Regulation: Enforcement and Compliance

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Australian Institute of Criminology

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Foreword

In its most straight-forward sense, regulation refers to a set of authoritative rules accompanied by a mechanism, usually administered by a public agency, for monitoring and promoting compliance with those rules. A broader understanding of regulation sees government strategies going beyond the creation and enforcement of rules, and includes taxation measures, subsidies and other incentives or disclosure requirements. The broader definitions of regulation recognise that non-government actors/agencies, including corporations, professional firms, international stakeholders, other community groups and private citizens can be involved in regulation.

There has been a significant increase in regulation of civil society in the late twentieth century by governments to ensure that their policy objectives are being achieved. As a result a wide range of institutions are subject to a range of new regulatory practices. These institutions are involved in every aspect of daily life ranging from environmental and occupational health and safety, crime control, competition practices, professional and business conduct.

An important part of the work of the Australian Institute of Criminology is to conduct research and provide information that informs public policy. Accordingly, the AIC regularly holds high quality conferences that explore topics of public policy importance. These conferences provide a forum for researchers, academics, practitioners, policy makers, police, community workers, lawyers and other interested groups to discuss and debate all issues associated with the criminal justice system so that an appropriate response can be formulated, best practice identified and appropriate preventive strategies developed.

This publication in the *Research and public policy* series brings together a selection of the papers presented at a conference convened by the Australian Institute of Criminology, in conjunction with the Regulatory Institutions Network (RegNet) at the Australian National University and the Division of Business and Enterprise at the University of South Australia. The conference, entitled *Current Issues in Regulation: Enforcement and Compliance*, was held in Melbourne in September 2002. These papers discuss the emergence of the 'new regulatory state', the various forms of regulatory techniques that are being used, the way in which regulatory regimes are increasingly being networked to ensure compliance and the conflicts that can sometimes emerge from such an interface.

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Acknowledgments

Disclaimer

This research report does not necessarily reflect the policy position of the Australian Government.

Contents

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David Gurney is a graduate of the University of Melbourne, BA (Hons) and Law (Hons). In 2001, he completed an Honours Thesis in Criminology which examined a number of issues raised by contemporary models of government regulation. He has an interest in pursuing further research on the problems faced by organisations in meeting their regulatory obligations, and how regulatory devices may be refined to improve their effectiveness.

Fiona Haines

Dr Fiona Haines is a senior lecturer in the Department of Criminology, University of Melbourne. She completed her BA (Hons) and PhD at the University of Melbourne. She teaches in a wide range of areas including compliance, regulation and crime and the sociology of crime and deviance. Her research interests are primarily in the area of the causes of corporate harm and its reduction. Her research has also included an analysis of reform in industrial safety in Thailand following the Kader toy factory fire, the largest factory fire in history.

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Professor Richard Johnstone is the Director of the Socio-Legal Research Centre, at Griffith University, and was the inaugural Director of the National Research Centre for Occupational Health and Safety Regulation, at the Australian National University where he is now an Adjunct Professor. His books include *Occupational health and safety law and policy* (LBC 1997 and 2nd ed 2004), *Safety, courts and crime* (Federation Press 2003), and, with Neil Gunningham, *Regulating workplace safety: systems and sanctions* (OUP 1999).

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Dr Lorraine Mazerolle is an Associate Professor in the Department of Criminology and Criminal Justice at Griffith University. She received her PhD from Rutgers University, New Jersey in 1993 and spent an additional seven years as an academic in the USA (at Northeastern University and the University of Cincinnati). She is the recipient of numerous grants on topics such as problem-oriented policing, police technologies (for example crime mapping, gunshot detection systems, 3-1-1 call systems), community crime control, civil remedies, street-level drug enforcement and policing public housing sites from funding agencies such as the National Institute of Justice and the Australian Research Council. In 2003, Dr Mazerolle was admitted as a member to the Academy of Experimental Criminologists and currently serves on the Board of the Australian Institute for Police Management and on the Capital Cities Lord Mayors Drug Advisory Board. She is the author of *Policing places with drug problems* and a co-editor, with Jan Roehl, of *Civil remedies and crime prevention*. She has written many scholarly articles on policing, drug law enforcement, displacement of crime, and crime prevention. Dr Mazerolle is an Associate of the Australian Institute of Criminology.

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Introduction

The papers in this collection have been selected by peer review from the presentations made at a conference in September 2002 entitled *Current issues in regulation: enforcement and compliance*, convened by the Australian Institute of Criminology in conjunction with the Regulatory Institutions Network (RegNet) at the Australian National University, and the Division of Business and Enterprise at the University of South Australia.

The papers reflect the wide-ranging issues and concerns, and interdisciplinary approaches, preoccupying contemporary regulators and regulatory theorists. Their focus is principally on compliance (the steps firms take to meet regulatory requirements) and enforcement (all dealings between enforcement agencies and firms to ensure compliance), and they demonstrate how regulatory research has advanced since regulation was dominated by a narrow 'command and control' model, and enforcement mired in the 'punish or persuade' debate (should enforcement agencies seek compliance through *advising* and *persuading* firms to comply with standards or by *punishing* them for not doing so?) The papers cover a wide range of regulatory regimes, from environmental and occupational health and safety (OHS) regulation, to the regulation of competition, the regulation of the professions, and the interface between police services and other parties.

In its simplest and narrowest sense (Baldwin, Scott & Hood 1998: 3–4), regulation refers to a set of authoritative rules accompanied by a mechanism, usually a public agency, for monitoring and promoting compliance with those rules (the command and control model — see Gunningham in this volume). A broader conception of regulation envisages government instruments going beyond the making and enforcement of rules, and includes taxation measures, subsidies and other incentives, disclosure requirements and similar mechanisms, and might go as far as to consider 'all mechanisms of social control — including unintentional and non-state processes — to be forms of regulation' (Baldwin, Scott & Hood 1998: 4). These broader definitions of regulation recognise that regulation can be carried out by non-government actors — including corporations, professional firms (auditors, accountants and lawyers), international stakeholders, non-government organisations (NGOs) (see Brereton in this volume), other community groups, and private citizens. In these broader conceptions of regulation, the state is 'decentred', so that it no longer necessarily dominates regulatory processes, but shares regulatory control with other sub-centres (see Mazerolle & Ransley in this volume).

As governments have outsourced their service provision functions, they have paid more attention to regulating non-government service providers, and these developments (sometimes called the advent of 'the new regulatory state' — see Mazerolle & Ransley in this volume) have had a significant impact on regulatory theory and practice. Governments increasingly rely on non-government institutions (such as civil society and markets) to achieve policy objectives (see Parker & Braithwaite 2003: 123). Modern regulatory forms often eschew

the intrusiveness of 'command and control' approaches, and rely on making regulated parties more responsible for their own internal regulation and risk management (Parker, and Gunningham in this volume), co-opt third parties (Mazerolle & Ransley), and rely on techniques like incentive schemes (Gunningham, and Brereton), enforced self-regulation (where regulatory standards are particularised to each firm and 'self-enforced' by the firm, failing which the state takes enforcement action against the firm), co-regulation (industry association self-regulation with some oversight or ratification by government — see Gunningham in this volume) and increased disclosure and reporting requirements (Gunningham, Brereton, and Parker). In short, the new regulatory state does less 'rowing' and more 'steering' (Osborne & Gaebler 1992, and Parker & Braithwaite 2003: 123).

Regulation in the 21st century is characterised by flexibility. Haines and Gurney outline key themes in what is now accepted as good regulatory practice — a focus on the outcomes of regulatory aims and a flexibility in process (especially where it achieves superior aims), rather than on concern about compliance with prescriptive rules; advancing self-regulation; promoting a 'culture of compliance' where commitment to regulatory goals is evident; and strong leadership and the use of experts to ensure that compliance with regulatory aims is compatible with business goals.

Indeed, since the mid-1980s, there has been a greater understanding of the importance of 'responsive regulation', in which regulators 'should be responsive to the conduct of those they seek to regulate', or, more particularly, 'to how effectively citizens or corporations are regulating themselves' before 'deciding on whether to escalate intervention' (Braithwaite 2002: 29; Ayres & Braithwaite 1992). For example, in regulatory enforcement, regulators have increasingly realised that an approach based entirely on strong penal enforcement may produce a culture of regulatory resistance among some employers, including employers who are prepared voluntarily to improve OHS. Regulators are also beginning to accept that reliance simply on informal measures can 'easily degenerate into intolerable laxity and a failure to deter those who have no intention to comply voluntarily' (Gunningham & Johnstone 1999: 112). To resolve this old debate, regulatory theorists now talk of finding a judicious blend of the two approaches, in the form of the 'enforcement pyramid' (Ayres & Braithwaite 1992: chapter 2) or 'interactive compliance' (Sigler & Murphy 1988, 1991). In this volume, Parker shows how enforcement agencies need to understand the complexities of compliance, and how to evaluate compliance, before they can design appropriate enforcement approaches. Smith categorises various categories of professional dishonesty, and then outlines various legal regulatory strategies (including conciliation, civil action, disciplinary action and criminal action) to control such conduct. He highlights difficulties with these regulatory approaches and then proposes ways in which each response may be matched with the various forms of dishonest conduct identified.

Gunningham shows how regulatory flexibility enables regulatory regimes to induce firms to strive to go beyond minimum compliance with regulatory requirements, but also requires regulators to ensure that there is independent verification of the firm's management system and of its achievement of regulatory goals; an ongoing dialogue with local communities concerning compliance goals and the ways of achieving them; and an underpinning of government intervention.

Regulatory theorists frequently talk of the importance of not relying exclusively on one form of regulatory technique, but rather on seeking out the optimal 'regulatory mix' (Sarre, and Mazerolle & Ransley). Gunningham shows how command and control regulation of the environment can be supplemented by voluntary approaches (self-regulation, voluntary codes, environmental charters, co-regulation, covenants and negotiated agreements); regulatory flexibility to induce systematic approaches to compliance that may transcend minimum requirements (fast-tracking of licences or permits, reduced fees, technical assistance, public recognition, penalty discounts under certain conditions, reduced burdens from routine inspections, and greater flexibility in means permitted to achieve compliance) and informational regulation (such as the community's right to know, corporate reporting on corporate performance in the regulated area, and product labelling and certification).

On another level, Brereton (in this volume) shows how, in the latter half of the 1990s, the mining industry addressed challenges posed by increased external scrutiny and control of the industry by engagement with critics of the industry, promotion of voluntary industry codes as an alternative to more intrusive regulation by governments, involvement in NGO-initiated certification schemes, and implementation of organisational change programs within individual companies.

Further, as a number of papers in this volume point out (Mazerolle & Ransley, Sarre, and Haines & Gurney), regulatory regimes often interface with each other (sometimes called 'co-production of regulation' or 'regulatory tripartism'). Sarre analyses the way in which Australian police services are integrating their resources with those of other institutions for the purposes of establishing an efficient and democratic policing 'network', and outlines a range of groups and functionaries, other than the public police, that play key roles in the prevention of crime, the regulation of conduct, and the maintenance of order. Mazerolle and Ransley explore 'third party policing', where police persuade or coerce third parties to take responsibility for preventing crime or reducing crime problems. They identify its prospects and challenges, and consider its implications for regulators, and its place in the 'new regulatory state'.

The interface between regulatory regimes is not, however, unproblematic. Haines and Gurney remind us that firms are subject to many regulatory regimes (for example OHS, environment, tax, consumer protection and competition regulation), and that these regimes may be focused on different regulatory goals, some of which may conflict.

That is not to argue that 'command and control' regulation does not have a place in the regulatory mix (Mazerolle & Ransley). Rather, as Gunningham argues in this volume, the problems of command and control regulation can be overstated, and it will often be an important part of a regulatory solution — usually as a 'safety net' under more flexible regulatory mechanisms, and 'kicking in' when triggered by the failure of more flexible approaches. But to be effective, command and control models need to be dovetailed with other regulatory techniques, and, in some cases, rethought. Johnstone shows that the use of criminal sanctions in regulatory enforcement can be undermined if regulatory offences are simply 'tacked on' to the mainstream criminal justice system. For prosecution to be an effective regulatory strategy, the legal rules and procedures and the underlying taken-for-granted conceptions might have to be reconsidered and reformed. Indeed, the use of prosecution itself may need to be reconsidered anew.

Recent research into regulatory compliance has shown that compliance is a subtle and complex process. Researchers (for example Hutter 1997; Di Mento 1986 and Parker 2002) have observed that, from a regulator's perspective, it is clear that it is overly simplistic to think that compliance is simply about regulators comparing the way that actual behaviour conforms with, or measures up to, the requirements of published rules or standards. Compliance is not just a single event, but an open-ended and ongoing social (and sometimes political) process of negotiation (Di Mento 1986; Hawkins 1984, 2002; Hutter 1988, 1989 and 1997; Black 2001). Regulatory requirements often impose ongoing, or continuing, obligations, which may be satisfied today but not tomorrow; and it may take considerable time for firms to organise themselves to reach the standards required for compliance. Parker in this volume notes that many regulatory regimes now require organisations to internalise responsibility for their own compliance through compliance programs. She argues that the crux of organisational responsibility for compliance is self-evaluation — the capacity to detect, prevent and correct breaches — and that regulators therefore need to be able to evaluate regulated firms' capacity for self-evaluation. Her paper critically examines current means for evaluating compliance systems by reference to the three phases that research shows organisations must travel through to implement effective compliance systems. Brereton outlines efforts by mining companies to develop fairly comprehensive internal governance systems to improve their management of the environment and community issues. Haines and Gurney outline the difficulties firms face in trying to comply with regulatory regimes with conflicting aims.

Finally, some of the papers in this volume remind us of the crucial importance of the context within which regulation operates. Haines and Gurney show how the economic and political contexts constrain, and sometimes impede, regulatory efforts to promote compliance with regulatory aims, especially where different regulatory regimes impose conflicting aims and requirements upon firms. As they tersely observe, 'regulation is first and foremost a political, not technical, activity.' Drawing on the work of Hood and Douglas, they outline the types of ideological conflicts that can underpin different regulatory regimes. The political exigencies underlying regulation shape both what is identified as a risk, and the nature of any trade-off between competing economic and/or regulatory demands. They argue that academic work on regulation can make a greater contribution to the field by a greater exploration of the contingent and political nature of regulation. Johnstone shows how the dominant form of criminal law, with its individualistic and 'event-focused' underpinnings, and its history of consigning regulatory offences to a lesser level of criminality, undermines the effectiveness of OHS prosecutions. Brereton describes economic factors, external constraints and pressures from international stakeholders, NGOs and the public that have led to the mining industry adopting a range of self-regulatory mechanisms broadly directed at improving corporate social and environmental performance.

As this collection shows, regulatory theory is in a period of rapid development, and we hope that the papers stimulate readers to explore new issues in regulation.

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Section 1: Regulatory conflict and regulatory compliance: the problems and possibilities in generic models of regulation

Fiona Haines and David Gurney

Regulatory conflict and regulatory compliance: the problems and possibilities in generic models of regulation

Abstract

A major aim of contemporary regulatory scholarship has been to provide solutions to the problems of securing regulatory compliance, with much innovative work emanating from Australia. In this paper we explore some limits to contemporary approaches that promise generic solutions to the problem of regulatory compliance. This is because generic models downplay both the problem of regulatory conflict and the importance of economic and political context to compliance outcomes. In short, the study of regulatory compliance risks mistaking means for ends, of confusing process with goal. We illustrate this through a vignette of the conflict between competition law and occupational health and safety law. Ultimately, we argue, recognition of the contingent nature of regulation may prove to be the most beneficial role regulatory scholarship can play.

Introduction

Dominant ideas of what constitutes good regulatory practice appear unproblematic. Several themes persist. Good regulatory practice focuses on the outcomes of regulatory aims, not with obsessive concern about compliance with prescriptive rules (May & Burby 1998; Black 1997). Flexibility in process should be allowed where it can demonstrate superior outcomes (Parker 2002). Regulation should advance self-regulation (Ayres & Braithwaite 1992). Further, a culture of compliance where commitment to regulatory goals is evident should be promoted (Gunningham & Johnstone 1999; Parker 2002), with strong leadership (Hopkins 1995) that avoids strategic use of regulations (Sitkin & Beis 1994; Black 1997; Parker 2002). Compliance experts, too, are useful to marry regulatory aims with business goals (Parker 1999). Underpinning this ideal is a rational enforcement strategy, where a stepwise progression of penalty for non-compliance ultimately results, for the recalcitrant, in severe penalties such as imprisonment or licence revocation (corporate capital punishment) (Ayres & Braithwaite 1992). Such a framework, it is argued, promotes the benefits of compliance as well as the costs of non-compliance.

Attractive as these ideas are, there are limits to approaches that assume a single regulatory goal. Often multiple goals exist, some of which conflict. In cases of conflict, exhortation to focus on outcomes, to engender a singular 'compliance culture' or to follow an ordered enforcement strategy misunderstands the regulatory task and overemphasises its simplicity. Conflict is not hard to find. Examples include those between employee safety and pregnancy (Randall & Baker 1994), employee safety and disability rights (Daniels 2003), environmental protection and competition law (Bennett 2000), health and anti-trust (Geis 1991), Indigenous rights and environmental protection (Cocklin & Wall 1997) as well as the messy arena of utilities privatisation, environmental goals and equity of access (Maloney 2001; Watters

2003). Such areas call for substantive resolution, not merely a decision about relevant regulatory techniques.

These conflicts illustrate that regulation is first and foremost a political, not a technical, activity. Political contests about responsibility and ideal conceptions of society shape what is seen as risk, and suggestions of how diverse risks should be dealt with. Regulatory techniques are weapons in this political struggle. Through a vignette below, we show how the political exigencies that underlie regulation shape both what is identified as a risk and the nature of any trade off (Hancher & Moran 1998; Haines & Sutton 2003). In light of this, we argue for greater exploration in academic work on the contingent and political nature of regulation.

The vignette we have chosen is a conflict between competition law and health and safety law within Australia. The specific site is that between 'chain of responsibility' provisions, a regulatory strategy that places liability along the contracting or production chain for harm that occurs lower down that chain, and requirements under trade practices legislation to ensure an open, competitive market. Australia has been at the forefront of reforms aimed at removing impediments to 'efficient markets' (Morgan 2003). It also has a well-developed state-based health and safety regulatory framework, based on a Robens philosophy of collective effort to remove safety risks (Johnstone 1997). The stated objectives of workplace health and safety law such as the *Occupational Health and Safety Act 1985* (Vic.) include the protection of the 'health, safety and welfare of persons at work' (s. 6). The legislation requires that employers care for workers and are responsible for their health and safety. On the other hand, the object of the *Trade Practices Act 1974* (Cwlth) is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (s. 2). Here the law is aimed to maximise the 'efficiency' of the competitive market where individual entities use their creativity and ingenuity to succeed (Hilmer 1993; Office of Regulation Reform undated).

Both Acts regulate — that is, they exert control through legislation and ancillary legislation. But they differ in their conception of the 'ideal' state of affairs, between a market and welfare ideology. The contention that there is an ideological conflict between different regulatory regimes is given support by the work of Christopher Hood (1998). Hood argues that fundamental paradigm differences exist between various justifications for regulation and notions of an ideal regulatory framework. His analysis, following Mary Douglas (1966, 1992), is that four master categories or principal ideologies underpin regulatory regimes and regulatory reform: individualism, hierarchism, egalitarianism and fatalism. Individualism is characterised by self-interested individuals interacting through the market, and regulation occurs through negotiation and contract. By contrast, hierarchism favours 'command and control' structures with strict lines of authority and clear procedures. Hierarchism is reflected in a paternalistic ethos where those in positions of authority are responsible for weaker

individuals in society (Hood 1998: 73–97). It is these two forms that are most clearly seen in writing on regulation, in the emphasis in 'command and control' structures and 'welfare' principles (both with a hierarchist conception of control and authority) (Reiss 1984), contrasted with the more recent shifts towards 'flexible' regulation that emphasise the potential within the market and systems of self-regulation to control corporate behaviour (Shearing 1993; Grabosky 1994). Indeed the concerns of competition law and occupational health and safety law reflect these two positions. In Hood's (1998) terms the goals of competition law are individualistic, whilst the goals of safety law are paternalistic or hierarchist. Nonetheless, the other two are reflected in certain regulatory regimes. Egalitarianism, the emphasis on collective decision-making and case-by-case resolution of the issues, is best exemplified historically through professional self-regulation (Salter 2001) and more recently through ideas such as tripartism (Ayres & Braithwaite 1992) and NGO involvement in the regulatory process (Drahos & Braithwaite 2000). Fatalism, regimes characterised by little cooperation but rigid adherence to rules is also seen, although most often in critiques of 'command and control' regulatory forms as well as ritualistic adherence to audit requirements (Power 1999).

Understanding the ideological differences underpinning regulation allows a depth of understanding of separate bodies of content-specific regulatory literatures. Occupational health and safety (OHS) scholarship has long been suspicious of market philosophies and individualism in general. Indeed, notions of individual worker responsibility for injury are viewed as 'victim blaming' (Hopkins 1995) and contracting out seen as a means to contract out risk (Quinlan 1999). This philosophy is reflected in law, with all Australian OHS legislation stating that the safety of a subcontractor's employee rests with the principal contractor (Johnstone 1997). In contrast, economic literature emphasises the benefits of individualism, and eschews paternalism as 'rent seeking' behaviour (Hilmer 1993).

What, then, is the principal commercial or non-commercial organisation (hereafter 'principal') to do in order to comply with regulatory requirements when deciding to employ a subcontractor for some work? The answer depends upon whether the principal aim is compliance with concerns of the OHS regulator — or the competition regulator. To assure the OHS regulator that the subcontractor's employees will be safe, the principal should prefer, in the tendering process, those contractors that can demonstrate a high standard of OHS, that is, to seek assurances from a contractor before it is engaged (NOHSC 1998). To do this, the principal might require tendering contractors to provide evidence of accreditation or training from a trusted, nominated safety and accreditation agency. Alternatively, a principal party might work together with other principals in the same or similar industry, perhaps through their industry association or employer organisation, in drawing up lists of preferred contractors with a safe working history (Rees 1994). Organisations may also formalise an alert system to warn each other to avoid a particular contractor with poor OHS practices.

These methods give the principal some comfort about the OHS credentials of the independent contractor whose services they are engaging.

