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RE-STOCKING THE REGULATORY TOOL-KIT

Arie Freiberg

Faculty of Law
Monash University
PO Box 12
CLAYTON VIC 3800
Fax +61 3 9905 9216
Ph + 61 3 9905 3357
Mobile 0407 344 606
Home page:
http://www.law.monash.edu.au/staff/afreiberg.html
Email: Arie.Freiberg@law.monash.edu.au

הפורום הירושלמי לרגולציה וממשליות
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האוניברסיטה העברית
הר הצופים
ירושלים, 91905
The Hebrew University
Mount Scopus
Jerusalem, 91905, Israel

regulation@mscc.huji.ac.il :Email
http://regulation.huji.ac.il

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Abstract: There have been many developments in regulatory technology since Christopher Hood's seminal 1983 work on The Tools of Government. New instruments have been developed, many have been refined and the relationships between them have become better understood. Regulatory design has become more complex, but possibly smarter. Australian legislators and regulators are slowly taking up the challenge of providing a coherent framework for regulation and for guiding the choice of instruments. This paper takes a broad view of regulation and examines the range of tools available to Australian regulators. It groups them into six broad, non-exclusive categories: economic, transactional, authorizational, structural, informational and legal regulation. It explores the relationship between state and non-state forms of regulation and suggests a distinction between 'passive' versus 'active' regulation (ie 'webs of influence' vs enforcement) in preference to those currently employed ('hard vs soft', 'heavy' vs 'light', 'traditional' vs 'alternative'). It argues that the challenge for good regulatory design is not to determine whether regulation is hard or soft, but whether it is effective, efficient and just and whether the transaction costs involved are reasonable and proportionate.

Key words: Regulatory methods, tools of government, responsive regulation

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INTRODUCTION

In 1983 Christopher Hood published a seminal book entitled *The Tools of Government* in which he articulated and elaborated a structure for understanding how governments can shape the lives of their citizens for their various purposes (Hood 1983). Hood's broad argument was that, in order to understand how government could achieve its aims, it was necessary to adopt a broad view of its activities, in particular how it deployed its resources. His powerful insight, which has remained influential for well over three decades (Hood 2007), was that the regulatory activities of government involve far more than legislating or rule-making.

In 1989 and 1992 Lester Salamon's books on the tools of government (1989; 2002) tracked the transformations occurring in public administration flowing from the new public management, privatisation and contractualisation of government services and their effects upon the art of governance. Together with the works of modern scholars such as Black (2000: 2002), Ayres and Braithwaite (1992), Baldwin and Cave (1999), Gunningham and Grabosky (1998), Sparrow (2000), Macrory (2006), law reform commissions (ARLC 2002), regulatory reform bodies, Better Regulation Commissions, advisory bodies (Canada 2004) and others, it can confidently be said that the regulatory toolkit is neither sparse nor neglected. Modern offices or bureaus of 'good' or 'better' regulation in many jurisdictions now provide useful guides to the regulatory process, from problem identification to instrument choice to evaluation (e.g. Australian Government 2007; Government of Victoria 2007)

If anything, the theoretical challenges of regulatory design and the choice of regulatory methods are considered passé. It is now well understood that regulation involves more than legal rules, that it is extra-ordinarily varied, complex and pervasive and that the tools of government are numerous, diverse and inter-connected.

In Australia, the influence of Ayres and Braithwaite's work on responsive regulation has been profound (Ayres and Braithwaite 1992). Regulatory pyramids have proliferated to the extent that most regulators have developed some variant upon this venerable structure. This conceptual rigor has without doubt improved the quality of regulation at both state and federal levels. Australia's regulatory frameworks withstood the challenge of the global financial crisis remarkably well.

The pyramidal approach has many strengths but it has had the effect of concentrating some regulators' minds too much on enforcement on not enough upon the prosaic, day-to-day factors that operate to influence behaviour and produce the vast bulk of regulatory outcomes.[1] These influences, which include social norms, ethical practices, codes of conduct or practice, guidelines, technical and other standards, business processes, technological constraints, licences, accreditation and information provision form what have been termed 'webs of influence' that can be regarded as the foundations of regulatory practice (Braithwaite and Drahos 2000:24; 550).

This paper is intended to provide a mild corrective to the hierarchical approach by suggesting that in practice, regulatory tools operate simultaneously upon regulatees, sometimes reinforcing each other, some more prominently and some more effectively and that enforcement is only one element of the larger regulatory process. Building upon Julia Black's expansive definition of regulation as (2008:139):

> … sustained and focused attempts to change the behavior of others in order to address a collective problem or attain an identified end or ends, usually through a combination of rules and norms and some means for their implementation and enforcement, which can be legal or non-legal

and Hood's post-legislative approach, this conception of the tools of regulation rejects the traditional regulatory/non-regulatory dichotomy that regards formal rules as 'regulation', and information campaigns, persuasion, self-regulation and quasi-

[1] I am not suggesting that this was Braithwaite and Ayres' intention and Braithwaite has written extensively on the many other forms of regulation.

regulation as 'non-regulation'. For government regulators, this is both challenging and exciting.

It is an approach that does not distinguish between 'regulation' and 'alternatives' to regulation, between 'heavy' and 'light touch' or 'light-handed' regulation, or between 'soft' and 'hard' regulation though it does take into account the differing regulatory burdens that may be imposed by the available tools and methods and, more broadly, the efficiency and effectiveness of those tools and methods.

Nor does it pivot on whether the state is directly involved or not. Rather the state's role in regulation is understood as a continuum. Its relationship to the private sector can vary widely in relation to such matters as the state's powers to make rules or delegate their creation, its powers to investigate, adjudicate and sanction behaviour, its ability to create offences, the requirements of accountability and the role of the courts in any regulatory regime (Priest 1997-98; Bartle and Vass 2005:28).

This more expansive approach to regulation views all behaviour as 'regulated', some of it intentional, some the by-product of normal human interactions in families, schools, religious institutions peer groups and work places. Utilizing the concept of regulatory space (Hancher and Moran 1989) it supports the view that government regulation is only one element of power or social control in a society and that power structures are complex, dynamic and fragmented (Black 2001). It accepts the view that while all governments regulate not all regulation is undertaken by government. The concept of regulatory space is a powerful conceptual and pedagogical concept (Hancher and Moran 1998; Scott 2001; Scott 2004:165).

Working from these premises the issue is therefore not *whether* there should be regulation, but rather *how* it should occur – how existing forms of regulation should be altered and what the appropriate role of government should be after it has decided its public policy direction. The preferred approach to changes in the nature of regulation is not to distinguish between 'regulation' and 'de-regulation', but to identify change as a process of 'regulatory reconfiguration', a term that better describes the on-going re-organisation of the various forms of regulation and the changing balances between state and non-state regulation, between 'command and control' mechanisms and other tools which require private sector involvement

(Gunningham 2005; Gunningham 2007; Eliadis et al 2005:9; Howe 2006; Braithwaite 2008:8; Bartle and Vass 2005).

THE TOOLS OF REGULATION

There is no generally accepted taxonomy of regulatory tools. While many classifications have been proffered, none is overwhelmingly persuasive. As with the search for a definition of 'regulation', the exercise is about fitness for purpose rather than establishing a definitive conceptual structure.

The concept of a 'tool' or 'instrument' of government action is a broad one. Salamon defines it as 'an identifiable method through which collective action is structured to address a public problem' (Salamon 2002:19). Gunningham and Grabosky (1998:37) state that 'instruments are the tools employed by institutions to do what they wish to do'. Landry and Varone (2005:107-8) suggest that 'a policy instrument, or a tool, is a means of intervention by which governments attempt to induce individuals and groups to make decisions and take actions compatible with public policies.'

