**Rethinking Responsive Regulation**

Professor Richard Johnstone, Director of Research, School of Law, QUT

Director, National Research Centre for OHS Regulation, ANU

 **Prof Richard Johnstone:**

Good day everybody. Thank you very much for logging into this presentation on rethinking responsive regulation. I hope you find the presentation clear and informative and helpful, and before I begin I'd just like to thank Safe Work Australia for inviting me to give this presentation. It's a great privilege and honour to do it.

Now, what I'm going to do today is introduce you to the contemporary thinking about responsive regulation and I'll start with a bit of history, and in particular, explain how the theory of responsive regulation developed in response to debates about command and control regulation and its strengths and weaknesses. I'll begin by explaining the key principles of responsive regulation and then to illustrate those principles I'll move on to a series of examples, and the examples will be firstly of enforced self-regulation, secondly the two pyramids that Ayres and Braithwaite's Theory of Response Regulation is famous for, that is the enforcement pyramid, and the pyramid of regulatory strategies, and then I'll finish with a discussion of tripartism where third parties are brought into the regulatory game, and then I will conclude with some reflections of the potential difficulties of implementing responsive regulation.

Now, I indicated in that introduction that responsive regulation developed in response to debates about command and control, so at this point it would be good to explain what I mean by "command and control." As the PowerPoint indicates, command and control is the deliberate attempt by the state to influence socially valuable behaviour which might have adverse effects by establishing, monitoring and enforcing legal rules. The two key ideas there are the state is involved and the state's key instrument is the use of legal rules.

Now, responsive regulation was to a large extent a response to some issues that had arisen out of command and control regulation. So for example, those who wanted stronger command and control regulation were arguing that command and control wasn't properly implemented by the state, there wasn't enough enforcement, penalties weren't high enough and as a result, command and control regulation was ineffective for their purposes. Against that were the proponents of deregulation who argued that command and control regulation was stifling initiative, it involved too much red tape and generally it had a bad impact on business activity. Then there was a third group that argued that really social life was just far too complex to be regulated by a blunt instrument like command and control regulation. So that really sets the tone and the space for the debate about responsive regulation.

Now, the key player in responsive regulation is John Braithwaite, and I'm giving this talk in Canberra and John works just down the road at the Australian National University, and it started with an observation about a policy dynamic. So it starts off with an empirical observation about how things work best and then over time it's theorised and there's a large debate involving lots of academics and policy people.

So I just want to talk briefly about what underpins responsive regulation, the theories underpinning it, and the first thing is microeconomic game theory. Now that may not be a term familiar to most of you, but let me talk about it briefly. Game theory really examines how intelligent individuals interact with each other to achieve their goals and probably the best example of game theory is the so-called prisoner's dilemma. That's a situation where the two players are prisoners, they've been arrested for a crime and they are placed in separate cells and they're involved in negotiations with the police about whether they plead guilty or whether they fight the effects.

Obviously for some prisoners if they are given - if they confess and testify against the other prisoner, they're let off for the crime and the other prisoner gets a very heavy sentence. If they both agree to confess, they'll both be convicted but live with low penalties, and if one of them fights the charge and the other – sorry – and if both of them fight the charges then they might get off but they might be convicted and face very high penalties. So, game theorists play around with those notions and explore how they work under different circumstances. Now, you might be wondering how that applies to regulation and in regulatory theory, and if you read Ayres and Braithwaite's very famous book about responsive regulation you'll see lots of discussion of game theory and the prisoner's dilemma, but in the context of a firm and a regulator and Ayres in particular explores the way that regulators and firms can play off against each other in relation to cooperation and breaking away from cooperation. So that's the first underpinning theory.

The second is responsive regulation is underpinned to a large extent by John Braithwaite's extensive empirical research and reading in criminology, sociology, political science and psychology. So it's very much an interdisciplinary, multidisciplinary exercise, and thirdly, underpinning responsive regulation is the notion of civic republicanism. That envisages a mixed institutional order where the state and associations or different institutions counterbalance the power of others by surveillance and by exercising their own power. So, as the PowerPoint shows, each exercise is a countervailing power over others and checks the great dangers of where one party - one institutional order is stronger than another.