From the perspective of the competition regulator, however, such solutions are problematic. 'Screening' contractors for OHS performance risks the principal breaching the competition provisions of the *Trade Practices Act 1974* (Cwlth) Part IV. To require a contractor to obtain accreditation or training from a specified agency is likely to constitute a third-line force in breach of s. 47(6) of the Act. This provision has been interpreted by the courts to mean that a company will breach the law if it agrees to acquire services of another only on condition that the other party, in turn, acquire the services from some nominated third party (Miller 2001). Therefore, if a company requires a contractor to obtain accreditation or training from a specified agency as a condition of acquiring their services, then it may breach the provision. Moreover, third-line forcing is prohibited *per se*. That is, a company will breach the provision by engaging in the conduct even without anti-competitive intent or any evidence of an anti-competitive effect. Further, the company does not need to state that it requires tendering contractors to obtain this accreditation to fall foul of the provision. Rather, under s. 47(13)(a) of the Act, conditions that are 'ascertainable only by inference from the conduct of persons or from other relevant circumstances' may be sufficient to constitute a third-line force. This means that companies need to be particularly vigilant in their communications with suppliers and customers to ensure that they are not considered to be imposing an implied condition. Thus, it is difficult to require the specified accreditation without imposing a third line force.

An attempt by the company to meet with others in the industry to draw up a preferred list of contractors, or warn on which contractors to avoid, on the basis of OHS performance may also fall foul of the Act's 'boycott' provisions. Arguably, it could also open up the possibility of collusion between companies, one of the most serious offences under the Act. Despite this, industry and employer associations are encouraged by health and safety consultants to draw up lists of preferred contractors as a way of ensuring safe working practice (Wiiki 1997; Shaw 2000, 2002) as 'hands on' experience of contractors' work is more effective in ensuring good safety practice than paper-based evidence presented within a tender (Bottomley 1999). Further, collaboration between competing organisations to set standards and share information is a key component of OHS law in Australia. The Robens Report (1972), upon which much OHS legislation within Australia is based, stated that, 'we feel very strongly that this should include more emphasis in future on joint action at the industry level' (Robens 1972: 30).

While there is no strict legal inconsistency here, and while compliance is possible with both sets of provisions, resolutions do not appear in the regulatory prescriptions above aimed at maximising compliance with a single regulatory aim and all involve additional cost to the principal. For instance if the company engages direct employees it will not fall foul of the

Trade Practices Act, as s. 4 expressly excludes application of the Act to formal employment relationships. Secondly, instead of requiring contractors to acquire a particular accreditation, the principal company could state that tenders must demonstrate a high commitment to health and safety and leave the means to achieve this open. This does not involve a third line force. However, in both cases costs for the principal increase, in the former by increasing its workforce and the latter by increasing the resources necessary to assess the tenderer's OHS credentials. A related approach would be to require safety accreditation, but not specify from whom. Again there are costs associated with evaluation of each of the accreditation schemes and if there is only one or a few accreditation agencies offering such services, this may still be considered a third line force under s. 47(13)(a) of the Act.

In summary, then, the simplest and most efficient ways of ascertaining the health and safety credentials of a contractor are likely to cause an infringement of the *Trade Practices Act.* 'Optimal' regulatory strategies provide little guidance concerning how this conflict can be resolved. Further, additional costs are not neutral in their effect, and they can directly affect a company's overall capacity to monitor compliance (Paterson 2000).

Legislators do understand there is a problem. Regulators, however, are reluctant to cede control to another regulator so that conflict resolution is dealt with case-by-case. For OHS, resolution is decided when an alleged safety breach has reached court. The obligation under the *Victorian Occupational Health and Safety Act* only requires such steps to be taken as are 'practicable' (as defined in s. 4 of the Act), practicability being a major issue at court (Johnstone 1997). Trade practices legislation allows resolution at an earlier stage. The *Trade Practices Act* enables the Australian Competition and Consumer Commission (ACCC) to excuse certain types of anti-competitive conduct by way of 'notifications' or by granting 'authorisations'. This allows the ACCC to decide exceptions earlier than the OHS regulator.

However, there are substantial costs for the principal involved in preparing this documentation to the satisfaction of the ACCC and exemption from the law only applies to the specific conduct that is the subject of the authorisation or notification. Further, notifications received under the Act may be withdrawn by the ACCC at a later date. Each new call for tender by the principal could require application for authorisation or notification. Most importantly, the ACCC is a competition regulator. Its policy commitment is to the competition regime so it may not be able to weigh up 'objectively' the extent to which competition is to be sacrificed in the name of a competing policy agenda. In short, for the ACCC, paternalism is conceded grudgingly, and only on a case-by-case basis.

Alternative forms of resolution deal with issues of legalities and sovereignty, rather than substance. Lanham (2001: 19) notes that criminal law does not require a party to comply with one law when it would absolutely preclude compliance with another. Freiberg (1992: 14) also points out that a breach of one law if caused by a genuine attempt to comply with another law will be treated more leniently by the courts, although in this case it will not absolve a party from liability. Further, s. 109 of the Australian Constitution prevents State and Commonwealth governments from creating legislation that is strictly inconsistent with the other, stating 'when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' In the case above, if there were a strict legal inconsistency between the two pieces of legislation, the *Trade Practices Act* would prevail. However, there is not a strict legal inconsistency. The real problem of tensions between competing regulatory obligations. Solutions based on sovereignty are traditional terrain for the conflict of laws literature, a literature that shies away from value-based resolution of conflict (for an overview see Guzman 2002). Yet, jurisdiction hunting itself is a well-worn method for achieving preferred outcomes, outcomes that match not only protagonists' material interests but also ideological preference (for a recent example see Sobczak 2003; Compa 2002).

In short, the vignette above highlights the problems with compliance techniques that assume a singular goal, when multiple and contradictory regulatory aims exist. Further, generic prescriptions might even exacerbate the conflict, since contemporary scholarship is not concerned simply with minimal compliance, rather regulatory theorists seek to motivate company behaviour that goes 'beyond compliance' (Gunningham & Johnstone 1999). Indeed, companies may simply go beyond compliance because of uncertainty created in non-prescriptive rules about what minimal compliance actually entails. The combination of uncertainty as to exactly what is required to be done to comply with a body of law and increased threat of punitive enforcement for non-compliance may lead companies to want to go 'beyond compliance' to make sure that they are free from liability, and this is exactly what is desired by regulators (DeHart-Davis & Bozeman 2001, Gunningham & Johnstone 1999; Parker 1999). The uncertainties in the standards imposed by law combined with the strong incentive to ensure compliance (including increased penalties) blurs the line between 'beyond compliance' and 'over compliance' (Kobayashi 2001; Spence 2001; DeHart-Davis & Bozeman 2001, Tucker 1998; Stanley 1995).

This blurring is further complicated in areas where there is a regulatory interface. 'Over compliance' with trade practices law may not result in negative consequences for competition outcomes (although it may) but it may inhibit compliance with other legislative requirements, such as OHS law. The reverse also may hold. Exemplary compliance in health and safety,

such the requirement of nominated accreditation, collaboration with competitors for the purposes of increasing safety (as advocated by Rees 1994) may breach trade practices law through either a third line force or collusion.

However, pushing regulatees to over-comply is not an accidental side effect of these models of regulation, but, aided by ideas of 'continuous improvement', are designed to have this effect. As Gunningham & Johnstone note, an important benefit of more flexible, less prescriptive models of regulation is that they encourage the organisation go beyond its strict legal requirements (1999: 34–5). Research in the competition regulatory arena supports this finding. Parker (1999), in her research notes that 'in settlement discussions, ACCC staff found that they could trade on the fact that companies were willing to do more than was strictly necessary under the Act to save costs and scandal of trial'.

When viewed from the perspective of 'over-deterrence' rather than 'beyond compliance' each regulatory initiative outlined above can exacerbate the problem of regulatory conflict. Outcome standards create uncertainties that push towards over-compliance, and a focus on compliance cultures propel innovation that may inhibit compliance with other bodies of law. Recent trends to increase use of criminal penalties, particularly penalties that apply to individuals, also contribute to the problem. Such penalties act in a highly symbolic manner to condemn certain behaviour and are those most likely to 'over-deter' targeted groups (Kobayahsi 2001; Fischel & Sykes 1996).

The emerging literature on meta-regulation may provide some way forward, but needs to recognise the problem of ideological conflict underpinning competing regulatory regimes. It might consider drawing on debates in economic geography where regulatory techniques are seen as uncertain and unstable solutions that 'paper over the cracks' of institutional conflict (Gibbs 1996). Analysis of the regulatory interface between diverse regulatory challenges, as in the vignette above, could map the synergies and conflicts between regulatory goals in each area. Studying the regulatory interface would give regulatory scholars a better idea of the complex and contingent nature of regulation and compliance.

Within a democracy, the state is quintessentially about the goals of a society, not the techniques by which those goals are to be achieved. Clearly, this is a messy business and desired goals will conflict. Indeed, recent research on the European Union suggests that the era of technocratic resolution of political difference may become progressively more difficult. Harcourt & Radaelli (1999) argue that inefficiency and prolonged conflict may be an inevitable corollary to increased democracy. If this is the case, then research by regulatory scholars on such conflicts, their impact on regulatees and methods for resolution seems critical.

Evaluation of good regulatory practice cannot be divorced from consideration of the goals to be achieved — including those in competition with each other. The growing interest in generic notions of regulation and compliance has an important role here in bridging the debates between competing regimes, understanding them on their own terms as well as providing a reflexive base that can communicate the regulatory implications of conflict.

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Section 2: Emerging forms of corporate and industry governance in the Australian mining industry

David Brereton

Emerging forms of corporate and industry governance in the Australian mining industry[1]

Abstract

In recent years the Australian mining industry, in line with trends internationally, has been subjected to an increasing level of external control and scrutiny. The industry has responded to this changing environment by adopting a range of self-regulatory mechanisms at the industry and firm level that are broadly directed towards improving corporate social and environmental performance. This paper describes the new forms of corporate and industry governance that are emerging within the industry, and assesses the impact, effectiveness and likely durability of these measures.

Introduction

In line with international developments, the Australian mining industry has taken some significant steps in recent years to improve its environmental and social performance. This has largely been a response to changes in the organisational, financial and regulatory context in which the industry operates, but strategic decisions taken by industry leaders have also played a part. This paper describes the new forms of corporate and industry governance that are emerging in the industry, and considers the effectiveness and likely durability of these mechanisms. The focus is primarily on companies operating, or based, within Australia, but the international context is also addressed where relevant.

The changing context of the mining industry

There has been a lot of merger and takeover activity in the global mining industry over the last decade or so, mainly in response to low commodity prices and poor returns amongst many of the bigger players (IIED 2002: 61). In Australia, the industry is now dominated by a small number of large trans-national corporations, such as BHP-Billiton, Rio Tinto, Alcoa, Anglo-American, Newmont, and Placer Dome. With the exception of BHP-Billiton, the corporate headquarters of all of these companies are located outside of Australia. These large corporate players tend to be more risk averse, and more concerned about their reputation, than their smaller counterparts. They are also highly sensitive to international stakeholder concerns, as well as being influenced by the norms of the countries in which their head offices are based (Sheehy & Dickie 2002: 29).

The external environment in which the industry operates has likewise changed markedly since the 1980s. The environmental and social performance of the sector is coming under increased scrutiny from non-government organisations (NGOs); there is a growing world-wide push for the corporate sector to embrace the principles of 'corporate social responsibility' and 'sustainable development' (Parker 2002); and financial institutions and financial markets are becoming increasingly sensitised to how companies — particularly those in the resources sector — manage environmental and social issues (Zemek 2002; Richardson 2002;

Extractive Industries Review 2003). Governments in Australia and elsewhere have also become more active in regulating the industry, particularly in the areas of health and safety and environmental management. In Australia specifically, Native Title legislation has had a significant impact on power relations between mining companies and Aboriginal peoples (Satchwell 2002; Howitt 2001).

These contextual changes have occurred at a time when the mining industry has been struggling to retain public support. Highly publicised environmental mishaps, such as occurred at Ok Tedi in PNG, Freeport in Irian Jaya, Marcopper in the Philippines and Baia Mare in Romania, have contributed to a perception that sections of the industry are environmentally irresponsible (MMSD 2002:17). Within Australia, the industry has also been embroiled in controversy around issues such as uranium mining and land rights. The industry has endeavoured to counter these negative public perceptions by highlighting the macro-economic and social benefits of mining to Australia and the world more generally, but has struggled to get this message across (for example Hooke 2002).

In short, the external constraints on the industry and the range of actors seeking to influence its conduct have grown at the same time as the industry's capacity to resist or circumvent these attempts at control has diminished. The situation, as described by one recent report, is that mining companies:

> '[l]ike other parts of the corporate world … are now more routinely expected to perform to ever higher standards of behaviour, going well beyond achieving the best rate of return for shareholders. They are also increasingly being asked to be more transparent and subject to third-party audit or review.' (IIED 2002: 4)

The following section describes how the industry has endeavoured to deal with this changing environment.

The industry response

The industry's initial response to increased external scrutiny and control was to adopt a defensive posture, but in the latter part of the 1990s industry leaders in Australia and internationally began to address these challenges in a more proactive manner. This response has had three key elements: increased engagement with the critics of the industry, particularly through the Global Mining Initiative (GMI); promotion of voluntary industry codes as an alternative to more intrusive regulation by governments; and implementation of organisational change programs within individual companies. Each of these aspects will be discussed below under the headings of international developments, industry-level initiatives within Australia and company specific responses. The section concludes by considering some issues relating to the junior sector in particular.

International developments

Traditionally, the global mining industry showed little capacity for collective action. This reflected the historical weakness of industry associations, particularly at the international level, the narrow focus on production-related issues, and the lack of perceived common interests amongst companies.

In a major shift in direction, 10 major mining companies belonging to the World Business Council on Sustainable Development's Mining and Minerals Working Group launched the GMI in 1999. A priority of this group was to ensure that the mining industry was able to present a coherent and defensible position at the World Summit on Sustainable Development in Johannesburg in September 2002.

One of the first actions of the GMI was to commission a London-based NGO, the International Institute for Environment and Development (IIED), to undertake the Mining, Minerals and Sustainable Development (MMSD) project. This project involved consultations around the globe with a large range of stakeholders, numerous meetings and conferences, and a comprehensive research program. Ultimately it generated over 100 research reports, four regional reports (including one for Australia), and several volumes of conference proceedings, plus a final report, entitled *Breaking new ground* (IIED 2002). The main report, which was published in mid-2002, provided a frank and well-documented assessment of the industry's strengths and failings and a comprehensive blueprint for its future reform.

In addition to sponsoring the MMSD project, the GMI moved to establish a new international peak association that would provide more effective representation for the industry at the international level and follow up on the outcomes of the MMSD exercise. In May 2001, the International Council on Metals and the Environment agreed to broaden its mandate and to be re-constituted as the International Council on Mining and Metals (ICMM). The new Council was given a broad charter to promote a sustainable development agenda within the industry and to perform a broader ongoing advisory and capacity building role for the sector.

The MMSD process culminated in the GMI conference in Toronto in May 2002, which was a major event attended by 550 people, including CEOs/chairpersons of 20 major companies, and representatives from 74 NGOs (many of which had traditionally been highly critical of the industry), 25 governments and several key international agencies. At the conclusion of the Conference, the ICMM issued a declaration outlining the actions that the Council would take to address the issues raised at the Conference and in the MMSD report.

A key stated priority was to strengthen the ICMM's existing Sustainable Development Charter to create a 'credible global sustainable development framework that provides the basis for ICMM members to demonstrate and verify improved performance in the achievement of their respective economic, environmental and social development goals' (ICMM 2002). In

May 2003, the ICMM delivered on this undertaking by releasing a sustainable development framework setting out 10 broad operating principles for the industry (ICMM 2003). These principles commit the industry to a process of continuous improvement in the areas of occupational health and safety, environmental management, community relations and corporate. To date, 15 companies have formally committed to measuring corporate performance against these principles.

Industry-level initiatives in Australia

Within Australia a voluntary Code of Environmental Management has been in force since 1996. The Code, which is administered through the Minerals Council of Australia (MCA), was launched in large part as a strategic move by the industry to head off the threat of further regulatory intervention by governments. Signatories commit to: application of the Code wherever the signatory operates; progressive implementation of seven broad principles; production of an annual public environment report; completion of an annual code implementation survey to assess progress against implementation of Code principles; and verification of the survey results, by an accredited auditor, at least once every three years (MCA 2000).[2]

Currently 38 companies are signatories to the Code, representing about 92 per cent of Australia's minerals production. Since 1 January 2002, adherence to the Code has been made a requirement of Minerals Council of Australia (MCA) membership, which leaves open the possibility that non-complying companies could in the future be expelled from the Council.

In 2003 the MCA commenced work on developing a broader Sustainable Development Code, which would be aligned with the ICMM framework. An External Sustainable Development Advisory Group has also been established to provide input into the development and roll-out of the Code.

It is hard to determine whether — and to what extent — Australian mining companies have improved their environmental practices as a consequence of becoming Code signatories (Greene 2002: 12). The broad language in which the Code's principles are couched makes it difficult to set a benchmark against which to track year-to-year changes in performance (Rae & Rouse 2001). Even if measurable improvements in performance could be documented, it would be very hard to determine whether these were attributable to the influence of the Code or to some other set of factors. There is little doubt, though, that the Code has *added* to the pressure being applied on mining companies from different quarters to give greater priority to environmental issues. Specifically:

1. The Code has required signatories to publicly commit to upholding key environmental values.

2. The Code processes have facilitated better communication between companies about what constitutes good practice in environmental management.

3. Corporate environmental managers have been able to use Code commitments to leverage improved management and reporting practices, and raise the profile of environmental issues within their own companies.

4. The requirement for regular public reporting has contributed to increased transparency in the industry. The proposed requirement for independent verification of code implementation surveys would create an added level of external scrutiny.

The Code's credibility depends heavily on companies being willing to comply voluntarily with its requirements. While the MCA has the ability to expel or suspend under-performing members, there would have to be sustained and flagrant breaches of organisational standards before the Council would be willing to exercise this power, particularly against a larger company. (In any event, a company would almost certainly withdraw voluntarily before this situation arose). Suspending or expelling a company would cause some reputational harm, but its ability to carry on business would not be seriously affected. As discussed in more detail below, the reach of the Code is also limited by the fact that most companies in the junior sector are neither members of the MCA or Code signatories (Sheehy & Dickie 2002: 44).

Another significant industry-level initiative currently under way in Australia is the World Wide Fund for Nature (WWF) certification trial. The key driver of this initiative is an NGO, but the trial has also received support from major companies such as Placer Dome Asia Pacific, BHP-Billiton, Western Mining Corporation, Newmont and Rio Tinto, plus the MCA. The trial is modelled on similar schemes that have been developed for the forestry and fisheries industries, particularly the Forest Stewardship Council. The object of the trial is to determine whether independent certification of on-ground social and environmental performance can be applied to the mining industry more generally (for an overview see Rae, Rouse & Solomon 2002).

The proposed scheme differs from the existing Code of Environmental Management in some important respects: the focus is on the site, rather than the corporate level; it has a much broader focus, addressing a range of issues relating to community relations, social impacts and workforce management as well as environmental performance; and the concept of external auditing and verification is central. However, efforts are being made to align the

scheme with other initiatives in place or being developed in the industry. For example, the draft certification criteria that have been developed take as their starting point the ICMM's Sustainable Development principles.

There are a number of obstacles to developing a workable certification scheme for the mining industry, including the difficulty of defining universally applicable certification criteria and setting a workable threshold for certification, establishing and maintaining the necessary institutional arrangements, and developing workable mechanisms for tracking minerals through the supply chain. Even if these design issues can be adequately addressed, companies may still be reluctant to participate in the scheme, especially if there are substantial compliance costs. It is doubtful whether industry purchasers would be prepared to pay a premium for certified minerals, so there may not be any clear financial — as distinct from reputational — benefit from being certified (Shinya 2002). Also, unless certification 'takes off' and becomes an industry-wide standard, uncertified producers are unlikely to have their access to markets significantly reduced. Hopefully the WWF trial will provide an opportunity to address these and related issues in a 'real world' setting.

Company-specific initiatives

In addition to participating in industry-wide initiatives, most of the larger mining companies — and some smaller ones — are in the process of developing fairly comprehensive internal governance systems to improve their management of environmental and, increasingly, community issues (see Harvey 2002 for a useful overview of Rio Tinto's internal management framework). These systems typically include the following elements:

1. A set of formal policy documents, usually including a Code of Corporate Conduct and policies addressing Health, Safety, Environment and Community (HSEC) issues. In some cases, companies have adopted omnibus sustainable development policies that incorporate all HSEC policies into the one document.

2. Requirements for contractors to conform to these standards while undertaking work for the company.

3. Designated organisational units and specialist positions with responsibility for managing different HSEC components.

4. A process for assessing social and environmental, as well as economic and technical, risks when approving new projects.

5. An auditing regime (mostly internal, but sometimes managed externally) for monitoring site level compliance with corporate policies.

6. Regular public reports on corporate HSEC performance. These reports are increasingly being issued for individual mine sites as well as for the organisation as a whole.

7. External advisory/consultative mechanisms at the corporate level, and sometimes also at individual sites.

8. An internal awards scheme for recognising good practice by sites and individuals.

Several of the larger companies have also made formal commitments to comply with a range of voluntary schemes administered by international agencies and NGOs, such as: the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the OECD Principles for Corporate Governance; the UN Universal Declaration of Human Rights; Amnesty International's Business Principles; the Global Reporting Initiative; Social Accountability International (SA 8000); the Institute of Social and Ethical Accountability (AccountAbility) AA1000; and the ISO Environmental Management Standards.

To date, very little research has been done on how HSEC governance systems actually operate in the 'real world' company environment. For logistical and other reasons it has not been easy for academic researchers to obtain first-hand information about site-level practices and processes in the industry, or about such matters as how individual companies handle breaches of internal rules and policies.[3]

It is apparent, however, that even in the most progressive companies there continues to be a tension between the stated commitment to improving environmental and social performance and the traditional focus on production, profit and cost minimisation. Senior management may talk about the need to embrace environmental and social objectives, but the day-to-day emphasis, particularly at the level of individual sites and business units, still tends to be very much on increasing production and reducing costs — 'the dig and deliver' model. Change advocates within and outside the industry have tried to reconcile these apparently divergent imperatives by arguing that there is a strong business case for companies to improve their social and environmental performance, but many within the industry remain unconvinced on this point. Many established sites are captives of their history, in the sense that they are often 'locked-in' to particular technologies, and have entrenched patterns of working and ways of relating with local communities. More generally, the knowledge base about how to deal with broader social responsibility issues is still relatively poorly developed, even within the larger companies, and many corporate personnel, particularly at site level, are not comfortable in dealing with these issues (Gilmour 2002; Sheehy & Dickie 2002: 46).

