

## Foreword

The GOVNET conference stream from which the chapters in this volume were drawn was titled 'Rethinking Regulation'. 'Rethinking' was what the *Regulation Taskforce* felt was called for if the causes, not just consequences, of the many poor regulations we observed were to be addressed. That, of course, is easier said than done, as some of the chapters in this volume attest.

The challenge facing aspiring reformers in this area reflects the reality, as one senior public servant put it, that 'no regulation is an orphan'. There are persistent demands on governments to 'do something' about issues of importance to particular groups. Such demands have both intensified and widened as our society has become more affluent and knowledgeable. That, of course, is democracy at work. It is to be expected. The resulting problems have more to do with how governments have responded to such claims through regulations, and how those regulations have been administered.

The Taskforce found not only an escalation in the stock of regulations, but also various deficiencies in their quality. Many regulations were found to be (among other things) overly prescriptive, poorly targeted, duplicative, mutually inconsistent, excessive in their coverage of firms and unduly onerous in the reporting and other obligations on the firms affected. Unintended consequences abounded.

How did this come about? Our report documents the reasons in clinical detail and more analysis can be found in this volume. But all the key ingredients can be illustrated in the following hypothetical scenario adapted from a speech I gave in 2006. Since no-one has subsequently contradicted me, I will assume that others too see it as a reasonable depiction of our regulatory processes at work.

### **A hypothetical regulation in the 'making'**

A child is critically injured following a mishap with a skipping rope. On a slow news day, the story gets a run in one of the tabloids. A caller to the local radio talk show expresses alarm that 'these potentially lethal products' are still being sold. The compere, a high profile figure, expresses concern: 'Government inaction is putting our kids at risk!' The Minister is commanded to appear on his show. In the face of some torrid questioning and innuendo, she promises that her government will take firm action to eliminate the threat posed by skipping ropes.

Next day, the talk-back king pursues a new story (about bad language in public places). The Minister, however, feels obliged to instruct her department to take steps to put the government's new skipping rope policy into effect.

The department gets to it. Following a couple of conversations with the Minister's office, a proposal to ban skipping ropes is drafted for cabinet consideration.

However, a few days before cabinet is due to meet, someone recalls that any new regulation that may impose costs on business must have had a *Regulation Impact Statement* prepared, demonstrating the superiority of the preferred course of action. Panic stations!

An RIS justifying the ban is hurriedly put together by a junior departmental officer and submitted to the government's Regulation Unit, whose job it is to assist agencies and monitor their compliance with the government's RIS requirements. The Unit finds that the draft is inadequate on the key matters of demonstrating that any new government action is warranted and that a ban in any case would be the best option. [Consternation!]

A second draft, responding to some of the Unit's concerns, is quickly assembled and re-submitted. On a less significant matter, or with a less extreme regulatory option (and perhaps with more time) the revised RIS may have been helped over the line. As it is, the Unit is obliged to deny approval a second time.

Time is now up, however, and the submission proceeds to cabinet. A *Coordination Comment* from the Regulation Unit notes that the RIS was not adequate. The Minister (who has not read the RIS) concludes that the Unit is being obstructionist. Cabinet, aware of the origins of the new skipping rope policy — the little girl, the public outcry — agrees to the Minister's proposed ban. The Treasurer/Finance Minister has been briefed by his department about the adverse efficiency implications, but takes comfort from the fact that there are at least no budgetary implications. The Minister responsible for Industry knows that there are no local manufacturers of skipping ropes left — the last turned to importing when the tariff dropped below 15 per cent — so she too is comfortable.

I could conclude my hypothetical scenario there, as I think you get my drift. But this would omit the implementation phase, which as business groups told the Taskforce, can be as problematic as regulation-making itself in contributing to bad outcomes. So I'll go further. In this contrived example, cabinet could have decided that a 'black letter' ban on skipping ropes was going too far. (Maybe there was a small local manufacturer after all, perhaps in a country electorate, or maybe the already precarious relations with the main exporting country were seen as an issue). So, instead, the power to decide which skipping ropes are too dangerous for sale is delegated under a legislative amendment to the regulator.

Not being super-human, he (or she) is inclined to be cautious. He knows from painful experience that his agency will be lambasted publicly if any further mishaps occur, but receive no credit at all if skipping ropes are able to be used more liberally without mishap. So to be on the safe side, he issues a new subordinate regulation placing a range of conditions on the marketing and sale of all devices that could conceivably be used by children 'for the purpose, inter alia, of skipping or related activities'.

Things now start to get politically charged again, because the regulator has inadvertently affected some key Australian enterprises producing a variety of products, as well as many firms (and adult consumers) who use them. Moreover, firms producing related goods are obliged to incur labelling and other costs to stop their products from being used for skipping, as well as in convincing the regulator about their compliance. Complaints are made to government at different levels by the firms' industry associations.

Eventually a review of the regulation is conducted — possibly as part of a wider review of business 'red tape' — and the regulatory constraints are greatly eased and their product coverage reduced.

## **Moral of the story**

While the subject of this little story was fanciful, a close variant could have been told based on any one of many actual examples at all levels of government, including some major regulatory initiatives in recent years. It therefore illustrates a number of failings in the way the legislative and other regulatory instruments of public policy have been developed. The key words are knee-jerk political responses, lack of analysis of costs and benefits, haphazard or limited consultation and, above all, a 'regulate first ask questions later' culture within parts of government; a culture that has been reinforced by a perception within the wider community itself that government action equals regulation.

All this needs to change if Australia is to meet its prospective social and environmental needs without compromising the economic growth that underpins living standards. For example, how we design the regulatory framework to achieve greenhouse emissions reductions looms as the critical determinant of the magnitude of the costs to our economy of achieving any particular targets.

## **A challenge for governments**

Good regulation demands good processes for developing and administering it. The essential elements are not rocket science. They simply require clarity about the nature of a perceived policy problem and why intervention would help, and a detailed understanding of the pros and cons of different possible measures. To do this well, however, can be demanding. Among the key requisites are an ability to analyse the costs, benefits and risks associated with regulatory 'solutions', and to undertake effective consultation with those who bear these (not just those calling for action).

And because today's solutions may no longer be the right ones tomorrow, the periodic review of existing regulation is integral to achieving good outcomes over time.

There is nothing very novel in all this and, indeed, most governments, to varying degrees, have requirements in place, including regulation impact statements for

significant regulatory proposals. What would be new would be their effective implementation and enforcement. This was what the Taskforce's recommendations were directed at, and many of its recommendations to entrench good process and practice have been adopted at the Commonwealth level. There have also been some steps forward within COAG, although the lowest common denominator appears to have prevailed thus far.

Ultimately, real progress will depend on the ability to change the 'regulate first' culture that is pervasive within government, and achieve a better appreciation within the wider community of the limits of regulation in dealing with society's complaints. I believe that procedural and institutional reforms will help on both fronts, but the critical ingredient for success will be political leadership.

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