Another crucial aspect is direct citizen participation where citizens involve themselves in various forms. It can be politically, it can be as a player in the market, it can be as a member of a public interest group or in any other sense. The whole idea of responsive regulation is to merge two ideas - the first is state regulation and the second is private facets of regulation where individuals and groups privately regulate particular orders. The great strength and the great insight from responsive regulation is the way that the public and the private interface and the way that the state steers private regulation.

Okay, now let me move to the key principles of responsive regulation. The first thing to say about responsive regulation is that it's distinguished by what triggers a regulatory response and what the regulatory response will be in any circumstance. In other words it's a very flexible process. The whole idea is that regulators look at the context and determine in the context which is the best balance of regulatory approaches, and there are two really key ideas that you need to understand to properly understand responsive regulation. The first is the notion of regulatory delegation and the second is the notion of monitoring that regulatory delegation with an escalating intervention by the state. So let me go through those two key ideas a bit more slowly.

Firstly, responsive regulation involves regulatory delegation of regulatory functions to private actors and these private actors can be public interest groups, trade unions for example, can be industry associations, they can be firms, individual firms or could be independent professionals, and the whole idea of delegating regulatory functions is to try and harmonise the state's regulatory objectives with the laissez-faire notions of market efficiency. It's not hard to see that that's an important - it's an important aspect of regulation that fits in well with some of the other themes of safe work month, got to do with productivity and sustainability and leadership. So that's the first aspect, the regulatory delegation.

The second aspect is monitoring that regulatory delegation by escalating state intervention, and the most famous examples as I mentioned earlier of this escalated state intervention is the enforcement pyramid which I'll deal with in a moment and also the pyramid of regulatory strategies which is my third example. So the exact form of regulation, the exact form of the balance between these two key principles depends on context. It depends on the industry. It will work best in – it will work in different ways in different industries. It depends on the regulatory culture. It depends on the history of regulation in the particular industry. It depends on the motivations of the actors and it depends just on how well they are self regulating.

Okay, now let me move to my first example and that's the example of enforced self regulation. Now I've done a very brave thing here because I've gone against the order of the discussion in the very famous *Responsive Regulation* book by Ayres and Braithwaite and that's because I'm trying to break out and be a bit of an individual, but I also think it's easier to start with the example of delegated regulatory functions because I think it makes it easier to understand the richness of responsive regulation.

So, this is an example of regulatory delegation and the monitoring of that delegation, and it's a response to arguments that the costs and red tape and inflexibility of command and control is stifling initiative and stifling a firm's ability to regulate themselves in response to their obligations, but it's also a response to the risks of leaving firms to regulate themselves. Everybody's very awkward of the fact that self regulation may lead to intolerable laxity and failure by firms to comply with the regulatory objectives. So you have this notion of self regulation but enforced by the state. Now how does this work?

Firstly, the big idea is that the state and the regulator and firms agree that firms will draft and then adhere to their own rules that meet the regulatory standards that the state would like to have met. So, the firm in a sense is a self regulator. The regulator indicates the standards that need to be met. They can do that either by setting out criteria, or they can set default standards and indicate to firms that they can particularise those criteria or try and meet those default standards but in a different way, or a better way.

So the firm tailors rules to meet its own circumstances, so the rules will be different across firms but they'll all be higher than the basic regulatory standard, and then the firm's responsibility is to monitor compliance with those rules and at the same time to where if breaches are found, to deal with those breaches and to comply. What's the state's role? What's the regulator's role? The regulator's first role of course is to set the criteria, set the default standards. Its principal function after that is to approve the rules. So the rules need to be submitted to the regulator. The regulator can approve or can require amendments. The third thing that the state does is ensure that the process of self monitoring by the firm is rigorous and done by an independent – at least there's some independence in that monitoring group. Where small firms are involved the state may have to undertake most of the monitoring. It may be that small firms don't have the capacity to self regulate in that sense, and of course, as enforced self regulation suggests, the key role of the state is to enforce breaches of the rules where they are detected.