In order for companies to overcome these barriers, they will need to embed new practices and ways of thinking at the operational level and change the key drivers of behaviour, particularly at site level. Amongst other things, this will entail developing new decision-making processes and reporting frameworks; re-aligning incentive and reward systems; providing operational personnel with new analytical tools and skills; building up a knowledge base about 'what works'; devising new indicators and metrics; and, most importantly, providing ongoing, top-down reinforcement to company personnel of the importance of focusing on sustainability issues. Some companies are making substantial progress in this regard, but maintaining the momentum over the longer term may prove difficult for some players in the industry, particularly if cost pressures intensify, or the attention of senior management is diverted to other issues (such as fending off or initiating corporate takeovers).

The junior sector

As highlighted by the above discussion, the larger companies have been at the forefront of moves to improve corporate social and environmental performance in the mining industry. By contrast, many of the smaller companies — 'the junior miners', as they are usually referred to — perceive sustainable development and corporate social responsibility as 'big end of town' issues, and often struggle to comply with minimum regulatory standards. These operations, because of their small size, low levels of capitalisation, and shorter time horizons, generally have much less developed internal governance processes and support systems than the larger players in the industry. Few are MCA members or signatories to the Code of Environmental Management and few appear to have signed up to other voluntary initiatives. This is a significant point of vulnerability for the industry: while juniors account for only a small proportion of total minerals production in Australia, they are still in a position to do significant environmental harm, as well as damage to the industry's reputation.

The MCA has indicated that it is actively considering how to encourage more small and medium enterprises to embrace the Code, including by showcasing the achievements of successful small operators, to demonstrate that smaller companies can meet Code obligations cost-effectively. However, these efforts do not appear to have been very successful to date. Other suggestions for how the industry might assist and encourage the junior sector to improve its standards include: establishing an industry-funded advisory service to assist smaller companies to handle complex environmental and social issues when they arise; seconding experienced personnel from larger companies to assist with the development of appropriate policies and procedures; and making it a condition of partnering with junior companies in the development and management of projects that these companies become Code signatories. Whether such measures would be effective is, however, open to question, given that many in the junior sector perceive that the industry's sustainable development agenda is of only limited relevance to them.

Another possible strategy for encouraging the junior sector to lift its standards would be to establish a 'dual track' regulatory system, such as has been proposed for the area of occupational health and safety (Gunningham & Johnstone 1999). In this system, companies would be given the option of: (a) participating in — and being audited against — 'approved voluntary schemes' administered by industry associations or third parties; or (b) staying outside of these schemes and being subjected to vigorous direct regulation by the responsible State agencies. Such an arrangement, *if* it could be made to work, would provide a good incentive for companies to participate in 'voluntary' schemes, and would possibly also enable the more cost-effective use of regulatory resources. Governments could help to facilitate the take-up of the voluntary option by providing practical assistance and incentives for those smaller companies that show a willingness to voluntarily improve their performance (Gunningham & Sinclair 2000: 13–40).

There are a number of practical obstacles that would need to be overcome before a dual track system could be implemented on an industry-wide basis within the mining sector. These include: the difficulties posed by the complexities of a federal system; the challenge of defining minimum acceptable social and environmental performance standards for such a diverse industry as mining; and the limited expertise and narrow focus of existing regulatory agencies. Nonetheless, the option is certainly worth exploring — particularly in the absence of obvious alternatives.

Conclusion

As described above, the Australian mining industry, in line with international trends, has taken some significant steps in recent years to improve its environmental and social performance. To a large extent, this has come about in response to a changing external environment in which scrutiny of the industry's performance has increased; a growing number of actors (NGOs, governments, financial bodies, international organisations) are seeking to influence the conduct of the industry; mining has lost some of its traditional public support; and the corporate sector generally is coming under increased pressure to act in a socially responsible manner.

Internationally, a concerted effort has been made by industry leaders to engage with stakeholders and critics through the MMSD and GMI processes. Within Australia, the industry has developed a Code of Environmental Management which has been adopted by most of the larger companies in the sector, and is likely to be broadened to address sustainable development issues more generally. Key players in the industry have also been actively involved in the WWF certification trial. In addition, individual mining companies have invested substantial resources into strengthening their internal HSEC management systems.

Needless to say, progress has not been uniform. Most junior exploration and development companies have not been involved in the change processes under way in the industry. Finding a way to improve standards in this sector remains a major challenge and may well require some form of regulatory intervention. The larger companies, for their part, have experienced a range of difficulties in translating higher-level commitments into changed practices on the ground, and many within the industry remain skeptical about whether there is a good 'business case' for companies to improve voluntarily their social and environmental performance. It remains to be seen whether companies can overcome these barriers and embed new ways of thinking and acting at the operational level. The one thing which can be said with certainty is that returning to the old ways of doing business is no longer an option for the industry: the issue is no longer the direction of change, but the pace at which it occurs and the extent to which it will be driven internally or externally.

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[1] This is a substantially revised and shortened version of a paper that was published in the August 2003 edition of the *Environmental and planning law journal* (Brereton 2003).

[2] For a very useful overview of the Code and its operation see Gunningham & Sinclair (2002: 134–156).

[3] Parker (2002) makes the same point about the difficulty of studying corporate compliance systems generally.

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Section 3: Occupational health and safety, courts and crime: the legal construction of OHS offences in Victoria

Richard Johnstone

Occupational health and safety, courts and crime: the legal construction of OHS offences in Victoria

Abstract

Prosecution has always been a controversial element in the enforcement armoury of OHS regulators. This paper reports on an empirically-based study of the manner in which the Magistrates' Courts in Victoria construct OHS issues when hearing prosecutions for offences under the Victorian OHS legislation. It also shows how courts, inspectors and defence counsel are involved in filtering, or reshaping, OHS issues during the prosecution process, both pre-trial and in court. It argues that OHS offences are constructed by focusing on 'events', in most cases incidents resulting in injury or death. This 'event-focus' ensures that the attention of the parties is drawn to the details of the incident, and away from the broader context of the event.

Introduction

Since earliest British *Factories Acts*, and since the *Victorian Factory and Shops Act 1885*, the Magistrates' Courts have always played a major part in the process of examining, constructing and adjudicating all aspects of the occupational health and safety (OHS) offences. Despite the importance of prosecution in an OHS regulatory regime, and the disquiet at the inadequacies of prosecution of those contravening OHS statutes, there has been little research into the way in which the courts hear OHS prosecutions.

This study aims to fill this gap (see also Johnstone 2000; Law Commission 1970), and examines pre-trial and in-court proceedings to analyse the way which the Victorian Magistrates' Courts construct OHS issues when hearing prosecutions for offences under the *Industrial Safety, Health and Welfare Act 1981* (Vic.) (*ISHWA*) and the *Occupational Health and Safety Act 1985* (Vic.) (*OSHA*).

After outlining the legal framework and historical approach to OHS enforcement, this paper provides a brief profile of OHS enforcement in Victoria in the period 1983–1999, and then examines the dynamics of sentencing of OHS offenders in Victoria.

The legal framework and historical approach to enforcement

The traditional approach to OHS regulation

Until the 1970s and 1980s OHS standards were extremely detailed and technical, focusing mainly on machinery guarding standards, and enforced by a government inspectorate. From the outset, the OHS offences in the OHS statutes have been tacked on to the existing criminal justice system, without any consideration of whether the criminal justice system

and its procedures, which developed to regulate the behaviour of individuals, needed to be reconstructed to suit the requirements of an OHS regulatory system aiming to regulate business organisations.

Commentators (Carson 1985; Johnstone 2000) have argued that the early Victorian OHS regulators were the heirs of an enforcement tradition that stretched back to mid-nineteenth century Britain. Prosecution was infrequently used by an inspectorate, which followed strongly an approach of negotiated compliance through the use of education, advice and persuasion. Carson (1979: 38) has vividly described this preference for informal action for detected contraventions as 'the conventionalisation' of OHS crime, where offences 'are accepted as customary, are rarely subject to criminal prosecution and, indeed, are often not regarded as really constituting crimes at all'. Further, he used the expression 'ambiguity' of factory crime to describe the discontinuity between factory crime and 'real crime' (Carson 1980).

The late twentieth century reforms

Reflecting the wave of OHS regulatory reform that swept through Australia from the mid-1970s, the Victorian *OHSA* was enacted in 1985 and imposed broad 'general duties' on a range of workplace parties, including employers; self-employed persons; occupiers of workplaces; designers, erectors and installers of plant, and manufacturers, suppliers and importers of plant and substances; and employees.

These general duties were 'fleshed out' by regulations and codes of practice that, since 1988, have used a mix of general duties of care, performance standards (where a goal or target was set, and the duty holder could decide how most effectively to meet the target), and process standards (which prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally).

The maximum penalties for offences were significantly increased in 1985 to $25,000 for a corporation, to $40,000 in 1990 and, in 1997 to $250,000 if taken on indictment in the County Court, and $100,000 if prosecuted summarily in the Magistrates' Courts. In addition, under the general sentencing legislation, courts were empowered to adjourn matters once the charges were proved, and, without convicting the defendant, to require the defendant to enter into a recognizance to be of good behaviour, and to fulfill other specified conditions, for a specified period. From 1991 courts were also able to impose fines without convicting the defendant (*Sentencing Act 1991* (Vic.) ss. 7(f) and 8).

The OHS offences described above differ from 'typical' crimes in that they are 'inchoate' offences, because they require no specific harm to be proven, but rather contemplate the possibility or risk of harm (*R v Australian Char Pty Ltd* (1996) 64 IR 387: 400; and *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149: 158).

These duties are also examples of what we might call constitutive regulation (Hutter 2001: chapter 1), a form of regulatory law which attempts to use legal norms to constitute structures, procedures and routines which are required to be adopted and internalised by regulated organisations, so that these structures, procedures and routines become part of the normal operating activities of the organisation.

The standards in the OHSA are clearly capable of broad interpretation, and have the potential to mandate that employers and other duty holders adopt and implement the key principles of effective OHS management, which are generally agreed to be: demonstrated senior management commitment to OHS; the integration of OHS management into core management and work activities; the adoption of a systems approach to OHS management; the ability of the OHS management system to accommodate change; and valuing worker input to the OHS management system (Johnstone 2004: chapters 1 & 4).

The enforcement of the OHSA

Data from the Victorian inspectorate's annual reports in relation to the OHSA show that only in a small proportion of visits were improvement and prohibition notices issued (Johnstone 2003a: chapter 4). Even then, improvement and prohibition notices far outnumbered prosecutions. This enforcement profile reflected the Victorian OHS inspectorate's 1985 *Prosecution guidelines*, which were operative until the end of 1997. Not only did these guidelines institutionalise the inspectorate's longstanding practice of pursuing an enforcement strategy which resorted to prosecution as a last resort, but the focus of the guidelines on prosecution for breaches resulting in fatalities and 'serious accidents' institutionalised the event-focused nature of prosecution.

From 1983 to 1999, 87 per cent of OHS prosecutions conducted in Victoria were the result of an injury or fatality. In the 1980s about 90 per cent of cases prosecuted involved injuries or fatalities which took place on machines. In the 1990s, the vast majority of prosecutions (about 90%) were taken under the employers' general duty to employees. Nevertheless, still about 40 per cent of cases up until the end of 1999 involved machinery guarding.

Further, 85 per cent of defendants were corporations, the remainder comprising individual proprietors, partners, workers and corporate officers. Despite the possibility of prosecuting general duty prosecutions in the County Court, in the vast majority of cases the parties chose to have prosecutions heard before a magistrate.

The vast majority of defendants plead guilty to OHS offences in the magistrates' courts. For example, of the pleas entered from 1990 to 1998, 83 per cent were guilty pleas. The matter then usually proceeds with the prosecutor giving an event-focused summary of the facts from the bar table.

With this prosecution profile in mind, the paper now turns to the central issue in the study — the penalties imposed by the courts.

The sentencing process

The Victorian OHS statutes left the courts with a broad discretion to determine the appropriate penalty for an OHS prosecution. The only significant limit was the maximum penalty (outlined above), and the usual sentencing principles developed by the courts. Given the Anglo-Australian tradition of limiting the role of the prosecutor in the sentencing process to raising the appropriate sentencing principles, and testing sentencing facts raised by defendants, defence counsel tended to control sentencing proceedings (see also De Prez 2000). Where the charges were proved in prosecutions under the ISHWA and OHSA a conviction and fine was imposed in just over 85 per cent of charges.

Nevertheless, the evidence suggests that defence counsel's mitigation strategies bore fruit. The average fine over the period of the study was just over 21 per cent of the maximum available fine. The percentage of cases resulting in good behaviour bonds from 1983 to 1992 was just over 17 per cent, and over the whole study it was 10 per cent. Given that prosecutions were only launched for what the inspectorate considered to be the most serious cases, and that sentencing law stated that good behaviour bonds were not an appropriate form of disposition for offences under the OHS legislation involving serious injury (see *Tucker v Mappin*, unreported, Industrial Relations Commission of Victoria, 21 November 1983), the number of charges resulting in good behaviour bonds would seem to be remarkably high. If fines without conviction are included in the analysis (imposed in just over 10 per cent of cases from 1993–1999), the percentage of cases over the entire study where charges were proved but the defendant was given a disposition which did not involve a conviction was just under 15 per cent. Fines without conviction appeared to be replacing good behaviour bonds as the disposition magistrates preferred to use to express their ambivalence about the true 'criminality' of OHS offences. Clearly magistrates' ambivalence about the criminality of OHS prosecutions influenced their approach to sentencing. There was, however, far more to the sentencing process than simply an expression of taken-for-granted ideas, or deep-seated ideologies, about corporate crime.

The dynamics of sentencing, and 'pulverisation'

In his study of OHS in the North Sea, Scandinavian sociologist Thomas Mathiesen (1981: 56) noted that 'when lives are lost, fundamental questions concerning the activity ... are often raised' by 'conditions which were earlier seen as isolated being placed in relation to each other', for example the relationship between the profit motive and the lack of safety measures or the pace of oil extraction or coal mining. Sociological explanations, focusing on the work process and the organisation of work, raise these concerns in relation to most OHS issues. As Mathiesen (1981: 56) notes, when many people perceive such a totality or context, the activity itself begins to be threatened. It then 'becomes important for the representatives of the activity to pulverize the relationships which people begin to see.'

An effective method of pulverising revealing relationships is to isolate the event which was the point of departure from the rest of the activity of which the event is part to 'cut the event out of the fabric in which it exists'. Mathiesen demonstrates that politicians and businesspeople engage in this process by using a series of 'isolation techniques' in response to macro-workplace disasters. Drawing on data from three samples (1986–1987; 1990–1991 and 1997–98) of 200 cases prosecuted in Victoria, this paper argues that, during OHS prosecutions, the offences and the facts which constitute them are decontextualised or ripped out of the fabric within which they are embedded using similar isolation techniques in the sentencing process, through arguments raised by defence counsel.

The splintering of the event

The most important isolation technique is to split up or splinter the event. The event is isolated from its context by 'splitting or dividing the event into its more or less free-swimming and unrelated bits and pieces' (1981: 63). By splitting up the event, the context within which the event has occurred fades and recedes into the background at the expense of the unrelated questions of detail which are in focus.

As demonstrated earlier in this paper, the OHS prosecution processes and procedures institutionalise this splintering of the event into minor details, because prosecutions invariably focus on a particular incident giving rise to an injury or fatality.

Blameshifting

A major consequence of splintering was the close scrutiny of the details of the event, which, in turn, almost inevitably led to an analysis of culpability based on individualistic notions of causation and the allocation of blame. There were a number of blameshifting techniques used.

The most common blameshifting mitigation technique was to *blame the worker*, despite the fact that the alleged carelessness of the employee has very little to do with the offence of failing to provide a safe workplace. Another frequently used blameshifting technique was to shift the blame onto the state, by arguing that the inspectorate had previously inspected the plant without commenting on the hazard under scrutiny. A third blameshifting technique was to allege that the supplier of plant and equipment had, for example, supplied the employer with unsafe equipment and was, therefore, responsible for the hazard, rather than the employer.

The good corporate citizen

The most basic and widespread plea in mitigation was that the defendant had an excellent safety record and an exemplary attitude to safety, so that the defendant was portrayed as a 'responsible' company or person. The plea turned the court's attention away from the event itself, and away from the organisation of work, to concentrate on the reputation and attitude of the defendant. It was clear that magistrates accepted that the employer's 'good record' (usually meaning that they had no, or very few, previous work-related illnesses or injuries) was an important factor in reducing the defendant's culpability.

Individualising the event

As Mathiesen (1981: 58) points out, the event may be individualised, by making it into 'something unique, something incomparable, something quite special, individual, a-typical', and thereby ensuring that far-reaching conclusions or generalisations cannot be drawn from the event, because it is far too exceptional, unique or abnormal. For example, workplace injuries can be typified as 'freak accidents', 'catastrophes' or 'tragedies', signifying that the event is something unusual and unexpected.

If an event is unusual, both the severity of the contravention itself, and the culpability of the defendant, must be reduced, and hence there is less need for the sentencing court to be concerned with punishment, rehabilitation or deterrence. This plea was usually built onto a 'good corporate citizen' plea, to show that the defendant usually had an unblemished approach to OHS, but that on this particular occasion the exceptional had occurred. An important aspect of the technique was that there be highly detailed scrutiny of the event, without any reference to a systematic management approach to OHS.

Isolating the present from the past and future

Mathiesen argues that to form a total or over-all understanding of an event, it is important to perceive the past, present, and future of the event. A total perspective is avoided by isolating the past, the present, and the future of the event from each other.

In sentencing pleas, defence counsel often isolated the event in the present, and arguably reconstructed 'the present' to make it appear benign, caring, even heroic. In the sampled cases, examples ranged from taking the worker to hospital after the injury, visiting the worker in hospital, re-employing the worker afterward, assisting with the worker's rehabilitation and so on. In virtually every case a key factor in mitigation was that after the incident and before the prosecution proceedings the employer had rectified the situation, for example, the employer had guarded the machine as required by the inspectorate.

Another extremely common isolation technique involved isolating the event from its context by relegating it more or less to an outmoded past. Examples included assertions that the company had replaced the offending machine, had engaged a new management team, or had employed an OHS consultant since the 'accident', or had introduced a new OHS program. The suggestion was that the old work method was old fashioned. By relegating the event to an outmoded past, the event was made untransferable to other parts of the work process.

These, then, are some of the isolation techniques, used by defence counsel to transform and individualise the already decontextualised event in the sentencing process (Johnstone 2003a: chapter 7).

Countering the isolation technique

Victorian OHS prosecutors gradually developed strategies to counter these arguments, but were never able to prevent fully the transformation of the issues.

One strategy was for prosecutors to play a greater role in sentencing, primarily by (a) ensuring that their summaries from the bar table outlined defects in overall system of work, and providing as much context as possible; (b) making greater use of their right to challenge the submissions put to the court by the defendant, and (c) emphasising the sentencing principles that had been developed by the courts (see below).

To support this strategy, the inspectorate sought to ensure that inspectors collected relevant sentencing material (such as evidence of contraventions discovered, and action taken, during previous visits, and the defendant's accident record) during their investigations. There was also much evidence that, as the OHS inspectorate's competence in investigation improved during the 1990s, so the sentencing outcomes improved.

It was also clear that, over time, magistrates became hardened to the mitigating factors raised by defendants, particularly the blameshifting arguments, and unsubstantiated assertions of good corporate citizenship.

Another possible strategy was for prosecutors to appeal against sentencing decisions of magistrates when these resulted in what prosecutors considered to be inadequate

penalties. Close analysis of OHS appeals, however, suggests that the appellate procedures have been used more frequently by defendants than prosecutors. The prosecution tended to use the appeal process mainly to overturn decisions by magistrates to impose a fine without recording a conviction.

The other function of the County Court was to develop sentencing principles, which it did in its role as an appeal court, and when hearing first instance prosecutions. The key questions here are: what were the sentencing principles developed by the County Court of Victoria during the period 1989 to 1999? Did they in any way counter the isolation techniques? In summary (Johnstone 2003a) the sentencing principles actually stated by the courts in OHS cases appear simply to apply normal sentencing principles without a coherent attempt to address the special features of OHS crime, particularly the constitutive and inchoate nature of the OHS duties, described earlier in this paper. They usually 'took account of' and 'balanced' the factors raised by counsel in determining penalty, and in the vast majority of cases this included taking into account factors embodying the isolation techniques. The only isolation technique that the Victorian courts have sought to limit are the blameshifting techniques (*Singleton (VWA) v Fletcher Construction Australia Ltd* unreported County Court of Victoria (Rizkalla J) 26 February 1999 and *DPP v Pacific Dunlop Ltd,* unreported, County Court of Victoria (Mullaly J), 28 June 1994: 93), and even here it is not clear to what extent these principles have prevented magistrates from taking blameshifting arguments into account in sentencing.

In conclusion, despite these important strategies developed by prosecutors to try to prevent the operation of the isolation techniques, it was clear that the isolation techniques were difficult to counter. Consequently, OHS prosecution proceedings inevitably failed to connect the event under scrutiny to the totality of which it was part. The individualistic form of the criminal law not only reduced the level of actual fines imposed when compared to the maxima available, but also played an important role in sanitising OHS offences.

The form of the criminal law

The *ISHWA* and *OHSA* were criminal statutes grafted onto the existing rules pertaining to criminal procedure and sentencing. They were principally concerned with the mechanics and details of standard setting, the establishment of the inspectorate, and, in the case of the *OHSA*, the functions and powers of OHS committees and representatives. Apart from the penalty structures in the Acts, all other provisions governing the procedural and sentencing aspects of prosecutions were contained in the statutory and common law provisions in the mainstream criminal law.

The remainder of this paper outlines some of the consequences arising from an unchallenged adoption by OHS regimes of the processes and procedures of the mainstream criminal justice system (Johnstone 2003a).

The event focused nature of the criminal justice system

The large majority of prosecutions within the criminal justice system are event-focused — whether they be traffic offences, theft, burglary, possession of illegal drugs, domestic violence, assault, sexual assault, murder or any other of the many statutory or common law offences. The rules of criminal procedure have evolved around, and consequently institutionalised, this event-focused nature of criminal procedure.

