

Chapter 7. Process and performance-based regulation: challenges for regulatory governance and regulatory reform

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Introduction

Recent decades have seen a substantial move by regulators in Australia, as in many — perhaps most — other OECD countries, toward adopting performance-based and process-based regulation, in preference to traditional prescriptive regulation. Performance based regulation can be defined as regulation that specifies required outputs, rather than inputs and thus provides a degree of freedom to the regulated to determine how they will achieve compliance. Process-based regulation specifies risk identification, assessment and control processes that must be undertaken, documented and (usually) audited. It is most commonly used in contexts in which there are multiple risk sources and multiple feasible risk controls.

This shift in regulatory styles has occurred in pursuit of more effective and efficient regulation and has been almost unanimously welcomed, indeed often vigorously promoted, by regulatory reformers. However, these forms of regulation have many potential drawbacks which have often been insufficiently recognised and inadequately taken into account in regulatory design and implementation. Regulators and regulatory reformers need to act to ensure that the promise of more effective and efficient regulation through the adoption of these newer forms is met in practice. This requires development of a more sophisticated understanding of the nature of these forms of regulation and the critical success factors for their use. Crucially, it requires a more critical approach to the question of whether they are suitable to particular regulatory circumstances: to replace the current tendency to see these regulations as necessarily more ‘modern’ and superior to prescriptive regulation.

Evidence of the shift

First, it is important to establish the extent of the shift in regulatory styles that has taken place. I will do this by means of a quick tour of the current Australian regulatory landscape. However, as some comparisons made along the way will indicate, in many areas the picture is quite similar in a range of other countries. In sum, it is fair to say that process and performance-based regulation is

prominent in all of the major fields in which social regulation exists. That said, it is important to recognise that these three categories of regulation are not mutually exclusive and that many regulatory structures are likely to include elements of two or more regulatory types.

Environmental regulation

Performance based environmental regulation has a history extending over more than two decades. Performance-based 'framework standards' are contained in quasi-regulatory instruments such as 'State Environment Protection Policies'. The works approval process arguably functions as a non-transparent form of process-based regulation. That is, environmental regulators exercise a substantial measure of control over the productive processes that emitters of significant pollutants are able to employ by requiring proposed works that would significantly change existing processes (or implement new ones) to be assessed and approved prior to construction. This process has the objective of enabling a 'whole of process' approach to emissions management to be adopted by effectively requiring company management to take these issues into account in plant and process design. This process-based element is then supplemented by the imposition of specific performance-based emissions standards, tailored to the individual licensee, as part of the licensing process which governs the ongoing operation of the plant.

Rail safety

Rail safety regulation is nationally harmonised and is largely process-based, being built around an accreditation process applicable to all rail operators and infrastructure managers. It requires that a 'safety management system' (SMS) be developed by the operator and assessed and approved by the regulator. The safety management system is based on the identification and assessment of all significant risks and the development of mechanisms by which they are to be controlled. This process is currently being reinforced through the adoption of new national model rail safety legislation, which is expected to specify in substantially greater detail the requirements for SMS and related auditing/approvals arrangements.

Interestingly, this high-level regulatory approach is supplemented in practice by extensive procedures manuals, developed by all significant operators on the basis of the internal regulatory controls that were in use in former times of vertically integrated government-owned rail monopolies. These procedures manuals continue to be largely prescriptive in nature, although they contain some important performance-based elements. For example, one such manual includes a prescriptive requirement that a defined proportion of the brakes on a train must be operational and a performance standard that it must be able to halt within a certain distance.

Food safety

This area is characterised by a mix of all three forms of regulation. A major element of process-based regulation exists, notably through requirements for all 'food premises' to adopt individual Food Safety Programs. At the same time, product standards set out in the Food Standards Code contain an interesting mix of performance-based and prescriptive requirements. For example, the standards relating to cheese contain a prescriptive requirement (milk must be pasteurised before being used for cheese-making), as well as performance-based requirements in the form of maximum allowable bacterial loads.

Occupational health and safety

All Australian OHS acts conform to the 'Robens model', which is based on the specification of the most general of performance standards: the duty to provide a workplace which is safe 'as far as reasonably practicable'. The acts include very broadly specified process-based requirements, for example specifying the 'hierarchy of controls' that must be adopted in undertaking actions to comply with the general duty in different circumstances.

