behaviour\textsuperscript{45}, eliminating the gain or benefit arising from non-compliance\textsuperscript{46}, restoring the harm caused by non-compliance\textsuperscript{47} and deterring future non-compliance.\textsuperscript{48} So, in seeking to bring about a change in the offenders’ behaviour, regulatory sanctions might seek to bring about the termination of the impugned conduct and to prevent specific types of activity, restoration may entail the payment of compensation to those harmed by the offence in order to place the parties affected by the impugned conduct in the position they would have been in had the conduct not occurred, and deterrence of future non-compliance might also entail punishment of offenders for their wrongdoing.\textsuperscript{49}

However, identifying the social purposes that any given enforcement tool or sanction may be thought to serve is not always straightforward. Some instruments may serve several purposes whilst the same purpose might be served by several different instruments. Hence enforcement tools are more appropriately characterised in terms of the purpose or purposes for which they are most suited and least suited (or even unsuitable). For example, the Macrory Report lists the purposes that EUs could serve to

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\item \textsuperscript{43} I Ayres and J Braithwaite, \textit{Responsive Regulation} (1992) Oxford University Press, New York, 19.
\item \textsuperscript{44} For a concise account, see J Black and R Baldwin, ‘Really Responsive Regulation’ (2008) 71(1) \textit{Modern Law Review} 59-94.
\item \textsuperscript{45} The Macrory Report at 29.
\item \textsuperscript{46} \textit{Ibid} at 9.
\item \textsuperscript{47} \textit{Ibid} at 31.
\item \textsuperscript{48} \textit{Ibid}.
\item \textsuperscript{49} s 50(3) RESA provides that the action specified in an enforcement undertaking must be (a) action to secure that the offence does not recur; (b) action to secure that the position is, so far as is possible, restored to what it would have been if the offence had not been committed; (c) action including payment of a sum of money to benefit any person affected by the offence; or (d) action of a prescribed description.
\end{itemize}
include rectifying non-compliance and securing changes in business behaviour, compensation, reimbursement and redress of affected parties and restoration. Yet the Report does not explain why these particular purposes are appropriately served by EUs. Part of the explanation may lie in the legal constraints circumscribing the power underpinning the sanction. Because the scope and content of administrative settlements are determined by mutual agreement between the regulator and defendant, rather than imposed unilaterally by an independent tribunal, this may suggest that they could be employed to pursue an infinite range of possible purposes, restricted only by the parties’ creativity and imagination. But because such settlements involve the exercise of public administrative power, they are subject to administrative law restrictions on the scope of permissible settlement. So, for example, administrative settlements could not lawfully provide for the payment of bribes or other kickbacks to the regulator in return for a favourable regulatory decision, including forbearance from more severe enforcement action. In other words, some purposes could not be secured by administrative settlements because they would involve an abuse of administrative power. In particular, it is well-established that the imposition of punishment is quintessentially a judicial function. Hence administrative settlements are unsuited to securing penal purposes, at least in the absence of independent oversight to oversee the fair and accurate application of legal standards so as to ensure that the innocent are not punished, a conclusion reinforced by the preceding discussion of the dangers of criminal plea bargaining. Aside from punishment, administrative settlements may, like court-ordered remedies, also be properly utilised to terminate impugned conduct and to pursue restorative goals including securing compensation for those harmed by the offence. On the other hand, because administrative settlements are based upon the parties’ agreement, rather than on the formal coercive state power, they might also be suited to promoting social goals that cannot readily be achieved by court order, such as the implementation of broad-based compliance programs, stimulating regulatory innovation in the relevant industry, or to implement arrangements that involve third party participation or on-going monitoring.

3.2 Administrative Settlements and the Bargaining Process

Administrative settlements can also be understood by reference to the underlying social process by which they are secured. Unlike court-ordered remedies, which are imposed following a process of impartial adjudication, administrative settlements are concluded following a process of negotiation and bargaining between the regulator and the regulated. These two processes, bargaining and adjudication, represent two distinctive and strikingly different forms of reaching decisions, of settling disputes and defining individual’s relations with each other. Hence academic reflection concerning forms of social ordering can help illuminate our understanding of administrative settlements, and to which I now turn.

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50 The Macrory Report 66.
In his well-known work on adjudication, Fuller highlighted three forms of social ordering which could be used to settle disputes: contract, elections and adjudication.\(^{51}\) In his view, the characteristic feature of each form lay in the manner in which the affected party participates in the decision reached. Thus, elections entail participation by voting, contract entails negotiation, and adjudication entails the presentation of proofs and reasoned arguments. Of these, Fuller identified adjudication as the most rational, for it is the device that gives formal and institutional expression to the influence of reasoned argument in human affairs. By this he meant that adjudication is institutionally committed to a decision based on 'principle'. It depends critically on governance through rules that are authoritatively applied by a neutral and independent arbitrator.\(^{52}\)