As this paper has demonstrated, despite the inchoate and constitutive nature of OHS standards, OHS prosecutions invariably focus on events. This event focus draws the court's attention away from an analysis of whether the defendant had taken a systematic approach to OHS management, and away from issues such as structural imperatives pressuring firms to put profitability, productivity and similar factors ahead of OHS. The important point is that this bias towards events and incidents is a direct result of the form of the criminal law, in particular, the rules of evidence and procedure. The legal form, deeply rooted in individualistic notions of responsibility, is preoccupied with events and details, and with scrutinising individual actions.

The nature of the trial

As Neil Sargent (1989: 50) has pointed out, the criminal trial in an adversarial legal system has the 'effect of abstracting the legally relevant *facts* from their complex social reality, thereby depoliticising the issue before the court.' Doreen McBarnet (1981: 148) notes that '[t]he facts of a case — a case of any sort — are not *all* the elements of the event, but the information allowed in by the rules, presented by the witnesses, and surviving the credibility test of cross examination.'

Not only is the law event-focused, but its view of the event is partial. Law, as Hunt (1985) observes, plays an important ideological role in individualising and decontextualising the experience of social relations under capitalism. Not only are issues decontextualised, but they are then recontextualised

> *'in terms recognizable to the legal gaze, ... into the form of an individual moral actor for the purpose of fitting the corporate persona into the discourse of criminal law conceptions of responsibility and sanctioning.' (Sargent 1990: 105–106)*

As shown above, the OHS prosecution process enabled defence counsel and the court both to enunciate the rhetoric of the importance of OHS and deterrence, but at the same time to chip away at the defendant's liability by transforming the nature of the issue until it is more in line with individualistic notions of culpability implied in the criminal law.

Trivialising occupational health and safety

These problems are exacerbated by the venue of the vast majority of OHS prosecutions, the magistrates' courts. Doreen McBarnet (1981: 138–40) observes that there is an ideology of the 'triviality' of the matters coming before the magistrates' courts at the lowest level of the judicial hierarchy, which are seen to deal with 'trivial', everyday matters, with low penalties, and little public scrutiny. The setting of the prosecutions, in the magistrates' courts, ensured that the triviality of the offences was always an issue, and a continual matter for contest.

The implications of decontextualisation and individualisation

First, all these factors explain why fines for OHS offences tend to be low, and thus not a serious punishment or deterrent to employers. Magistrates tailor the sentence to the culpability of the defendant.

On another level, this study suggests that even though the OHS legislation has the potential to enforce a broad construction of OHS issues, the models of injury causation and OHS management reproduced by the prosecution process are very narrow. If prosecution is to have the desired impact of improving working conditions, it must be clear to employers that they need to place an emphasis on developing an organisational culture and ongoing organisational processes that envisage OHS as an interdisciplinary and broad, systems-based management activity. This is undermined by event-focused prosecutions focusing on a narrow range of hazards.

Finally, the OHS prosecution process may, indeed, defuse OHS as an issue. The conflictual nature of work relations are obscured by the decontextualised and individualised nature of the trial, which provides no scope to link particular hazards with the nature of capitalist work relations. The use of criminal sanctions in regulatory enforcement can be undermined if regulatory offences are simply 'tacked on' to the mainstream criminal justice system (see further Johnstone 2003a: chapter 9). For prosecution to be an effective regulatory strategy, the legal rules and procedures governing prosecutions of corporate offenders, and the underlying assumptions about the relationship between 'corporate crime' and the mainstream criminal justice system, might have to be rethought and reformed. Indeed, the way in which prosecution is used in an enforcement strategy may itself need to be reconsidered anew (see for example, Gunningham & Johnstone 1999).

Further, the focus of the prosecution on a particular employer and a particular event suggests that what the court is dealing with are isolated instances of unsafe work practices in an otherwise safe industrial world, rather than as an example of a more deep-seated problem concerning the priorities given to the provision and maintenance of working environments that are safe and without risks to health. The court is seen to be dealing with the issue, and convicting offenders, but at the same time sanitising the issues so that the underlying activity, the production of goods and services, is not threatened.

In conclusion, this paper argues that the ill-fit between corporate OHS offences and the mainstream criminal justice system has undermined the potential effectiveness of OHS prosecutions. While some may argue that this study illustrates the futility of OHS prosecutions, that is not my intention. Rather, this paper (see further Johnstone 2003a) demonstrates the need for OHS regulators to reconstruct the criminal law and procedure surrounding OHS prosecutions so that (a) such offences are redefined as '*real* crimes' and (b) the processes of individualising and decontextualising OHS offences are reversed.

Note: This is a substantially revised and shortened version of a paper published in mid-2003 in *Policy and practice in health and safety* (Johnstone 2003b) and summarises work published in Johnstone (2003a).

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Section 4: Beyond compliance: next generation environmental regulation

Neil Gunningham

Beyond compliance: next generation environmental regulation

Abstract

How can regulation and alternatives to regulation be designed so as to protect the environment at least cost to regulators and regulated enterprises? Command and control regulation has made a substantial contribution in many areas of environmental policy, particularly in relation to laggards, and will continue to do so. However, 'the low hanging fruit' has largely been picked, and, in an increasingly complex, diverse and interdependent society, command and control is a blunt tool. A variety of other options including voluntary mechanisms, regulatory flexibility and informational regulation, are examined. Such strategies are most likely to succeed if they are underpinned by direct regulation.

Introduction

The environmental impact of industry, especially pollution, has been subject to regulation for at least three decades, under an approach which is somewhat unfairly called 'command and control' regulation. This approach typically specifies standards, and sometimes technologies, with which regulatees must comply (the 'command') or be penalised (the 'control'). And it commonly requires polluters to apply the best feasible techniques to minimise the environmental harm caused by their activities. Command and control has achieved some considerable successes, especially in terms of reducing air and water pollution. However, it has been widely criticised by economists for inhibiting innovation, and for its high costs, inflexibility, and diminishing returns.

The problems of command and control can be overstated and its considerable achievements too easily dismissed. Nevertheless its limitations have led policy-makers and regulators to recognise that it provides only a part of the policy solution, particularly in a rapidly changing, increasingly complex and interdependent world. However, regulatory reform must take place in an environment of shrinking regulatory resources, making it necessary in some contexts to design strategies capable of achieving results even in the absence of a credible enforcement (as when dealing with small and medium-sized enterprises), and in almost all circumstances, to extract the 'biggest bang' from a much diminished 'regulatory buck'.

This paper is about how to design regulation and alternatives to regulation in this economic and political context, in a manner that is both effective in protecting the environment and efficient in that it does so at least cost to regulators and regulated enterprises. It takes as its starting point the proposition that command and control regulation has indeed made a substantial contribution in many areas of environmental policy, particularly in relation to laggards, and will continue to do so. However, it is also clear that 'the low hanging fruit' has largely been picked, and that in an increasingly complex, diverse and interdependent society, command and control is a blunt tool, which is not well-suited to meet many of the challenges which lie ahead.

For reasons of space, this report focusses on large organisations and does not address issues relating to small and medium-sized enterprises (SMEs). For the same reason the role of economic instruments or issues of compliance or enforcement are not addressed.

Regulating large enterprises

Voluntary approaches

Voluntary approaches are 'schemes whereby firms make commitments to improve their environmental performance beyond legal requirements', and include self-regulation, voluntary codes, environmental charters, co-regulation, covenants and negotiated agreements. Recently, such approaches have become an increasingly popular environmental protection tool, and their use has permeated worldwide. The reasons for this new-found interest in voluntarism include the limits of command and control regulation, the need to fill the vacuum left by the retreat of the regulatory state, and the interest of industry itself in seeking (at best) a flexible, cost-effective and more autonomous alternative to direct regulation, or (at worst) a means of avoiding altogether the imposition of binding standards.

From an environmental policy perspective, the increasing reliance on voluntary approaches raises a number of important issues. Not least, how do they work, where do they work, what are their strengths and limitations and how can they best be used within the overall framework of environmental policy design? In the following section we focus on the types of voluntary arrangement that are most prevalent, and do not address the role of unilateral commitments or of public voluntary programs.

Negotiated agreements

Negotiated agreements involve specific commitments to environmental protection goals elaborated through bargaining between industry and a public authority. They have been developed as part of an explicit attempt to improve environmental policy outcomes without overburdening industry or putting it at a competitive disadvantage, and, in particular, to promote a quicker and smoother achievement of objectives than the cumbersome and often conflict-ridden route of legislation. In Europe they represent by far the most popular and important form of voluntary initiative. Here in Australia, they are usually entered into by an industry association and government against a backdrop of threatened legislation: the tacit bargain being that if the industry will commit to reach given environmental outcomes (for example an industry sector target) through its own initiatives, government will hold off on legislation it would otherwise contemplate enacting to address the problem.

The tension between the goals of government and industry under voluntary agreements raises a number of challenges for policy-makers. First, to the extent that the agreement would commit industry to doing something it would not otherwise choose to do (i.e. spend money on environmental improvements which do not otherwise enhance profits), then the agreement must provide sufficient incentives to deliver a net gain. Such incentives might include reputation enhancement (for example bestowing the status of a 'green enterprise', for example, through a green logo), facilitating a price premium or expansion of market share, or the provision of regulatory concessions. The latter is likely to be by far the strongest incentive to join, and a substantial number of agreements have involved implicit or explicit bargains of this nature.

Second, since industry would prefer to obtain whatever benefits are available under the program at as little cost as possible, it is likely to negotiate hard so as to minimise its commitments. Most commonly, this implies negotiating for as low a performance target as possible, and ideally one that can be met as a result of improvements taking place already, without necessitating any additional action or expenditure.

Third, where the costs of participation are substantial but the enterprise has sufficient incentive to join, it may seek to gain the benefits of participation without bearing the costs. That is, it may default, and hope to 'free-ride' by gaining the reputation benefits and regulatory concessions consequent on participation without discharging its responsibilities under the agreement.

Fourth, these tensions generate risks of a phenomenon tantamount to regulatory capture, whereby regulators, by virtue of a too close association with industry (and the closed-door nature of many negotiated agreements), or in consequence of informal inducements (such as the promise of future employment in the regulated industry) acquiesce in the negotiation of targets and other conditions that are unduly favourable to industry and contrary to the public interest.

The first generation of voluntary approaches achieved only very modest success. The reasons include: the central role of industry in the target-setting process, the scope for free-riding, the uncertainty over regulatory threats, non-enforceable commitments, poor monitoring and lack of transparency. In turn, the manifest deficiencies in the design of first generation instruments suggest a number of lessons about how to design such approaches better in the future. For example, the OECD has identified a number of 'success' criteria which if followed, may achieve more positive results.

To conclude, the evaluation of negotiated agreements requires a dynamic analysis: the second generation of such agreements is somewhat different from the first, and considerably more likely to provide public interest benefits. Much more specific targets now tend to be set by government rather than vaguer goals being determined by industry, government

negotiators are much more sensitive to the risks of setting targets that merely reflect improvements that would happen anyway, and there is a movement towards linking negotiated agreements with other policy instruments, such as taxes, or to complement rather than replace existing regulations. Greater efforts are also being made in terms of transparency and third party input. Whether these developments will justify the faith of advocates of voluntary approaches, and whether the additional transactions costs of building in essential checks and balances will render such instruments too costly, remains to be seen.

Regulatory flexibility

An increasing number of large enterprises now recognise their obligations to comply with environmental regulation and do so irrespective of the likelihood of detection or sanction, in contrast to an earlier generation of enterprises which frequently sought to evade their obligations. Increasingly, such corporations are also developing environmental strategies which incorporate pollution prevention, internal compliance auditing and compliance assurance programs. Some are also actively seeking out win-win outcomes.

These developments raise considerable challenges for the traditional system of regulation. That system was primarily concerned with bringing enterprises up to a minimum legal standard, a function which is still important with regard to laggard companies, but which is increasingly irrelevant or counterproductive in relation to companies which are ready, willing and able to go beyond compliance. For these companies, the challenge is to design environmental policies which reward, facilitate and encourage them to do so.

A number of regulatory flexibility initiatives have been introduced for this purpose, particularly in the USA. The incentives or rewards offered for participating in these initiatives include fast tracking of licences or permits, reduced fees, technical assistance, public recognition, penalty discounts under certain conditions, reduced burdens from routine inspections and greater flexibility in means permitted to achieve compliance. In return for the various incentives offered, industry is expected to go beyond compliance though an EMS-based approach to environmental protection (and in some instances to engage in stakeholder dialogue, to be more transparent, and to take greater responsibility for the environmental behaviour of others in the supply chain).

However, an EMS should be used to complement rather than to replace other regulatory tools. While it is possible to envisage a scaled-back role for command and control regulation, particularly in relation to environmental leaders, it will still be necessary (at least in the short term) to maintain a variety of oversight and regulatory fall-back mechanisms (in particular, performance measures) to ensure that the system actually delivers the benefits of which it is capable in principle. For these reasons, many policy analysts argue that the new regulatory

flexibility initiatives must be based on 'ISO Plus' rather than merely on conformity with ISO 14001 itself. Unfortunately, this has not necessarily been the case in practice. Past analysis suggests that there are four key components necessary to the successful implementation of such regulatory flexibility initiatives. These are:

- that those enterprises engaging in regulatory flexibility should adopt practices and processes that lead to the pursuit of beyond compliance goals and include outcome-based requirements, the achievement of which can be measured through specific performance indicators;

- that there should be independent verification both of the functioning of their management system and of environmental performance under it (for example by a third party environmental auditor), with the results or a summary of the results available both to the regulator and third parties such as community groups (transparency);

- that there should be an ongoing dialogue with local communities concerning beyond compliance goals and the means of achieving them (this ensures the credibility and legitimacy of the process and enables third party input and oversight); and

- that there should be an underpinning of government intervention; acting as a safety net which only 'kicks-in' when triggered by the failure of the other less intrusive mechanisms described above.

In the USA, state and federal regulators are now moving towards a more systematic approach, designed to provide rewards and incentives for improved compliance and high environmental performance through a two track system of regulation. Under this approach, enterprises (or at least enterprises with certain environmental credentials) are offered a choice between a continuation of traditional forms of regulation on the one hand, and a more flexible approach (the central pillars of which are usually the adoption of an environmental management system, periodic internal environmental audits, and community participation) on the other.

The ultimate test of the success or otherwise of regulatory flexibility initiatives such as the above is an empirical one. Despite the very considerable potential of EMS-based regulatory flexibility initiatives more generally, the jury is still out on their strengths, weaknesses and, ultimately, their successes. It will be some time before we know whether, and if so, to what extent, the benefits of the various initiatives outweigh the costs and whether they will in fact, overcome many of the problems of traditional forms of regulation, or indeed whether the skeptics are correct in questioning why so many resources are being devoted to making the top 20 per cent (or perhaps only the top 5%) even better, rather than concentrating on the most serious problems, or on under-performers.

Informational regulation

An increasingly important alternative or complement to conventional regulation is what is becoming known as 'informational regulation'. This has been defined as 'regulation which provides to affected stakeholders information on the operations of regulated entities, usually with the expectation that such stakeholders will then exert pressure on those entities to comply with regulations in a manner which serves the interests of stakeholders'. In contrast to command and control, informational regulation involves the state encouraging (as in corporate environmental reporting) or requiring (as with community right to know) the provision of information about environmental impacts but *without* directly requiring a change in those practices. Rather, this approach relies upon economic markets and public opinion as the mechanisms to bring about improved performance.

Informational regulation is targeted almost exclusively at large enterprises, and, in particular, at public companies (which are vulnerable to share price and investor perceptions) and those which are reputation-sensitive, because it is essentially these types of enterprise which are most capable of being rewarded or punished by consumers, investors, communities, financial institutions and insurers on the basis of their environmental performance. The overall strategy is to empower these groups to use their community and/ or market power in the environmental interest by providing them with a sufficient quality and quantity of information as to enable them to evaluate an enterprise's environmental performance. Such a strategy becomes even more effective as companies recognise the importance of protecting their 'social licence' and the need to improve their environmental performance in order to do so. There have been a number of experiments with the use of informational regulation that have demonstrated its potency even in circumstances where conventional regulation is weak.

Informational regulation can take a number of different forms. Probably the most successful and best known of these is the use of community right to know (CRTK) and pollution inventories. The basis of these policy instruments is to require individual companies to estimate their emissions of specified hazardous substances. This information is used to compile a publicly available inventory, which can then be interrogated by communities, the media, individuals, environmental groups and other NGOs that can ascertain, for example, the total emission load in a particular geographical area, or the total emissions of particular companies. The latter information, in particular, enables comparison of different enterprises' emissions and can be used to compile a 'league table' which identifies both leaders and laggards in terms of toxic emissions. Such benchmarking exercises, facilitated by easy access to the relevant information, enable the shaming of the worst and rewarding of the best companies. The evidence suggests that well-informed communities use this information both to ensure tight enforcement of regulations and to pressure enterprises to improve even in the absence of regulations. The foremost example of this approach is the USA Toxic Release Inventory (TRI).

Recognising the potential value of this approach, a number of countries have followed the USA example, and introduced laws compelling disclosure of pollution and chemical hazard information. However, not all such inventories and similar instruments will be equally effective and much depends upon their particular design features. While the large majority of assessments of the USA TRI are strongly positive, the more recent Canadian scheme has yet to prove its worth, and there is only weak evidence that the latter has been effective in promoting voluntary emissions reductions. In Australia, the National Pollutant Inventory (NPI) was so severely weakened by industry-proposed amendments that environmental groups withdrew from the consultation process and the quality of information available under it remains extremely problematic.

A second form of informational regulation is through the practice of corporate reporting on environmental (and on ethical and social) performance. Such reports can be used by companies both as a means of communicating with stakeholders and as a management tool to enhance their performance. Beyond this, motives for producing such reports vary substantially. They may include building goodwill and protecting corporate reputation, overcoming past bad publicity, enhancing product marketing and communicating with employees. However, unsurprisingly in the light of these mixed motives, many of the early environmental reports were far more public relations exercises than serious attempts to disclose environmental information of value to stakeholders in assessing the corporation's overall environmental performance. Even genuine attempts to provide relevant information foundered because of a lack of common standards as to the type of information to be included. Much of the information reported was qualitative and difficult to evaluate, and there was a lack of consistency in relation to its collection, analysis and presentation. These problems were exacerbated by a lack of independent verification.

It will be a considerable period before corporate environmental reporting reaches the same level of comparability, consistency, credibility and relevance as has been largely achieved by financial reporting. Nevertheless, in the long term, environmental reports which use common reporting criteria and measurements and standardised (possibly sector-specific) formats, and which are independently and professionally verified by third parties, will provide a variety of external stakeholders with valuable information which can and, no doubt, will be used to reward good performers and to shame recalcitrants into improvement. For example, as with pollution inventories, communities, NGOs, insurers and stock markets are likely to use this information as a means of ranking enterprises according to their environmental performance and responding accordingly. The growth of socially responsible or 'ethical' investment funds, which seek to balance financial performance with social and environmental issues, may provide additional significant rewards to good environmental performers, as these funds become significant players in investment markets.

A third form of informational regulation is product labelling and certification. Surveys indicate that many consumers are taking environmental considerations into account when they purchase goods and services. There is evidence, however, that unassisted markets do not provide accurate information to consumers and, in some cases, may mislead them about the environmental performance of specific products. In order to inform the public about the environmental 'soundness' (or otherwise) of various consumer products, governments can contribute to the development of labelling standards, and of eco-labelling schemes. This can help inform consumers, and sustain markets for environmentally appropriate goods and services. Private accreditation schemes, with appropriate safeguards, might achieve similar results. However, the experience of establishing eco-labelling schemes within and between nations has been mixed at best.

Finally, informational regulation strategies work better in some circumstances than others. The evidence suggests that they work best with respect to large companies and well educated communities. CRTK for example, relies heavily on the energies of local communities in using the information and pressuring enterprises to improve their environmental performance. Where an environmental hazard involves no immediate threat to human health, or where there is no identifiable local community, or where we are dealing with non-point source pollution not readily measured and traced back to its origins, then this instrument has far less to offer. Similarly, corporate environmental reporting is dependent upon the willingness of public interest groups to follow through on its results and both to shame bad performers and praise good ones. Finally, eco-labelling relies upon the willingness of consumers to buy 'green' products and upon their capacity to distinguish between these and other classes of product.

Recognising these limitations, an integrated strategy, using informational regulation in combination with other instrument types, is demonstrably likely to be more effective than a stand alone approach. One example of information regulation in Canada provides evidence of this. In this case, as a means of bringing extra pressure to bear on non-compliant organisations and in order to bring about greater transparency, the British Columbia Ministry of Environment publicly lists enterprises that either do not comply with the existing regulations or that are of concern, and where the Ministry continues to undertake legal action for those violating the regulation. A study of this scheme found that public disclosure is providing reduction incentives beyond traditional compliance levels, that is beyond those set in place through traditional regulatory approaches of enforcement and fines and penalties.

This example also serves to illustrate that informational regulation need not be particularly complex, nor introduced at federal level, to be effective. Even state government regulators without the constitutional or political capability to introduce pollution inventories, can achieve substantial results through the use of much cheaper and simpler strategies. Extrapolating from the available evidence described above, it would seem likely that even something as

simple as an on-line public register of prosecutions subject to modest procedural precautions (such as not publishing cases subject to appeal) would provide a positive incentive to improved environmental performance at minimal public cost.

Another positive example of informational regulation is provided by the PROPER PROKASIH in Indonesia. Under this program, priority polluters are required to negotiate (legally unenforceable) pollution control agreements with teams comprising public agencies, environment groups and regional development groups. Regulators rank the performance of individual facilities using surveys, a pollution database of team reports, and independent audits. An enterprise's pollution ranking is readily understood by the public, being based on a colour coding (gold and green for the best performers; black, blue and red for those not in compliance). The program has been very successful in improving the environmental performance of participating enterprises. A recent study which examines the program over time, suggests that community pressure and negative media attention, and increased likelihood of obtaining ISO 14000 certification, are the major stimuli for improved environmental performance.