Regulations deal with the interpretation of these duties in a range of specific areas of identified major risk and, in doing so, often adopt a combination of prescriptive requirements and performance standards. For example, Victorian asbestos regulations set out a performance-based exposure standard, which is supplemented by a number of prescriptive requirements, as well as restatements of the general duties applicable and of the required hierarchy of controls to be adopted.

Vehicle design standards

Vehicle standards are internationally harmonised to a large degree — although the USA is a major non-adherent — and based on the United Nations Economic Commission for Europe (UNECE) standards. They are fundamentally performance-based, although they also include significant prescriptive elements in some areas. For example, the door latch regulations are based on a performance standard, requiring that latches be able to withstand a specified pressure but also include a prescriptive requirement that doors must hinge at the front, unless the front door is designed to close over a rear hinged back door.

Building regulation

Technical standards in this area are almost completely nationally harmonised. They are fundamentally performance-based and are supported by 'functional statements' (in common with the vehicle design standards just mentioned) which clearly state the underlying purpose, or objective, of each of the specific regulatory requirements. Building regulation includes, as part of the published

regulatory document, a set of 'deemed to satisfy' prescriptive standards aimed at providing certainty of compliance.

This summarises the position in the major areas of social regulation within Australia, in terms of the extent to which process and/or performance-based regulation has been adopted. Of course, the position in Australia is not unique. As I have suggested, there are substantial formal regulatory harmonisation processes in place in some areas, such as vehicle design standards, while in others, such as occupational health and safety, substantially similar regulatory approaches are the results of less formal co-operation between regulators and 'demonstration effects'.

More generally, a number of recent OECD publications have documented the fact that the trend toward increasing use of performance and process-based regulation is visible in the great majority of its member countries. For example, the OECD reported in 2002 that approximately half of member countries stated that they were making increasing use of performance-based regulations in both environmental and health and safety regulation, while a slightly smaller number reported increased use of process-based regulation in these areas (OECD 2002).

Support by regulatory reformers

The advice of regulatory reformers to regulators can generally be summarised as amounting to a fairly uncritical endorsement of the adoption of process and/or performance-based regulation in a wide range of areas. For example, the main guideline document on regulation-making issued by the Council of Australian Governments states:

... unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used (Council of Australian Governments 2004).

Similarly, the Victorian government's *Guide to Regulation* states that:

Where appropriate and where permitted by the enabling Act, the Victorian Government encourages the use of performance-based regulation (Victorian Government 2005).

Guidelines as to when performance-based regulation may be appropriate are issued pursuant to the *Subordinate Legislation Act 1994* (Vic). However, apart from making the point that the enabling legislation must permit regulation to be of this type, they say little other than that a benefit/cost approach should be taken and that regulators should be familiar with the characteristics of the regulated industry when making this decision.

The New Zealand regulatory guidance document differs in providing a more balanced view, arguing that:

Principle and performance-based standards are more appropriate where the outcome can be measured (to ensure compliance) and where innovation is likely to be an important consideration ... Prescriptive standards are useful where information costs are high and there is little scope for innovation (New Zealand Government 1999).

Interestingly, neither of the two Australian regulatory guidance documents mentioned above makes any reference at all to process-based regulation, notwithstanding that the quick survey of existing regulatory styles that I have just given suggests that process-based regulation may now be even more widely used than is performance-based regulation. The New Zealand guide refers to 'principle based' regulation, which it defines as regulations that 'describe the objective sought in general terms and require interpretation according to the circumstance' (ibid). Legislation, such as the occupational health and safety (OHS) Acts that specify a range of 'general duties', would fall within this definition.

The relatively uncritical endorsement of these forms of regulation revealed by these quotes reflects a widespread perception among regulatory reform officials that regulators are conservative in their approaches to the use of different policy instruments and largely reliant upon existing approaches. For example, the OECD has written in this context:

... a crucial challenge for regulatory policies is to encourage cultural changes within regulatory bodies that will ensure that a comparative approach is taken systematically to the question of how best to achieve policy objectives. Efficient and effective policy action is only possible if all available instruments are considered as means of achieving the identified objective. The instruments to be considered include a wide range of non-regulatory instruments, as well as a number of distinctly different forms of regulation (OECD 2002: 52).

If regulators are seen as having strong conservative biases in their choices of policy instrument, it is unsurprising that regulatory reformers would see their main task as being that of promoting relatively new and unfamiliar instruments with the potential for improved efficiency and effectiveness.

