

Chapter 4. The mirage of rail reform: building regulatory capacity in policy sectors

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Introduction

The title of this chapter is somewhat provocative and is intended to focus attention on the question of whether or not regulatory reform in Australia is only about cutting red tape and achieving national consistency. My experience as a state government official for some 15 years, in both line and central agencies, suggests that there exists a dominant view that regulatory reform will only deliver value when it is about achieving simplicity and consistency. This appears to be the orthodox view across all governments at both Commonwealth and state levels. There is, of course, considerable value in creating regulatory environments that are simple and easy to follow for all participants. In a federal structure, for example, where inter-jurisdictional transactions and cross border services operate, treating these activities in a consistent manner makes sense for the organisations and individuals concerned. However, one of the keys for successfully managing organisations within the modern world is about building the capacity to operate and work within complex regulatory systems. As Quiggin (2006) claims, innovation and diversity are more enduring than neat and tidy arrangements based on uniformity and simplicity. If we are to achieve the capacity to operate complex systems then we need systems that enable organisations to effectively operate within those diverse and complex regulatory environments.

The argument that follows is similar to the position put forward by Twomey and Withers in their recent paper on Australian federalism (2007). They argue that reform efforts should focus on working within our system of governance to improve our capacity to reallocate roles and responsibilities and improve mechanisms of intergovernmental cooperation. Their argument suggests that rather than work only to reduce complicated arrangements and diversity, governments should also work to harness the benefits of federalism. This will result, they argue, in more flexible and responsive government, promoting innovation and efficiency through competition (Twomey and Withers 2007:6).

The chapter is divided into six sections, followed by a conclusion. The first examines what is meant by expanding the regulatory reform process to include building regulatory capacity across policy sectors. The second looks at the increasing trend to a centralisation of decision-making in Australia's federal

system. The third analyses some of the negative impacts associated with the use of targets as a means for regulatory reform. The fourth and fifth sections, following Steane and Carroll, suggest that, in practice, regulatory systems necessarily are becoming more complex, not less, despite the waves of regulatory reform that have occurred. The sixth section examines the case of the National Transport Commission (NTC) in relation to regulatory reform in land transport.

Regulatory reform and capacity building

Regulatory systems involve two key elements, the process of regulation-making and the instruments and approaches required for compliance and enforcement (Doern 2003). Recent Australian debate on regulatory reform (Regulation Taskforce 2006) has predominately focussed on the second component with the objective of simplifying instruments of enforcement, for example, proposing a movement from traditional, prescriptive regulation, to various models of industry self regulation. It also stresses the need to streamline regulatory systems by, for example, removing duplication of effort across levels of government and achieving regulatory uniformity. In summary, the key demands from industry and governments have been that we need to reduce the level of regulation and simplify what remains.

There is no doubt pressure needs to be maintained to ensure regulatory systems are responsive and adaptive to change. Regulatory frameworks need to be under constant review in order to ensure unnecessary regulation is removed and where appropriate more innovative and responsive mechanisms introduced. However, policy makers also need to monitor, evaluate and improve how participants in a regulatory sector function within complex systems. In particular, the central agencies of government have an important role to play in assessing whether the institutional arrangements and regulatory mechanisms within particular policy sectors facilitate and develop the capacity of businesses, non government organisations and key public sector agencies to participate in the policy-making process and achieve higher levels of regulatory compliance.

In a globalised world markets are becoming more complex and interdependent. Local standards, rules and operating procedures are increasingly influenced by national and international forces that aim to more seamlessly integrate the efficient movement of goods and services across national boundaries, free from unnecessary and varying, regulatory requirements. The result is a proliferation of international trade agreements and the increasing development of international standards, accompanied, at the national level by processes of mutual recognition, harmonisation and the adoption of Australian Standards aimed at regulatory simplification.

There is also mounting pressure to further integrate and build relationships across related systems. Those responsible for the regulation of the freight rail

sector, for example, now take a stronger interest in how its operations interface with road and sea transport systems. As COAG notes: 'More flexible rules governing access to the road network should be established that will allow freight carried by rail to be seamlessly picked up and dropped off by road transport operations.' (COAG 2006: Appendix C:14). The result is increasing regulatory harmonisation, as well as an increasing harmonisation of, for example, communication systems across transport modes, such as standardised electronic tracking systems for containers and goods. These systems are then 'overlaid', by other regulatory regimes such as those related to OH&S and the environment. In terms of Doern's analysis of regulatory regimes (2003), we see sectoral regulatory issues specific to rail interacting with broader 'horizontal' framework regulatory regimes that are universally applied across a range of policy fields. This interaction of regulation, standards and rules that have both specific and universal impact on policy sectors adds to the complexity of policy, building a layered regulatory framework into the system of governance.