Baldwin and Cave describe the different models as 'command and control', the deployment of wealth, harnessing markets, use of information, direct action and conferral of protected rights (Baldwin and Cave 1999:34). Van der Doelen is commendably succinct, describing three basic methods as carrots, sticks and sermons (cited in Salamon 2002:22). Gunningham and Grabosky (1998:37ff) divide regulatory methods into 'command and control', self-regulation, voluntarism, education and information, economic methods and markets. Parker and Braithwaite (2003:127-8) discuss enforced self-regulation, co-regulation, corporate compliance systems, incentive-based systems, harnessing markets, conferring private rights and liabilities, and relying on third party accreditation to standards. McConnell and Enmore focus on strategies of intervention: mandates, inducements, capacity building and system changing (cited in Salamon 2002:22) while Daintith (1994; 1997) distinguishes between 'imperium' (i.e. 'command and control') and 'dominium' (the employment of wealth). Morgan and Yeung classify regulatory instruments and techniques according to the underlying modality of control that is intended to influence

behaviour: command (legal rules), competition (economic instruments), communication (social norms, disclosure, advertising), consensus (cooperation, contracts, partnerships and self-regulation) and code (architecture, techno-regulation) (Morgan and Yeung 2007:9; 80 and Chapter 3). There are clearly many lenses though which to view regulation.

Classifying tools

Regulatory taxonomies usually involve the notion of the deployment of some form of resource. Hood's classification of the tools of government was based on the role of government and the type of resource used, for example: information, authority, 'treasure' and the organisational resources of government (Hood 1983).

Regulation is essentially about the use of power and the debates about the nature of regulation are similar to those about the nature of 'power' in political science discourse, 'social control' in sociological discourse and 'sanctions' in criminological discourse (Freiberg 1987). Power, like regulation, can be regarded as the ability of A to get B to do something that he or she would not otherwise do, or not do something he or she otherwise would (Freiberg 1987:226). A and B include groups, corporations and governments as well as individuals. Power is not the exclusive province of the state or a group. It is the ability to control resources, and a resource can be understood as anything of cultural significance in a particular society at a particular time (Freiberg 1987:227). The tools of governments are, in essence, things of cultural significance that can be concentrated or amassed and used to influence behaviour.

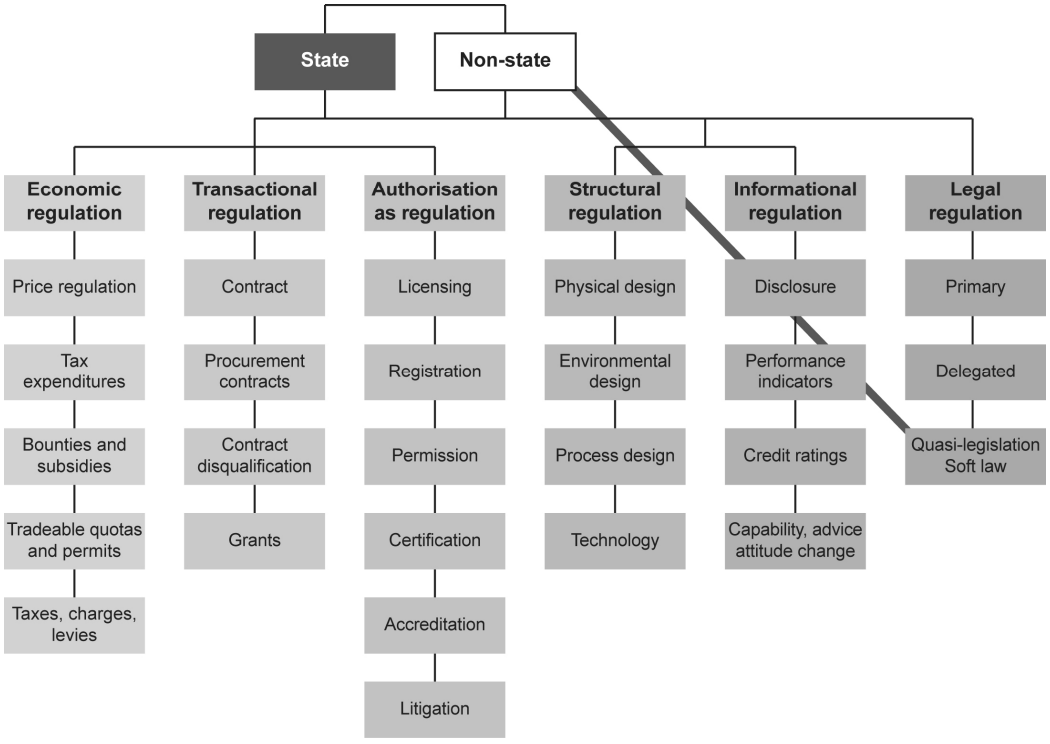
This paper argues that there are six broad forms of power, or tools, which can be employed by governments to produce behavioural change. Economic power, and therefore economic regulation, involves the manipulation of the production, allocation or use of material resources such as money or property, in all its forms. Transactional regulation is a variant of economic regulation where the *form* of the tool assumes great important. The exclusive power that governments have to confer benefits by authorizing or permitting certain forms of conduct is a major resource that can be deployed to direct or prohibit activities. Physical power, or structural regulation,

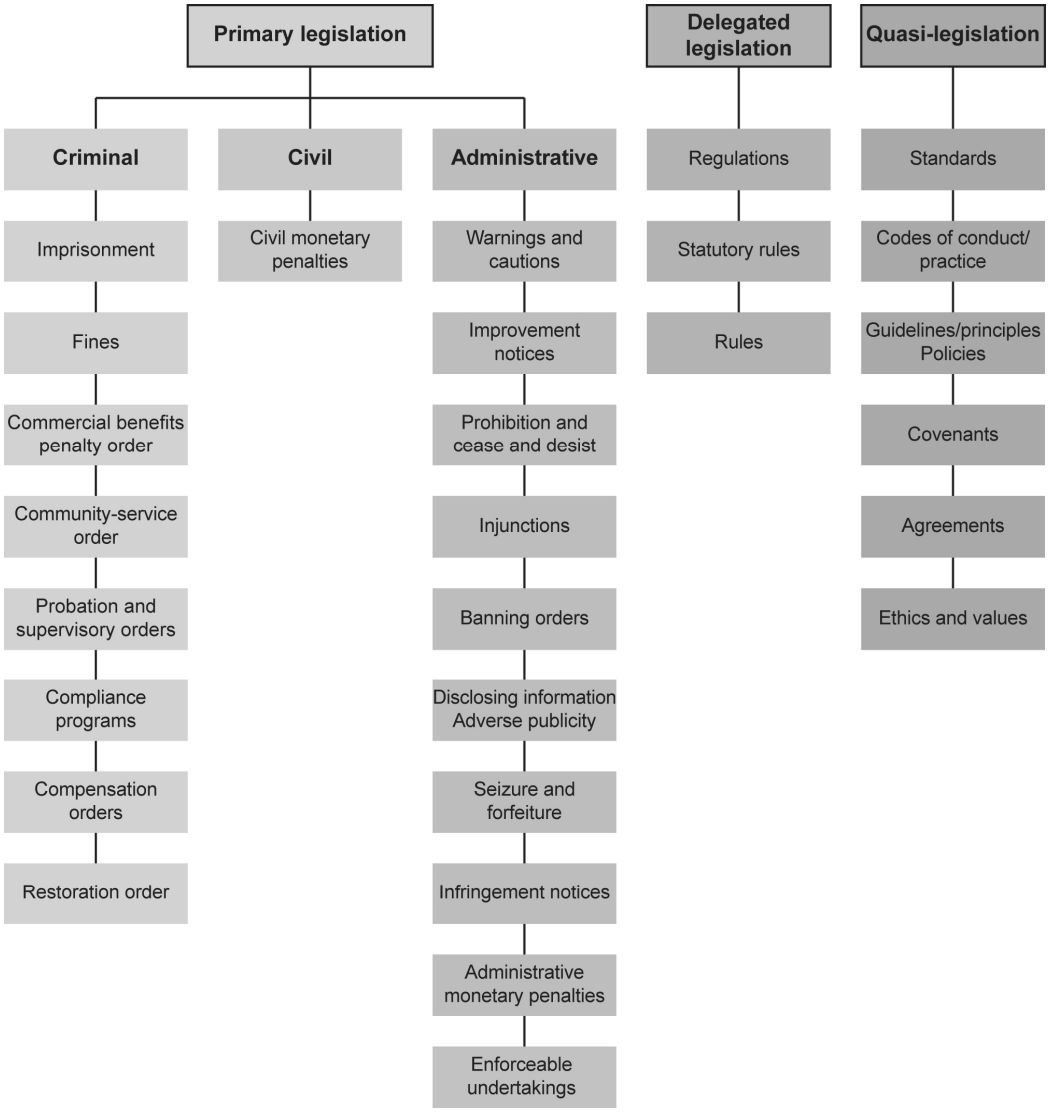
relates to the ability to manipulate the physical environment to influence action. Informational power relates to access to knowledge or beliefs. Legal power relates to the ability to invoke the mechanisms of the legal apparatus for the purpose of applying or not applying other resources (or tools) through a legitimated authority (Freiberg 1987:228).