Now, where do we find examples of those? Well we find examples of enforced self regulation right through work health and safety regulation and probably the best and purest example is in relation to major hazard facilities and a part 10 of the work health and safety regulation, and there a major hazard facility operator must be licensed, and what do they have to do to be licensed? They have to introduce a safety case after consultation with their workers and that safety case has to be submitted to the regulator and to be licensed, the safety case must be approved. So there's a classic case of enforced self regulation, Ayres and Braithwaite style.

Other examples are found in mining. For example in New South Wales and Queensland under the mining health and safety legislation mine operators are required to develop safety and health management systems in consultation with workers. Those systems are there to meet the requirement to reduce or to eliminate or at least minimise hazards, as far as reasonably practicable. Those safety and health management systems are scrutinised, monitored, examined by safety - site safety and health representatives and industry health and safety representatives - those are worker representatives - and also scrutinised by inspectors whenever they visit workplaces. So you'll notice there's a slight difference in that model from the model that I posited earlier and that is that the inspectorate doesn't approve health and safety management systems, but they are scrutinised closely by worker representatives and by the regulator.

Now the third example is actually to be found in all of - in the mainstream health and safety legislation, the Work Health and Safety Act in most jurisdictions and there, Section 19 in the harmonised legislation sets out a duty of care. The duty of care delegates management decisions about how to best manage health and safety to the person conducting the business or undertaking. So the regulator could have set out very detailed standards saying exactly what has to be - what has to happen but the regulator recognises that it's better to leave it to firm's who know best their circumstances and who know best the hazards facing them in the industry to regulate themselves. So as most of you I hope will know, Section 19 requires PCBUs to providers to ensure the health and safety of their workers, but it doesn't specify in detail how that has to be done. So it's up to the firm to work out ways of identifying hazards, setting the risks and then controlling those risks.

Now that's a difficult job. Most people will know that that's difficult to do, so the state plays a secondary role and provides guidance in the form of regulations and in the form of codes of practice, and they indicate how particular hazards should be managed and what processes should be followed, but the regulator - but the PCBU doesn't do this alone. The PCBU has to manage health and safety in consultation with worker representatives, health and safety representatives, and where a PCBU is involved in activity with other PCBUs, has to manage health and safety in consultation with other PCBUs. This is a classic example of enforced self regulation, delegated responsibility to the firm but surveillanced by a number of other parties including the state. So enforcement can take place here by a health and safety representative issuing a provision improvement notice or a prohibition notice, or by the state stepping in and using one of the enforcement methods that I'll discuss in a few moments when we talk about the enforcement pyramid.

The fourth example of enforced self reregulation is the enforceable undertaking. This is an Australian invention first appearing in the trade practices and consumer area, but now found in the model health and safety legislation in Part 11 of the Model Work Health and Safety Act. Essentially enforceable undertakings are promises made by the firm usually in a situation where the firm has committed a contravention of the legislation and is being investigated by the regulator, and if the promise or the undertaking is accepted by the regulator because it meets the regulator's criteria of an enforceable undertaking, then the firm is committed to carry out whatever has been promised in the enforceable undertaking. And usually it's a bit more than just comply with the obligation that it contravened and you would hope that that would be the case.

So often an enforceable undertaking includes activities that involve the industry for the benefit of the particular industry. So it could be developing training in an industry, it could be developing a code of practice for the industry or model guidelines or something like that. There are a whole raft of things that you can find in enforceable undertakings that you won't find that are beyond what a regulator can do because the enforceable undertaking can include things that don't fall within the regulator's powers.

Now the beauty of the enforceable undertaking is that if the firm breaches the undertaking, they can be prosecuted for the initial contravention and they can be prosecuted for failing to comply with their undertaking. Again, regulatory functions are delegated to the firm and when there's a breach of those functions, the state can step in and enforce. So each of those four examples enables the firm to tailor its rules to its own circumstances and the implementation of those rules is monitored by the state in the form of the regulator, but also in many circumstances by worker representatives, health and safety representatives. Okay, so that's the first example.