Shaming takes place in a different form under various informational regulation initiatives described earlier. For example, under the TRI, we saw how companies were required to calculate and disclose estimated emissions of specified hazardous substances. This information is then used by environmental groups and others to develop league tables and similar mechanisms which can then be publicised in order to shame the worst performers. Thus the Environmental Defence Fund (EDF) has developed a publicly accessible database called Scorecard, which is based on TRI data and provides information on pollutants and rankings of individual enterprises. There is no doubt that, notwithstanding methodological criticisms, such databases have succeeded in pressuring large chemical companies and others to address and, in some cases, substantially improve their environmental performance. The USA General Accounting Office estimates that 'over half of all [TRI] reporting facilities have made one or more operational changes as a consequence of the inventory program' and EPA credits a 40 per cent reduction in toxic chemical releases to the TRI.

Regulatory reform: the never ending journey

While each of the perspectives described in previous sections provides insights concerning how best to approach the task of regulatory reconfiguration, none provides unproblematic or comprehensive answers as to what next generation environmental regulation should involve. Nevertheless, both the commonalities and the differences between these perspectives provide insights as to how best to approach the journey ahead:

- returning to the policies of the past is not an option. Traditional regulation is not suited to meet many contemporary policy needs (although it still has a role to play). In effect, the increased complexity, dynamism, diversity, and interdependence of contemporary society makes old policy technologies and patterns of governance obsolete;

- regulated enterprises have a diversity of motivations and it cannot be assumed (as in some versions of command and control regulation) that deterrence is the principal weapon available to regulators and policy makers. Other motivational drivers are equally important. These include the effects of negative publicity, informal sanctions and shaming, incentives provided by various third parties, the significance for private enterprise of maintaining legitimacy, and the necessity to maintain co-operation and trust;

- each of the frameworks we have examined has something valuable to offer and none of them is 'right' or 'wrong' in the abstract. Rather, they make differing contributions depending upon the nature and context of the environmental policy issue to be addressed;

- none of the policy instruments or perspectives we have examined works well in relation to all sectors, contexts or enterprise types. Each has weaknesses as well as strengths, and none can be applied as an effective stand alone approach across the environmental spectrum. This suggests the value of designing complementary combinations of instruments, compensating for the weaknesses of each with the strengths of others, whilst avoiding combinations of instruments deemed to be counterproductive or at least duplicative;

- from this perspective, no particular instrument or approach is privileged. Rather, the goal is to accomplish substantive compliance with regulatory goals by any viable means using whatever regulatory or quasi-regulatory tools might be available;

- much of our knowledge about policy instruments and, in particular, about what works and when is tentative, contingent and uncertain. This suggests the virtue of adaptive learning, and for treating policies as experiments from which we can learn and which in turn can help shape the next generation of instruments;

- in particular, adaptive learning is heavily dependent on the depth and accuracy of an agency's statistical database and other information sources. Only with adequate data collection and interpretation can one know how effective or otherwise a particular regulatory strategy has been. There will be a need to establish databases which provide more accurate profiles of individual enterprises, hazards and industries. Environmental Information Systems have the potential to play a key role here; and

- it is only the state which can impose criminal sanctions and the full weight of the law, and only the state which, under statute, has, in certain circumstances, the power of entry into private property to inspect, take samples and gather evidence of illegality more generally.

While there may be some circumstances where far more can be achieved by various other forms of state and non-state action, this is certainly not the case across the board. Many less interventionist strategies are far more likely to succeed if they are underpinned by direct regulation.

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Section 5: Third party policing: prospects, challenges and implications for regulators

Lorraine Mazerolle and Janet Ransley

Third party policing: prospects, challenges and implications for regulators

Abstract

'Third party policing' describes police efforts to persuade or coerce third parties, such as landlords, parents, local governments and other regulators, and business owners, to take some responsibility for preventing crime or reducing crime problems. In third party policing, the police create crime control guardians in locations or situations where crime control guardianship was previously absent. Sometimes this results from cooperative consultation with community members. At other times, the police use coercive threats, with the backing of a range of civil and regulatory laws, to engage third parties into taking some crime control responsibility. Our paper describes the dimensions of third party policing and identifies its prospects and challenges, including its implications for regulators.

Introduction

A central part of police work is forging partnerships with individuals, groups, and organisations in an effort to control and prevent crime. Police team up with building inspectors, environmental regulators, community groups, business leaders, local government personnel and anyone else who is ready, willing and able to work with police. But what happens when police co-opt and coerce regulators and individuals to help the police pursue their crime control and crime prevention functions? What happens when regulators and individuals are unmotivated or unwilling to go outside of their routine activities to take on a crime control or crime prevention responsibility? This process of cooption and coercion by the police is part of what Michael Buerger and Lorraine Mazerolle have termed 'third party policing' (1998: 301).

Third party policing is defined as police efforts to persuade or coerce other regulators or non-offending persons, such as health and building inspectors, housing agencies, property owners, parents, and business owners, to take some responsibility for preventing crime or reducing crime problems (Buerger & Mazerolle 1998: 301). In third party policing, the police create or enhance crime control guardians in locations or situations where crime control guardianship was previously absent or non-effective. Sometimes the police use cooperative consultation with community members to encourage and convince third parties to take more crime control or prevention responsibility. At other times, the police use coercive threats, with the backing of a range of civil and regulatory laws, to engage third parties into taking some crime control responsibility.

Third party policing exists in many forms. For example, in some police agencies the police might use coercion or persuasion of third parties to solve ongoing problems within the context of their problem-oriented policing program. In other police agencies, third party policing might exist as an especially designed, stand-alone policing program. The Beat

Health Program in Oakland, California (Green 1996; Mazerolle, Price & Roehl 2000) is an example of a stand-alone third party policing program that targets property owners in a systematic way to control drug and disorder problems in their tenancies.

In most police agencies, however, the police implement third party policing in very unconscious, episodic ways during routine patrol work. This category of third party policing activities, that occurs outside of any programmatic intervention, includes coercive and ad hoc conversations with bar owners, parents, property owners, local government regulatory officers and other persons that the police at least believe to have some responsibility for creating or controlling the conditions that encourage or aggravate lawless behaviour. These ad hoc third party policing activities occur frequently and without any systematic consideration of the ethical challenges. It is on this ad hoc, episodic category of third party policing that we focus much of our attention in this paper.

We are concerned here first with establishing the dimensions of third party policing, and identifying its prospects and challenges. But second, we aim to analyse the interrelationships between third party policing and regulation, particularly in the move to the new regulatory state. As notions of enforcement give way to compliance, pluralism, and regulatory networks, where does policing fit, and in particular, how does the police relationship with other regulators work? The first part of this paper describes third party policing, the second part analyses its place in the new regulatory state, the third part looks at challenges, and we conclude by discussing future directions and prospects.

What is third-party policing?

Purpose of action

We identify two primary purposes of third party policing activities: crime prevention or crime control. In crime prevention, the police seek to anticipate crime problems and reduce or alter the underlying criminogenic conditions that may cause crime problems to develop or escalate. Third party policing that has crime prevention as its purpose of action operates to control those underlying criminogenic influences that may (or may not) lead to future crime problems. By contrast, third party policing that seeks to control existing crime problems explicitly aims to alter the routine behaviours of those parties that the police believe might have some influence over the crime problem. The apparent influence of 'involved parties' in creating criminogenic conditions might be conscious or unconscious, it might be explicit or implicit, and it might be planned or unplanned.

Initiators of third party policing

A variety of collectivities and individuals initiate third party crime control activities. Prosecutors, individual citizens, community groups and regulatory agencies are all potential initiators of third party crime control practices. For example, taxation laws regulate business practices and give taxation agents the authority to compel businesses to adopt accounting methods and procedures that reduce risks and the likelihood of business fraud. Aviation regulators compel airport management corporations to adopt standard screening practices that are thought to reduce illegal importation, immigration and terrorism. In both of these examples, a regulatory agency compels a third party to engage in practices that are potentially outside of their routine activities in an effort to control crime problems. We define these practices as 'third party crime control' and distinguish them from third party policing on the basis of who it is that initiates the crime control action. In this paper we do not focus on explicating the dimensions of third party crime control. Rather, this paper focuses on the police as the initiators of third party policing. Third party policing, as we define it here, involves the police identifying a problem, co-opting a non-offending person to take on a crime control role, and using a range of civil and regulatory laws to insure the co-opted person (or persons) complies with the will of the police.

Focal point

The focal point of third party policing can be people, places or situations (Mazerolle & Roehl 1998; Smith 1998). Sometimes third party policing efforts are directed specifically at categories of people such as young people, gang members or drug dealers. To address some types of crime problems, the focal point of third party policing efforts might be directed against specific places, more often than not places that have been defined by the police as 'hot spots' of crime. Drug dealing corners, parks where young people hang-out, and public malls are typically the focal point of third party policing activities that address specific places as opposed to certain categories of people.

Another focal point of third party policing activities includes situations that give rise to criminogenic activity. Examples of criminogenic situations include bus stop placements that facilitate strong-arm robberies, late opening hours of bars that lead to bar room brawls, and the general availability of spray paint in hardware stores operating in high-risk communities. In third party policing, the police utilise the principles of situational crime prevention (Clarke 1992) to coerce government agencies to change the locations of bus stops, reduce the opening hours of problematic bars and restrict the sale of spray paint to minors.

Types of problems

Third party policing can, in theory, be directed against a broad range of crime and quality of life problems (Finn & Hylton 1994; National Crime Prevention Council 1996). However, most examples and evaluations of third party policing comprise police efforts to control drug problems (Eck & Wartell 1998; Green 1996; Mazerolle, Kadleck & Roehl 1998) and disorderly behaviour.

There are several reasons why third party policing tends to proliferate in efforts to control low-level, street types of crime activity: first, third party policing practices, as we define it, tend most to occur at the grassroots of policing and in episodic, ad hoc ways. The ad hoc nature of third party policing means that the police are largely not conscious of their implementation of third party policing, linkages are not made between various third-party policing practices, and best practices are not openly discussed, developed and distributed. Second, third party policing is not an articulated or developed doctrine (but see Buerger & Mazerolle 1998; Roach, Anleu, Mazerolle & Presser 2000). As such, very little discourse surrounds third party policing activities and there exists very little systematic assessment of third party policing practices (for an exception see Mazerolle & Roehl 1998). Third, the marginalised, young, and disadvantaged targets of third party policing activities are least likely to challenge the basis of third party policing practices (White 1998). Finally, the principles of third party policing are used by regulatory agencies to address non-street crimes such as high level drug marketing, white collar offending, and fraud. We define these activities, however, as third party crime control (see above). Hence, while we recognise that third party crime control activities occur in many settings and forums, we argue that third party policing, as we define it, is likely to continue to be relegated to occupy the 'street' level territory of policing.

Ultimate targets

The ultimate targets of third party policing efforts are people involved in deviant behaviour. In theory, the ultimate targets of third party policing could include those persons engaged in any type of criminal behaviour including domestic violence, white-collar offending, street crime and drug dealing. In practice, however, the ultimate targets of third party policing are typically those offenders that are vulnerable, disadvantaged and/or marginalised. Young people (White 1998), gang members, drug dealers (Green 1996), vandals, and petty criminals typically feature as the ultimate targets of third party policing.

Proximate targets, burden bearers and third parties

A key defining feature of third party policing is the presence of some type of third person (or third collectivity) that is utilised by the police in an effort to prevent or control crime. The list

of potential third parties is extensive and can include property owners, parents, bar owners, shop owners, local and state governments, insurance companies, business owners, inspectors, and private security guards. Indeed, any person or entity that is engaged by the police to take on some type of role in controlling or preventing crime could potentially be identified as a third party or what Buerger and Mazerolle (1998) refer to as 'proximate targets' and what Mazerolle and Roehl (1998) have referred to as 'burden-bearers.' These are the people or entities that are coerced by the police and who carry the burden for initiating some type of action that is expected to alter the conditions that allow crime activity to grow or exist.

Proximate targets of third party policing are often stakeholders or regulators that are identified by the police as being useful levers in controlling a crime problem. Indeed, the roles in third party policing can change rapidly; they are varied depending on the situation, sometimes reciprocal in nature and idiosyncratic to the problem at hand. Indeed, the proximate targets of a third party policing activity in one context may become the ultimate targets of third party policing in another context. Moreover, cooperative police partners in one context might become hostile 'partners' in another context. We suggest that the dynamic nature of third party policing reflect the fluidity and chaotic nature of crime prevention and crime control more generally.

Legal basis

Another defining feature of third party policing is that there must be some sort of legal basis that shapes police coercive efforts to engage a third party to take on a crime prevention or crime control role. The most common statutory basis of third party policing includes local, state, and federal statutes (including municipal ordinances and town by-laws), health and safety codes, uniform building standards, and drug nuisance abatement laws, and liquor licensing. We point out that the statutory basis does not necessarily need to be directly related to crime prevention or crime control. Indeed, most third party policing practices utilise laws and regulations that were not designed with crime control or crime prevention in mind (for example health and safety codes, uniform building standards). For the vast majority of third party policing activities, the statutory basis that provides the coercive power for police to gain the 'cooperation' of third parties derives from delegated legislation and obscure, non-legal sources.

Types of sanctions and penalties

Civil sanctions and remedies vary greatly, including court-ordered repairs of properties, fines, forfeiture of property or forced sales to meet fines and penalties, eviction, padlocking or temporary closure (typically up to a year) of a rented residential or commercial property,

licence restrictions and/or suspensions, movement restrictions, lost income from restricted hours and ultimately arrest and incarceration (Mazerolle & Roehl 1998). Often, several civil remedies and sanctions may be initiated simultaneously to solve one problem.

Tools and techniques

Dozens of examples can be provided to illustrate the processes by which third parties are recruited and used by the police. Against the backdrop of a legal foundation to force a third party to cooperate, the police operate on a continuum to engage third parties in their crime prevention or crime control activities. At the more benign end of the spectrum, the police can approach third parties and politely ask them to cooperate. The police might consult with members of the community as well as local property owners and ask them about ways that they see fit to control an existing crime problem or help them to alter underlying conditions that the police believe might lead to future crime problems. At this low-key, benign end of the spectrum, the ultimate sanctions that might be unleashed on third parties most likely go unnoticed. The police may themselves consciously utilise their persuasive powers, yet not be conscious to the alternative methods of coercion that they may resort to if the third party target proves to be an unwilling participant.

At the more potent end of the spectrum the police coerce third parties to participate in their crime control activities by threatening or actually initiating actions that compel the third party to cooperate. We point out that there are several stages in the forcible initiation of third parties in taking a crime control role: the first stage may involve a building services agency issuing citations to a property owner following building inspections of their property (Green 1996). The latter stages of this most coercive practice involve the initiation of prosecutions against the non-compliant land-owner and ultimately court-forced compliance by the third party.

Types of implementation

There are many different ways that police implement third party policing practices including implementing third party policing within the context of problem-oriented policing or situational crime prevention programs. Problem-oriented policing provides the management infrastructure (Goldstein 1990), step-wise approaches to solving a crime problem (Eck & Spelman 1987) and situational crime prevention offers the police with a range of ideas for reducing crime opportunities (Clarke 1992, 1995). When third party policing is implemented as part of police problem-solving or crime prevention efforts, the theory of third party policing provides the procedural and strategic foundation for how opportunities might get blocked and problems solved.

In some jurisdictions, forms of third party policing are now being mandated by governments, such as the crime and disorder reduction partnerships established under Britain's *Crime and Disorder Act 1998* which require police and local authorities to work together to formulate and implement strategies for the reduction of crime and disorder in their local areas (Loader 2000).

Another way that the police might implement third party policing is through 'contracting out' crime control. In this situation, the police might recruit a third party and initiate early efforts to control crime. At some stage in the crime control process, the police might contract with a 'fourth party' and step to one side. In this situation, the police abdicate their crime control responsibility to this fourth party contractor and leave the crime control arena for the fourth party to manage.

The most common manifestation of third party policing, however, is the ad hoc utilisation of third party principles initiated in a subconscious manner by patrol officers who are simply trying to find a way to solve a problem. These police are simply 'flying by the seats of their pants'. There is no script for them to follow, no police department policy that they are working within, and generally very little accountability for their actions. The police are working within the law, but using the law for their gain with little regard to the possible negative side-effects.

Third party policing and the new regulatory state

The previous section of this paper introduced and examined the notion of third party policing. This section explores its place and importance within broader contemporary discourses about regulation, risk and governance, and the role of police in the new regulatory state.

The new regulatory state

The civil and regulatory controls necessary to third party policing exist in an historical, legal, political and organisational environment that has undergone fundamental change quite independently of the policing environment. The most recent shift towards deregulation and the rhetoric of market solutions has, in fact, led to a new form of regulation (Braithwaite 1999, 2000). But the new regulators differ from the old, state-centred models. They recognise a plurality of regulatory methods, departing from reliance on command and control as the only way of securing compliance, towards theories of responsive regulation (Ayres & Braithwaite 1992). Here, regulation becomes a layered web, with strands contributed by public agencies, professional and community organisations and individuals, and increasingly international organisations as part of globalised regulatory networks (Braithwaite & Drahos 2000). The new regulatory state then is based on neo-liberal combinations of market competition, privatised institutions, and de-centred, at-a-distance forms of state regulation (Braithwaite 2000). The new forms of governance require strong central state control of the

direction of regulation and risk management, with many of the operational regulatory and compliance functions shifted not only to the market, but to the community and to other social institutions.

The impact of these changes on regulatory agencies is to transform them from reactive, hierarchical command structures to problem-oriented, team-based units focused on risk management (Sparrow 1994, 2000). The emphasis moves from after-the-event use of formal legal sanctions, to cooperation, persuasion and the creation of incentives for compliance. The attraction for the regulated is the comfort that the 'big stick' of coercive sanctions will only be used as a last resort, and also that those who are regulated will have some input into the rule-making and compliance processes. The attraction for governments is also twofold — first, persuasion and the other techniques are cheaper and give quicker results than the formal legal process, but more importantly, they help build an image of government as supportive of business, rather than focused on bureaucracy and red tape.

The changing role of police

The new regulatory state necessarily affects the policing of crime and social order as a fundamental function of government. Garland (1996) suggests that contemporary governments have sought to re-define their responsibilities in relation to the control of crime by shifting the onus beyond state agencies onto the organisations, institutions and individuals of civil society. The most immediately noticeable effect has been the shift from state dominated policing to the situation where most developed economies have more private than state police (Shearing & Stenning 1987), with the private security market in Australia at least double the size of the public police (Prenzler & King 2002). As private security guards replace police in public and private buildings, community centres, even public space, and as private prison administration proliferates, the role of the state increasingly becomes one of regulating standards rather than actually performing most policing and criminal justice functions.

One logical conclusion of this trend sees the state as putting criminal justice out to competitive tender, with police services competing with private security, local government, community agencies and other bidders for contracted functions. The end result is a '…reconstitution of policing as a mechanism of governance oriented to the management of conduct across civil society, and the advent of a loosely coupled network of policing agencies' (Loader 2000: 333–4) and a partial shift in the control of policing away from the state towards political subcentres (Shearing, 1996). Ericson and Haggerty (1997) describe the impact of compliance-based regulatory enforcement on police as a transformation, centred on the role of police as information brokers, the dissemination of police intelligence becoming a primary form of social control. That is, the function of police becomes essentially one of intelligence-gathering, analysis, and distribution to other agencies and individuals with a capacity to take further action.

In some ways these developments in governance theories fit well with criminological theory, which has seen both notions of 'responsibilisation strategy' as a way of spreading crime control functions to individuals and non-state organisations (Garland 1996), and 'actuarial justice' as an application of risk management to criminal justice (Feeley & Simon 1994; Anleu, Mazerolle & Presser 2000). Responsibilisation strategy, like the new governance theories, owes a debt to Foucaldian notions of the limits of governmentality by the state, with the solution being the involvement of a broader range of civil society in criminal justice and government functions. One of the features to emerge from it has been the notion of police partnerships, now entrenched in legislation in the United Kingdom with the requirement for police and local authorities to develop cooperatively crime and disorder reduction policies. Actuarial justice has required a shift in the management of crime towards the calculation of risk, based on the use of intelligence, monitoring and surveillance, well beyond the boundaries of traditional policing. These trends place police in a central, gatekeeping role as knowledge coordinators in networks of regulatory agents and actors (Ericson & Haggerty 1997). In this way, we observe a transformation of public enforcement agencies in the new regulatory state, focusing on the emergence of regulatory networks as a location for third party policing.

The role of third party policing

In this transformation of the policing function to one located in a network of agencies and individuals, rather than one state agency, the notion of third party policing serves an organising role. It helps formalise and rationalise the partnerships between police and other agencies for crime control and crime prevention purposes, and to present these partnerships as a coherent response to a changing regulatory environment. By examining the occurrence, challenges and prospects of third party policing, we highlight changing regulatory roles, and particularly the increasing crime control and prevention roles of agencies such as local authorities, and health, housing, safety, building and environment regulators and the symbiotic relationships between these regulators and the public police.

What are the challenges?

Coordination

What then, is the impact of trends in regulation and governance on third party policing? Much of the literature on third party policing and the use of civil remedies in policing assumes that regulatory agencies have a focus on formal sanctions — the issuing of breach notices, followed up by prosecution for non-compliance (Mazerolle & Roehl 1998). This fits well with old-style command and control regulators who rely on these methods to perform their functions. But in the new regulatory state the focus is on building communities of interest

between the regulator and the regulated, and other professional and community groups. Formal sanctions become a tool of last resort. What is more, any perceived coupling of the regulator with the police, as a formal arm of the criminal justice system, could prove counter-productive. The use of regulatory sanctions in policing may help achieve police aims, but may undermine regulatory goals. The challenge, then, is for police and regulators to form partnerships to develop ways of working cooperatively to advance both sets of goals. Unplanned, ad hoc third party policing is unlikely to achieve this.

Mobilisation issues

There are many other challenges facing the implementation of third party policing within this new regulatory state, for example, the difficulties which confront police managers in their efforts to motivate and mobilise their police sub-ordinates to engage in traditional and community policing modes of policing. In addition, police managers face challenges in mobilising police to engage in ethical and accountable third party policing practices, and to consider the broad range of methods that police can utilise to engage third parties in third party policing activities.

Disproportionate implementation

Another challenging issue with third party policing is the potential disproportionate allocation of police and regulator resources. It is not clear, at least to date, how third party policing might either entrench or alleviate inequities in the distribution of regulatory resources. On the one hand, the proliferation of third party policing might work towards making middle and upper class property owners more responsible for their housing stock and thus improve the conditions for lower class residents. On the other hand, third party policing has the potential to add additional (and more complex) burdens on already over-policed groups in society.