This conception of the tools of government as being any resource of cultural significance that can be used by governments to influence behaviour is broader than an approach that regards government regulation as rules and sanctions. Under this approach, governments can be regarded as having many roles: as authorizors and facilitators, as economic actors, as trading partners and as information providers. In each of these capacities, governments can influence action and produce outcomes often more effectively than through rule-based mechanisms.

Figure 1 provides an overview of these six general categories of tools.

FIGURE 1: SIX CONCEPTUAL CATEGORES OF THE TOOLS OF GOVERNMENT





Caveats

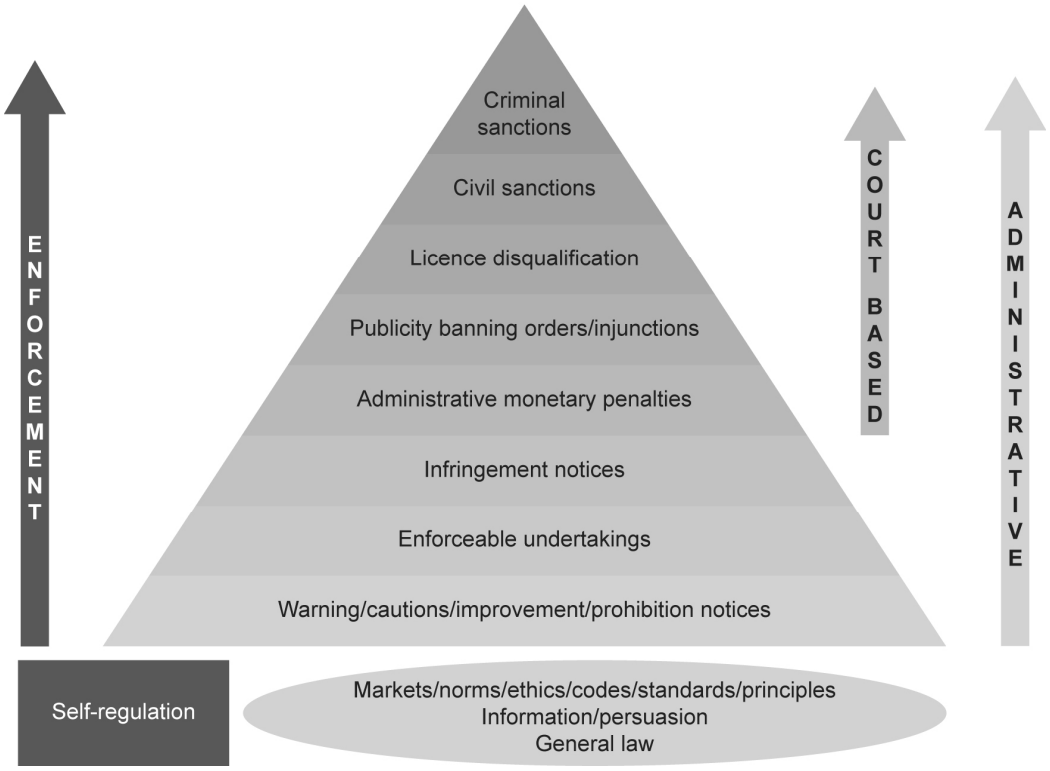
There are a number of caveats to this framework.

First, it is non-hierarchical. Though the pyramidal concept is a useful means of describing the dynamics of *enforcement* action and underpins the notion of responsive regulation, it does not fully capture the complexity of regulation as it operates when enforcement is not required, which for most people and organisations, will be the norm. Standards, codes, ethics, guidelines, agreements, covenants and disclosure

requirements constantly operate to affect behaviour. One conception of this 'pre-enforcement' or 'pre-education and encouragement' level of the pyramid might be to consider these mechanisms as the 'base' of the pyramid, separate from enforcement, but ultimately connected to it. However, a better view is that they can be better considered as creating a general field in the regulatory space in which a wide range of regulatory tools is used to produce a regulatory outcome, independent of enforcement.

Figure 2 based upon the Ayres and Braithwaite's responsive regulation model, highlights the importance of the non-enforcement elements of the pyramid.

FIGURE 2: RESPONSIVE REGULATION



The traditional pyramid, in all its forms, fails to capture the complexity of enforcement action: each rung on the pyramid may contain not one, but multiple tools. Braithwaite et al (2007:313-4) identify seven reasons why multiple regulatory interventions might be needed in some circumstances, though cautioning against a

regulatory 'smorgasbord' approach: (1) different causes will require different methods; (2) redundancy: some tools may fail, so it is useful to have others in place; (3) different tools may be needed to deal with different risks or hazards; (4) interacting tools may strengthen each other; (5) multiple tools may provide checks and balances against each other; (6) multiple tools can be layered hierarchically as well as horizontally; and (7) multiple tools can provide more nodes of regulation, thus making the pyramid broader as well as higher.

For the regulator, multiple interventions have the advantage of flexibility and greater effectiveness. They are also more likely to result in the imposition of sanctions that are more appropriate and proportionate to the wrongful conduct or harm done. Thus information is often used in conjunction with the introduction of new criminal sanctions, or changes to them. A prohibition notice will be accompanied by advice and guidance material; a criminal sanction may be used in combination with an administrative sanction: for example, a prison sentence or a fine together with a licence cancellation, suspension or disqualification. Alternatively, methods may operate sequentially: a licence may be needed before a person or organisation can qualify for a subsidy, quota or bounty (Hood 1983:66).

The enforcement pyramid is premised on the dyadic relationship between the regulator and regulatee, yet there may be circumstances when regulatory agencies fail to act; possibly due to a lack of resources, a lack of will or possibly because of too close a relationship with the regulatee. In such circumstances, informal tools, such as informational sanctions (adverse publicity), may be imposed by third parties such as NGOs or unions. Gunningham and Grabosky (1998) have proposed a multi-faceted pyramid that includes non-government agencies within the responsive regulation matrix (Scott 2004:159).

The responsive regulation model may not be suitable for all situations. In many cases it may be unrealistic or undesirable to start at the bottom and then escalate the response if the harm caused was very great. Some harms or offences warrant serious immediate responses, such as criminal sanctions: the response should not depend on any future actions by the offender (see also Baldwin and Black 2008:62-63)

The second caveat over the conceptual model is that the categories are not intended to be mutually exclusive. Real world tools are not comprised of single, pure elements and they may overlap. There is little purpose in attempting to exclude any form of duplication.

Thirdly, although 'legal regulation' has been presented as a separate category, it is recognised that law, in its variety of forms, plays an important role. As noted above, legal regulation relates to the ability to invoke the mechanisms of the state for the purpose of applying or not applying other resources (or tools) through a legitimated authority. In relation to economic regulation, for example, it creates the rules that constitute markets, establishes agencies that can set prices or the terms and conditions of trade, can authorise and impose taxes, levies, charges, bounties and subsidies and create markets where none previously existed (for example, a market for carbon emissions). In relation to governmental transactions with the private and NGO sector, for example, it can create binding rules that guide expenditures in the form of contracts or grants and can establish guidelines for their use. Law establishes or recognises many forms of authorisation: licences, certificates, permits, accreditation systems and registration mechanisms that in turn can allow or prohibit action. It can be delegated to many state and non-state agencies, and these delegations can be given and withdrawn. Law can influence how technology is used and how the physical environment is structured. Finally, and traditionally, law can provide the ultimate sanction when private systems fail. Law, in all these forms, can not only command and control but also shape and influence.