Now, there are a couple of issues that arise out of this and you'll have noticed that only in one of the instances I've given you does the regulator actually approve the rules, and that's because it's argued that that's a costly process and it takes a lot of regulator resources. Ayres and Braithwaite in their optimistic way, suggest that over time regulators will become more practised and skilful at this and will have to devote fewer resources, but it's interesting that the only approvals we find in health and safety legislation are firstly in relation to major hazard facilities where the hazards are extremely high. And secondly, there are relatively few facilities. The other is in relation to enforceable undertakings where a firm has already contravened legislation, so there has to be approval but whatever the case is, rules are being scrutinised by workers and their representatives, and ultimately by the state.

So let me move on to the second example and that's the example of the enforcement pyramid. This is a broader example or one example of the second principle I talked about earlier, this notion of escalating state intervention in relation to - in a process of monitoring and checking on the activities of firms to whom regulatory tasks have been delegated.

So, the enforcement pyramid came about because of a very tired and long-standing debate between people who argued that the regulator's job in health and safety enforcement is to advise and persuade whenever a contravention was detected, and those who argued that, "No," it was a breach of law and therefore the state's role and the regulator's role was to step in and prosecute. And this debate's been going on since about 1833 in the UK and has been going on ever since the Australian legislation was introduced in the late 19th Century, earlier 20th Century. The problem with both of those approaches is that if you take the approach of excessive punishment, if you reckon that every single contravention should be prosecuted, what happens is that - firms who are trying to do the right thing, who are motivated to comply and breach legislation, are likely to be demotivated, are likely to become resistant to regulation because they feel they're on the right track and that the punishment is excessive. If on the other hand, you only advise and persuade, the result can be intolerable laxity and low levels of compliance.

So, Ayres or particularly John Braithwaite noticed that really master regulators were adopting a different kind of approach and adopting the strength of both of each of the advice approach and the punish approach to cover up the weaknesses of the other approaches. So what emerges is a regulatory dynamic which revolves around the notion of a hierarchy of sanctions or what we call is a pyramid. So, the argument is that you'll get optimal compliance when you have an enforcement pyramid where you've got very strong sanctions at the top and more advice persuasive type sanctions at the bottom, and here's an example.

This isn't actually in mainstream health and safety regulations, but it's an example that John Braithwaite uses in a very good article in the 2011 University of British Columbia Law Review in relation to transport authority, and you'll see there on the left hand side is - on the pyramid is an arrow showing the attitude to compliance. So at the bottom you've got a firm that's fully compliant and at the top you've got a firm that seriously engaged from the regulator, and if you look on the right hand side of the pyramid you'll see that the bottom, the firm - the regulator adopts strategies like maintaining awareness about health and safety, about educating, counselling and at the top are much stronger enforcement approaches like prosecution. You'll see that each of those approaches is tailored to the compliance response on the other side.

People watching this will probably be more familiar with the National Work Health and Safety Enforcement and Compliance policy which is now on the PowerPoint, and at the top you'll see strong court sanctions. At the bottom you'll see advice on persuasion methods which are labelled "encouraging and assisting compliance" and in the middle are sanctions or measures such as the improvement notices and prohibition notices which are directing compliance. And the whole idea of the pyramid is that the regulator begins at the bottom, assuming cooperation, assuming virtue, but when this assumption is not met or alternatively when the firm exploits this cooperative strategy, then the regulator escalates and adopts a stronger enforcement posture, first using measures like improvement and prohibition notices, but if that doesn't work, escalate into higher enforcement approaches.

So what are the key principles guiding the use of the pyramid? The first big idea is that optimal compliance, that is cooperative compliance at the very bottom, is most likely when the regulator displays an explicit enforcement pyramid with a wide range of enforcement options so that there a wide range of possible responses to the compliance posture adopted by the firm, and it's important that there be a large number of enforcement measures because it's important that the regulator doesn't adopt the wrong approach. So if there are a limited number of enforcement measures the regulator may find it difficult to choose the appropriate response which might lead either to lack of affect on the firm, but worse, by overshooting and demotivating the firm, and leading to resistance. So that's why there needs to be a large number of very nuanced sanctions because otherwise the regulator's going to get it wrong and it's not going to have appropriate choices.