With its reliance upon rules, adjudication is most closely associated with what Lacey calls the 'legal paradigm'\(^{53}\) which draws heavily on Dicey's largely formalist conception of the rule of law.\(^{54}\) Fixed, certain and precisely formulated legal rules constitute a critical (but not sufficient) component of the rule of law ideal, fulfilling one of the important aims of the law in guiding behaviour, enabling citizens to ascertain the rules governing their activities. In normative terms, governance by settled rules assists in defining and protecting the liberty of the person from the exercise of arbitrary state power. But there are a number of now familiar problems associated with using rules, such as their inability to control behaviour, which can be attributed to the inherent properties of rules themselves.\(^{55}\) Rules are anticipatory, generalised abstractions which, when endowed with legal status, provide authoritative reasons for action. Rules will inevitably be under- or over-inclusive in relation to their overriding purpose, failing to catch situations which they should while catching situations which should be excluded, due to epistemological uncertainty and the inherent nature of generalisations. Since rules are not self-executing, but require interpretation for their application, they are inevitably indeterminate, due to the inescapable indeterminacy of language and the subjective and contingent nature of the interpretation of the fact situations to which they are applied.\(^{56}\) The problems associated with rule indeterminacy are

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particularly acute in relation to legal rules – for their authoritative status generates the possibility of sanction for breach so that it is important to understand whether or not a particular action is covered by and in compliance with the rule.

(b) Bargaining and Negotiation

In contrast, rules and settled standards are largely alien to the process of bargaining and negotiation which relies critically upon the consent of its participants, ideally given freely and on an informed basis. In contrast, governance through rules relies upon coercion rather than consent – it is the application of rules that authoritatively determines the outcome of the parties’ dispute. In the regulatory context, one of the particular strengths of the negotiation process is its potential to overcome, or at least reduce, problems associated with the inherent limits of rules, a function admirably illustrated by Julia Black in her discussion of regulatory ‘conversations.’ Put simply, bargaining and negotiation can mediate the tensions between the desire for certainty on the one hand and flexibility on the other enabling rules to be applied to the particular circumstances in a manner which conforms to their underlying purpose or ‘spirit’. These virtues chime harmoniously with the general practical benefits that supporters of alternative dispute resolution (ADR) emphasise, including its informality (implying that it is less alienating and intimidating to ordinary citizens), low cost, width and ease of access, and speed of operation. But in addition to these practical claims lies a further ideological dimension: because the resolution of disputes through negotiation and bargaining relies primarily on consent to generate a mutually satisfactory outcome for its participants, it is more consistent with individual autonomy and freedom than is formal adjudication. Because the latter is based predominantly on coercion, it thus reflects a paternalistic and interventionist state. Modes of resolution that are primarily consent-based are thus claimed to be associated with images of accommodation, conciliation, inclusiveness and participation. Court adjudication, on the other hand, is alleged to be associated with notions of combat, hostility, formality, resistance and exclusion.

3.3 Bargaining and the Rule of Law


58 Black supra n 56.

59 McEwan and Maiman supra n 57.


But enthusiasm for ADR dispute processing is far from universal. For example, Richard Abel argues that processes of ‘informal justice’ involve techniques of subtle manipulation in which the state is able to expand its apparatus of control over citizens.62 They disguise rather than eliminate coercion, providing the forum in which the ‘velvet glove has largely hidden the iron fist.’63 Similarly, Auerbach claims that ADR techniques operate in practice to disempower and exclude the socially disadvantaged, while formal legal rights remain the domain of the bourgeois elite who can afford to invoke the formal legal process and its protections.64 These are largely political objections to ADR, resting on deep-seated scepticism of the ability of methods of alternative dispute resolution to live up to their promises when translated into a world fraught with distributional inequalities. But principle-based objections have also been raised, powerfully expressed in Fiss’s arguments ‘against settlement’.65 To him, ‘[t]o settle for something means to accept less than some ideal.’ For Fiss, the purpose of adjudication is not primarily to resolve disputes, but to explicate and give force to the authority of legal rules, to interpret the values upon which they are grounded and to bring reality into accord with them. Thus, when legal disputes are resolved outside the court, this purpose is left wanting. Fiss’s objections point to an inherent tension between the use of negotiation and bargaining as a mechanism of decision-making and dispute-resolution and the rule of law. As Luban has stated:

‘…we can see why Fiss finds nothing to celebrate in settlements. When a case settles, it does so on terms agreeable to its parties, but those terms are not necessarily illuminating to the law or to the public. Indeed, those terms may be harmful to the public. Instead of reasoned reconsideration of the law, we often find little more than a bare announcement of how much money changed hands (often accompanied by a disclaimer of actual liability) – unless the settlement is sealed, in which case we don’t even find that out…..A world without adjudication would be a world without public conversation about the strains of commitment that the law imposes.’66

In response, the underlying assumptions upon which Fiss rests his claims can be readily challenged. Lacey has, for example, lamented legal scholars’ tendency to conceptualise disputes in terms of the ‘legal paradigm’ which portrays disputes as calling for resolution on the basis of given rules and according to the standards of due process.67 At the heart of the legal paradigm is the central place occupied by the rule of law in liberal legal ideology, involving the ideal of subjecting areas of legally relevant activity to

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63 Ibid, 270.
64 Auerbach supra, n 60, 145.
67 Lacey supra n. 53, 362.
general standards which emphasises formal justice and the importance of rationality in the liberal worldview. Because the resolution of disputes through negotiation is shaped by the reciprocal needs and interests of the parties worked out through their bargain, rather than dictated by legal rules, it can be seen as contrary to the rule of law ideal. The resulting agreement need not reflect that which would have resulted from court adjudication through the application of legal rules.