The view of regulators as fundamentally conservative and risk adverse in nature is probably fairly soundly based when considering the attitudes of regulators toward replacing regulatory approaches with other, non-regulatory policy instruments, although, even here, it is possible to argue that the propensity of regulators to entertain options such as carbon taxes and emissions trading as responses to global warming is probably greater than that of the politicians that they serve.

However, if there is a degree of risk aversion in relation to non-regulatory policy instruments, the quick tour of current approaches to social regulation I have given casts considerable doubt on the question of whether regulators can truly be said to be averse to adopting regulation that departs from the traditional prescriptive, or 'command and control', form.

If regulators are actually quite open to the use of innovative regulatory instruments, the emphasis of the advice that regulatory reformers are providing to regulators should, arguably, be shifting away from an uncritical promotion of the use of process and performance-based regulation and toward the provision of sophisticated and practical advice regarding both the potential drawbacks of these styles of regulation and the tools that can be used to minimise or avoid these potential problems.

Of course, this proposition rests upon a view that substantial negative impacts can be identified in respect of moves to adopt process and/or performance-based regulation. Consequently, I would now like to identify and analyse some of these potential negative impacts, before moving on to a discussion of how they can be minimised and/or avoided.

Negative impacts and problems — types and evidence

Indiscriminate use

The first of these problems is the increasingly apparent tendency toward the indiscriminate adoption of process or performance-based regulation. Such a tendency is, perhaps unsurprising, given the largely uncritical view of these forms of regulation being promoted in some quarters, including by regulatory reformers, as I have shown.

The adoption of process-based regulation in inappropriate circumstances is particularly problematic. This form of regulation is potentially a powerful tool when the range of risks that need to be controlled is numerous, when some or even many risks may be poorly understood and when a wide range of possible controls exists. In such circumstances, it is nearly impossible to specify an optimal prescriptive approach to regulation and even the use of performance-based regulation may be problematic if appropriate risk standards cannot readily be identified and specified.

However, the adoption of process-based regulation, with its emphasis on management based and systemic controls, is necessarily a relatively 'heavy-handed' approach, in the sense that it inevitably implies quite substantial compliance obligations on affected parties. This suggests that its use should be reserved for situations in which:

- the size of the identified risks that regulation must address is substantial (or the consequences of a single failure are catastrophic, e.g. aviation safety);

- existing regulatory approaches are performing poorly in achieving their underlying objectives, are unduly costly or otherwise subject to a significant measure of ‘lack of consent’ on the part of the regulated; and
- the regulated industry generally has sufficient capacities to effectively implement the management based requirements of process regulation.

By contrast, where the risks to be mitigated are relatively few and the control measures that can feasibly be employed are also relatively few and well known, there is little likelihood that the specification of a process-based approach will perform better than other alternatives. The application of process-based regulation in these circumstances is likely to lead to strong complaints that the regulatory requirements amount to a costly and time-consuming ‘paper chase’, with little being achieved as a result.

Some examples of this problem arising from recent Victorian experience are instructive. A requirement, adopted in 2001 in the *Food Act 1984* (Vic), for all food premises to adopt a Food Safety Plan effectively applied process regulation to all corner cafes and the like. This implied a massive paperwork burden in a context in which risks were few and well defined, as were the appropriate controls. Small businesses saw the requirement to develop the plans as a massive compliance burden, given their unfamiliarity with the processes required, as well as leading to a situation in which they had no certainty that their resulting plan would be found to be compliant. The resulting outcry effectively forced the government to develop and propagate ‘template’ food safety plans to act as guidance for such businesses.

In practice, it seems that little customisation of these templates occurred. The fact that template food safety programs *could* be developed effectively constitutes an admission of the inappropriateness of applying process-based regulation in this context, as it showed that broadly applicable risk controls could be identified and specified in a quasi-regulatory document. However, this did not prevent the proposal of similar requirements for all dentists across Victoria, covering the use of x-ray machines. These requirements would have been implemented under the *Radiation Act 2007* (Vic). Here again, small dental practices would be required to undertake the whole risk identification, assessment and control process when, in fact, the requirements of their registration as dentists already included elements of regulation of the use of x-ray machines.

In the event, recently implemented requirements for regulatory impact assessment to be conducted on draft legislation identified the disproportionate costs involved and convinced the regulators to drop the proposal. However, without such controls, it is highly likely that the developing ‘orthodoxy’ among regulators in favour of process-based regulation would have led to its use in this obviously inappropriate context.

These are examples of areas in which the basic rationale for process-based regulation, that is, that there are multiple sources of risk and multiple potential means of addressing those risks, are not met. However, in some other circumstances in which these 'threshold' conditions are met, substantial problems have still arisen due to the process-based regulatory requirements being applied across too broad a scope.