The second big idea is that when does the regulator use these sanctions or how does the regulator decide? The regulator decides by being responsive to how effectively corporations or firms are regulating themselves. So whether or not to escalate depends on the compliance posture of the firm and how well in particular the firm is regulating itself. And why do I use that term, "regulating itself"? Because we saw from the earlier example that the health and safety legislation is largely about delegating regulatory functions to the firm.

And the third big idea is that there's a real trick to responsive enforcement and there's a synergy between punishment and persuasion. So, why does persuasion work? Persuasion will work because it's underwritten by the possibility of punishment. Why is punishment legitimate? Because it's legitimised by the underpinning posture of advice and persuasion and cooperation, and the two work together in synergy. Writers like Nielsen and Parker have commented that the other beauty of the enforcement pyramid is that by leading firms into a more cooperative approach and a more compliant attitude, you're more likely to get a long-term and sustainable compliance approach. You're more likely to get to a nice kind of equilibrium at the bottom of the pyramid where there's ongoing sustained compliance rather than a battle between the regulator and the firm.

Now, that's all fairly complicated, but what makes it even more complicated is if you follow the development of responsive enforcement over time you'll see that in particular John Braithwaite's approach to responsive enforcement has changed, really in line with his developing interest or highly-developed interest in restorative justice. So those old-timers like me who grew up reading the 1992 responsive regulation book with Ian Ayres, would have noticed in chapter two that responsive enforcement is largely built around the notion of tit-for-tat and that comes out of game theory as I mentioned earlier, examining or theorising or modelling what happens when a regulator adopts a cooperative approach, but the firm breaks away from cooperation and starts breaching legislation. What sort of – what's the ideal response of the firm? And the tit-for-tat argument is that the regulator starts with this assumption of virtue, starts with a cooperative approach. Everything is fine if the firm is cooperative and complying, but if the firm doesn't comply, then the regulator escalates its response up the pyramid, and as soon as the firm begins to comply, then the regulator drops back again. But if the firm doesn't comply and is fairly intransigent in non-compliance, then the regulator escalates further. But what you notice is that the regulator is watching closely what the firm does and is responding to the firm's approach to cooperation and to compliance.

And as Nielsen and Parker point out that the regulator's approach, in other words the level of formality it adopts and the level of coerciveness it adopts - and by "formality" I mean how literally the regulator is in interpreting the legal rule that's being complied with and how formal it is about compliance, and "coercive" of course is the level of the hierarchy that the regulator is working at. Those are all matched to the firm's response at the previous stage of the tit-for-tat approach.

Now, the later restorative formulation is quite different. What's crucial to know about tit-for-tat is that it's important that the regulator and the field staff involved in the regulation, threaten escalation as part of the transaction. The later responsive restorative justice formulation involves the regulator - that's the field staff, the inspectors engaging face-to-face with duty holders - making minimal use of formalistic and coercive approaches. In other words they signal that they prefer to take a cooperative approach, they signal that their preference is for capacity building and cooperation, and they never threaten escalation. That's a major difference in the restorative justice approach - the field staff never threaten escalation. They believe that cooperation, kindness and respectfulness on their part, leads to the same attitude on the part of the duty holder - the firm - and this leads to greater cooperation by the firm and better compliance. And in fact where there is compliance, there is a pyramid of rewards. So, at the bottom of the pyramid of rewards the regulator of firms, the compliance supports it, provides further education and can escalate to praise, can escalate to positive recognition by spreading word of the approach that the firm has taken, and at the very top of that pyramid of awards, can nominate the firm for a prize, a health and safety award and so on.

The other crucial difference between the restorative justice approach and the tit-for-tat approach is that it's the legal system and the enforcement system itself that threatens the firm with punishment and escalation. It's not the field staff dealing face-to-face with the firm. So, in a sense escalation sits further in the background than it would under the tit-for-tat model, and in a sense the field staff are saying, "We're the good guys. We're helping you comply. If it doesn't work out, others are going to take over and come over the top of us," and the system itself, it will implement the more coercive and formalistic enforcement approaches.