Yet to insist upon court adjudication of all legal disputes would be impossible to achieve in practice, even if such an ideal was considered worth pursuing. Negotiation can promote the effective resolution of disputes, furthering the public interest by promoting the value of participation, encouraging relationships of trust, and resolving conflict in a flexible, responsive, inexpensive and timely manner. Nevertheless, there is some cogency in the objection to ADR techniques such as bargaining on the basis that they may circumvent the standards of the law. This points us to the critical question: what is the public interest in having the law applied in accordance with legal standards rather than as agreed between the parties? What, if anything, is lost when legal disputes are resolved privately between participants which inevitably implies, at least in some situations, a departure from the general standards embodied in authoritative legal rules?

My suspicion is that the answer is heavily context-dependent, contingent upon the nature and purpose of the legal standards allegedly departed from in particular social contexts. In revisiting Fiss’s opposition to settlements, Luban suggests that the issue is not whether we should be ‘against settlements’, as the title to Fiss’s well-known article suggests, but rather that we position ourselves ‘against the wrong settlements’. Thus, for example, the resolution of allegations of serious criminal wrongdoing in which an innocent accused agrees to the prosecution’s offer of a lesser punishment than that which might ordinarily attach to the relevant crime seems unquestionably illegitimate. This is primarily because the punishment of the innocent represents a gross violation of the rule of law and an unjustified infringement of fundamental human rights, even if it could plausibly be said that the innocent person ‘consented’ to her punishment. But the illegitimacy also arises partly because the standards of the criminal law may be seen as embodying minimum moral standards of behaviour, so that a departure from these standards, or a failure to apply them correctly, is seriously to undermine the moral and social fabric of the law and legal institutions. In a similar, albeit less striking way, the acceptance of an administrative settlement by an innocent firm alleged to have contravened regulatory law, may be seen as an unacceptable departure from the rule of law. On the other hand, the resolution of a contractual dispute between two well-resourced and well-informed commercial parties by reference to agreement does not pose such difficulties, providing a socially desirable means of resolving the conflict between them. The importance

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68 Galligan supra n 32, 285

69 Luban supra n 66, 2647.

70 Fuller supra n.51, 245.
of context strongly suggests that, in evaluating the use of administrative settlements as a means of enforcing regulatory law, we must consider the use of bargaining between the state and citizen.

### 3.4 Regulatory Bargaining Between State and Citizen

In the context of resolving suspected regulatory violations by negotiation and bargaining, two particular sets of concerns arise, which may arise whenever the state bargains with its citizens: the risks of coercion, and risks to constitutional values.

*(a) Coercion and Consent*

In ideal terms, the essence of agreement is one resulting from negotiations between two equally resourced and well-informed participants. When negotiating parties occupy positions of broad equality, we can have confidence that their agreement is truly consensual. But where there is a serious inequality in their bargaining positions, be it in terms of resources, knowledge, or expertise, the resulting agreement might not be genuinely consensual and voluntary. When the state negotiates with a citizen, there appears to be an inherent institutional imbalance between their respective bargaining positions. This may be particularly true when the regulated negotiates with the regulator in relation to its response to suspected non-compliance, for the suspected violator is largely at the regulator’s mercy, hoping that the regulator’s discretion will be exercised in its favour.\(^7\)

That said, regulated firms include well-resourced and sophisticated commercial parties not easily ‘bullied’ into agreement. Furthermore, both regulator and regulated will be acutely aware of the relevant legal rules in the shadow of which their bargaining occurs. At any time, either party could insist on the strict application of the law by invoking the formal legal process to determine the matter. Thus, for example, a regulated firm which denies that it has violated the law is at liberty to refuse to participate in settlement negotiations so that the regulator is forced to proceed to a formal determination to establish the validity of its allegations which the suspect can then appeal to an independent tribunal. The regulator may be keen to avoid this in light of the potentially extensive drain that it places on its resources, particularly when faced with a sophisticated and well-endowed opponent. Nevertheless, even sophisticated, well-resourced firms may face significant pressure to settle rather than risk a more severe regulatory response and the associated cost, delay and adverse publicity. In such circumstances, it may be difficult to characterise the resulting settlement as one based on consent, largely negating a key public interest in resolving disputes by agreement.