It is this constantly changing and overlapping nature of regulatory systems that suggests that the debate on regulatory reform should be expanded to include strategies that enhance the capacity of agencies and stakeholders to better manage and respond to this increasing regulatory complexity. This is an issue of genuine concern for line agencies heavily involved in regulation, where the dominant discourse focuses on reducing the burden of red tape and the causes of over-regulation but neglects the need to build and improve the capacity to cope with regulatory complexity. The issue of building capacity to manage and operate within a diverse and ever changing regulatory environment has received little attention from central agencies and COAG. In their discourse, regulation is still regarded with some suspicion and efforts to promote a positive agenda of working *with* regulation are less likely to be vigorously supported (McConkey and Dutil 2006). What is necessary is the introduction into Australian jurisdictions of 'Capability Reviews', similar to those being undertaken of key government departments in the United Kingdom (Cabinet Office 2006). These reviews examine current and future demands on departments and look at their capacity to manage and respond to changing circumstances and demands. The reviews are focussed on future needs and examine how customers and stakeholders are engaged in the design and management of service delivery and the related regulatory models. An examination of regulatory capability might also involve extending the assessment of an agency's capability to include an assessment of the overall capacity of the sector. Such a review would look at the constraints or barriers for key participants (public and private) to successfully engage and comply with regulatory arrangements that govern behaviour and the rules of operation and engagement.

Many commentators have observed an incremental centralisation of regulatory reform agendas over recent years (Quiggin 2006; Patty 2006). The recent High

Court decision on Commonwealth powers in respect to industrial relations saw a flurry of commentary expressing concern with the growing centralisation of Commonwealth power and the need to reform the federation (Debus 2006; Lynch 2006; Dick 2006). Twomey and Withers (2007) present a comprehensive argument as to what they regard as the negative economic and social consequences of such centralisation of power in the Australian federation. A key theme is their concern with what they see as a growing Commonwealth interest in the detail of policy, an area that has traditionally been managed by states. This is a process Twomey and Withers refer to as 'opportunistic federalism' (2007: 5) and is evident in the shifting of COAG's interest from system wide issues of institutional arrangements to more specific reform targets that shape the rules and patterns of interaction on matters of detail in various policy sectors. In this context, the Commonwealth, drawing on its authority and financial strength, has shaped the COAG agenda to reflect its increasingly centralised, political and policy interests (Twomey and Withers 2007). COAG's focus on detail seems to have distracted it from the more strategic issue of how regulatory institutions and processes of governance influence the operational capacity and compliance levels of stakeholders and participants in key policy sectors.

In land transport, as in other sectors, there exist well established systems for handling the detailed matters of inter-jurisdictional coordination and cooperation, such as Ministerial Councils and their supporting forums of chief executives from government agencies. In the late 1980s and early 1990s pressure for microeconomic reform saw heads of government become increasingly involved in steering inter-jurisdictional reform agendas in several key policy sectors. In land transport, for example, central agencies and, ultimately, COAG, took a strong lead in shaping institutional arrangements for regulatory reform, leading to the 1991 Intergovernmental Agreement that established the National Road Transport Commission (NRTC) (Painter 1998). However, what is important to note is that while central agencies were critical in pushing the establishment of the NRTC, they did not shape the details of the reform agenda and resulting work. This arose out of the detailed work and proposals of the various road and transport agencies (Wilson and Moore 2006). The success of the NRTC as a model for progressing regulatory reform was acknowledged in 2004 when its mandate was expanded to include rail and it was renamed the National Transport Commission (NTC).

However, in 2006, COAG once again became involved in land transport reform but this time announcing a far more detailed approach to reform with a set of specific targets and timelines. In particular, it requested the simplification of rail safety regulation by December 2006, with a program of work specifically targeting accreditation guidelines, safety management system requirements, disclosure of information and the management of fatigue amongst rail workers (NTC 2006). This recent interest by heads of government in the operational detail

of policy represents a shift from the 1991 approach, where the focus was on developing appropriate institutions and accompanying frameworks for progressing reform, not operational detail. It also continues to neglect the question of improving our regulatory capacity to deal with complex systems.