Now, just two observations before I move on, about the enforcement pyramid. The first is, as we've seen from the national compliance and enforcement policy, there does seem to be an enforcement hierarchy as part of the approach of most regulators and certainly if you map the aggregate statistics about enforcement you'll see that most enforcement activities at the bottom of that pyramid and then the use of improvement or prohibition notices is slightly less than advice and persuasion activities at the bottom, and prosecution and enforceable undertakings, they're fewer in number than you find improvements in prohibition notices. If you map that in the aggregate you actually do get a pyramid and that's used as justification for saying that Australian regulators do follow the enforcement pyramid.

Now, the problem with that is that empirically it's very rare to see genuine tit-for-tat, in other words multi-transactional approaches to enforcement and, as I'm going to foreshadow later, one of the reasons for that is that most regulators just don't have the resources to play tit-for-tat with duty holders. So, I've in a sense labelled that "response enforcement light". It's not quite tit-for-tat but it's still a responsive approach in the sense of adopting a proportional response to the level of compliance.

The second problem with the enforcement pyramid is a little more complex and that is that if you look at the enforcement statistics you'll see that prosecutions are generally only taken where there's a serious injury or a fatality. In other words when there's a serious injury or fatality, the regulator jumps to the top of the pyramid. When there isn't the regulator generally plays the bottom half of the pyramid, might go up to an infringement notice or an improvement notice, or a prohibition notice.

So in a sense the pyramid is split. It stops halfway when there's not a serious injury of fatality and we go straight to the top when there is, and I hope you'll see that one of the problems with that is that the regulator is not getting the full benefit of the pyramid because people know that the regulator won't go to the top of the pyramid unless something really bad goes wrong. Okay, so that's the more famous example of the pyramid.

Let me may move to the less famous example of the pyramid, but equally interesting, and that's the pyramid of regulatory strategies. Again, the key ideas here are regulatory delegation and escalating forms of government regulation, but instead of it being pitched at the level of the firm, it's pitched at the level of the entire industry. And the idea is that governments would like their regulatory strategies to take place at the bottom of a pyramid of regulatory strategies where self regulation is the key idea. Now why is self regulation good from a regulator's perspective? Well you don't need to draw up detailed rules, you don't need to consult widely on what the codes of practice and the regulation should be and you don't have to spend a lot of money on enforcement staff. You just leave it to firms to get on and deal with the broad principles and the broad objectives of regulation.

From the firm's perspective, self regulation is ideal because they don't have to spend money deciphering what the regulatory standard requires and instead they can get on to determining their own approaches to compliance. Most of us are a little uneasy with that idea because we may not have the faith and belief in the intrinsic goodness of humankind to get on and comply with broad regulatory objectives. So that's where the second idea comes in, the idea of escalating government intervention. So if a regulator starts with the idea that self regulation is the ideal approach, it then indicates its willingness to escalate up the regulatory strategies pyramid of interventionism to stronger and more traditional forms of regulation.

So for example, what you might find within a particular industry, self regulation being the original approach but over time when there's clear non-compliance with the broad objectives of self regulation, the enforcement - the regulatory strategy moves up to enforce self regulation. If that doesn't work, we move up the pyramid of regulatory strategies to command and control - the notion I discussed earlier - but with a discretionary approach so that the regulator can decide in particular instances whether to prosecute or whether to use lesser strategies. But if that doesn't work, we move up the pyramid of regulatory hierarchies to command and control with no discretion, so the state has to prosecute.

You can play around with that pyramid. You can use other approaches like licensing and taxing harm and so on, but you see the idea is fairly clear. Now of course in health and safety we are very reluctant to start at the bottom and in a sense we are in the enforced self regulation model and the debate really is about how serious the sanction should be.