*(b) Regulatory Bargaining and Constitutional Values*

\(^7\) Abel *supra* n 61, 271.
Unlike concerns about coercion and inequality of bargaining power, which also arise when negotiation occurs between private parties, concerns resting on constitutional values are perhaps unique and largely confined to bargaining between the state and citizen. Resolving regulatory enforcement disputes by way of private agreement between regulator and the regulated can reduce openness, transparency and undermine due process. One of the strengths of court adjudication to resolve suspected non-compliance lies in the strict regulation of court proceedings, the public nature of the trial, and the written, reasoned judgement of the court. It is in formal court procedures that the most stringent and rigorous procedural safeguards are found, particularly in criminal cases. But bargaining and negotiation between the regulator and the regulated occurring outside the court process is a largely closed affair, typically hidden from public view. The general public might be completely unaware that a bargain has been struck and even if the outcome of negotiations is publicised, the underlying reasons for the settlement may remain secret. Excessive or undue resort to bargaining and negotiation in regulatory enforcement, particularly where the matters in issue are contentious could also expose the regulator to claims that it is inadequately accountable for its decisions.

The secretive nature of such negotiations also raises concerns of due process and participation. Typically, enforcement negotiations are confined to the regulator and the regulated. Third parties whose interests may be directly and significantly affected by their outcome are typically excluded, generating a real risk that their interests may not be given due consideration despite the effects of the agreement upon them. Furthermore, extensive reliance on negotiation and bargaining between the regulator and the regulated may suggest that their relationship is rather too cosy, generating allegations that the regulator has been subject to ‘capture.’72 But the bargaining process is not entirely unregulated; the administrative law requirements of procedural fairness that apply to the exercise of power by public authorities would doubtless apply to such negotiations. But the person in question is very unlikely to bring a legal challenge for alleged procedural unfairness once an agreement had been made, particularly given that one of the strong incentives driving it to agreement is its desire to avoid formal legal processes.

Finally, negotiation and bargaining between the regulator and regulated parties may threaten the constitutional values required by substantive fairness, particularly those of proportionality and consistency or equal treatment.73 As we have seen, negotiation can be useful in the regulatory context to overcome the inherent limitations of rules by allowing regulatory responses to be tailored to the individual circumstances whilst giving effect to the underlying purpose or spirit of regulatory rules. But this generates risks of inconsistency and unequal treatment. Because the content of the agreement made

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between the regulator and regulated is largely a product of their respective bargaining strengths and skills, there is considerably greater scope for inconsistent outcomes when comparisons are made across multiple regulatory agreements. Such inconsistency may generate the appearance of unfair treatment between similarly situated parties and is contrary to the fundamental value of equality before the law. For similar reasons, there is also a risk that the content of the agreement ultimately concluded between the regulator and regulated may be substantively unfair. For example, the regulated firm may agree to terms that are disproportionate to, or not rationally related to, the conduct in question. Nonetheless, the latter might accept such terms to have done with the matter and avoid the risks and associated cost, expense and adversely publicity that would ensue if the regulator invoked the formal legal process.

So, how should we manage the tension between the virtues of bargaining and negotiation in regulatory enforcement with the potential threats that they may pose to the constitutional values? On the one hand, the suspect’s consent to a settlement agreement might be thought to override the constitutional values identified as under strain. So, for example, why should we object if the parties resolve suspected non-compliance by an administrative settlement on terms which exceed the limits of the relevant regulatory legislation, or which involve terms are which disproportionately broad or intrusive in scope? If effective outcomes are achieved, and given that the purpose of constitutional values is ultimately to protect citizens from the exercise of arbitrary state power, then why should such consensual settlements be a cause for concern? In short, does the pursuit of effective compliance trump constitutional values where it is supplemented by the parties’ consent?

A generalised answer to this question is unlikely to be forthcoming: context is vital, with this tension being worked out within the regulatory and constitutional architecture upon which s 50 RESA powers are exercised. In this respect, the Australian Competition and Consumer Commission’s experience in using statutory administrative undertakings pursuant to s 87B of the Australian Trade Practices Act 1974 is instructive. Clearly the Commission’s ability to accept enforceable administrative undertakings has given it an extremely useful, flexible and powerful enforcement tool, which has been used in two distinct contexts: first, remedially in response to suspected regulatory violations, and secondly, prophylactically as a mechanism through which parties to a proposed merger can offer enforceable undertakings aimed at reducing the market power of the merged entity to avoid exceeding the statutory market power threshold. In the remedial context, the legal force and flexibility of such undertakings has proved more versatile than either litigation or informal administrative resolution, and has been useful

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74 As part of the Australian Consumer Law amendments, the Trade Practices Act 1974 was renamed the Competition and Consumer Act 2010. For a more detailed analysis see Yeung, supra n 24, Chapter 7.