The problem with targets in complex systems

A significant risk in setting a program of reform with specified targets, such as that proposed by COAG for rail safety regulation, is that it focuses agency interest on delivering a 'one-off', result at one point in time rather than in creating incentives for embedding ongoing processes of quality improvement and review. For example, achieving national consistency in the regulation of rail sidings by December 2006, for inclusion in a report to COAG, tends to focus activity on reaching uniformity rather than any real assessment of the best approach for regulating the access and safety management systems of such facilities. The challenge of revising existing operational systems and practices within set timeframes means that jurisdictions tend to add each other's requirements together to build a common national approach rather than review practices down to the minimum most effective requirement. National targets tend to result in the mere 'compilation', of practices rather than a rigorous identification of the most effective and efficient approach. It suggests that we have stable, static, regulatory and operational systems that can be reduced to a set of simple regulatory requirements. Specifying targets also tends to lead to the neglect of areas not included on the list of targets for reform and action. Rather, reform efforts should acknowledge the dynamic nature of the regulatory process and the complexity of systems and also focus on means to enable participants to more effectively deal with and manage that complexity. An unwarranted assumption that simplicity can be achieved distracts from the need to develop an understanding of the processes of regulatory transformation that are currently underway across many policy sectors.

The case of rail freight is an illustrative example. The microeconomic reform efforts of governments during the 1980s and 1990s saw rail systems undergo massive transformations. Independent, localised networks that were government owned and integrated both vertically and horizontally within states were transformed into a more complex set of arrangements of public, corporatised and privatised operations (Productivity Commission 1999:92). The transformation of railways from single, state owned entities in the 1990s to a multi-organisational arena with both public and private participants, subject to independent regulatory oversight, clearly demonstrates the growing diversity and complexity of policy sectors, even though the initial reform aim may have been to gain greater harmonisation and regulatory simplicity. The result is that the shaping of public policy in relation to railways has become a much more complicated,

multilayered process for organisations and individuals, managers and politicians, as suggested by Steane and Carroll (2001).

Out of this process of change two key outcomes can be observed. Firstly, a growing desire amongst some participants and observers to simplify arrangements, including further regulatory reform. The increased complexity in railway systems brought about, at least in part, by the wave of reforms in the 1990s, is now seen by some as a cost to business and a potential constraint on operational efficiency (Regulation Taskforce 2006). Second, the process of making and modifying regulation has become more porous and complex, with a broader range of public and private participants gaining access to and varying degrees of influence upon, policy networks and forums. This is evident, for example, in relation to COAG, where a wider range of economic interests has entered the regulatory reform debate, bringing pressure to bear as to the need to engage in detailed reform of rail safety regulation. Nor is this phenomenon confined to Australia. Doern (2006), for example, suggests that in federal systems operating with multiple levels of governance there is evidence of increasing pressure to merge, collapse or rationalise previously separate levels of regulation. He argues that this tendency is mainly driven by business interests promoting a neo-liberal agenda primarily concerned with economic productivity. It is ironic that those interests are now calling for freer markets, smaller government and regulatory simplicity, when it was, in large part, similar calls for microeconomic reform that resulted in the break up, privatisation and expansion of regulation in the Australian rail sector in the 1990s.

The growing complexity of regulation and policy sectors

A key observation of the Regulation Taskforce was that there had been a proliferation of regulatory agencies across all levels of government. It argued that these agencies, along with their excessive regulatory output, have added further layers to the policy process and increased the complexity of regulation (Banks 2005; Regulation Taskforce 2006). The OECD (2002) has made similar observations and argues that governments now need to work to simplify regulatory systems. This is an increased focus on the quality and value of regulation and 'whether the legitimate policy goals underlying the regulation can be achieved in a way that does not impose as high a burden on business' (Regulation Taskforce 2006:2).

Regulators and policy makers have had to skill up to deal with the changing nature of the policy and institutional environment. Regulatory agencies no longer operate as traditional public sector bureaucracies in stable environments where the organisation's tasks are highly specified, discrete and carried out on a routine basis (Considine 2005). The complexity of the tasks and the environment in which regulators now work means staff need to exercise judgment and respond with innovative solutions to problems as they emerge. Regulatory agencies need

to be adaptive organisations responding to business demands and environmental changes.

Steane and Carroll (2001), in reviewing the early work of the OECD on regulatory reform, are critical of its argument that what is emerging and what is needed, is a new regulatory state. In particular, they note that a key OECD report reveals an expectation that the state 'will be less intrusive, with other social systems, notably markets providing the dynamic that will drive society. The state will not 'wither away' but will become an 'umpire', adjudicating with regard to transgressions of the rules.' (Steane and Carroll 2001:33). They take issue with this argument, suggesting that, in an environment of multiple networks of contracts and public private partnerships, the task of governance becomes more challenging as smaller public sector agencies work to influence and manage more complex arrangements of inter-organisational relations (2001:39). It is, they suggest, the need to manage this complexity that is now a major challenge for government agencies and key stakeholders as they work to navigate, influence and participate in the policy process.