Fourthly, this taxonomy organises the *forms* of regulation in a different way. Under this taxonomy, self-regulation, co-regulation and meta-regulation are not treated as regulatory methods per se, but as mechanisms through which regulation occurs. They are regulatory techniques rather than pure forms of power, real world applications rather than a pure set of assumptions as to what causes regulation to work effectively. Thus in a self-regulatory environment, economic sanctions can be used as can informational sanctions.

Similarly, various forms of regulation such as prescriptive regulation, performance-based regulation and the like are also regarded as regulatory forms rather than substantive tools of regulation themselves. For example, a prescriptive rule may set

out precise requirements for action and the legal consequences that may follow if the rule is breached, such as a fine or imprisonment. Similarly, a performance-based form of regulation may set out the desired outcome and the sanctions for breach. They are therefore the means of expressing the desired outcomes, not the means of achieving them.

In the next section, the six conceptual categories of the tools of government are discussed in more detail.

ECONOMIC REGULATION[2]

Markets

'Markets' are physical or virtual spaces where buyers and sellers come together to engage in the exchange of goods and services. In each market, prices equate supply and demand so that the market 'clears'. When this occurs, there is no excess demand for or supply of the relevant goods and services, and the market reaches 'equilibrium'.

However, all real-world markets will deviate from these perfect conditions to some degree, and the extent of deviation is understood in terms of the extent of 'market failure'. Market failure can arise in the case of externalities (where there are 'missing markets' for positive and negative 'spillovers'), monopoly and oligopoly (where suppliers can exercise market power to restrict supply and increase prices), monopsony (where a single buyer has market power), imperfect and asymmetric information (where, for example, participants are differently informed about goods in the market, or where information is incomplete or costly) and public goods.

The existence of market failure is one of the principal rationales for government regulation. In the presence of market failure, governments may seek to intervene to create missing markets (such as markets in pollution), break-up or regulate

[2] Parts of section have been contributed by Stuart Kells.

monopolies (or punish collusion), improve information flows, or take over provision of public goods or essential services that otherwise would be under-provided.

The term 'economic regulation' has various meanings. It can mean providing, limiting or preventing access to a market, or 'ensuring competitive markets for goods and services and ... avoiding consumer and other harms when such markets are not feasible' (May 2002:157). It can involve intervention in a market that already exists, or the creation of a market that does not. It can also encompass 'altering the costs and benefits of certain actions, thereby influencing a change in the economic, social or environmental behaviour of individuals and firms' (Government of Victoria 2007:2-10).

Forms of economic regulation include taxes, subsidies and tradable permit schemes. Each of these can be used to promote as well as restrict or even prevent certain activities (Gunningham and Grabosky 1998; Cordes 2002:256). Economic regulatory instruments are particularly suitable when the activities to be encouraged or discouraged are 'price-sensitive' (Rider 2006:366) or susceptible to influence with financial incentives.

There are two main categories of economic regulation. In the first category ('making markets'), governments are responsible for creating markets as a tool of regulation and policy. Into this category fall tools such as auctions. Auctions are used by governments to create markets and thereby harness the competitive and informational benefits that markets can offer. Infrastructure tenders, auctions of lottery licenses, auctions of logging rights and auctions of used government assets are common around the world.

Tradable permit schemes are one of the most common manifestations of market-making by governments. In tradable permit schemes, governments grant transferable property rights to permit holders. These rights can be bought and sold. The rights might be to use a specified material or resource, to produce a particular output, or to engage in a certain activity.

In the second category ('influencing markets'), governments seek to influence markets that already exist by changing prices or altering supply or demand. In cases of monopoly, a government can regulate the prices charged by the monopoly. In most of

these areas of monopoly independent bodies have been established to determine prices and to regulate service quality and other standards. Where monopoly arises from unnecessary barriers to entry into a market or from the conduct of firms in the market governments can remove the barriers to entry and establish laws to prohibit, detect and punish collusion and other anti-competitive conduct.

Taxes, charges and levies can be used to influence the behaviour of individuals, organisations and firms by increasing or decreasing their costs. Corrective taxes are placed on alcohol, tobacco, petrol unhealthy foods, industrial or other activities that at any time are deemed to be undesirable or objectionable, but not to the extent that they are deemed to be illegal. Levies are placed on containers or parking places to discourage their use. Congestion charging is a mechanism that uses variable pricing to affect behaviour.

Tax expenditures are provisions in tax laws that encourage 'certain behaviour by individuals or corporations by deferring, reducing or eliminating their tax obligation' (Howard 2002:411). They may be directed at classes of taxpayers or specified activities through tax deductions, exemptions, credits, deferrals, tax holidays or preferential rates (Barkoczy et al 2006:28). They are an alternative method to direct government expenditure to produce a regulatory outcome. Using this mechanism, governments forgo income rather than redirect it. In pricing terms, the market for goods and services is 'corrected' by the tax incentive by reducing the cost/price of the activity that consequently increases the demand for it (Rider 2006:368; Daintith 1997:65).

Bounties and subsidies are a government fiscal instrument whereby payments are made in exchange for a form of activity, whether it be increased production of goods, the destruction of vermin or the capture of criminals.

TRANSACTIONAL REGULATION

Governments may regulate through direct commercial transactions with regulatees using the immense economic resources at their disposal. Transactional regulation is a

variant of economic regulation that has come to prominence over recent decades following the privatisation or contractualisation of commercial activities consequent upon the privatisation or out-sourcing of government services. It is often referred to as regulation by contract.

'Transactional regulation' refers to regulation that occurs through the direct interaction between parties via a contract, grant agreement or other financial arrangement under which the parties have a right to enter into the arrangement or negotiate its terms. Transactional regulation does not require direct legislative authority and rests primarily on the general concepts of contract law.

There are two dimensions to this form of regulation. The first is the delivery of what may be termed the primary regulatory outcome, for example the construction of a road, a bridge or the provision of a health or educational service. Government may deliver those products or services itself or it may arrange for their delivery by other parties through contractual or other arrangements such as grants. The second regulatory dimension, however, relates to the pursuit of regulatory outcomes that are extraneous to the primary purpose of the contract or grant but considered to be in the public interest (Seddon 2009:44). This extraneous or ulterior purpose has been described as the incorporation into a government contract of:

> terms and allocation procedures, clauses and requirements reflecting public interests which by their breadth and importance pass far beyond the mutual objectives of the contracting parties and which might be promoted by statutory regulation (Daintith 1979:41-2).

The public interests or objectives may include payment of minimum wages, workers compensation, insurance, affirmative action, child protection, training, probity, quality assessment regimes, environmental controls, sustainability, occupational health and safety, the organisation of industrial relations and the public acknowledgment of the sources of funding (Baldwin et al 1998:26; Keating 2005:17).

Procurement contracts

Governments are amongst the largest purchasers of goods and services either for themselves or for third parties. It is estimated that the Australian federal government

spends over $29 billion per year on procuring goods and services (Emerson 2008) and governments have formalised this power through their procurement policies.

The Commonwealth government's guideline on *Complying with Legislation and Government Policy in Procurement* provide an excellent example of the 'interacting policies' that can influence government contracts. These include matters such as Accountability, Construction, e-Government, Environmental, Financial Considerations, Industrial Relations, International, Land Acquisition, Legal, Outsourcing, Privacy, Security, Small and Medium Enterprises (SMEs), Social and Whole of Government Arrangements and Workplace Relations. Thus construction contracts may require adherence to the Australian Government Implementation Guidelines for the *National Code of Practice for the Construction Industry*.