The food safety case I have just cited is also an example of this dynamic. Another example is the recent adoption of new rail safety legislation in Victoria. While rail operations clearly do constitute an appropriate context in which to implement process-based regulation, the scope of the legislation and specifically its requirements for accreditation and the preparation of detailed Safety Management Systems, was broadened to the point where tourism and heritage sector operators were also required to conform to these requirements. Thus, organisations running very small scale rail operations and relying largely or wholly on volunteer labour are being asked to undertake the whole risk identification and assessment process, document the findings, submit them for regulatory approval and have them audited on a regular basis. While there was some debate as to whether these operators might be excluded, it appears that the decision to expand the scope of process-based regulation to include this group was essentially a political one.

In the event, the political solution to the problem generated by the poor decision on regulatory scope is that government will subsidise the sector to complete the regulatory obligations that have been imposed upon it. This surely constitutes recognition that the public would not willingly accept that the necessary consequence of expanding the regulatory reach of the new requirements into these areas would otherwise be the closure of substantial parts of the tourism and heritage rail sector.

Negative combinations of process, performance & prescriptive regulations

A second set of problems relates to the frequent failure of regulators to produce logical, mutually supportive combinations of process, performance and/or prescriptive regulation. Certainly, many or even most regulatory structures need to combine at least two of these types of regulation in order to achieve an efficient and effective whole. However, there seems to be little understanding of how these combinations ought to be achieved. Again, a couple of examples can highlight the problem.

The first relates to the *Australia New Zealand Food Standards Code* and specifically the part of it that deals with cheese-making. This part constitutes a wholly dysfunctional combination of prescriptive and performance-based regulation, as was made apparent in an Administrative Appeals Tribunal hearing in 2003.¹ The prescriptive requirement is that milk used to make cheese must be

pasteurised. The performance standard specifies the maximum allowable bacterial load. As cheese is defined as a high-risk product, a certain proportion of cheeses must be tested on importation and the bacterial load shown to be below the performance standard. The AAT hearing arose because an importer of cheese made from unpasteurised milk wished to have it tested and approved for sale on the basis that it met the performance standard. AQIS argued that it was not required to test the cheese until he could show that the cheese had met the prescriptive standard. The AAT upheld the AQIS viewpoint, based on its reading of the letter of the code, notwithstanding that AQIS did not make any claim that the cheese in question was unsafe for human consumption. Despite this demonstrated absurdity, the code has not been amended and the cheese in question is on sale now in Australia only because it went through an expensive and time consuming 'exemption' process which must audit the entire cheese-making process in order to prove that it will systematically lead to the production of 'safe' cheese.

A second type of dysfunctional combination of performance and prescriptive standards relates to the widespread use of Deemed to Satisfy (DTS) standards. These are generally prescriptive standards drafted in order to provide guidance on means of compliance, particularly for small business and therefore to improve the certainty of compliance with performance-based regulation. Their use, in many circumstances, is an almost inevitable adjunct to the adoption of performance-based regulation.

However, two problems can be identified. First, most of Australia's occupational health and safety legislation arguably makes this material 'quasi-compulsory' by reversing the onus of proof, such that employers who do not use the DTS material must, in the event of a prosecution, prove that they achieved 'an equivalent level of safety'² by alternative means. Thus, the performance-based legislation is effectively supplemented by a substantial body of detailed, prescriptive quasi-legislation.

Second, even where this issue of a reversal of the onus of proof is not relevant, the adoption of large quantities of DTS material will still tend, in many circumstances, to lead to a 'reading up' of the compliance obligations established in the performance-based regulation. This problem may be exacerbated by the fact that there is often relatively little attention paid to the drafting quality of the DTS material, as it is seen as having guidance status rather than constituting regulation. Thus, while a high proportion of businesses may use the DTS material as the basis for their regulatory compliance efforts, it's technical quality may be substantially less than that of the prescriptive regulation that it has, in many cases, replaced. This is particularly the case where large numbers of technical standards are adopted in the DTS material, as this kind of material is not generally drafted with legislative compliance issues in mind.

To take just one example, a quick search of the NSW *Occupational Health and Safety Regulation 2001* reveals that it calls up 30 Australian Standards and five National Occupational Health and Safety Commission standards. This demonstrates a third area of concern: while performance-based regulation has often been promoted, in part, because it supposedly simplifies regulatory requirements (by replacing detailed prescriptive requirements with simple outcome standards) the result is very often the reverse. The total volume of the technical standards one must read and digest in order to reach a clear understanding of the regulatory meaning may be many times larger than the previous body of prescriptive regulation.