75 The statutory market power threshold specified in the Act is defined in terms of whether the merger or acquisition may lead to a ‘substantial lessening of competition’: per s 50 Trade Practices Act 1974 (Cth Aust).
in supplementing court-ordered remedies to secure social purposes that could not be readily secured by way of court order. In the merger context, the acceptance of enforceable undertakings has encouraged a co-operative dialogue between the Commission and the regulated community, providing opportunities for firms to develop creative and innovative responses that will allow them to proceed with their proposals without the resort to costly and cumbersome litigation, which is a particularly blunt instrument for regulating mergers and may not always provide effective remedies post-completion. But their use has attracted significant criticism, primarily when used to facilitate the informal approval of proposed mergers. These criticisms have focused on issues of participation, due process, accountability and substantive fairness, partly due to the greater likelihood that mergers will impact upon third parties compared with their use in a remedial setting. On the other hand, because merger undertakings are used prophylactically to prevent anticipated contraventions, rather than remedi ally in response to past suspected contravention, this diminishes the risk that they are not genuinely consensual. In other words, the risk of unfair pressure to offer enforceable undertakings is higher in relation to remedial undertakings than in circumstances where merger undertakings are offered. Accordingly, the consent of a regulated firm or individual to provide remedial undertakings should not, in my opinion, be regarded as legitimating the use of enforceable undertakings that are unduly burdensome or disproportionate scope, but we may be more tolerant of excessively wide merger undertakings because the parties willingly consent to these obligations.

4. Regulatory Compliance Advice

The preceding discussion demonstrates how the expansion of regulators’ civil sanctioning power is indicative of the diversionary turn advocated by the better regulation movement, altering the functions and powers of the administrative and judicial arms of government in which the former occupies the predominant role and the latter merely provides a formal channel through which legal accountability can be secured if an aggrieved person is sufficiently motivated to invoke the judicial process to review the exercise of administrative power. Changes to the way in which regulators’ functions are conceived need not, however, entail any formal expansion of their legal powers. In particular, Hampton enjoined regulators to engage more proactively in providing “firm-specific, tailored compliance advice to improve

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77 There have, however, been some criticisms of remedial undertakings, including concerns that some of the purposes which it has pursued may exceed the scope of its legislative power, including the use of enforceable undertakings to secure penal purposes, and to enable the Commission to recover its investigation costs. See Yeung, supra n 24, 204-214.
noting that UK regulators had not actively done so. According to Hampton, not only does
“better advice lead[s] to better regulatory outcomes, particularly in small business”, but:

“a more open and productive relationship between business and regulators can be achieved if regulators frame
their interactions with lower-risk businesses around advice...This could, in some cases, be more resource-intensive than a box-ticking inspection, but will bring benefits to the company, and by extension to the
regulator’s aim of achieving the goals of regulation”.

Hence Hampton recommended that, ‘Regulators should make on-site advice visits and tailored advice
available to businesses’.

This recommendation, which is currently being implemented by UK regulators without any legislative
reform, chimes harmoniously with the better regulation movement’s penchant to avoid formal,
adversarial approaches to enforcement in favour of a more flexible, conciliatory approach in which
negotiation between the regulator and regulatee is emphasised. Yet because the legal status of such
advice is not straightforward, it is far from certain that the benefits which Hampton anticipates will be
realised. In failing to appreciate the complex and uncertain legal status of such advice, the Report also
failed to grapple with the underlying constitutional tensions to which such advice gives rise. In the
following discussion, I explore these constitutional tensions as well as identifying the potential
constitutional implications of a systematic shift in favour of a more proactive tailored, advisory role by
regulatory enforcement officials.

4.1 Regulatory Advice and the Principle of Legal Certainty

Implicit in Hampton’s support for a more pro-active, tailored advisory role for regulators lies an
assumption that the provision of firm-specific advice will enhance legal clarity and certainty for regulated
firms thereby improving their compliance with regulatory rules. Hence Hampton’s recommendations
appear to promote the values of legal clarity and certainty traditionally associated with the rule of law
ideal, enabling citizens to ‘know where they stand’ in relation to the law. But, as administrative
lawyers will be keenly aware, the legal significance of administrative advice is a complex matter that is
highly dependent upon the context in which it is offered. Hence it may be that increasing the provision
of advice by regulators may reduce legal clarity and certainty. In particular, a wide range of difficult legal

78 The Hampton Report, para 2.68.
79 Ibid.
80 The Hampton Report, Recommendation 5.
questions arise when a public authority responsible for the enforcement of legal standards issues advice (whether of a general or firm-specific nature). Consider for example:

- To what extent, if any, is the regulator bound by its advice?
- What if the advice given is erroneous or otherwise unlawful?
- If the firm acts in good faith in reliance on wrongful advice, can it nevertheless be subject to legal penalties for failure to comply with the law?
- If a regulated firm suffers loss as a result of the regulator’s wrongful advice, can the firm recover compensation from the regulator?
- What are the legal consequences for a regulated firm which ignores or fails to heed advice given to it by a regulator?
- What if a third party is unhappy about the advice from the regulator issued to the firm?
- To what extent is a third party entitled to have access to the advice so given?
- What if the regulator issues inconsistent advice to two parties who are similarly situated?
- What if a firm acts on the advice offered by a regulator, and a third party then seeks to bring a private enforcement action against the firm alleging violation?