The ability to contract includes power to decide with whom not to contract. Non-contracting can be used as a regulatory tool. Parties who have breached previous contracts, or who indicate that they are unwilling to abide by the terms of the proposed contract can be excluded from consideration, as may those who might have previous criminal convictions, who have been bankrupt or found guilty of professional misconduct.

Grants

Grants are payments from a donor (government) to a recipient individual or organisation with the aim of stimulating or supporting a service or activity (Beam and Conlan 2002:341). It has been in estimated that in Australia, federal government discretionary grants alone totaled over $4.5 billion in 2007, having risen from $494 million in 2003 and from 7,459 grants to 49,060 grants in the same period (Kelly 2008:10; Grant 2008:34).

Grants are designed to bring about policy outcome such as the delivery of the service or activity. They may take the form of inter-government transfers and be conditional or unconditional, competitive or non-competitive (Kelly 2008:46). They can vary from capital works grants, project-based grants, recurrent funding grants or service agreement grants (State Services Authority 2007:59).

The agreements that embody the granting relationship will normally contain core conditions that pertain to the recipients' accountability for the funds, such as those that require financial reports, service performance and other data, compliance with service standards and client data (State Services Authority 2007:52). These are required so that the funding agency's can meet its own reporting and accountability obligations.

However, like contracts, grants can be used as indirect tools of government in relation to the extraneous requirements which may relate to issues such as the environment, discrimination, organisational or corporate governance, minimum wages, drug use and, particularly in the research area, in relation to ethical standards and procedures.

Government to government grants are possibly one of the most significant forms of regulatory activity that employ direct economic power of the state. In federal polities such as Australia and the United States there are constitutional advantages in using grants. Although the federal constitution limits the powers of the central government, that power has been extended through the grants power (s 96 of the *Constitution*), whose conditions may not be constrained by overt constitutional powers or prohibitions. State governments deliver many services through grants to non-government organisations.

AUTHORISATION AS REGULATION

One of the oldest and most pervasive forms of government regulation is that which relies on the power of the state to authorise, permit, allow, recognise or legitimate a particular activity, status or premises. Balwin and Cave refer to this tool as the conferral of protected rights (Baldwin and Cave 1999:34).

Authorisation mechanisms are essentially 'tokens of trust' issued by governments and other bodies that enable people to go about their daily lives without the need to independently verify the qualifications of every professional they deal with, or the safety of every item they consume, or every instrument that they use. They are primarily means of addressing information asymmetries but have a number of other

regulatory purposes as well. Authorisation is a major activity of government. In Australia, there are hundreds of government departments, agencies, councils and other bodies that issue or enforce licences and permits and register people, places and activities.

Licensing

Licensing is one of the basic resources of government long used to provide access to markets on terms and conditions. A licence permits a person or organisation to compete in a market provided that the person or organisation has obtained permission which will be conditional (Baldwin & Cave1999:58; Kleiner 2005:40). Its essential feature 'is the creation of a specific relationship between the regulator and the licence holder so that the holder's conduct is restrained not only by rules of general application but by the conditions of the licence itself' (ALRC 2002:121). The conditions will often relate to a requirement of competence to undertake the activity (Friedman 1962:145).

There are various forms of licences: occupational, business or activity. They are multi-purpose (Smith & Ward 2005). They can be used to ensure probity, protect consumers, minimise or prevent harm, enhance markets and promote urban order and civility. Their elements and structures vary, but the essence of the schemes is that they require a regulatory body, some form of notification or prior approval, specification of standards and attachment of conditions, again of almost unlimited variety and enforcement mechanisms. These mechanisms may include cancellation, suspension, disqualification, variation of conditions and the imposition of criminal sanctions for breach or failure to obtain a licence. The regulatory structures vary widely and range from industry specific bodies, to government departments and independent statutory bodies (Smith & Ward 2005).

Negative licensing is a system that requires no licence or permit to enter a market, but any serious breaches of standards may result in sanctions (Rimmer 2005:122) It is designed to ensure that individuals or organisations who have demonstrated that they are incompetent or irresponsible are precluded from operating in an industry (VCEC 2009; Braithwaite 2009).

Permission

A permit is a document that permits or authorises an activity usually on a more limited temporal basis than a licence. Like licences, permits may be subject to conditions that relate to the object of the permit: time, space, rate, quantity, method of operation. Permits, or the conditions thereunder, may be varied, revoked or cancelled.

Registration

Registration has been defined as 'an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities' (Friedman 1962:144; Priest 1997-98:253). Usually there is a fee attached to the registration. In theory an individual can still engage in the activity even if not registered. Registration is primarily aimed at addressing problems of information asymmetry and is, in reality, difficult to disentangle from the idea of licensing.

Certification

Certification is a system of formal or authoritative recognition that persons or organisations have attained certain qualifications, met specified standards, or adopted certain processes. Certification may be provided by state or non-state agencies or bodies. A non-certified person or organisation may still undertake an activity or practice.

Accreditation

Accreditation can be defined as the 'formal expression by a private [or public] body of an authoritative opinion concerning the acceptability, under objective quality standards fairly applied, of the services rendered by a particular institutional provider (adapted from Havighurst 1994:2). Accreditation is aimed at assuring consumers that the person or organisation accredited is competent and has the capacity to manage the function so accredited. Other purposes of accreditation may be to uphold standards and maintain public confidence in particular activities.

Accreditation schemes may cover such matters as the qualifications, skills, knowledge and experience required, a code of conduct for accreditation holders, requirements for

professional development and other relevant matters. In relation to organisations such as schools, they may cover administrative and governance arrangements, financial viability, educational programs, resources and improvement processes.

Litigation as regulation

Governments create or authorise legal systems to facilitate and order the resolution of disputes, not just between the state and individuals or corporations, but also between private individuals and corporations. Private litigation is not ordinarily regarded as a regulatory tool, but it can have regulatory outcomes, some of which are intended by the state.

Like direct government regulation through statute, litigation can arise from market failure where harm has been inflicted on a party. Where governments fail to act, or act inadequately, private litigation may play a role in filling regulatory gaps. This has occurred in recent years particularly in relation to harms caused by tobacco, alcohol, firearms, asbestos, pharmaceutical drugs, therapeutic goods such as breast implants and professional misconduct (Smith 2002). In such cases the aim of the litigation moves beyond the compensatory to the punitive or deterrent or, more broadly the regulatory – to change behaviour. It may be regarded as a form of devolution of enforcement from the public to the private sector. Class actions are a hybrid of public and private action and purposes.

STRUCTURAL REGULATION

'Structural regulation' refers to tools or mechanisms that are designed to produce regulatory outcomes by removing or limiting choice and structuring behaviour in such a way 'that regulatees have no choice at all but to act in accordance with the desired regulatory pattern' (Brownsword, cited in Morgan and Yeung 2007:103). This form of regulation does not require, as between the regulator and regulatees, a normative consensus, nor shared values, nor information provision, nor moral discipline nor enforcement. Rather, it requires structuring the physical or technological environment in which regulatees operate. From a governmental viewpoint, the state can be regarded as providing not only the legal framework but also the physical environment in which human activity takes place.

Physical design

In its most basic form physical design may be as simple as creating spaces that limit a person's movement (eg a prison) or forfeiting or impounding dangerous goods to prevent their use. It can also take the form of 'target hardening' which denies access to crime targets such as cash, drugs and property by creating physical barriers such as screens, locks, alarms, fences and gates (Crowe 2000:35) or reinforcing cockpit doors in airplanes.

Engineering an environment in a manner that will reduce harm is a strategy used in road safety where very high volume activity means that harm is inevitable. Physical design in this context is evident in attempts to separate vehicles by the construction of overpasses and highway dividers, and in the installation of roundabouts at intersections, roadside hazard removal, frangible poles, shoulder sealing, edge-lining and audible edge-lining, road delineation and the separation of vehicles and pedestrians in areas such as pedestrian malls (Friedland et al 1990; Australasian College of Road Safety 2009:5). To prevent certain forms of unsafe driving, speed governors can be installed and alcohol interlock devices can be fitted to prevent intoxicated people from driving.