Now that introduces the next important notion that underpins both of the pyramids that I have just discussed and this is the notion of the benign big gun and you'll find discussion of this in chapter two of Ayres and Braithwaite's book. So at the heart of responsive regulation and particularly the two pyramids I've talked about - the hierarchy of sanctions and the hierarchy of regulatory strategies - is a paradox and the paradox is that the greater the image of invincibility of the regulator and the greater its capacity to escalate to the top of the hierarchy either of sanctions or of regulatory strategies, and the tougher the sanctions at the top, the more likely firm are, or the industry in the case of strategies, the more likely there is to be participation in cooperative compliance at the bottom. So the tougher the sanctions at the top and the more likely it is that the regulator will move to the top of the pyramid, the more likely it is that compliance will take place at the bottom.

So both hierarchies work best if they are tall, and I've explained earlier what I mean by that, with lots of sanctions – a range of sanctions all carefully nuanced to different levels of compliance, and if there's super punishments at the top. Now what's interesting about super punishments is most people will know that the model health and safety legislation now has as its maximum penalty for a corporation $3 million. Ten years ago in a book of essays, John Braithwaite discussed restorative justice in health and safety and talked about restorative justice playing at the bottom of the enforcement pyramid and at the top you have significant mega penalties, and the kinds of penalties he was talking about were penalties of $100 million dollars for contraventions, but major discounts where a firm had a robust approach to systematic health and safety management. So, when we talk about large penalties at the top, we are talking about significantly greater penalties than we currently find in the health and safety legislation.

Okay, time to move onto example four – tripartism, and to introduce this properly we need to move back to the original idea of civic republicanism and there were two key ideas that I was trying to get across at that point. The one was in the sense of institutions checking on each other and counterbalancing the exercise of power by other institutions, this notion that there should be checks and balances in the system and institutions should have the power to check and to countervail abuse of power by other parties, and the second was participation of citizens – two key ideas. And these come together in Ayres and Braithwaite's civic republican notion of tripartism, and their argument is that so far we have discussed regulation as a game between two players. We've talked almost exclusively about the regulator and the firm, and tripartism as the name suggests, introduces the third player in the regulatory game.

So responsive regulation can be improved and capture and corruption prevented - these are the two great fears in the model we've talked about. Capture is when the regulator gets a bit too close to the firm. Now we want the regulator to be close to the firm because we've talked about cooperation, so in a sense cooperation is good capture. What we are trying to prevent here is bad capture and corruption probably doesn't need much explanation. So how do we check against capture or corruption? And we do that by empowering public interest groups and we also do it by promoting deliberation, dialogue and trust-building government where there's a system of checks and balances so that the third party, the private interests, come into the regulatory game and check on the public regulatory approach taken by the public regulator. So this is Ayres and Braithwaite's idea that private interest can be harnessed for the public good.

So public interest groups become a fully-fledged third player and can directly take action against the firm and can take action against the regulator where the regulator doesn't enforce or is corrupted, or is harmfully captured. So, under the Ayres and Braithwaite tripartist model the public interest groups have access to all information that's available to the regulator, they have a seat at the negotiation table when there are deals done between firms and regulators, and they have the same capacity to sue or to bring prosecutions as the regulator does. Now that may sound like something from Pluto, but let me give an example using the work health and safety statutes.

So, in Part V of the harmonised worth health and safety statute you'll know that workers can elect worker health and safety representatives. These representatives have a range of powers. Some of the powers include getting information about health and safety, so there's a tick on the first item there, the first tick. Secondly, inspectors need to cooperate with health and safety representatives and they have to consult with health and safety representatives and report to health and safety representatives the kinds of issues that they're finding at the workplace, and thirdly, health and safety representatives can issue provisional improvement notices and can issue and can direct the dangerous work cease. Well they can, except in my home state of Queensland, and in a sense ideally they would also have the right to prosecute. People will know, particularly New South Wales people will know that there is a very limited right for a trade union secretary to prosecute for a category one or a category two offence in New South Wales but it's a long and convoluted and very difficult to implement strategy. But ideally we could in a sense, have a private enforcement hierarchy if we had stronger sanctions at the top and a right to prosecute, and that would be following the Ayres and Braithwaite model that I've outlined here.