There is a rich and complex body of law that has evolved in response to questions of this kind, vividly illustrated in legal challenges arising from advice given by the Inland Revenue concerning tax liability.82 This complexity arises because there are other constitutional values besides that of legal certainty at stake in this context, and, as we shall see, much of legal complexity is rooted in the courts' attempt to mediate between these constitutional values. In particular, whether one can rely on advice issued by a public authority depends upon the application of the administrative law doctrine of legitimate expectations. Under this doctrine, the representations of public authorities may give rise to ‘legitimate expectations’ which the law may protect even though there has been no alteration of legal rights or duties.83 In so doing, the courts give expression to the principle of legal certainty, recognising that it would be unfair to deprive those to whom such representations are made of any legal protection. Yet the nature of the legal protection provided is, except in the most exceptional circumstances, confined to the conferral of procedural rights, entitling the representee to be consulted if the authority proposes to resile from its


representations. The law’s reluctance to confer substantive rights obliging the authority to adhere to its representations arises from judicial respect for the constitutional framework of responsible government such that the sphere of policy discretion entrusted to public administrators by the legislature to serve the public and third party interests should not be subject to judicial interference. By largely confining the protection of legitimate expectations to procedural rights, the courts attempt to reconcile their concern to protect the representee from unfairness, whilst respecting the lawful exercise of the public authority’s policy discretion.

In other words, even if recipients of firm-specific compliance advice from regulatory authorities can establish that they are entitled to legal protection of their legitimate expectations, this is unlikely to encompass a right to insist that the authority should be substantively bound by its representations. Hence the provision of firm-specific advice may well confer on advisees a false sense of security based on their mistaken belief that such advice is binding and authoritative. As several cases concerning the doctrine of legitimate expectations demonstrate, it is not difficult to envisage scenarios where a regulated business acts bona fide in reliance a regulator’s specific advice, believing it to be legally authoritative and binding, and then subsequently discovers that it is in violation of the law or is required to incur considerable additional expenditure in order to ensure that its activities satisfy legal standards. This is not to suggest, of course, that professional legal advisors always or necessarily provide more accurate or reliable advice, but when a regulated entity consults legal counsel seeking specific advice concerning its compliance with the law, the resulting advice will not carry the same aura of authority when compared with informal advice issued by a regulatory agency entrusted to enforce the laws in question.

4.2 Is it Constitutionally Appropriate for Regulators to Offer Firm-specific Advice?

The Hampton Report’s failure to recognise the constitutional complexity associated with the provision of firm-specific compliance advice may stem from its tendency to portray the relationship between regulator and regulatee as a largely bilateral one. But there is an important public dimension to the regulator’s role that reaches beyond members of the regulated community. The complexity associated with identifying the legal consequences of regulatory advice is partly a product of their legal duties and functions: for regulatory authorities, this includes a legal duty to enforce laws that are intended to safeguard the public interest by reducing the risk of harm associated with the regulated activity. Hence the role of regulator as ‘advisor to business’, which is reflected in the pro-business orientation that Hampton vividly represents, is fundamentally in tension with the role of regulator as enforcer of the law. While Hampton’s failure to realise (let alone grapple with) the legal consequences of advocating a pro-

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84 This is reflected in the administrative law doctrine that a public authority cannot ‘fetter its discretion’; see Craig, PP, Administrative Law, 5th ed (2003) Sweet & Maxwell, London, 530-535.

85 cf R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213.
active advisory role for regulators towards regulated firms might be dismissed as a lawyer’s penchant for technicalities, they are merely manifestations of a more important and deeply-rooted concern – the failure of Hampton and much of the better regulation movement to take legal and constitutional values seriously.

From the perspective of constitutional principle, casting regulators as advisors to business raises significant concerns, including risks associated with abuse of authority, compromising regulatory independence and impartiality, and failing to allow third party participation. Each of these concerns is briefly elaborated on below.

a) Abuse of authority

One of the justifications for the constitutional separation of powers between the judiciary, administration and legislature is to safeguard against the risk that governmental power will be abused. Only courts have the legitimacy to provide legally binding interpretations of legislative standards. It is through judicial adjudication that legal rules are public expounded and applied, enabling the courts to provide authoritative interpretative guidance – not just to the parties to the dispute in question, but to the public at large. Yet a systematic movement in favour of regulatory authorities offering informal firm-specific compliance advice effectively diverts potential interpretative disputes away from the courts, in which the regulator’s interpretation effectively prevails in practice. At one level, whether this is a cause for concern ultimately echoes the debates about the desirability of administrative bargaining rather than judicial adjudication as the means for settling disputes discussed in the preceding section. But what is lost is not just the public interest in the authoritative application of legal standards to a particular dispute, but also the authoritative interpretation of those standards which can then serve as more general guidance beyond the specific firm to whom tailored advice is offered.