Situational crime prevention looks at crime from the point of view of a potential offender and focuses on reducing the opportunities for crime, including physical opportunities, and so includes such techniques as target hardening or concealment, limiting access to facilities and controlling access to the tools of crime (for example spray paint for graffitists, selling beer in plastic rather than glass containers) (Sutton et al 2008:53-5).

Physical well-being can also be improved by, for example, adding fluoride to water supplies to prevent dental decay or folic acid to bread to prevent spina bifida. In the occupational health and safety area physical design can take many forms, from the elimination of the causes of danger, to substituting more hazardous machines or practices with less hazardous ones, isolating the person from the risk or ensuring that the risk and the person cannot coincide (Western Australia 2009).

Environmental design

The notion that the built environment can influence the way that people behave is a central tenet of architecture and of urban design and planning. Whereas physical design restricts or shapes movement through tangible objects or properties, environmental design seeks alter behaviour by altering attitudes.

The design of buildings, streets, open areas and parks, placement of traffic lights, placement of transport stops can affect whether people will travel a particular path and the amount of traffic on that path. Crime prevention, or deterrence, though environmental design is based on the idea that 'the physical environment can be manipulated to produce behavioral effects that will reduce the incidence and fear of crime, thereby improving the quality of life' (Crowe 2000:34-5; Newman 1972).

Process design

Regulation through process design is an approach that seeks to influence behaviour, or eliminate or reduce non-compliance by systematically structuring the activities or tasks of people involved in that activity or business to ensure that the regulatory outcome is achieved.

One mechanism that has been utilised to reduce tax evasion is that of pay-as-you earn or pay-as-you go arrangement and withholding taxes (Braithwaite 2008:24). Withholding arrangements have been developed over the past six decades or so to replace taxation arrangements that allowed taxpayers to pay their annual taxes in a lump sum.

Business process design can also be used in relation to the compliance requirements of various authorities. Management processes, quality management systems and standards, such as ISO 9000, provide guides to organisations on how to effectively run their systems and deal with such matters as document and record control, audits and on-going development.

Compliance mechanisms can also take the form of computer programs that can perform various forms of checks against regulatory requirements or produce audit

reports. Most of these programs are designed to detect and report on non-compliance rather than prevent it, but they can operate to obviate errors.

Technology

Structural regulation can also operate in the realms of information technology or bio-technology so that systems can be designed to prevent certain forms of behaviours and activities. On the internet, protecting children (and adults) from accessing harmful or undesirable content has been attempted by the development of filtering technologies that block or limit access to certain content (Price and Verhulst 2005:76). These can be applied at the local (individual computer) level, at the service provider level, or at the content producer level. Screening may involve filtering for words, phrases, images, sites or domain names. Other mechanisms to prevent access to restricted material include user identification (for example, in relation to age) currently employed by commercial pornography providers (Price and Verhulst 2005:102).

The advent of digital television has enhanced the ability of producers and end uses to prevent access to undesirable material by encoding programs or content which then enables decisions to be made as to the appropriate levels of access (Price and Verhulst 2005:87).

INFORMATIONAL REGULATION

Information asymmetries have been identified as one of the reasons that governments may wish to regulate. Information is a resource that is used widely as a regulatory tool by governments (Hood 1983:21; Daintith 1979:40). It can be targeted at individuals or broadcast more generally. One of the main purposes of providing information is to correct the information asymmetries (allowing the recipient to make an informed choice), but other purposes include persuasion or attitude change, capability development and norm formation or modification.

Professional regulation in the form of licensing, registration, accreditation or certification is one means of addressing information asymmetries

Disclosure

Information asymmetries can be redressed through legislation that requires information to be disclosed in order to allow consumers and others to make informed choices about the risk they wish to assume. These laws do not prohibit the product, but are intended to provide a consumer with information about its advantages and disadvantages and particular characteristics (VCEC 2009). They attempt to influence behaviour without forbidding it. This can be done in two ways. Consumers may alter their behaviour because of the additional information or the manufactures may alter their products to make them less hazardous (Weiss 2002:242).

Examples of these kinds of provisions include: prospectus requirements; ratings systems in relation to broadcasting; disclosure statements about franchises or leases; continuous disclosure under company laws; product certification; ingredient labeling; date stamping; disclosure of interest rates; fuel or water or energy consumption; pricing; truth in lending; health warning labels; hazardous material disclosure; community 'right to know' laws; death rates or waiting lists for hospitals; and sustainability disclosures.

Performance indicators

Information in the form of performance indicators or 'report cards' can provide public information about the performance of regulatees to the outside world, as well as a feedback mechanism for those whose performance is being monitored (Braithwaite, Healy and Dwan 2005:22; Gormley and Weimer 1999; Braithwaite et al 2007: Chapter 8). Public information allows consumers to make informed choices that will then shape the market (Braithwaite, Healy and Dwan 2005:22 Morgan and Yeung 2007:100-102).

The provision of information about performance or compliance behaviour can be regarded as a strategy to inform consumers and improve standards – most often in universities, schools, child and health care, telecommunications and essential services. Performance indicators may also be used in relation to the performance of public bodies where those bodies are required to report to a Minister or in some public forum.

Capability, advice and attitude change

Informational regulation can be used to persuade or bring about attitude change, to develop capability and create or modify norms. Information campaigns are frequently used tools either alone or in conjunction with other regulatory techniques and are based on the premise that unwanted behaviours may be the result of a lack of knowledge about the dangers or benefits of a particular activity.

Advice, education and training can be used to provide information about the existence of regulatory regimes and their operation, about the appropriate behaviours, procedures or outcomes desired and about the social purposes behind the particular regulatory regime. Information programs can take the form of advertising, training programs, broad or targeted information campaigns, websites, newsletters, brochures, media releases, email lists, forums, class-room materials, fact sheets, legislative summaries, technical assistance, help lines, counseling, dissemination of research findings and the like.

LEGAL REGULATION

Law, rules and regulation

It is evident that regulation is far more than law, but law is a major form of regulation because it is a system of rules backed by sanctions. A rule is a 'general norm mandating or guiding conduct or action in a given type of situation' (Twining and Miers 1991:131; Baldwin 1997:7). A legal rule is a rule that has attached to it a legal consequence or sanction. Law is primarily rule based, but not all rules are of the 'command and control' type, that is, rules backed by sanctions. The use of rules themselves as regulatory tools is problematic (Black 2002; Parker and Braithwaite 2003:121). Rules can be broad or precise, under- or over-inclusive and require interpretation (Black 1997:6). Rules often specify minimum standards and are poor vehicles for promoting excellence or continuous improvement (Parker and Braithwaite 2003:121).

TYPES OF LEGISLATION

Good regulatory design requires an understanding of the best type of law to apply in any particular situation. Primary legislation or Acts of Parliament, and delegated legislation or subordinate legislation are well-understood forms of law but it is in the growing area of 'soft law' where most recent regulatory innovations have occurred.

'Soft law' and quasi-legislation

At the borderline between the public and private, between law and non-law and between self-, co- and government regulation lies a range of rules, instruments, rulings, guidelines, codes and standards which occupies a very large part of the regulatory terrain as is it experienced by most regulatees.

Quasi-legislation has been defined as including 'a wide range of rules or arrangements where governments influence businesses and individuals to comply, but which do not form part of explicit government regulation' (Australian Government 2007:xiii). There is no agreed definition of 'soft law', but it is generally take to mean rules, or instruments that have no legally binding force but which are intended to influence conduct. It is produced by non-state actors and where it is only enforced by non-state actors it is truly 'soft', but where it can also be enforced by the state, under co-regulatory systems, its legal status becomes uncertain.