Now, the book *Responsive Regulation* was written in 1992 and Peter Grabosky, a long time collaborator of John Braithwaite very recently wrote a very interesting article where he talked about the way that the world has changed since 1992 which will come as a shock to all of us, but three things have happened. Firstly, there's been a weakening of the state regulatory activities, partly because state - because governments don't have the revenues that they used to have and there's greater call on their resources. Secondly, some states might be - some countries might be scared to antagonise capital, and thirdly, many governments have a philosophy of reducing government intervention. So you can discern a trend for a weakening of state or a withdrawal of regulation of the state from it's regulatory activities.

The second development is there's been an increase in the number and the type of non-government actors in the regulatory process. One example is the power of large retailers. Large retailers establishing supply chains have power - have extensive powers to control the quality of the product in the supply chain, the use of resources in the supply chain and the use – and the working conditions in the supply chain, and in a sense this has been recognised in a number of areas of regulation, but most hopefully the clothing, footwear and textile industry where there are regulatory provisions to try and harness the power of retailers and those high in the supply chain, and requiring them to ensure health and safety and the payment of wages to workers at the bottom.

The third development is developments in digital technology and the possibilities of what Grabosky calls "Wiki regulation without government mediation." So, more and more private individuals using smart phones and using Google Earth and all sorts of things can monitor non-compliance by corporations. And what's more frightening for we old people, they can communicate very quickly with other people through social media and so it's very easy now to monitor prices in supermarkets. It's very easy now to track where waste is being dumped. It's very easy now to track animal cruelty in abattoirs all over the world and this has had a profound impact on the way that regulation can take place. So in other words there's a radical increase in the types of private actors to whom regulatory activities can be delegated or who will in fact undertake regulatory activities even if those activities aren't delegated to them.

Now, that's a moment of optimism but we must always remember as many theorists point out, that we shouldn't get too excited about the possibility of private actors not being involved in regulatory failure. We're all sceptical about governments in regulation, but commentators warn us all not to get too carried away with private regulation and the possibility of private regulatory failures is always good. But it is worth thinking about in discussions about responsive regulation, ways of harnessing players outside the players that we've traditionally considered in health and safety.

Let me just end with a discussion of the potential difficulties of responsive regulation and these difficulties really - the ones I'm going to raise are really in relation to the enforcement pyramid, and one we've already touched on, do regulators have enough resources to work their way up and down the pyramid, and I'll leave that as a question, but in a sense we answered that earlier.

The second is just more of a conceptual issue or a skills issue. For responsive enforcement to work really well you need a regulator that's able to determine the compliance posture of the firm, really understands systematic approaches to health and safety management, really understands compliance programs and so on, and that of course is a tall order. That's in no way belittling the qualities of health and safety inspectors. It's just saying it's a really difficult job, and you also need firms that are able to pick up signals from regulators and fully understand what a regulation is doing. And as Etienne in a recent publication has noted, ambivalence and ambiguity characterises most regulatory transactions, and so there's not always the clarity of communication, and the other problem with big firms of course, big organisations, is "Who is the regulator communicating with?" and "Is that communication getting to the key decision makers in the firm?"

Critics on the left are very sceptical about the capacity of business organisations to put concerns for health and safety ahead of concerns for profitability and production. People like Steve Tombs are Dave White are very sceptical about the presumption of virtue and starting at the bottom of the pyramid, and the same authors and others argue that particularly when you look at the UK experience of enforcement, there's a clear trend to reduce enforcement resources and there's a clear trend to reduce enforcement activity, and this coupled with risk-based strategies feeds easily into debates about responsive regulation but leaning a bit too closely to the advise and persuade, and the bottom of the pyramid activity rather than the top. So there are risks of in a sense, responsive regulation being captured by more conservative debates and debates where enforcement doesn't take such a high priority.

So let me conclude there. The point I've been trying to make is that responsive regulation has developed in response to clear weaknesses in the command and control model, that responsive regulation provides really exciting opportunities for very smart regulation, for nuanced regulation, but of course there are great dangers from lack of resources and also because of the inherent problem in health and safety of a conflict between health and safety, and production and profit.

Thank you very much for attending.

[End of Transcript]