But something further is lost: by reducing the opportunities for courts to review and test the interpretation of legal standards, this diminishes the extent to which regulators are held judicially accountable for their enforcement functions. By advocating a systematic shift in which regulators are encouraged to exercise their informal authority through the provision of firm specific advice, this expands the risks that such informal authority might be abused. Regulators can exert very substantial influence over the way in which legal standards are understood and implemented in practice through the exercise of their informal authority, thus generating the risk of ‘abuse’. Such abuses may take various forms, including either excessive laxity, or overzealous interpretation of legal standards, or in failure to take seriously the interests of other third parties in the exercise of the regulator’s informal interpretative authority. These risks are exacerbated in circumstances where regulators possesses formal sanctioning power which has now been very substantially enhanced and where the regulator’s advice is provided in
the context of closed (‘tailored’) discussions with the regulatee (rather than in the form of general, publicised guidance), so that the contents of that advice is not publicised or open to scrutiny.

b) Independence and impartiality

A systematic shift towards the provision of firm-specific compliance advice by regulators is also likely to result in a diminution of their independence and impartiality in carrying out their enforcement functions. When a regulatory authority which has provided tailored advice concerning a specific activity, a fundamental conflict of interest arises when it subsequently considers whether to bring enforcement proceedings against the advisee in relation to that activity, particularly where the latter has acted in reliance upon, and in accordance with, the regulator’s advice. This lack of impartiality may well entail a departure from the constitutional demands of procedural fairness which requires that a public decision-maker be unbiased and impartial when exercising its decision-making authority. Yet in circumstances where a suspected violation by a regulated firm has occurred, regulators are likely to be very reluctant to pursue enforcement action where the firm under investigation has acted on specific advice which it had previously provided. For example, a recent empirical survey identified reluctance on the part of regulatory inspectors to offer advice because this may compromise their independence. Likewise, in the Hampton Implementation Report on the Environment Agency, the National Audit Office found that front line officers were unclear on where the boundary line lies between advice and consultancy, and worried about the consequences of getting it wrong, regarding the latter role as inappropriate and potentially in conflict with their enforcement responsibilities. An erosion in regulatory independence and impartiality may also exposes regulators to charges of failing to give proper expression to the underlying public interest goals which support the regulatory scheme. In extreme cases, the lack of visibility of such advice, and the bilateral nature of such informal discussions, may cases expose the regulator to charges of corruption and of allowing itself to be improper influenced in the conduct of its enforcement duties.

c) Participation

Within the Hampton vision, regulatory beneficiaries are marginalised or excluded, lacking any standing within the regulatory process other than as a source of information to the regulator. As the preceding

86 Brady, J., ‘The Point is to Change It: Exploring the Role of Advice, Guidance and Improvement in the Inspection of Health and Social Care’ (EPCR Standing Group on Regulatory Governance, 3rd Biennial Conference, unpublished, University College Dublin 2010).

discussion demonstrates, it is partly due to an awareness of the constitutional and democratic importance of the role of administrative authorities to safeguard the interests of third parties and the broader public which explains why courts are typically unwilling substantively to bind public authorities to their representations, despite the individual hardship this may generate. While the HMRC issues a sophisticated set of guidelines about when its advice will be binding, this is made more straightforward by the essentially 'bilateral' nature of taxation matters, in which taxation disputes are conceived by the courts as arising between the HMRC and the individual tax-payer, and not as matters in which third parties have standing to complain. In contrast, regulation is traditionally understood as necessary to protect third parties from harm caused by otherwise legitimate business activities and thus implicates multiple stakeholders, including the regulated firm, the regulator and regulatory beneficiaries. For example, if advice is offered to an employer concerning the legal requirements for health and safety standards in the workplace, employees have a direct interest in ensuring that the contents of that advice accurately reflects the employer’s legal obligations. Yet employees may have no way of accessing the contents of the advice thereby offered, or to challenge its propriety, and may well be unaware that any advice has been offered. The lack of any recognition within the Hampton Report of the importance of participation by third parties is particularly troubling, given that regulatory beneficiaries are often vulnerable, poorly resourced and disorganised.

5. Conclusion

This paper has sought to explore the constitutional implications of the ‘diversionary turn’ advocated by the Hampton Report and its progeny, upon which the UK’s current better regulation programme is founded. By diverting the resolution of suspected non-compliance away from the courts in favour of administrative resolution, the better regulation programme seeks to promote more effective, timely, flexible and cost-effective approaches to regulatory enforcement. This approach is evident in the extension of the civil sanctioning powers of regulators under Part III of the Regulatory Enforcement and Sanctions Act 2008 which is likely in practice to lead to greater reliance on administrative bargaining and negotiation within the regulatory enforcement process. Hence I have subjected two such practices – the use of negotiated penalty settlements, and the acceptance of enforceable undertakings, to critical scrutiny. I have also examined the constitutional implications of the Hampton Report’s exhortation that regulators should be more pro-active in issuing tailored, firm-specific compliance advice, which provides further evidence of this diversionary turn, and is currently being implemented in the UK without any legislative reform.