Displacement

Another issue that challenges the effectiveness and value of police crime control programs is the extent that the intervention will lead to problems being displaced to nearby places (spatial displacement) or to some other time (temporal displacement), being committed in another way (tactical displacement), or being transformed into some other kind of offence (target displacement) (Cornish & Clarke 1987; Gabor 1978, 1990; Reppetto 1976). These negative displacement effects happen when a police intervention reduces a crime problem at one place, or in one particular situation, but fails to protect other nearby places or situations from offenders who are not discouraged or deterred from committing a crime. We are also interested in police efforts when the opposite effect occurs: that is, when a police intervention like third party policing creates a diffusion of the crime prevention benefits (Clarke & Weisburd

1994). This 'diffusion of benefits' occurs when crime control measures not only reduce crime opportunities at targeted places or situations, but also reduce crime at other places not the subject of the crime control efforts.

Unintended consequences

We identify many potentially negative side-effects of third party policing such as the impact of eviction, retaliation from domestic violence perpetrators, retaliation from displaced or arrested drug dealers, and strained relations with service providers and local regulators (for example building inspectors, local council code enforcers etc). We also suggest that there are significant consequences for the law arising from police cooption for criminal justice purposes. The theory surrounding the unintended consequences of legal action is well documented (Bottomley & Parker 1997), but what of the unintended consequences of coopted law? Will third party policing have an impact on the law it uses, perhaps through the imposition of further judicial or administrative controls to counter any abuses by police?

We also note the potentially positive side effects of third party policing. Examples of positive side effects of third party policing include the creation of collective efficacy and social cohesion within some neighbourhoods (Sampson, Raudenbush & Earls 1997), the establishment of positive relations between the police and local service providers, the creation of some responsibility within otherwise negligent organisations, and more satisfied police officers.

Accountability

Third party policing does not necessarily sit well with traditional notions of democratic governance, ethics and accountability. Legal and institutional mechanisms directed at controlling and making accountable police use of power do not necessarily affect other providers of policing functions, particularly those that are not state agencies. Problems will occur, first, when these mechanisms do not extend to the new situations arising under third party policing, for example if there are no established protocols or rules for the situation. Secondly, problems may arise because of the plurality of policing agents, including the possession by numerous agencies of coercive, intrusive, legal powers over citizens' lives, and the impact of the 'quiet force' of these agencies, in terms of their impact on usage of public space, patterns of action and inaction, surveillance decisions and decisions about how, when and over whom to use their powers (Loader 2000). Other problems will arise if there is conflict between the ethical and accountability regimes of police and the third party organisation, whether it is a state regulator, housing authority, or business-owner. Finally, there is the need for accountability and ethical considerations to be taken into account in choosing when and where to deploy third party policing — to consider whether that decision means potential crime victims elsewhere or at other times are being abandoned to their fate.

Directions for the future

We suggest that there are several ways of overcoming accountability and ethical hurdles, including the need for new legal frameworks as well as managerial, training and administrative responses, both within police services and likely proximate targets. This may be seen in training programs for state agency regulators, but also for local authorities, housing associations and individual property owners. Furthermore, there is a need for formal recognition of the crime control and prevention roles of many agencies other than the public police, and of systematic planning for the performance, funding and accountability of those functions in a way that integrates with police planning and performance mechanisms.

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Section 6: The future of policing in a broader regulatory framework

Rick Sarre

The future of policing in a broader regulatory framework

Abstract

A new era in Australian policing presents police services with opportunities to integrate their resources with those of other institutions for the purposes of establishing an efficient and democratic policing 'network'. For there are a number of groups and functionaries other than the public police that play key roles in the prevention of crime, the regulation of conduct, and the maintenance of order. Indeed, governments have not discouraged the expansion of the regulatory roles currently being played by private police personnel, private investigators, government administrators, specialist agencies and non-government 'policing' organisations. This paper reviews this trend in the context of regulatory theory generally.

Introduction

For the past two decades in Australia, police policy-makers have sought to integrate official public police activity with the 'policing' done by private institutions and other 'non-police' as part of a trend towards regulatory activity that is creative and broadly-based (Tomasic 2000a: 13). David Bayley (2001: 211–212) expresses the modern phenomenon as follows:

> *'Security is being provided increasingly by commercial firms through the market, by businesses to their own employees and customers, and by private residential communities. Volunteers … have also been encouraged to share responsibility for public safety with the public police, as in Neighbourhood Watch, citizens' patrols, and community crime prevention councils. … [This involves] the relocation of authority, either to non-state auspices altogether or to lower levels of government. Multilateralisation as well as devolution involve the reconstruction of criminal justice in decentralised ways so that it responds to local needs, reflects local morality, and takes advantage of local knowledge.'*

Two thoughts spring to mind immediately. First, it is arguable that, if the aim of the exercise is for governments to provide the sort of security that a community desires, it should not matter, prima facie, which persons or agencies, uniformed or non-uniformed, are engaged in that task (Kempa 2000: 310). Second, given the policing and surveillance activities now undertaken by a vast array of private personnel and administrators, for example, the nature of 'policing' as it may formerly have been understood has changed irrevocably.

The trend towards quasi-policing

The following groupings and rubrics provide a reminder of the breadth of 'quasi'-policing activities in the context of 'multi-lateralisation', as Bayley would refer to it. The most obvious identifiable 'group' is private security firms and their professional associations, discussed first and foremost. But there are other manifestations of regulatory 'policing' too, discussed thereafter. These 'other' manifestations have been grouped and listed, for the purposes of this paper, firstly as institutions and secondly as strategies.

Policing by the use of private security personnel

Modern security and order maintenance is now undertaken on a daily basis by a host of private police and security operatives, licensed and unlicensed. These operatives may be working for government agencies or government-owned enterprises, private security operations or private companies, and they all exercise some degree of enforceable power over others.

The world market for private, contractual security and policing services is growing rapidly. Private providers alternative to public police, in terms of numbers of personnel and annual expenditures at the very least, now dominate the 'order maintenance' landscape in Australia, and many other nations as well (Prenzler & Sarre 1998; Prenzler 2000). All of this is not particularly surprising, given that the publicly funded agents of order maintenance that were initiated during the nineteenth century development of modern policing never really eradicated the private forms of policing that had preceded them.

As Philip Stenning (2000: 328) writes,

> *'[I]t is now almost impossible to identify any function or responsibility of the public police which is not, somewhere and under some circumstances, assumed and performed by private police in democratic societies.'*

Thus the traditionally clear dichotomy between 'public' and 'private' policing has gone (Sarre 2000). New terms have been coined to describe what is happening, such as a 'pluralisation' of policing (Bayley & Shearing 1996), 'hybrid policing' (Johnston 1992: 114), a 'continuum of activity' (Jones & Newburn 1998), a 'security quilt' (Ericson & Haggerty 1997), 'parapolicing' (Rigakos 1999), the 'greying' of policing (Hoogenboom 1991), a 'fragmentation of policing' (Johnston 1999: 231), and a 'mixed economy' of protection (Loader 1997: 147).

So pervasive is the mix today that policing theorists are moving beyond the public/private debate, preferring to review models of complementarity ('how would we like the future to look?') rather than engaging in an ideological dialectic ('are the processes of privatisation effective and worthwhile?'). This theme has been reiterated by Brian Forst (1999: 40), as follows:

> *'The great contemporary challenge confronting public safety … is not primarily to decide whether privatization is a good thing. It is to find a way to shape and coordinate our resources and energies to secure the safety of those quarters of society that are least able to afford effective security, public or private. Wealthy communities can afford to take care of themselves both publicly and privately, and they do so. Poor people, especially minorities living in areas with the highest concentrations of crime, cannot. Sworn police officers must be made available in sufficient numbers and with effective systems of accountability to ensure that those areas are adequately served and protected. The fact remains that private police will continue to play an important role in the regulatory framework.'*

Policing by specialist policing agencies

Budget and personnel figures indicate that most of the specialist policing agencies outside of the more recognised police services in Australia are relatively small, but significant players nevertheless on the regulatory landscape.

Table 1 illustrates the diversity of these 'regulatory' bodies.

Table 1:	Composition of specialist public sector policing agencies in Australia				
Agency	Targets/functions	Jurisdiction	Personnel	Year est.	Allocation/ expenditure
Protective Security Co-ordination Centre	Co-ordination of security for holders of high office, visiting dignitaries and diplomats	National	72.0 (a)	1977	26,411,000
Australian Protective Service	Guarding Commonwealth property	National	731.0 (a)	1984	61,166,731
National Crime Authority (c)	Organised criminal activity	National	410.0	1984	48,355,841
Australian Customs	Smuggling, illegal entry	National	4,043.0	1985	544,593,000
NSW Crime Commission	Organised crime, drug trafficking	NSW	93.0	1986	9,432,000
Australian Securities and Investments Commission	White collar crime	National	1,225.0	1991	145,533,000
Queensland Crime & Misconduct Commission (b)	Organised and major crime & public sector misconduct	Qld	285.0 (b)	2001	27,000,000(b)
Australian Institute of Police Management	Executive education, policy input	National	26.0	1960	3,258,823
Australian Bureau of Criminal Intelligence (c)	Clearinghouse for criminal intelligence	National	66.0	1981	6,422,937
Australasian Centre for Police Research	Research assistance to police	Australasia	15.0	1983	1,277,783
AUSTRAC	Monitoring financial transactions, money laundering and fraud	National	49.0	1988	9,588,732
National Crime Statistics (ABS)	Crime statistics	National	5.0	1990	510,203
CRIM TRAC	Clearinghouse for forensic data	National	31.0	2000	8,006
National Institute of Forensic Science	Facilitate the use of forensic evidence	National	4.0	1991	1,060,074
Law Enforcement Coordination Division	Co-ordination of policing primarily at a policy level	National	53.0 (a)	1997	8,072,000

cont.

Table 1:	Composition of specialist public sector policing agencies in Australia *cont.*				
Agency	**Targets/functions**	**Jurisdiction**	**Personnel**	**Year est.**	**Allocation/ expenditure**
WA Ombudsman	Public sector misconduct	WA	35.0	1972	2,294,000
Vic. Ombudsman	Public sector misconduct	Victoria	23.0	1973	2,776,018
NSW Ombudsman	Public sector misconduct	NSW	91.5 (a)	1975	7,219,000
Cwlth Ombudsman	Public sector misconduct	National	85.0	1976	8,667,925
Tas. Ombudsman	Public sector misconduct	Tasmania	21.0	1978	483,300
NT Ombudsman	Public sector misconduct	NT	13.0	1978	1,158,000
Police Complaints Authority	Police misconduct	SA	12.6 (a)	1985	925,930
Independent Commission Against Corruption	Public sector misconduct	NSW	146.0	1989	15,268,000
Police Integrity Commission	Police misconduct	NSW	93.0	1996	14,837,000
Anti-Corruption Commission	Public sector misconduct	WA	58.0	1996	10,270,958
Totals			**7,699.1**		**$956,369,261**

(a) FTE (full time equivalent).

(b) A new body combining the former Queensland Criminal Justice Commission and the Queensland Crime Commission, estimates from October 2001

(c) It was announced by the Federal Justice Minister on 4 April 2002 that the NCA would amalgamate with the Australian Bureau of Criminal Intelligence to form the Australian Crime Commission (ACC). The ACC commenced operation on 1 January 2003, with 520 personnel covering investigations and surveillance, engaging in, inter alia, strategic consultation with the private sector through its National Fraud Desk, the National Card Skimming Database (pilot) and the Vehicle Re-birthing Campaign

Source: 1998/99 annual reports and Tim Prenzler's personal correspondence with agencies. Reproduced from Prenzler T & Sarre R 2002: 55. Allocation/expenditure figures are the total revenue from government or expenditure for 1998/99. Where both figures were available, the higher figure is displayed.

Many of these organisations were created for the purpose, essentially, of combating corporate fraud and white-collar crime. While their successes have been mixed, when added together they present a significant 'policing' profile.

Policing by intelligence services and the military

A case might be made for including the Australian Security Intelligence Organisation (ASIO) in Table 1, particularly given the introduction of legislation in April 2002 by the Howard Liberal-National Party Coalition government to allow the holding of suspects for questioning on terrorism charges for 48 hours without representation (Advertiser 2001).[1]

The military, long associated with having provided the basis for the policing styles assumed by colonial Australia (McCulloch 2001: 34–44), assumed extra powers by virtue of the Sydney 2000 Olympic Games security plan. Almost 4,000 troops were deployed for the Games under the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cwlth) to counter terrorist threats. While state, territory and Commonwealth governments have always had the power to request a call-out of defence forces in Australia in situations of extreme emergency, the above Act was passed to ensure that the Commonwealth has a process in place that includes safeguards and accountability mechanisms in the event of joint operations. The Act requires three ministers to be satisfied that police cannot deal with a situation before the military are called in (Ransley 2002).

Policing by state and federal administrators

There are currently many government administrators too, who exercise 'policing' roles, including child welfare officers, health and safety inspectors, parking officers, animal welfare officers and so forth. For example, 'policing' of family violence is carried out by child welfare counsellors through mandatory reporting regimes. Health and safety inspectors engage in 'policing' by enforcement of health and hygiene laws and educational tasks required by legislation. There are also many boards and agencies that combine quasi-judicial functions with inquisitorial and investigative 'policing' functions. These include tribunals responsible for responding to violations of sporting codes, and human rights and equal opportunity tribunals responsible for the enforcement of anti-discrimination and racial vilification legislation. The Australian Competition and Consumer Commission (ACCC) and its State consumer protection counterparts (under fair trading legislation) are prominent regulatory institutions, responsible both for 'policing' those who perpetrate fraud on consumers and 'policing' anti-competitive behaviour. State environmental protection agencies have responsibility for formal investigations and prosecutions. They have power to investigate and 'police' any activity likely to compromise environmental responsibility (Gunningham & Sinclair 1999). Within their jurisdictions, many of these agencies now have considerable powers to enter property, seize material that may be used in evidence, give directives, require appearances and halt operations.

Policing by 'administrative' justice

As part of the trend towards 'quasi-policing', there has also been, in the last decade in Australia, a conscious shift away from the systems of criminal justice towards private justice and 'non-criminal' outcomes (Sarre 2001). Those accused of breaches of environmental regulations or corporate laws or charged with minor drug offences, taxation evasion and social welfare fraud, for example, are now far more likely to receive a summons from an agency (to whom regulatory responsibility has been delegated) and face civil proceedings or an administrative tribunal than face a criminal court (Gilligan, Bird & Ramsay 1999; Tomasic 2000b: 264).

The *Commonwealth Corporations Act 2001* provisions that came into operation on 15 July 2001 now have corporate criminal provisions and corporate civil provisions that look very much alike. For example, in *ASC v Nomura International PLC* (1998) 29 ASCR 473, a stock market manipulation case, the Australian Securities Commission (ASC, now the Australian Securities and Investments Commission or ASIC) successfully 'prosecuted' Nomura using civil, not criminal, proceedings. In the year 2002/03, ASIC initiated 67 civil proceedings resulting in orders against 151 people or companies, made $121 million in recoveries and compensation orders and froze $2 million in assets. This compares with their initiating criminal proceedings that led to 29 jail terms for white collar offenders (ASIC 2003).

Agencies that initiate civil proceedings may not see themselves as 'police' but as 'expert advisors or consultants whose aim is to secure compliance to laws and regulations' (Croall 2001: 105) or to limit threats to revenue (Levi 1995). Nevertheless the policing methods are not dissimilar in law.

Policing by private civil action

There have been documented instances where victims of childhood sexual abuse have instituted their own civil actions for compensation, and succeeded against the perpetrators of the harm (Laster & Erez 2000: 253). It is not uncommon for civil actions to be pursued by victims of rape against their alleged attackers in circumstances where criminal charges have been dismissed or not proceeded with (*Australian* 2002). The civil standard of proof is merely evidence 'on the balance of probabilities' while the criminal standard is the much higher guilt 'beyond reasonable doubt' (Sarre 2001).

Moreover civil litigation in the United States has had a significant effect in removing, from urban and suburban settings, much physical and social blight that has been identified as giving rise to criminal activity, an innovation referred to as 'third party policing' (Buerger & Mazerolle 1998; Mazerolle & Ransley this volume). Carefully initiated civil remedies, for example, have had a significant impact in controlling the distribution and use of illicit drugs (Graycar et al. 1999, citing Mazerolle & Roehl 1998) and empowering local neighbourhoods to ensure local authority compliance with regulatory standards (Grabosky 1995, 1996). Privately funded civil law options have also been recognised as important in the fight against corporate crime (Fisse & Braithwaite 1993).

Policing by combining a network of popular initiatives

In developing a policing model for post-apartheid South Africa, Michael Brogden and Clifford Shearing proposed a 'dual model' of policing in which order maintenance networks are grounded primarily in local societies and only secondarily in the state itself (Brogden & Shearing 1993). Shearing (1995: 58) explained the process as follows:

'Once policing is seen as something that is, and can be, done by other institutions besides the South African Police, new possibilities for transformation become available. This approach, we argued, was well suited to South Africa where governance has not been the sole preserve of the state and where the struggle against apartheid has given rise to a vast network of popular policing initiatives. Whatever problems these initiatives might have, and certainly many questions can have been raised about them, the culture that has guided them has not been the culture of Afrikanerdom. These institutions of popular policing, we concluded, provided a basis for radically reforming policing. What is more, as these institutions already existed they could be mobilised relatively easily and quickly to bring about change. What was required to do this was a recognition that policing could be done through a network of civil institutions outside the state.'

Indigenous communities, too, in some of the more remote areas of Australia have recognised the value of privately organised order maintenance networks, arising out of a perceived community need, and drawing upon community resources (Blagg & Valuri 2002; Tangentyere Council 2001). Likewise, what are referred to as 'community warden' or Stadswacht schemes have been introduced into a number of cities and towns in the United Kingdom (Stockdale et al. 2001 cited in Blagg & Valuri 2002) and Europe (Hauber et al. 1996 cited in Blagg & Valuri 2002).

Self-policing

Self-policing has long been a tradition of professional bodies (such as law societies) or semi-professional groups (such as journalist associations) that have ensured standards are maintained by reserving the right to disqualify members or barring certain status to those who fail to maintain appropriate standards (Croall 2001: 109). This tradition and role has been extended in recent years to the associations concerned with monitoring performance of security and guarding firms, keen to establish high quality service in the face of allegations that many members of private security associations are unregulated and undisciplined. The Critical Infrastructure Protection Branch of the Federal Attorney-General's Department, for example, has a role to play in assisting private businesses to develop and uphold the standards as set from time to time by Standards Australia.

Policing by consensually-based control

Clifford Shearing and Philip Stenning, in their research into private policing, encountered a policing phenomenon they described as the 'Disney Order' — a form of consensual policing not perceptible to the naked eye. 'Consensually-based' control, they say, is a style of policing that is enforced by staff who are employed for a range of functions, but whose security

function pervades everything that they do (Shearing & Stenning 1987). Staff members engage in surveillance and 'policing' activities from behind innocuous guises such as street sweepers, popcorn sellers and entertainers.

Discussion

What is described above are some of the variations on a policing theme now manifest in modern societies. While private security personnel make up the most overt of these themes, the other manifestations contribute to a policing 'quilt' that is as broad as it is diverse.

This is not to say that some commentators have not voiced their concerns about pluralised regulatory trends. Les Johnston remains concerned about the possibility of an excessive amount of 'exclusionary' and 'un-coordinated' policing. He maintains that the key issue for policing in the 21st century is about governing and managing the increasing diversity.

> *'How … are fragmented policing systems to be governed so as to maximize democratic accountability, justice and effectiveness?' (Johnston 1999: 236)*

The challenge for governments, he says, is 'how to incorporate autonomous citizens so that their actions do not degenerate into arbitrary violence and injustice' (Johnston 2000: 146). Ian Loader (1997: 158) echoes this theme and raises his concerns that social equality is at stake if we rely too heavily upon private security firms and personnel:

> *'It seems plausible to suggest … that if the commodification of security continues apace, it will be affluent, residential areas which will benefit, leaving impoverished, crime-blighted communities ever more vulnerable. One all too foreseeable consequence of the current mushrooming of private security will be a deepening of prevailing social and spatial inequalities in the distribution of criminal victimization.'*

That is, are those who do policing by and through private means compromising principles of democratic participation and social integration? Mark Findlay, Stephen Odgers and Stanley Yeo (1999: 76) are suspicious.

Certain new investigation and prosecution agencies, with enhanced powers and unfettered by protections of due process, operate in ways which do not recognise the traditional sequences of criminal justice.

What does the future hold then, given these trends and concerns? Is there a way through the maze? Bayley and Shearing argue that it is possible for states and communities to adopt and adapt successfully new forms of private policing, quasi-policing and civil and administrative justice if two key tenets remain in place. These two tenets are first, that governments must ensure the ability of poorer communities to sustain self-governing

initiatives; and second, that there must be a commitment to community-based responses within public policing. If this is so, they assert, governments can concentrate upon developing the self-disciplining and crime-preventative capacity of high crime neighbourhoods.

> *'This requires government not only to reform the police but to redistribute political power with respect to one of the core functions of government. This is a lot to ask because, faced with shortcomings in public safety, governments will be tempted to enhance directiveness rather than encourage devolution … fortunately … there seems to be a growing realization in democratic, individualistic societies that in order to create a more humane, safe, and civil society, government must be reinvented, specifically, that grassroots communities must be made responsible for central aspects of governance. The rethinking of security that our proposals require is consistent with this rethinking of governance. Restructuring is a problem that may contain the seeds of its own solution.' (Bayley & Shearing 1996: 604–605)*

In other words, policy makers should explore ways of encouraging diverse forms of policing, but, at the same time, must ensure that they keep human rights and accountability issues to the fore. Security should be seen as a public good available to all citizens simply on account of their membership of a community (Loader 1997, paraphrasing Walzer 1983), and not just on their ability to pay. The mobilisation of private citizens towards more specific police purposes should be done as a way of empowering communities to find their own solutions to security problems, not simply as an attempt by police services to re-exert their control over an increasingly fragmented system (Johnston 1999: 232).

Conclusion

We live in an era where there is a public and private regulatory 'mix' (Ayres & Braithwaite 1992: 14). The upshot of this mix is a society in which policing is conducted not just by those people commonly referred to as 'the police' but by a host of private personnel, government agencies and non-government operatives who have at their disposal a range of empowerment tools and resources, not just the criminal law. This trend is set to continue.

