

**Submission to the Productivity Commission re its Discussion Draft on
Performance Benchmarking of Australian Business Regulation by**

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The purpose of this brief submission is to urge those engaged in seeking to benchmark Australian business regulation to take into account normative considerations and how they affect the policy and practice of regulation. This is a major challenge as the impacts of human preferences and structural biases can be notoriously difficult to quantify in many contexts, but this is especially the case in regard to the numerous elements that can comprise regulatory environments.¹ In a very real sense regulation reflects and helps to constitute the societies and communities of which it is a part.² Some sections of those communities will be more affected by, and/or, more interested in regulation than others. This means that in regulatory space in general, and in public regulatory discourse in particular, some voices will be heard more often and more loudly than others.³ Indeed many, many voices are rarely, if ever heard in public regulatory discourse, and it is as important to consider who is not represented in regulatory space, as it is to consider who is participating there. Nonetheless all members of society are affected by regulatory infrastructures and processes and this can help lead to a widespread sense of dissatisfaction amongst individuals, groups and organisations that regulatory burdens upon them are becoming ever more onerous, and that in many instances this growing regulatory burden is somehow “unfair”.⁴

To a significant extent, the Prime Minister and the Treasurer were responding to this perceived widespread dissatisfaction when they established the Taskforce on Reducing Regulatory Burdens on Business in October 2005. In January 2006, that Taskforce produced its excellent report *Rethinking Regulation*, and this discussion paper and inquiry into Performance Benchmarking of Australian Business Regulation is another step forward in that process. I fully expect that the Inquiry will make progress on issues such as comparing regulatory compliance costs and changes to the

¹ For a discussion of how human agency and structural factors are in a state of continuing interaction see: Giddens, A., *The Constitution of Society, Outline of the Theory of Structuration*, Cambridge, Polity Press, 1984.

² See generally Baldwin, R. and Cave, M., *Understanding Regulation, Theory, Strategy and Practice*, Oxford, Oxford University Press, 1999

³ For an explanation of this concept of regulatory space and how its impacts can often be ‘under the public awareness radar’ as it were, see: Hancher, L. and Moran, M., “Organizing Regulatory Space”, (Chapter 10), in L. Hancher and M. Moran (eds), *Capitalism, Culture, and Economic Regulation*, Clarendon Press, Oxford, 1989, p.271

⁴ For example, the Business Council of Australia’s detailed overview, Business Council of Australia, *Business Regulation Action Plan for Future Prosperity*, 2005, BCA, resonates with many of the contemporary frustrations about the ever-expanding mountain of “red tape” that can inhibit business activity.

quantity of regulation over time. However, the greatest challenges will remain in the normative dimension.

The greatest problem perhaps, is that many regulatory initiatives when considered in isolation can be well-justified. Indeed they can often be justified in a more macro context too, as they are subject to the rigours of the Regulatory Impact Statement process supervised by the Office of Regulation Review. However, it is the cumulative snowballing effect of ever-increasing regulatory burden that causes organisations such as the Business Council of Australia to bristle and groan about how Australian business activity and innovation is stifled. The danger for Australian society and governments is that not only will Australian businesses start to lose faith in the veracity and efficacy of Australian regulatory infrastructures, but so too will Australian citizens. There is potential in encouraging Australian citizens, organisations and governments to be more lateral-thinking in how they view regulatory practice and innovation. In particular, to think more collectively about how regulatory processes which in some instances they may self-interestedly support, have impacts beyond their immediate sphere of activity. To this end I would urge those associated with this inquiry to think of how regulation in general, and the benchmarking of regulation in particular, should be affected by notions of:

1. Legitimacy
2. Sustainability
3. Heritage

All power is limited, but if a regime retains legitimacy from those it regulates, it is more likely to lead to enhanced order, stability and effectiveness. The literature shows clear evidence that if regulatory systems and process can retain legitimacy in the eyes of the regulated, even if the latter may not agree with certain aspects of that regulatory praxis, then higher levels of regulatory compliance will ensue.⁵ This is what is referred to as *Compliance Pull*, and is manifest in international as well as in local contexts.⁶ Over-regulation, repetitive regulation, unfair regulation, ineffective regulation, indeed under-regulation may all lead to dilution of legitimacy and reduced compliance pull, potentially undermining not only specific regulatory infrastructures, but civic institutions more generally. Suchman's 3 tier-model of organisational legitimacy can be useful in trying to analyse how these movements in regulatory legitimacy are played out. The three tiers in ascending order of value are:

1. Pragmatic legitimacy – rooted in self-interested calculation, with an emphasis on notions of exchange and value;
2. Moral legitimacy – normative evaluations are crucial, with an emphasis on notions of consequence, procedure, structure and personality; and
3. Cognitive legitimacy – comprehensibility is crucial, with an emphasis on notions of predictability and plausibility.⁷

⁵ For example see: Tyler, T.R., "Measuring Legitimacy and Compliance", (Chapter 4), in *Why People Obey the Law*, Yale University Press, 1990

⁶ For example: Raustalia, K. and Slaughter, A.M., "International Law, International Relations and Compliance", (Chapter 28), in W. Carlsnaes, T. Risse and B.A. Simmons (eds), *Handbook of International Relations*, Sage Publications, 2002, p.538.

⁷ Suchman, M.C., "Managing Legitimacy: Strategic and Institutional Approaches", *Academy of Management Review*, 20 (3), 1995, p.571

Although moving *up* the legitimacy scale from pragmatic to moral to cognitive is difficult, it can achieve more profound and self-sustaining levels of legitimacy. Similarly, regulatory initiatives can move *down* the legitimacy scale, (at least in the view of some of those interpreting them), if they are perceived to lack fairness and/or effectiveness. Such a matrix has relevance for initiatives across many social, political and economic situations, and should be of special interest for an inquiry such as this which is looking how to benchmark regulation across a broad range of regulatory contexts. The goal should always be to seek how to continually move regulatory policy and practice up to the third stage of cognitive legitimacy.

A fundamentally important contemporary issue locally, regionally and globally is that of sustainability. It is crucial to citizens, businesses and governments of developed jurisdictions such as Australia, just as it is to those in the countries of sub-Saharan Africa. The drive to achieve sustainability seen in response to environmental problems such as global warming and drought, are propelling a sea change in attitudes around the world. Entrenched policies in many business sectors may not yet have shifted, especially amongst the richer nations and the most powerful trans-national corporations, but there is a discernible trend towards at least the consideration of less self-interested policy positions. This analogy could be extended usefully when seeking to benchmark Australian business regulation in a holistic manner. If regulatory praxis in general, and regulatory benchmarking in particular, is to attain Suchman's third tier of cognitive legitimacy, then various interest groups may have to wind back, at least to a degree, the self-interest component of their policy positions.

The third dimension I wish to emphasise, that of heritage, might facilitate such processes. If governments, businesses, communities and individuals increasingly can view regulation through a lens of heritage, then they may well become more concerned about the overall regulatory legacy that they are creating. This means building a sense of increased individual and collective responsibility for the regulation that we have had, have now and will have. Governments do not, and should not, have a monopoly of regulatory activity and control. They are both regulatory proactive, and in turn acted upon in a regulatory sense. Contemporary benchmarking of business regulation should reflect this co-regulatory reality and consider the normative dimensions of legitimacy, sustainability and heritage that I have discussed above. This perspective is unashamedly utopian, and it may prove impossible to achieve in the hurly-burly of regulatory practice, but it is an ambition that should be on the regulatory policy-making radar.

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