The challenge of building innovation and flexibility into regulatory regimes

A recent report on harmonisation in the Australian rail industry (BTRE 2006) notes the difficulty of balancing the benefits of uniformity with customised arrangements for localised operations. The report notes that in complex technical systems like railways, with a relatively small number of operators, the potential for regulators to adopt customised systems is far more likely. Combine this with the Australian federal structure of decision-making and the potential for achieving uniformity in some areas of regulation become almost impossible. In fact the report states:

The regulatory track record in Australia in the last decade is one of regulatory instability. Since the establishment of State regulatory bodies in the 1990s, the regulators have sought to maintain consistency. Despite the signing of intergovernmental agreements on 'rail safety' and on 'rail operational uniformity' (in 1996 and 1999, respectively), jurisdictional safety regulators continued to develop safety regulations on an individual basis. Regulatory systems diverged from the outset (BTRE 2006: XXV).

Failure to achieve uniformity however, is not all bad news. Developments in regulatory techniques and compliance technology now mean that jurisdictions are developing the capacity to manage and regulate for variable standards of performance within similar industries. The focus of regulatory enforcement is moving away from prescriptive rules to outcomes and performance-based standards. Innovation in approaches to regulation requires both the industry and government agencies to have an informed understanding of regulation and

greater capability to work within complex regulatory regimes. How do we get such regulatory innovation to prosper in a climate of reform that remains focussed on the rhetoric of deregulation, red tape reduction and a preference for simple prescriptive consistency?

The National Transport Commission (NTC) as a model for capacity building

It is in this context that the experience and practices of the NTC are worth reviewing. This institutional model demonstrates the value of linking sector wide capacity building with reform programs. While the primary function of the NTC is to promote uniform regulation in land transport the Commission's influence and approach to its work also develops industry and government capacity to work more effectively in an ever changing regulatory environment. The Commission plays a key role in shaping industry opinion and attitudes towards reform and regulation (Painter 1998:146).

The NTC experience demonstrates that as well as supporting uniformity there are times where industry concerns centre on the lack of flexibility and capacity of regulation to account for local variation and need. There is a desire for regulatory regimes to accommodate two opposing views:

- consistent treatment of all participants under uniform systems and requirements; and
- a capacity to accommodate variation based on local circumstances.

The NTC has developed a culture of cooperative decision-making in the development of land transport policy and regulatory reform (Wilson and Moore 2006:298). It has an extensive range of consultation mechanisms and this includes regulatory authorities, transport agencies, enforcement agencies and representatives from the road and rail industry. The effectiveness of the NTC model rests in its robust policy development process, one that engages transport ministers and links their decisions on reform to a broad intergovernmental agreement that commits governments to a reform process. It is also a participative process, with substantial input from industry advisory bodies, ensuring a broad range of stakeholders are engaged and have access to the process.

Since its inception in 1992 the Commission has progressed regulatory reform in a range of areas impacting on land transport. This has included driver licensing regulations, vehicle standards, emission standards, vehicle registration regulations and legislation governing compliance and enforcement arrangements. The Commission's current approach to the development and implementation of the new national rail safety laws involves communication strategies, provision of information and guidelines and working groups aimed at helping parties in the rail industry to comply with the legislative requirements. In preparing for the implementation of new rail safety regulation the NTC has also looked at how

reform will be maintained into the future. This action is more about building and sustaining regulatory and compliance capacity in the sector. Their work includes the release of an information package for stakeholders that explains how states and territories will work together to ensure regulatory consistency (NTC 2006:2).

The Commission has also recommended changes to the institutional arrangements for the administration of rail safety regulatory regimes. This includes:

- establishing development and approval processes for national guidelines and codes;
- detailing processes for the maintenance and review of legislation, regulations and guideline material; and
- establishing administrative arrangements for the recognition of industry codes and standards (NTC 2006).

It is this type of analysis that reform agendas should aim to promote but tend to neglect. The work of the NTC in rail safety recognises the need to develop mechanisms to more effectively manage complex systems for the benefit of governments, industry and the community (NTC 2004). While not an explicit role of the organisation, the Commission's work in developing regulations has a major influence on the understanding stakeholders have of the regulatory framework within which they operate. The consultative work of the NTC brings industry and government into the regulatory development process and jointly builds their understanding of what is a dynamic regulatory environment. The outcome is an improvement in both regulation-making and compliance in the land transport sector.

Conclusion

The governing of policy in a federal system increasingly involves complex systems of state and non-state actors and we need to rethink our approach to regulatory reform to include the building of sector wide capacity to effectively operate within such complex and dynamic environments. An advantage of our federal system is that it enables local variation to meet local needs, responding with a degree of sensitivity to pressures at a variety of levels of government. It provides an admittedly complex set of state based and nationally based consultative forums. In land transport reform the National Transport Commission is a key player in this process, both enabling differing interests to have a voice, as well as playing an essential part in guiding and managing, as an independent body, what is a necessarily complex system.

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