'Soft law' may take the form of regulatory guides, rules or codes of conduct standards, frameworks, resolutions, directives, ministerial directions, circulars, charters, manuals, rulings (private or public), declarations of policy and practice, management plans, orders, advisory notes, compliance codes, enforcement polices, practice notes, interpretative guides or decisions, service charters, procedural rules, instructions, memoranda of understanding, and evidentiary rules (ALRC 2002:244; Creyke and McMillan 2008:379-380).

A significant part of the ambiguity of 'soft law' can be attributed to the vagueness of its legal status. Codes of practice or conduct, or standards may acquire legal force by being referred to, or incorporated in, primary legislation, or, more commonly, in regulations. Such legislation may formally delegate power to an industry to create and enforce a code, or give the industry the power to order compliance with a code. Or it

may require an industry to have a code or prescribe a code for all members of an industry or provide governmental sanctions for those who fail to comply with a code (Keating 2005: 7; Australia, DIST 1998:22-24). Conformity with standards can also be a condition of licensure, accreditation or membership. The creation of codes or standards may be solely the province of the private sector or may have various degrees of public sector involvement.

Standards

Standards are norms or criteria that are provided in order to clearly specify what is acceptable and what is unacceptable practice. They have been described as 'regulatory requirements or private agreements between market participants that determine specific (technical) aspects of a good or service with the aim of reducing the diversity of its (technical) forms (Weber 2002:119).

There are various forms of standards: design standards, compatibility standards, performance standards, process standards and industry standards. Around one-third of Australian Standards have been incorporated into State, Territory or Commonwealth law and they can be given legal force in a variety of ways, including being a condition of a licence or accreditation, being the basis of a criminal or civil offence or being regarded as a sign of conformity with a principle under an Act.

Codes of conduct or practice

Codes of Conduct or Practice are published documents that set out commonly agreed sets of guidelines that inform all parties of responsibilities and expectations under the code. They are regulatory in the sense that they are intended to influence or control behaviour (Webb 2004:11). Codes can be voluntary, mandatory or industry-based.

Codes are regarded as good regulatory tools because they are flexible, speedy, encouraging of best practice, relatively cheap for governments, more customer focused and more likely to achieve compliance than, for example, primary legislation, principally because they are developed by those who are subject to them (Keating 2005:13). They can be given legal force by making non-compliance an offence, by legislative reference, by making compliance a condition of licensing or involvement in government contracts and in other ways.

Guidelines, principles and policies

There are many kinds of non-statutory guidelines, including guides, charters, manuals, policy statements and formal declarations of policy, practice notes, policies, principles and interpretative decisions (ALRC 2002:244). Guidelines may acquire legal force where they have direct statutory authorisation (Creyke and McMillan 2008:394).

Covenants

A covenant a formal, voluntary agreement entered into between a regulator and a company, organisation, supply chain, industry association or sector or other group to achieve a regulatory outcome.

Ethics and values

The Oxford English Dictionary defines ethics as 'the moral principles governing or influencing conduct'. Ethics are often not regarded as 'regulation' because they are not mandated by governments. However, if regulation is about 'influencing conduct', ethics, or ethical rules or codes are clearly regulatory. Individual ethical beliefs will affect a person's conduct or attitude to other regulatory forms and may require conduct that goes beyond the standards set by formal rules (Creyke and McMillan 2008:385).

Some ethical codes are co-regulatory because they are recognised and enforced by law. For example, the Australian Public Service (APS) has a statement of Values and a Code of Conduct which are set out in the *Public Service Act* 1999 (Cth), ss. 10 and 13). The APS Code of Conduct requires employees to behave honestly and with integrity, act with care and diligence, treat people with respect and courtesy, maintain confidentiality, avoid conflicts of interest and not abuse their powers (s.13). Under Commonwealth law, a failure to observe the APS values may amount to a breach of the Code of Conduct which may be sanctioned under the Act by termination of employment, reduction in salary, reprimand and by other means.

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LEGAL SANCTIONS

Sanctions are generally understood as forms of punishment imposed following a breach of a law. They are means of enforcing the law in order to ensure that the purposes of the law are achieved.

Enforcement is the taking of some coercive action when voluntary means have failed. Enforcement has its place in the compliance armory, but increasingly the evidence is that its part is overestimated. No compliance system can operate without serious sanctions, criminal or civil, but no compliance system can rely on them solely. As Ayres and Braithwaite have written: 'To reject punitive regulation is naïve; to be totally committed to it is to lead a charge of the light brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion' (Ayres and Braithwaite 1992: 25).

Determination of the form of law to adopt (primary, delegated or quasi-legislation) still leaves open the question of the type of law that a regulator should use in seeking compliance (namely, criminal, civil or administrative) as well as the types of sanctions that should be made available.

Criminal sanctions

Criminal sanctions can take the form of imprisonment, fines and various forms of supervised or unsupervised orders such as probation. Their main purposes are punishment, deterrence (both specific and general), denunciation, rehabilitation and incapacitation and protection of the community. The criminal law's primary use is as a sanction in its own right directly prohibiting conduct: the quintessential command and control model. However it also operates as a sanction of last resort, when all other sanctions fail, representing the sharp and narrow end of the regulatory pyramid - as a means of ensuring the functioning of other sanctions such as licences.

Imprisonment

Imprisonment is the most serious of the criminal sanctions and is the sanction that is commonly regarded as the one that ultimately distinguishes the criminal from the civil law. No matter how high a fine or civil penalty, it is the gaol term that is considered to be the most stigmatic and the greatest deterrent.

Fines

A fine is a monetary penalty ordered by a court as punishment following a finding of guilt in relation to a criminal offence (Fox and Freiberg 1999). It is the most frequently applied criminal sanction in the criminal courts and is predominantly used by courts of summary jurisdiction in relation to a wide range of offences.

Commercial benefits penalty order

A commercial benefits penalty order is an order which permits a court to order the person found guilty of an offence to pay, as a fine, an amount not exceeding a specified multiple estimated by the court to be the gross benefit gained by the person through the commission of the offence. It is intended to operate as a deterrent by removing any financial advantages to offending.

Probation and other supervisory orders

A probation order is a court order that requires the person found guilty of an offence to be placed under the supervision of a specified person or the court, and to agree to, and meet, specified conditions.

Special forms of probationary orders or 'corporate rehabilitation orders' (Macrory 2006:78) have been created to deal with cases in the regulatory context. Under the *Trade Practices Act* 1974 (Cth), s.86C a probation order of no more than 3 years can be made by a court, the purpose of which is to ensure that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order. Depending upon the legislative scheme, such an order may be imposed in addition to, or instead of a penalty.

Compliance programs

One form of probation order is that which empowers a court to require a person to establish a 'compliance program' for employees or other persons involved in a business. The purpose of a compliance program is to ensure that such persons are aware of their responsibilities and obligations in respect of the contravening conduct. In addition a court may order the person to establish an education and training program for employees or direct the person to revise the internal operations of the business that led to the contravening conduct (Fisse 1989; Parker 1999; Parker and Lehmann Nielsen 2006).

Compensation orders

A compensation order is an order made by a court that a person who has been found guilty of an offence or contravention that has resulted in an injury to a person or damage to property must pay compensation for the loss arising from the injury or damage.

Compensation orders can be used reimburse the State for the harm caused by the offending behaviour, for example, the damage to the road system caused by overloaded vehicles

Restoration orders

A restoration order is an order that requires an offender to remedy any matter caused by a contravention that it is within an offender's power to remedy. It may include actions to prevent, control or mitigate the harm, make good any damage or to prevent the continuance or recurrence of the contravention.

Civil sanctions

Civil penalties are sanctions that are imposed by courts in non-criminal proceedings, following action taken by a government agency (Gillooly and Wallace-Bruce 1994: 269; ALRC 2002:21). They are mainly used in the areas of trade practices, corporations and customs law but are increasingly used in other fields. They are primarily monetary sanctions and their main purposes are punitive and deterrent, rather than compensatory. In most respects they resemble fines but a criminal

conviction is not recorded. The maximum civil penalties that may be imposed can be very high, relative to criminal fines, for example $10 million under the *Trade Practices Act* 1974 (Cth), s.76 and 76E for each offence for a corporation; $10 million under the *Telecommunications Act* 1997 (Cth), s 570(1)(3)(a).