Thus, while the supplementation of performance-based standards with DTS material is probably virtually inevitable, in most regulatory contexts, there is a strong danger that excessive use of this mechanism will effectively contribute to significant increases in regulatory complexity and cost, particularly because of the relative absence of regulatory quality controls on such 'grey letter' law.

I should note that this issue of the overuse of technical standards has been recognised for some years now, with some regulatory guidance material advising a sceptical approach (or at least a careful one) should be taken to their adoption in regulation. However, as a recent Productivity Commission report suggests, with around 2300 Australian Standards (one third of the total) alone now being incorporated 'by reference' in Australian law, there seems to have been little progress made (Productivity Commission 2006: xiv).

Lack of clearly defined compliance requirements

Process and performance-based legislation also often suffers from an absence of clearly identified standards as to compliance obligations. This issue was highlighted in the recent *Maxwell Report*, which reviewed the Victorian occupational health and safety legislation that had been in place since the mid-1980s (Maxwell 2004). Maxwell made recommendations intended to deal with this issue. However, their implementation by government appears to have had a perverse outcome.

The core issue is that the general duty on employers has historically been to provide 'as far as is reasonably practicable' a safe workplace. This is an example of what in New Zealand is referred to as 'principles based' regulation. Maxwell recommended that the legislation should explicitly state that this standard involves a requirement to take action to reduce risk up to the point at which the costs of the risk reduction activity became 'grossly disproportionate' to the benefit obtained from the risk reduction (Maxwell 2004: 125-34).

This test is itself clearly open to some interpretation. However, Maxwell explicitly contrasted this test with the benefit/cost framework that is statutorily required to be used in Regulatory Impact Assessment (RIA) and which, for an economist

is consistent with societal welfare maximisation. Maxwell makes clear that the 'gross disproportion' test would require that actions be taken with costs that significantly exceed benefits in many cases. However, he fails to discuss or resolve the conflict inherent in his proposing primary legislation that sets an entirely different test of employer duties from that to which any subordinate legislation made under its authority must be subjected.

Interestingly, it has not taken long for other regulators to recognise this problem. This has led to the adoption in the new *Rail Safety Act 2006* (Vic) of an alternative form of words: the duty of rail organisations is to control risk 'So Far As Is Reasonably Practicable'. According to the regulators involved, it was intended that the 'gross disproportion' test would not apply, as it was considered impractical and unduly onerous to apply this standard to the industry.

However, while this is the intent behind establishing alternative wording for the relevant test, it remains far from clear that it has been achieved and will presumably await the development of case law for this question to be determined.

RIA problems

A very significant problem with performance-based and, especially, process-based legislation is that it can become almost impossible to undertake reasonable *ex ante* RIA on regulation that is framed in these terms. In particular, there is little prospect of developing robust *ex ante* analyses of requirements to develop SMS and to develop risk controls based upon those SMS. This problem is particularly acute when legislation gives little explicit detail as to the required content of SMS and relies overly on the discretion of regulators in this regard. In this context, there must be substantial uncertainty as to whether regulation of this sort will produce net benefits for society, while the legitimacy of the RIA process is also undermined as a result.

This problem is compounded by the fact that the spur for the adoption of process-based regulation in a particular circumstance is often not any clearly identified and measured problems with the outcomes achieved under existing regulation but, rather, a desire to adopt 'best practice' regulation — with process-based regulation increasingly being seen in this light regardless of the specific regulatory circumstance. Thus — and I say this from the viewpoint of a consultant who undertakes a great deal of RIA — there can be major challenges at both the 'problem identification' stage and in terms of developing the argument that process-based regulation is likely to lead to superior regulatory performance than existing arrangements: there is often no identifiable regulatory failure when outcomes are considered, yet very substantial new compliance obligations are being proposed. As an example, new rail safety legislation in Victoria has been estimated to impose over \$20 million in additional regulatory costs over 10 years and is being imposed in a context in which the incidence of rail fatalities has

shown a continuing declining trend over more than two decades and, considered in an international context, is already running at levels well below OECD averages.