By employing a wide range of analytical tools, ranging from ethnographic studies of the behaviour of regulatory enforcement officials, criminal law critiques of plea bargaining within the criminal process, jurisprudential analysis of the civil-criminal divide, UK regulatory policy literature, academic analyses of various modes of dispute resolution and administrative law doctrine, I have sought to demonstrate how the movement away from formal judicial adjudication towards administrative resolution of enforcement disputes may antagonise several constitutional values, particularly those of due process, participation, transparency, accountability and legal principles of fair treatment. Of these, it is the demands of due process and participation that are arguably placed under the greatest strain. So, for example, where the nature, scope and magnitude of a proposed penalty is negotiated between the regulator and the firm believed to have committed an offence pursuant to RESA Part III, firms may be inclined to accede to the penalty even if the evidence against it may not be sufficient to persuade a court that an offence has occurred, since the regulator can proceed to a formal penalty decision without involving the courts. In addition, because the regulator has responsibility for both investigating offences and making formal penalty decisions, there is a real risk that it will not be impartial and dispassionate when negotiating the terms of a penalty settlement, or in proceeding to a formal decision. Similarly, when a regulator accepts enforceable undertakings from those it believes have committed a regulatory offence, there is a risk that those who may be directly affected by those undertakings will not be involved in the preceding negotiations, contrary to the due process requirement that those whose interests may be adversely affected by a public authority’s decisions should have an opportunity to participate in them. And when a regulator issues firm-specific compliance advice, it is unlikely to be impartial and unbiased when subsequently considering whether to bring enforcement proceedings against firms who have acted in reliance on any advice which it had previously given.

To some extent, the strain which these practices place on the constitutional demands of due process and participation arise because their content and contours rest largely on the ‘legal paradigm’, according to which legal disputes are settled authoritatively through the application of legal rules by a neutral and independent arbitrator. In contrast, the resolution of enforcement disputes through negotiation, discussion and advice sits rather uncomfortably with the formal rule of law ideal. By resolving disputes through the consent of the parties to the negotiations, rather than through rules, the values of accountability, transparency, accountability, and fair treatment may also be placed under strain. On the other hand, resort to negotiation and discussion in regulatory enforcement can generate important benefits, largely in facilitating the timely, creative, and cost-effective resolution of enforcement disputes while avoiding the formality, delay and hostility typically associated with formal court adjudication. While any meaningful evaluation of the tension between their benefits and shortcomings necessitates an examination of the specific legal and practical context in which they are utilised, I have nevertheless demonstrated that this general antagonism can be traced to inherent differences in bargaining, on the one hand, and adjudication on the other. Bargaining and adjudication represent two quite different and
distinct forms of social ordering by and through which disputes can be resolved, and it is these differences that lie at the foundations of their respective virtues and shortcomings when employed to resolve disputes concerning regulatory violations.

In the course of this analysis, I have also shown how the better regulation movement has tended to adopt a largely one-dimensional, instrumental, understanding of the law that typically fails to engage with law’s normative structure and underpinnings. Hampton’s recommendations that regulators should adopt a more pro-active approach to the provision of authoritative, firm-specific compliance advice vividly illustrates this simplistic understanding of the law. This is not to suggest that legal values have been ignored: indeed, many of the so-called ‘principles of good regulation’ originally propounded by the Better Regulation Taskforce, which require, amongst other things, that that regulation should be carried out in a way which is ‘transparent, accountable, proportionate and consistent’, 89 promote values which public lawyers would have no difficulty in endorsing, although many might be surprised to discover that these principles now have statutory status 90. Rather, my claim is that the better regulation movement has made very little attempt to grapple with what these important constitutional values require in specific regulatory contexts, particularly when their demands may come into conflict with the instrumental quest for ‘rational’ and ‘cost effective’ approaches to regulatory decision-making. This exemplifies what Baldwin identifies as a ‘clash of logics’ within the better regulation movement 91. Yet by drawing on a diverse range of analytical tools that have been employed in various strands of legal scholarship, it is possible to obtain a richer, more sophisticated and constitutionally sensitive account of what counts as “better” regulation than that which is currently on offer. It is here that lawyers, especially public lawyers, can make an important contribution – but they may be understandably reluctant to do so when faced with policy level rhetoric that tends to view law in a fairly thin, instrumental fashion. 92

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90 These principles are now enshrined in s 21(2) of the Legislative and Regulatory Reform Act 2006. Regulators who are afforded Part III RESA powers are also required to observe the principles set out in s 5(2) RESA which requires that ‘(a) regulatory activities should be carried out in a way that is transparent, accountable, proportionate and consistent, and (b) regulatory activities should be targeted only at cases in which action is needed.’: ss 64-65 RESA.

91 Baldwin supra n 2, 265; I have expressed this clash of logics as a potential tension between the quest for effectiveness on the one hand, and constitutional values on the other: per Yeung, supra n 24, Chapter 3.