There are public policy ramifications of such diverse policing models. These include the potential for an expansion of surveillance by government and non-government operatives, a trend towards greater reliance upon administrative action without the legal safeguards attached to criminal processes, and a growth in specialised policing agencies targeting different aspects of business and social activity. Observers must remain committed to monitoring these trends in order to ensure that appropriate levels and mechanisms of accountability and governance remain in place. It is axiomatic that the freedom from anti-social conduct should not come at any price.

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1   The *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2] (Cwlth) came before the Senate Legal and Constitutional Legislation Committee of the Australian Parliament in 2002 before being passed, after significant amendment, in 2003.

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Section 7: Regulating dishonest conduct in the professions

Russell G Smith

Regulating dishonest conduct in the professions

Abstract

This paper examines the question of how professionals who engage in dishonest conduct in connection with their professional practice should be dealt with. A categorisation of professional dishonesty is provided and examples given of each of ten types of dishonest conduct: professional misunderstandings; client-centred altruistic dishonesty; dishonest omissions; conflicting interests; professional opportunism; inadequate standards; individual psychopathology; dishonesty involving undue influence; misuse of professional power and personal cupidity. The various legal regulatory strategies available to control such conduct are considered including conciliation, civil action, disciplinary action and criminal action. The paper highlights certain problems with these regulatory approaches and proposes ways in which each response may be matched with the various forms of dishonest conduct identified. By achieving an appropriate matching, the effectiveness of the various systems can be maximised, both in terms of achieving deterrence as well as ensuring that individuals are dealt with fairly.

Introduction

This paper considers the various legal regulatory strategies which may be used to control dishonest professional conduct with a view to matching appropriate strategies with the various forms of dishonest conduct which may take place. An effective matching is necessary in order to fulfil the various aims of the different regulatory systems which are available. It will not deal with the many non-legal risk minimisation strategies that can be employed to prevent fraud such as training in ethics and fraud awareness, auditing by colleagues, and consumer-oriented fraud prevention initiatives.

At the outset, it is important to realise that there are now considerable numbers of professionals working in the community, and that new occupations, such as complementary medicine, are now achieving professional standing. In Australia in 2001 for example, there were approximately 1.5 million professionals (Australian Bureau of Statistics 2001). Professionals were the largest occupational group in Australia making up 18.2 per cent of the total Australian labour force. There were also 975,653 associate professionals, making up an additional 11.8 per cent of the labour force. Together, professionals and associate professionals comprised 30 per cent of the nine million Australians aged 15 years and over in the employed labour force in 2001.

This paper focuses on dishonesty engaged in by those professionals who have, because of the nature of their work, the greatest opportunities to commit financial crimes. These include lawyers, accountants, financial advisers and health care providers, all of whom have ready

access to funds provided by either their clients/patients or government funding agencies. Others, such as teachers, academics and computing professionals, arguably have more restricted opportunities to commit crimes of dishonesty, although there are notorious examples of instances in which they have.

A continuum of dishonest conduct

The concept of dishonesty lies at the heart of most property offences and is a matter of fact for juries to determine in criminal trials. *The Commonwealth Criminal Code Act 1995*, for example, defines 'dishonest' as:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people (s. 130.3).

With respect to professionals, standards of honesty for criminal prosecutions are determined in the same way as for other accused persons. In professional disciplinary proceedings, however, standards of dishonesty are determined by reference to whether the conduct 'would reasonably be regarded as disgraceful or dishonourable' by professionals in the same profession 'of good repute and competency' (*Allinson v General Council of Medical Education and Registration of the United Kingdom* (1894) 1 QB: 750, 760–761).

> **Figure 1:   Seriousness of dishonesty categories**

Personal cupidity
Misuse of power
Undue influence
Individual psychopathology
Inadequate standards
Professional opportunism
Conflicting interests
Dishonest omissions
Client-centered altruistic dishonesty
Professional misunderstandings

Seriousness ➡

In order to understand the complexity of dishonest conduct in professional contexts, Figure 1 presents a categorisation of behaviours that lie on a continuum from least serious to most serious, in terms of moral turpitude, the motivation of the offender and the importance of mitigating circumstances.

Professional misunderstandings

Arguably the least serious forms of dishonesty might be said to arise through poor communication between practitioners and their clients, resulting in clients believing that they have been defrauded or deceived in some way when, in fact, a legitimate explanation exists.

Examples might include lawyers failing to be clear in describing the circumstances in which costs are incurred or in which monies are debited from client accounts for legitimate purposes. A number of complaints arise each year against lawyers for over-charging or misappropriation of funds that involve poor communication between practitioners and their clients (Neville 2000). In these cases, criminality is generally not involved, although the practitioner may well be guilty of failing to adhere to proper professional standards of conduct.

Client-centred altruistic dishonesty

Circumstances can also arise in professional practice in which a practitioner is drawn into criminal activity which is being conducted by a dishonest client, or advises a client concerning a proposed course of conduct that might be illegal (Williams 2002). Sometimes such conduct may be hard to characterise as dishonest, as it may involve the practitioner acting with undue zeal on behalf of a client and, in the process, breaking professional ethical principles or criminal laws. For example, advising clients as to the circumstances in which it is legal to do certain activities, such as minimising taxation or destroying documents that could be relevant to legal proceedings, could sometimes lead to the professional adviser aiding and abetting a criminal act, or otherwise acting contrary to professional ethical standards.

In other cases lawyers who have stolen trust account funds have argued that they were trying to assist a desperate client or were attempting to cover errors with other clients' trust funds (Neville 2000). Invariably, the client is unable to repay the funds and the deficiency in the trust account becomes apparent.

Dishonest omissions

Although the criminal law does not always distinguish between acts and omissions in terms of culpability, in some cases failure to act may be considered to be less serious than carrying out an overt act of dishonesty. Where, for example, an auditor discovers fraud within a client's company but fails to take action by reporting the matter to the police, it is sometimes

unclear that the auditor has acted improperly. The International Federation of Accountants has suggested amendments to International Standard of Auditing (ISA 240) which will place a greater onus on auditors to ensure that fraud control measures are in place and to report suspicious financial transactions (Gettler 2000). Similarly, in light of recent corporate collapses, greater scrutiny is being placed on professional advisers to disclose improper activities within corporations that could involve dishonesty.

Conflicting interests

Dishonesty can also arise out of a conflict of interest between professional advisers and their clients. There have for example, been cases in which doctors have prescribed drugs or medical appliances for improper motives, such as where they have a financial interest in the drug or appliance, or where the doctor has received an improper inducement from a company to prescribe the drug. One recent problem has arisen of doctors constructing their own Websites in order to advertise their professional activities or provide information to the public, but failing to do so ethically and in accordance with standards of acceptable practice. In one case, for example, a famous doctor in the United States maintained a Website which contained material advertising particular health products. It was alleged, however, that he had failed to disclose a commercial interest in the products being advertised and sold through the Website (Noble 1999).

Professional opportunism

Sometimes professional advisers will become privy to information that could be used for their personal advantage and then make use of that information dishonestly. This may infringe client confidentiality or involve a misuse of confidential information. An example uncovered in late 1999 involved up to 300 Australian radiologists who were alleged to have backdated orders for MRI machines, or used revokable contracts, in order to profit illegally from a 1998 budget decision to introduce Medicare rebates in respect of scans carried out on privately-owned machines. The rebates were only applicable for machines purchased or ordered prior to the date of the budget announcement. Some 33 machines were ordered six days before the announcement with 27 orders allegedly made on the basis of inside knowledge of the terms of the proposal (Zinn 2000). The Health Insurance Commission sought the repayment of $164,000 from one doctor in respect of payments made for MRI scans which had been requested by a general practitioner rather than a specialist as required by the HIC (Gray 2000 and see Australian National Audit Office 2000).

Inadequate standards

Dishonesty can also arise out of inadequate professional standards or poor levels of training. Sometimes a practitioner may make use of client funds in order to keep a failing or poorly

managed practice alive. In one case, a Melbourne pharmacist defrauded the Health Insurance Commission of $1.1 million in pharmaceutical benefits over a two-and-a-half year period to help finance her struggling business. She was convicted and sentenced to an 18 months' suspended term of imprisonment (*R v Thi Thuy Nguyen*, County Court of Victoria, 13 June 2001, *The Age* 14 June 2001). Her accomplice, who obtained $350,000 from the scheme, was sentenced to three years' imprisonment with a non-parole period of two years (*R v Phuong Thi Le,* County Court of Victoria, 5 September 2002; *The Age* 6 September 2002).

Invariably in such cases, the financial difficulties are not solved and further funds are stolen which are never able to be repaid. Although clearly illegal and unethical, the reason behind the conduct is understandable as being due to ineptitude or incompetence rather than intentional dishonesty.

Other cases have involved inept investment of client funds or investment outside regulatory controls. In one Queensland case, a lawyer pleaded guilty to having misappropriated approximately $4 million from client trust account funds for investment in a Nigerian advance fee letter scam. He was sentenced on 5 May, 2000 to 10 years imprisonment for one count of misappropriation and 5 years imprisonment (to be served concurrently) for two counts of uttering false documents. It was ordered that he be eligible for release on parole after three years of that period (*R v Paul John Crowley*, District Court of Queensland, 5 May 2000).

In the case of *R v Fulton* (Supreme Court of Tasmania, 13 December 2001, Slicer J) a lawyer had used client trust funds amounting to $98,000 for the payment of settlement monies due to other clients which the practitioner failed to secure due to incompetent handing of civil litigation on their behalf. He was convicted and sentenced to two years' and six months imprisonment, suspended after he had served 14 months.

Individual psychopathology

In some cases, an individual may commit dishonest conduct owing to the presence of some personal psychopathology, such as an addiction to gambling or drugs. In these cases the conduct will clearly be dishonest and culpable, but the addiction may be taken into account as a mitigating circumstance in sentencing. Cases involving lawyers and accountants who misappropriate client funds in order to fund compulsive gambling activities or to purchase drugs of addiction occasionally come before the courts (Sakurai & Smith 2003).

Dishonesty involving undue influence

Another area in which dishonesty has arisen concerns practitioners who have exerted undue influence over their clients to leave them bequests in their wills or who have sought to

borrow money from clients which they are unable or refuse to repay (for example *R v Dirckze* County Court of Victoria, 13 August 1999, Anderson J). Two famous cases in the United Kingdom involved medical practitioners, John Bodkin Adams in the 1950s, and Harold Shipman in the 1990s who were alleged to have killed patients in order to obtain bequests. In both cases the allegations relating to the financial motivations for their conduct were not proved, although both practitioners were de-registered. Shipman was sentenced to life imprisonment for murder (Devlin 1986; Smith 2002) and died in custody in January 2004.

Misuse of professional power

Dishonesty can also arise in non-financial circumstances. For example, health care providers have sometimes misrepresented the nature of treatment provided for inappropriate personal reasons. In one case, a radiographer had, on eight separate occasions, placed a transducer probe of an ultrasound machine into the vaginas of his patients ostensibly for diagnostic purposes but actually for his own sexual gratification. According to the law at the time, he could not be convicted of rape because the patients had agreed for the act to take place, albeit due to a mistaken belief as to the necessity of the procedure (*R v Mobilio* (1991) 1 VR 339, Victorian Court of Criminal Appeal). The law was subsequently amended to provide that consent is not valid where 'the person mistakenly believes, because of a false representation, that the act is for medical or hygienic purposes' (*Crimes Act 1958* (Vic.) s. 36(g)).
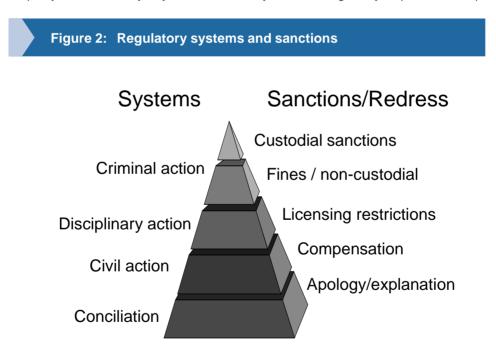
Personal cupidity

Finally, there are financial cases in which dishonesty occurs simply through greed and a desire for personal advancement. Such cases often involve practitioners living beyond their means and trying to maintain an inappropriately extravagant lifestyle. Cases in this category often involve heath care providers who defraud the government, or financial advisers who misappropriate clients' funds. Some of the largest and most complex instances of professional dishonesty in Australia's history have involved financial planners and advisers, not all of whom have been qualified accountants. The largest investment fraud in Australia's history was perpetrated by an accountant, David Gibson, who defrauded 600 clients out of $43 million in the 1980s, using managed investment funds and employing a Ponzi scheme in which early investors were paid dividends out of the investments of subsequent investors. Gibson was sentenced to 12 years imprisonment with a non-parole period of nine years (Brown 1998).

Regulatory mechanisms

Having considered some of the types of professional dishonesty, it remains to examine the various ways in which they may be dealt with. The following discussion is restricted to legally regulated systems which enable people to take positive action. This obviously excludes the various non-legal ways of handling complaints such as adopting what is known as 'exit procedures' or simply not going back to the professional person concerned and taking no further action.

In order to illustrate the range of systems and sanctions (or mechanisms for redress), Figure 2 presents them around a pyramid based on frequency of use and severity of sanctions. This derives from the responsive regulatory model described by Ayres and Braithwaite (1992) and Braithwaite (2002). Although this gives an appearance of clarity and simplicity, there are many ways in which these systems and regulatory responses overlap.

Figure 2: Regulatory systems and sanctions

Systems | Sanctions/Redress

Custodial sanctions
Criminal action — Fines / non-custodial
Disciplinary action — Licensing restrictions
Civil action — Compensation
— Apology/explanation
Conciliation

Conciliation

In recent years many professionals have been made more accountable through the introduction of independent complaint-handling authorities. These bodies operate as a form of coerced self-regulation or what Johnson (1972) has called 'mediated professionalism'. Examples include the consumer-oriented New South Wales Office of the Legal Services

Commissioner and the Victorian Legal Practice Board, the latter of which is currently being reviewed. In relation to health care, all jurisdictions in Australia have Health Complaints Commissioners whose functions include the resolution of disputes between health providers and health users arising out of the provision of health services. Commissioners are required to investigate complaints and may resolve them by conciliation, which simply means encouraging a settlement of the complaint by holding informal discussions with the health provider and the health user.

Civil action

Consumers of professional services who have suffered loss as a result of unprofessional conduct may commence civil proceedings for damages in negligence, trespass or breach of contract, although the legal principles which apply in this area are by no means settled. Allen (1996) has argued that various doctrinal barriers to recovery remain in the way of responding adequately to the breach of trust inherent in professional exploitation. In certain circumstances, loss which has been caused by a professional person's conduct and which is reasonably foreseeable may be recovered. Civil action will provide a financial sum to successful claimants which aims to place them in the same position they would have been in had the wrongful act not taken place. Normally, an award of damages is aimed at compensation rather than punishment although in rare instances exemplary or punitive damages may be awarded which aim to make an example of the defendant with a view to deterring similar conduct in the future (Collis 1996).

Disciplinary action

Each jurisdiction in Australia has a body which is responsible for the registration of various kinds of professionals. Although the members of the oldest professions are statutorily recognised and registered, some professionals, including accountants, are not covered by existing registration authorities and thus are not subject to internal professional disciplinary controls, other than their potential removal from membership of a professional association. Where misconduct occurs in such situations, the client will only have recourse to criminal and civil action or in some cases to conciliation offered by some consumer agencies.

Registration bodies such as professional boards are set up to protect members of the public by providing for the registration of practitioners (for example *Medical Practice Act 1994* (Vic.) s. 1(a)). Boards are under a legal duty to investigate complaints that are made and where allegations are proved, the registration of the practitioner may be restricted in some way or removed. Disciplinary action is not intended to be punitive in the retributive sense, but rather is designed to ensure that acceptable standards of practice are maintained in the profession (Smith 1994). The one exception to this is Boards with jurisdiction to

impose monetary penalties or fines which are exclusively intended to be punitive and to act as a deterrent (for example *Medical Practice Act 1994* (Vic.) s. 50(2)(f)). Some Boards may also require practitioners to undergo counselling or further education in order to remedy any deficiencies in their professional skills.

Proportionally, there are few complaints made to disciplinary bodies each year. In Victoria in 2001/02, the Law Institute of Victoria received 2,849 complaints concerning the conduct of lawyers in Victoria mainly relating to costs, failure to return clients' calls, excessive delay and negligence (Shiel 2003). In medicine, between 2000/01 and 2001/02, the number of complaints made to the Medical Practitioners Board of Victoria rose some 43 per cent, from 401 to 573. Given that there are more than 17,000 registered medical practitioners in Victoria, this number, however, remains a relatively low proportion. The range of complaints received in 2001/02 remained broadly consistent with the previous year, with the largest percentage (42%) relating to clinical care, standard of practice and poor outcomes. There was an increase in complaints about medical practitioners' conduct or behaviour and fewer about sexual misconduct (Medical Practitioners Board of Victoria 2002).

Criminal action
The final way in which complaints of dishonesty may be dealt with is through the criminal courts. Criminal proceedings for theft or deception aim at punishing the offender in the retributive sense, denouncing the conduct in question, and preventing further offending by deterring the individual from engaging in similar conduct in the future while deterring others in the community from offending by making an example of the individual in question. Guilt is determined by a jury in serious cases and criminal compensation may be awarded in certain circumstances.

The penalties which are available to a judge in sentencing an offender include imprisonment, fines, community-based orders and various forms of conditional and supervised release. The extent to which such sanctions are appropriate and effective in deterring unprofessional conduct by so-called 'white collar' offenders such as doctors is hotly debated (for example Tillman & Pontell 1992) and many have argued that more appropriate sanctions should be used such as adverse publicity, financial penalties or further compulsory training in ethics and professional conduct.

Problems with the current systems
There are a number of problems that arise out of the current regulatory framework for dealing with dishonest professionals and, indeed, professionals accused of crime or misconduct generally. First, there is a multiplicity of rules that govern professional practice that are to be found in civil and criminal laws, other regulatory statutes and codes of conduct

which statutory professional bodies administer. There is also a proliferation of ways in which professionals are regulated and a duplication of complaint-handling procedures. Professional behaviour may be investigated by the civil and criminal courts, registration authorities and a variety of consumer-oriented statutory bodies such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, Departments of Fair Trading, Ombudsmen and Complaints Commissioners within certain professions.

As such, professional conduct may be scrutinised from a plethora of perspectives which are both time-consuming and expensive to administer. Each system also has conflicting aims and overlapping sanctions. In summary, therefore, we have a range of different types of professional dishonesty which may be engaged in and a range of different ways in which allegations may be investigated and dealt with. The task which faces us is how best to match any unprofessional act with an appropriate and effective regulatory response so as to ensure that both consumers and providers of professional services are dealt with fairly and justly.

Matching dishonest conduct with appropriate responses

What then, is the most appropriate and effective way in which to respond to professional dishonesty? Arguably, the many different systems which exist should be used appropriately having regard to their aims and to their ability to alter the behaviour of offenders and others in the professional community. To impose condign punishment such as imprisonment may be satisfying in the retributive sense for a complainant, but it may do nothing to ensure that misconduct is not repeated and that others refrain from engaging in similar forms of deviance in the future.

In order for compliance-based systems to be effective, the various motivations of the professionals need to be considered. First, they may seek to comply with what may be described as deontologically-based motivations, namely, those ancient ethical precepts of professions such as those espoused in the writings of Hippocrates. Secondly professionals may be motivated through a sense of social responsibility in that they seek to avoid harm being inflicted through unprofessional or incompetent conduct. Thirdly utilitarian motivations based on financial and lifestyle considerations may guide a professional person's actions such that compliance is achieved through a self-interested fear of losing income and position. Finally, professionals may seek to avoid the stigma of appearing before their colleagues in a disciplinary hearing and the attendant publicity which that attracts.

Bearing these considerations in mind, it is suggested that the various regulatory systems be used in the following ways:

- Conciliation should be used where explanations can be used to settle disputes such as misunderstandings between practitioners and their clients. It should not be used where the persuasive effects of imposing a deterrence-based sanction are needed. Conciliation should be conducted openly and with representatives of the practitioner's professional colleagues being present.

- Civil action should be used where the consumer has suffered some pecuniary loss which may be quantified in monetary terms. Awards of exemplary damages should not be imposed where other regulatory approaches are being used in respect of the same offence. Where awards of damages are paid by a practitioner's mutual fund, such as a defence society, the practitioner should bear part of the financial burden such as by way of a no-claim bonus being reduced.

- Disciplinary proceedings should be used where standards of professional conduct have been breached and where restrictions need to be imposed on the individual's registration. The most severe sanctions of erasure and suspension should be restricted to instances of repeated offending or failure to comply with previous directions. Following disciplinary suspension or erasure of registration, the practitioner's conduct should be monitored by the registration authority and procedures undertaken so as to enable registration to be renewed.

- Criminal action should be restricted to cases in which the criminal law has been breached and where the most severe deterrence-based sanctions are required and where other regulatory responses are inadequate to deal with conduct of this level of seriousness.

- In addition, thought needs to be given to expanding the range of available responses. Sanctions such as adverse publicity, other financial penalties, or further compulsory training in ethics and professional conduct could be considered. Adverse publicity is a powerful sanction when directed against professionals, although care must be taken that this is not used in an oppressive or unfair way, or in such a way as to permit 'grandstanding' of criminal conduct.

Conclusion

In recent years there have been many changes that have taken place in the professions and these have created new opportunities for fraudulent and dishonest conduct to occur. In addition, the proportion of professionals in the labour force has increased greatly, leading to an increase in the number of crimes of dishonesty that are being committed.

We have also witnessed various changes in the way in which criminal and unprofessional conduct are dealt with. Criticism of professional monopolies and self-regulatory practices has led to the establishment of new controls which have removed some of the power of the traditional professions such as the law and medicine. The creation of external forms of control which arose out of the consumer protection movement has been the most dramatic change in this regard and is likely to continue to be of importance in the years to come.

These developments have taken place in a relatively uncoordinated way with the boundaries between the various regulatory systems sometimes being blurred and the situations in which they should be used not clearly understood. The proliferation of regulatory controls has also been wasteful in terms of resources and is sometimes oppressive for individuals who find themselves subjected to multiple investigations into the same course of conduct.