Civil proceedings differ from criminal proceedings in that the standard of proof is the balance of probabilities and the privilege against self-incrimination is attenuated (ALRC 2002: Chapters 2 & 25).

Administrative sanctions

Administrative penalties and actions fall into four broad categories, which are not necessarily mutually exclusive. All, however, require statutory authority. An administrative action is an authorised act or order requiring another person to perform some act, but not necessarily as a punishment or for deterrent purposes. There are various forms of administrative sanctions that can be imposed at various stages of the legal process and at various times:

1. following a breach or contravention that requires a court or tribunal order;
2. following a breach or contravention that does not involve court or tribunal action;
3. not following a breach or contravention, but where a regulatory agency or officer may take action;
4. following a breach but imposed by force of law: these sanctions are automatic and non-discretionary.

Warnings and cautions

A warning is a statement or notice that a person should desist from conduct that may amount to a breach of the law or a code of conduct, or, if the law or code has already been breached, that such may result in legal proceedings or further action. Warnings may be oral or written, formal or informal.

Banning or prohibition orders

A banning order is a restriction placed on an individual disqualifying him or her from either holding a particular position or engaging in particular activities (ALRC 2002:21). Banning orders are commonly used in the corporate and financial sectors.

Banning orders can also be made in relation to the provision of goods and services and may be made on an interim, fixed-term or permanent basis

A prohibition order is a court order that prohibits a systematic or persistent offender from participating in an industry or having a specified role or responsibility in an industry for a specified period of time.

Injunctions

An injunction is a court order to prevent future breaches of the law or continuing criminal activity by restraining a person from contravening an Act. An injunction may be issued by a court prior to or following a conviction for an offence or contravention. An interim injunction can be made by a court to stop conduct that threatens harm where the full extent of the potential damage is unclear (Peel 2005:139). Restraining orders and intervention orders are similar forms of sanctions aimed at preventing future harm.

Orders to disclose information or publish advertisements

These are court orders requiring the contravening party to disclose to the public, to a person or a particular class of persons specified information or to publish, at the person's own expense, in the manner and at times specified in the order, advertisements whose terms are specified in, or are to be determined in accordance with, the order.

Adverse publicity orders are intended to remedy an information asymmetry. They are generally regarded as 'non-punitive' and are primarily aimed at protecting the public interest by dispelling an incorrect or false impression that has been created as a result of misleading or deceptive conduct. They are also intended to alert consumers to the fact of the misleading or deceptive conduct and informing them that they might have some remedy if they relied upon any of the misleading or deceptive conduct and finally, they are regarded as aiding the enforcement of the primary orders and the prevention of repetition of the contravening conduct by adversely affecting the offender's reputation.

Improvement notices

An improvement notice is a notice issued by an authorised officer requiring a person to remedy a contravention or likely contravention (of an Act or regulation) within a specified period.

Seizure, forfeiture and destruction

Where there are health or safety concerns about a particular item, authorities are empowered to seize the item, which may be retained, for the purposes of evidence or to prevent a risk to the community or to prevent the commission of an offence. Such items may be destroyed, forfeited automatically or following a conviction of an offence or a contravention of a civil penalty provision (Fox and Freiberg 1999:476).

Infringement or penalty notices

An infringement penalty is a form of administrative monetary penalty. It involves the payment of a monetary penalty to forestall prosecution for an alleged summary offence. The payment of the penalty 'expiates' the wrong-doing and no conviction is recorded (Fox and Freiberg 1999). It 'is a notice authorised by statute setting out particulars of an alleged offence. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or electing to have the matter dealt with by a court' (ALRC 2002:426).

The aim of the infringement penalty is to provide an expeditious method of dealing with minor offences while saving the offender and the court time. They are relatively unstigmatic, efficient and can produce revenue to the agency or government that issues them.

Enforceable undertakings

An enforceable undertaking is a promise enforceable in a court (ALRC 2000:98). The undertaking is given to the regulatory authority, not to the court. However, a breach of the undertaking may be taken to a court for enforcement and failure to comply with a court order will amount to a contempt of court.

An undertaking may also be attended by specific statutory powers given to a court such as the power to direct a person to comply with the term of the undertaking, to make an order to pay an amount not exceeding the financial penalty obtained by the

person who gave the undertaking, to award compensation, suspend or revoke a licence, prevent, control or mitigate harm or make good any harm. Usually it will be a requirement that an undertaking must be connected to a matter in relation to which the regulator has a power or function under its legislation.

In the absence of specific statutory powers, enforceable undertakings may include conditions such as:

- Publishing an apology
- Setting up an internal compliance plan and being required to report periodically to the regulator;
- Remedying deficiencies in an organisation's structure, systems or processes by taking certain specified action;
- Performing community service such as
    - Conducting, facilitating or funding research;
    - Providing education and training in relation to the prevention of the contravening activity;
- Compensating victims and/or their families;
- Engaging independent third parties to audit the organisation's management systems;
- Acknowledging that the undertaking can be made public and used in publicity.

IMPLICATIONS

When Hancher and Moran articulated the concept of 'regulatory space' in the late 1980s (Hancher and Moran 1989) and Braithwaite and Drahos developed the idea of 'webs of influence' in the context of regulation (2000:24) they illuminated some crucial elements of regulation, in particular its complexity and diversity. Regulation, it was argued, was not just the property of governments but was embedded in all social relations.

This very broad view of regulation accepts that both the concept of regulation and its tools must be moved beyond the notion of formal rules and legislation, beyond the role of government and beyond the boundaries of the nation state. This contention is hardly new, but it is remarkable how many times it must be restated.

This paper has argued that regulation is about 'influence', 'power' and 'control', all terms used social science literature to express a basic idea: how to get someone to do something that he or she would not otherwise do, or not do something that they otherwise would. The nature of those 'influences' is what comprises the tools of regulation. Many things influence people to act: norms, standards, ethics, culture, business practices, formal and informal rules, information and prices all affect decisions. These influences may emanate from the family, social groups, religious organisations, work places, local, state and federal governments, public, private and non-governmental international organisations, amongst others. Not all are in harmony. Norms, practices and rules may conflict. Government is only one of many vectors in a very large web and although the job of government is to regulate, it is not the only regulator: it is just one, albeit a powerful one.

The conceptual scheme presented is imperfect and incomplete because it is impossible to capture the universe of influences that operate within the regulatory space. It is also imperfect because the conceptual categories are suggestive and pragmatic rather than pure and final. It is one of many such classifications that may or may not be helpful in the work of regulatory practitioners. However, my experience of working with regulators is that presenting them with this large array of tools, broadly categorised, can force them to re-consider their regulatory roles beyond that of rule-makers and enforcers, particularly in relation to prohibitive rules enforced by sanctions, to come to the understanding that ordinary regulatory practice is often made up of a multiplicity of licences, permits, registrations and other forms of authorisation that allow or disallow so many forms of everyday activity. Though failure to comply with these authorisations may result in sanctions being imposed, in the vast majority of cases, it is obtaining the authorisation itself that is the beginning and end of regulation.

Regulators also become aware that their activities in taxing, pricing, charging, and providing information directly, or requiring the provision of information, are all forms of regulation, as are the contracts and grants they enter into and manage. They come to acknowledge that the vast array of codes and standards to which regulatees may or must conform are all part the broad regulatory landscape that they may shape. They may also appreciate that policy outcomes may be achieved subtly and unobtrusively

by shaping the physical and technological environments in which people work and act.

A working knowledge of the wide range of instruments available can provide regulators with a creative repertoire of interventions to achieve their desired policy outcomes, provided that they also understand that there is no ideal regulatory configuration nor a perfect set of tools and provided that they understand that the task of identifying the regulatory toolkit is one small element of the larger task of regulatory design. Ultimately, tools are just tools, a means to an end, and only one part of the public policy process.

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