Equity and accountability issues

Process-based regulation, in particular, often lacks legitimacy with the public and, in some cases, with regulated entities owing to concerns that it does not necessarily ensure equal, or equitable, treatment for different regulated entities. This concern arises from the degree of discretion, or judgment required to be exercised by the regulatory agency in assessing compliance with, for example, an SMS requirement. Arguably, this issue largely constitutes a specific case of the general issue of regulatory transparency: that is, that many of these concerns can be addressed by regulators being more open about the criteria used for judgment, such as by publishing guidance material on relevant issues.

Finally, a long-standing concern with the use of performance standards, which is also relevant to process-based regulation, relates to the availability of various 'incorporated texts'. As I have already suggested, performance-based regulation often leans heavily on supplementary material that is prescriptive in nature and which often has deemed-to-comply status but may also be compulsory. The use of Australian Standards in this context is particularly widespread. The key issue here is that these standards must be purchased at substantial cost and frequently updated. By contrast, legislation has traditionally been published at minimal cost, while there is an increasing expectation that legislation will be available online at no charge.

Some possible solutions

In raising all of these problems and concerns, I certainly do not mean to suggest that the use of either process-based or performance-based regulation is, on balance, a negative for regulatory quality. Rather, I want to highlight the need for a better understanding of the nature of these regulatory tools and, in particular, of the specific regulatory contexts in which their use is being considered. Also needed is more careful regulatory design and development that takes account of this context. The following highlights major issues in ensuring this is achieved.

Ensure adequate understanding of the regulatory context

This implies one must:

- understand the nature of the risks being regulated and the possible solutions before determining what form of regulation is preferred;
- only use process-based approaches where there are multiple risk sources and multiple possible risk controls; and

- only use performance-based regulation when it is possible to specify clearly the required outcome standards and, again, where there are likely to be different ways of achieving them and/or innovation is likely to be an important factor.

Understand the regulated industry

When considering process or performance-based regulation, consider the capacities of regulated parties: will it be feasible and proportionate to ask them to undertake the required compliance processes?

If process-based regulation appears appropriate, consider how small business compliance issues will be dealt with.

Appropriate use of DTS material

When developing DTS standards, consider the overall volume of regulatory and quasi-regulatory material and assess this against the question of feasibility of regulatory compliance.

In this context, remember that regulation should set a framework for compliance efforts, not attempt to set out a prescriptive requirement for all conceivable circumstances.

When adopting existing materials as DTS standards, consider whether they are drafted in ways that are appropriate for interpretation in a regulatory context. If not, consider the need to draft new materials specifically for this purpose.

Combining regulatory forms

Consider the relationships between prescriptive, performance and/or process-based regulatory elements, ensuring that they are mutually supportive rather than antagonistic. For example, setting out prescriptive regulatory requirements but providing for exemptions to be provided where process-based alternative approaches are adopted is likely to be an effective combination. Setting out both a prescriptive and a performance-based standard and requiring both to be met (rather than either) is not likely to be effective.

Role of regulatory policy/regulatory reform bodies

Responsibility for making more sophisticated and effective choices among regulatory alternatives obviously rests primarily with regulators. However, regulatory reformers have a potentially major role to play — these issues are at the core of what the OECD calls ‘regulatory policy’.

As a first step, regulatory policy must abandon the almost uncritical promotion of these forms of regulation in favour of a more sophisticated message. A major element of this would be developing more sophisticated regulatory guidance

material that looks at issues of linking regulatory context and regulatory design and goes into some detail on aspects of regulatory design.

Enhanced controls as part of regulatory policy

The provision of improved advice and guidance on the use regulation should also be accompanied by the adoption of a 'challenge' function as one of the responsibilities of regulatory reform authorities. This challenge model already exists in some jurisdictions including, to a degree, the Australian Federal government. The issue here is necessarily broader than the question of the use of performance or process-based regulation. However, providing regulatory reform authorities with the power, or responsibility, to act positively to challenge what they believe to be poor regulatory practices could be particularly important improving the way that these forms of regulation are being used.

Finally, I suspect that this is an area in which regulatory reform authorities may themselves frequently have limited expertise and understanding. This suggests the need for significant development activity, both through research of the relevant literature and, potentially, through working cooperatively with regulators in the development and implementation of practical models combining different regulatory types.

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ENDNOTES

¹ Studd vs Secretary to the Department of Agriculture, Fisheries and Forestry (AATA897, 12 September 2003).

² This term was used in S56 of the former Victorian *Occupational Health and Safety Act 1985*. Similar provisions allowing non-compliance with a Code to be admitted in evidence in OHS prosecutions exist in, for example, S42 of the Queensland legislation and S46 of the NSW legislation.