Having simple and appropriate systems in place is, arguably, the best way in which to identify and to control all forms of professional deviance, from the least to the most serious forms of illegality. The professions have a developed set of ethical principles which enable practitioners to determine what is and what is not acceptable conduct in the opinion of their peers, although the guidance given to practitioners regarding some types of dishonest conduct could be clearer and more specific in setting out what is and what is not permissible. Registration Boards possess the big sticks of suspension and erasure, and these are used relatively rarely in dealing with the very small number of practitioners who fail to comply with the ethical rules.

In cases where deterrence-based sanctions are used, registration authorities should take on board the notion of 're-integrative shaming' (Braithwaite 1989) in order to ensure that practitioners are not isolated and scapegoated by the experience. This would help to ensure that those individuals who have breached the profession's ethical rules will not do so again when they resume practice, as many of them do.

The time has come to review the range of responses that can be used to regulate the conduct of professionals and to make sure that the procedures which are used are matched closely to the nature and seriousness of the conduct in question. This might help to maximise the effectiveness of the various systems that we have available both in terms of achieving deterrence as well as ensuring that individuals are dealt with fairly.

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Section 8: Is there a reliable way to evaluate organisational compliance programs?

Christine Parker

Is there a reliable way to evaluate organisational compliance programs?

Abstract

Many regulatory regimes now require organisations to internalise responsibility for their own compliance through compliance programs. But how can regulators know which systems are worthwhile and which are worth little? The crux of organisational responsibility for compliance is self-evaluation — the capacity to detect, prevent and correct breaches. Regulators therefore need to be able to evaluate regulatees' capacity for self-evaluation. This paper critically examines current means for evaluating compliance systems by reference to the three phases that research shows organisations must travel through to implement effective compliance systems.

Introduction

Many regulatory regimes now require organisations to internalise responsibility for their own ethics and self-regulation through compliance programs via license conditions, requirements of enforceable undertakings and other settlements of potential enforcement action, penalty discounts, and even corporate probation orders. However companies cannot be left alone to put in place compliance programs that self-regulate compliance. Corporate compliance programs are only effective when they are 'permeable' or open to external stakeholder and regulator accountability (Parker 2002). In practice regulators, consumers, corporate managers and other stakeholders are short on techniques for evaluating the quality and performance of companies' internal responsibility systems. This paper considers how regulators can evaluate corporate compliance programs.

Three phases of corporate self-regulation of responsibility

Empirical research on corporate self-regulation of compliance shows that organisations must always travel through three phases in order to manage compliance effectively and responsibly (Parker 2002: 43–61; Chaganti & Phatak 1983):

Phase One: The commitment to respond via self-regulation: The CEO and/or other senior managers become interested and involved in making statements about compliance issues and setting aside resources to address them. This is usually prompted by some crisis that (momentarily) pricks management consciences — a terrible accident, media scrutiny, legal liability.

Phase Two: The acquisition of specialised skills and knowledge for compliance management: The corporation acquires the know-how and personnel to deal with compliance issues. This process often means that specialist functions and policies are set up to deal with compliance issues. Specialist employees are appointed such as environmental managers or compliance professionals and are empowered to put responsibility issues on the agenda and formulate procedures and policies to deal with them.

Phase Three: The institutionalisation of purpose in compliance: The policy of detecting, preventing and correcting non-compliance is made an integral part of corporate objectives. Standard operating procedures are revised to make compliance issues a part of everybody's job and (formal and informal) reward systems are changed so that managers and employees are motivated to take compliance issues into account.

Understanding these three phases of corporate compliance management clarifies what it is that regulators can and should evaluate. Regulatory evaluation should set goals and incentives that will continually move companies on to the next phase:

Phase One: The management desire to do something in relation to corporate compliance, once aroused, must be channelled into adopting a quality, systematic process for management to assure compliance. Regulators need to be able to evaluate the design of corporate compliance systems.

Phase Two: Regulators will need to be satisfied that the self-regulation system has been adequately implemented within the particular business context of the organisation in question. They should not be satisfied with a well-designed system of compliance management that exists only in policy and on paper.

Phase Three: Regulators need to be satisfied that the corporation now has an ongoing capacity to self-regulate compliance. The capacity to self-regulate depends on an ongoing commitment to holistic evaluation of the company's compliance performance outcomes that relates compliance outcomes back to the design and implementation of compliance management processes. This is unlikely to be spontaneous — it depends on meta-evaluation of corporate self-evaluation by regulators.

It is useless to measure one of these aspects of compliance management — design, implementation, outcomes — without the others and expect it to give a true and fair picture of the quality of a corporation's compliance program. However it may be the case that measures focused on one of these aspects of compliance management will be more appropriate for a particular business or industry at a particular time. Nevertheless an effective regulator will know that the business or industry must be moved forward to the next phase and that the most apposite measures of total compliance system effectiveness are ones that show that all three phases have been covered, and continually revisited. Indeed, ultimately the only good measure of a company's self-regulation is a meta-evaluation of how well the company itself does at evaluating and learning from that is, acting upon) each of the design, implementation and outcomes of its compliance system.

Evaluation of design of compliance systems

Australian law and regulatory practice has been fairly vague in setting principles for judging the design of internal compliance processes that might prevent a company, its employees and/or agents breaching the law or acting irresponsibly. For example the AWA Case[1] made it very clear that directors are individually responsible not just for setting broad policy, but also for taking an active interest in ensuring adequate corporate governance systems to bring the company into compliance with Board policy. However the judgment leaves it unclear what the standard for such systems might be, and this is even more unclear in the light of more recent reforms to the law of directors' duties (Parker & Conolly 2002). Similarly in trade practices, environmental and discrimination law, directors and managers are also being held accountable, via strict vicarious liability, for regulatory offences coupled with the availability of 'due diligence' defences or damages discounts for having in place a management system to prevent breaches (Parker 1999; Parker & Conolly 2002; Streets 1998). Nevertheless the standard of courts' capacity to evaluate self-regulation system is quite basic in these areas. Part 2.5 of the *Commonwealth Criminal Code Act 1995* implicitly makes a 'corporate culture' of compliance (or lack of one) a relevant factor in determining corporate responsibility for an offence that includes a fault element in several ways. 'Corporate culture' is defined to mean: 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.[2] These provisions are even more vague than the court cases mentioned above and provide little guidance to companies and their lawyers about what is required.

There ought to be a basic set of principles for corporate compliance or self-regulation[3] systems set out by an international organisation such as the OECD and/or by national governments that could be a guide and an evaluation standard for the design of corporate compliance and self-regulation in any area. Such principles already exist and are widely recognised in relation to corporate governance that is, defining the responsibilities of Boards of Directors in relation to shareholders and management: see OECD 1999; Belcher 1995). Something similar is needed for corporate management of broader social and legal responsibilities. Those principles should, at the very least, state that a corporate self-regulation or compliance system should encompass the following (Parker 2002: 197–244):

(1) The company's internal discipline system must articulate with the compliance system; i.e. management and employees should be regularly and swiftly disciplined for any misconduct under the company's compliance system (and also rewarded via performance evaluations for positive contributions). This disciplinary action should be designed in such a way that it respects employees' integrity, connects with employees' values and allows the company as a whole to learn from individual mistakes and misbehaviours in order to prevent them recurring.

(2) The company should have a Justice Plan for engagement with external stakeholders; i.e. systems for identifying its obligations under law, and any other standards it wishes to adopt voluntarily (for example broader human rights principles), and have systems that allow external stakeholders to use those rights to contest corporate actions and decision-making; including at the very least a complaints handling system with a capacity to identify patterns of complaint, and to report those issues to someone who can resolve them.

(3) There should be clearly defined responsibility for compliance that is shared between:

- a specialised self-regulation/compliance function with clout to determine strategies and priorities for legal and social responsibility issues, monitor compliance, receive complaints from internal and external stakeholders, and be responsible for coordinating reporting on the company's responsibility performance to government agencies and the public. The chief self-regulation staff member should generally have a certain level of seniority (for example direct reporting line to Board or Board Committee) and employment protections (for example no termination of the contract without a Board review).

- a clear Board-level compliance/self-regulation oversight agenda. This might be achieved by a Board Audit or Compliance Committee, a designated Board member (as is the custom in Germany), or simply by making the self-regulation/ compliance program a standing agenda item for normal Board meetings. The Board should receive reports on social and legal responsibility issues, review compliance management strategy and priorities, and act on policy issues raised by compliance management activity. Certain categories of stakeholder might be represented on a Board Audit, Compliance or Social Responsibility Committee.

- reporting lines and job descriptions that make compliance part of everybody's job and make clear pathways for compliance performance and problems to be taken direct to the top through a reporting line independent of line management. All employees and managers should have clear access to the self-regulation/ compliance function to receive advice and raise issues. The chief self-regulation/ compliance person must have senior management status, and a direct reporting line to the CEO and the Board. This means that the self-regulation/compliance function can bypass uncooperative line management, has access to intelligence about conflicts and problems at every level, and the power to put them on the agenda at the highest level.

(4) Regular evaluation of corporate self-regulation/compliance processes and performance, including the extent of implementation of self-regulation processes, whether their scope and strategy remains appropriate for the organisation, verification of reports of activity and performance produced internally, and assessment of performance and outcomes of the whole approach to self-regulation within the corporation.

The closest thing to this in Australia is AS3806–1998, the Australian Standard on Compliance Programs. However the courts have been reluctant to use AS3806 because, they say, it is 'likely to involve vague evaluative judgments or significant debates on their interpretation', and 'imposes standards which are aspirational in their expression and not readily measured in application'.[4] In other words, it is perceived as unmeasurable by the courts. However courts have occasionally used ISO14001, the environmental management system standard, as a standard for judging compliance processes in cases of breaches of environmental law.[5] Moreover there is quite a compliance industry in Australia now of compliance consultants and in-house professionals who can be called upon to express an expert opinion on how a particular company's self-regulation systems would fare against the AS3806 criteria. Indeed, regulators are using AS3806 fairly extensively as a guide for compliance self-regulation processes where one is appropriate. Both ASIC and the ACCC regularly require that companies must implement compliance systems as an element of an enforceable undertaking (a type of negotiated settlement of potential enforcement action), and that it comply with AS3806.[6] ASIC has also stated that it will usually use AS3806 as a guide when judging licensee's compliance arrangements in relation to the various licences for financial services entities that it administers.[7]

However, AS3806 is a confusing document that contains a multitude of detail for elements of compliance system processes, but no clear over-riding substantive principles and objectives. The three main organising principles — structure, operation and maintenance — are purely process-oriented. It provides little in the way of emphatic guidance on the substantive principles that make compliance work that is, the principles set out above). For example nowhere does it state that responsibility breaches should lead to appropriate discipline. This makes AS3806 of limited use as a guide for learning about how to design an effective self-regulation system. However it can provide a useful checklist for ensuring that basic process elements have been covered, once a company has designed its self-regulation system (subject to the reservations above and below about its content). AS3806 is currently being revised by Standards Australia. Perhaps the new revision will improve its usability for courts, regulators and organisations.

Evaluation of implementation of compliance systems

The most obvious strategy for evaluating organisational compliance system implementation is to conduct an audit or review following similar methodologies as quality assurance, ISO 14000 and internal control audits (Coleman 1985: 84). Preferably the audit or review would be conducted by an independent monitor in the first instance, or, at least, the self-reports generated would be verified by an independent auditor. The ACCC and ASIC enforceable undertakings rely on this strategy. A condition of the undertaking is usually that the company have an independent professional approved by the regulator report on their implementation of the undertaking to management and to the ACCC at certain intervals. Similarly, compliance audits are required for managed investment funds on an annual basis under their licensing regime in Australia.

However the use of audit verification of self-regulation system implementation also raises a number of issues. As one commentator has noted in respect of corporate health and safety management system audits:

> *'Auditing is one of the most widely used (and abused) ideas in the area of safety management today. It covers anything from a ten-minute exercise ticking boxes on a questionnaire, done by an administrative assistant whose boss is too busy to do it, to a three-week inquiry by a team of six high-powered managers from company sites or headquarters in other parts of the world.' (Hopkins 1999: 70)*

Clearly there is no point auditing if there is no system to audit, or if the system that is audited is not appropriately designed to achieve the goals. In other words, audit is no substitute for management implementation of an appropriately designed system. Nevertheless, audit at its best is not merely a check on what management has already done. It is a test that creates an incentive for management to make sure it has put in place an appropriate system. A critical audit from a well qualified monitor can also be an opportunity for the monitor to point out design and implementation flaws and make suggestions for how to improve them. It can create a space for external opinions and expertise to have an impact on how the compliance system is actually designed and implemented through discussion between the auditor and management (Parker 2003). This is more likely to be the case where there is some sort of obligation for management to address the flaws that the auditor notes in the self-regulation system design and implementation.

However, this raises a number of further issues about the stance, the methodology and the expertise that the auditor brings to the process and the conduct of the process itself. There is a danger that audits of compliance systems will tend towards 'desk audits' (Parker 2003; Power 1997: 126). The only evidence gathered to check implementation will be the company's internal paperwork, supplemented perhaps by a few interviews with head office management

staff. Auditors will not necessarily conduct systematic fieldwork to find out what actually happens where it counts. Instead they will rely on the policies that have been committed to paper by management and information that has already been collected by the company. The audit will gravitate towards 'ticking off' that certain formal systems elements are present, rather than one of creative professional judgment. An effective auditor should act on a well-informed opinion about what might go wrong and what sort of processes and systems should be in place to prevent that happening on the basis of their own assessment of the organisation's business and management structure. The effective compliance auditor will test the limits of management systems and see what happens. They will 'mystery shop' to see how sales agents actually represent the company's product to the customer. They will arrange for a safety alarm to be set off to see how a mine's management and workers respond. They will ask employees to explain in their own words how they understand compliance procedures or what they learnt from a training session. In other words they would be proactive in checking how self-regulation was implemented (Hopkins 1999: 70–79).

The audit or evaluation should always be a platform for discussion and implementation of changes to the company's compliance system. It should not be a formality that everyone assumes will simply verify that an appropriate compliance system is in place. This does not mean it must be aggressively adversarial. It does mean that it should go out of its way to look for problems and to include the views of stakeholders and others who are likely to be critical of the system. The assumption is that if evaluations do not find breaches and problems (and lead to their correction and improvement) then there is something wrong with the evaluation process. This means that the audit reports ought to be as public as possible so that stakeholders can be included in the discussion about how compliance management should be changed and improved. The audit methodologies should also be public so that stakeholders can form their own opinion about the value of self-regulation audits (Fung et al. 2001).

Evaluation of self-regulation outcomes and performance

Measures of design and implementation provide no assurance that managers and employees are actually behaving in compliance with corporate legal responsibilities that is, a lack of breaches of laws and/or licence obligations). It is these outcomes that regulators and stakeholders are generally most interested in measuring, regardless of whether they are the results of any systematic attempt at corporate compliance management or not. In order to measure whether the third phase of corporate compliance management has been reached, however, the regulator's focus should not be on measuring outcomes that is, breaches) for their own sake. Rather the regulator will need to evaluate what those outcomes indicate about the performance of the company's compliance management as a whole.

Regulators will need to be able to evaluate:

1. whether breaches of the law and other social responsibilities (voluntarily adopted by the company) have been identified and corrected. Regulators and stakeholders do not want merely the 'cold comfort' of seeing that compliance systems are in place. They need to know that these systems are actually working to identify problems and to improve them.

2. whether the substantive outcomes of the company's compliance program have been determined. Is the compliance program guaranteeing (or at least improving) the company's accomplishment of the objectives of regulation (for example product safety, environmental health in the local area, well informed consumers/investors, worker health etc)?

Audits of implementation of compliance systems are of limited usefulness in the absence of evidence about the outcomes of those systems. Comprehensive verification audits of compliance systems (discussed in the previous section) should therefore include outcome measures as the ultimate tests of the critical limits of the implementation of management systems.

For phase three, however, regulators and stakeholders need to undertake a further evaluative step:
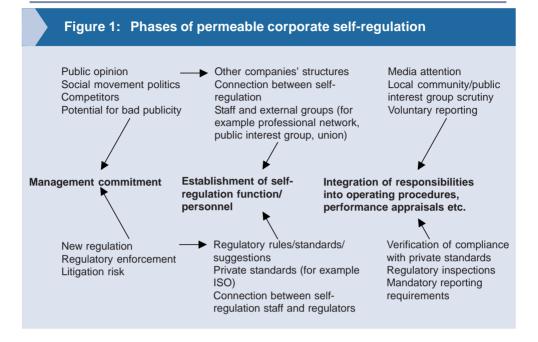
3. Is the company using its own outcome monitoring to re-design and improve its own compliance management? Clearly regulators will, or should be, doing their own monitoring of outcomes and breaches of the law. For the purposes of evaluating corporate compliance management, what regulators need to know is that the company itself is monitoring these things (hopefully in a more detailed way than a regulator can afford) in relation to its own impact.

The only way to measure corporate self-evaluation and continuous improvement of their own compliance performance is through corporate self-reports on their implementation of compliance processes, what standards they meet, and their own evaluations of how well they are working. These self-reports should generally be independently verified using the type of audit methodology discussed in the previous section. A corporate requirement to report on compliance program performance can prompt improved internal processes of decision-making. This is because reporting of compliance management makes a certain level of corporate self-knowledge unavoidable. In order to report meaningfully, companies must have conducted compliance reviews. They must have implemented compliance management systems and they must have evaluated how those systems work. Reporting to the public also, of course, diffuses accountability and promotes discussion and debate about corporate compliance practices.

Globally, many companies do now voluntarily publish information about their social and legal responsibility compliance practices, especially in relation to the environment (Gray et al. 1996).[8] However voluntary social and environmental reporting is likely to be limited in its scope, and biased towards positive information (Deegan 1996; Deegan & Gordon 1996).[9] Secondly, even where compliance and social responsibility reporting is widely adopted, corporate reports vary so considerably in the conventions used to report performance that stakeholders find them difficult to interpret intelligently, to compare and to be assured of their significance and reliability. This suggests that there must be some regulation of the quality of reported information before it can be of any use to stakeholders and regulators who are seeking to evaluate corporate compliance programs. Regulators need to provide some guidance and standards against which companies can report their compliance practices; as well as standards or guidance for the audit or review methodologies to be used in verifying those self-reports. At the very least corporate reporting of compliance performance should cover the three issues mentioned above in this section. Secondly companies should also report the design and implementation of their compliance programs against the principles proposed above in the discussion of evaluation of design. Thirdly regulators should make it clear that reviews of compliance programs and independent verifications (or audits) of compliance self-reports should use the methodology recommended in the discussion of evaluation of implementation of compliance programs.

Conclusion

The methodologies for evaluating corporate compliance management are critically under-developed at present. The three phases of corporate compliance management set out in Figure 1 are a helpful way of thinking about what jobs evaluation and measurement of compliance programs should do. Evaluation by regulators of corporate compliance management is important because it promotes a virtuous cycle of open self-regulation. The goal is that companies themselves will evaluate their own design, implementation and outcomes of their compliance management systems. It is only through this process of self-evaluation that companies will develop the capacity to detect, prevent and correct their own breaches of ethical, social and legal responsibilities. However they will only be motivated to do so because they know that regulators (and stakeholders) have powerful, sophisticated evaluative capacities to hold them accountable for their attempts at compliance management (and, of course, their breaches of legal responsibilities). In other words, external evaluation of corporate compliance management is a critical democratic capacity. It is one of the few things we can do to change the way large companies manage their own behaviour for the better.

1   Daniels & Ors v AWA (1995) 13 ACLC 614.

2   Division 12.3(6)

3   These principles should apply not only to legal or regulatory compliance narrowly defined but more generally to self-regulation of all legal or social responsibilities.

4   *ACCC v Real Estate Institute of Western Australia* (1999) ATPR 41–673 42, 606–607. See also *ACCC v Rural Press* (2001) FCA 1065 (7 August 2001). These comments have been made in cases where the ACCC has argued that a court should order a defendant to implement a compliance systems that follows AS3806.

5   for example *EPA v Great Southern Energy* (1999) NSWLEC 192. See also *EPA v Shell* (1999) NSWLEC 16; *EPA v Camdide Pty Ltd* (1996) NSWLEC 221. In a Canadian case (decided 18 August 1998) Coretec Inc and its former environmental manager, Mohammed Zadeh pleaded guilty to violations of the Export and Import of Hazardous Waste Regulations in Provincial Court in Mississauga. The Judge granted both parties discharges in lieu of convictions on condition that they fulfill certain orders of the court, including orders that they comply with Environmental Management Systems and ISO 14001 environmental standards. See Environment Canada, 'Court orders unique environmental penalties' Press Release, 20 August 1998 archived at www.ec.gc.ca/ press_arch98e.html (accessed 01/10/2001).

6   ACCC, Section 87B of the Trade Practices Act (Procedural guide series, August 1999); ASIC practice note 69, enforceable undertakings (issued 7 April 1999).

7   ASIC policy statement 132: Managed investments: compliance plans (issued 3 August 1998 and updated 4 November 1998); ASIC policy statement 164: Licensing: organisational capacities, (28 November 2001) at PS 164.54; PS 164.55–56; PS 164.110–114 where ASIC also recommends AS/NZS 360–1999 Risk management systems as a benchmark for the risk management aspects of compliance arrangements; ASIC, Commentary on compliance plans received by ASIC: financial asset schemes (March 2000: 4). Similarly, environmental regulators use ISO14000 on environmental management systems as a standard for licences in certain circumstances. See for example, Gunningham & Sinclair 1999.

8   See the study by EthicScan for the Canadian Auditor-General, reported at http://www.bsr.org/bsr (accessed 23 July 1999) under the 'Social audits and accountability' heading.

9   The 'opportunistic reporting hypothesis' (Blair & Ramsay 1998) holds sway strongly here, since frequently if the company does not voluntarily supply social responsibility information itself, there is little probability that stakeholders will find out independently.

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No. 57

There has been a significant increase in regulation of civil society in the late twentieth century by governments to ensure that their policy objectives are being achieved. As a result a wide range of institutions are subject to a range of regulatory practices. These institutions are involved in every aspect of daily life ranging from environmental and occupational health and safety, crime control, competition practices, professional and business conduct.

This collection of papers is from an Australian Institute of Criminology conference which was held in conjunction with the Regulatory Institutions Network (RegNet) at the Australian National University and the Division of Business and Enterprise at the University of South Australia in Melbourne in September 2002. They summarise the issues relating to the emergence of the 'new regulatory state', the various forms of regulatory techniques that are being used, the way in which regulatory regimes are increasingly being networked to ensure compliance and the conflicts that can sometimes emerge from such an interface.