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# REGULATING FOR LEARNING IN AUSTRALIA'S TERTIARY EDUCATION INSTITUTIONS

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## Summary

This paper introduces a broad conception of regulation. It explains how narrow conceptions of laws, rules and compliance systems place positive outcomes at risk through not meaningfully connecting with the educational enterprise as it is understood by teachers, students and prospective employers. When regulatory hot-spots flair in response to harms to the public, government commonly intervenes by taking control and introducing risk management measures in a top down fashion. When, as happened recently, private tertiary education providers declared themselves bankrupt and closed their doors on students part-way through their studies, government responded with demands for greater accountability.

Risk management strategies of this kind have merit but tend to be applied universally without concern for context. The emphasis was on ensuring providers passed the tests of financial auditors and had satisfactory business plans and governance arrangements in place. They impose significant burdens and divert resources from mainstream activities. In the process, the efficacy and achievements of the sector are placed in jeopardy. Top-down regulatory impositions can diminish responsibility within the sector for dealing with its own problems and with the public that has experienced the harm: regulated actors follow government instructions without feeling they can or should come up with any initiatives to improve the situation.

The burden of new layers of regulation is not only felt by the sector but also becomes a millstone around the neck of the regulatory agency and a drain on the government budget. Once in place, it can be hard to return responsible stewardship to the sector from which it had been taken. While in moments of crisis top down intervention may be necessary to prevent further harm, fixing the problem in the long term will likely require greater sharing of the responsibility for ensuring stability and quality in the tertiary education sector. The argument of this paper is that there are many ways in which this sharing of responsibility can occur.

This paper introduces four well-established approaches to regulation: risk management, commitment and responsible self-regulation, nodal governance and meta-regulation, and responsive regulation. The argument is that all of these approaches, while emanating from different sources with different purposes, share a common element. When implemented well, they will leave the stronger aspects of the learning culture intact and will apply pressure for reform to the weaker parts. Just as important is that, considered together, these regulatory ideas recognise diversity among regulated actors. One step on from recognising diversity is understanding how to manage the diverse reactions of individuals and entities to regulatory intervention. This paper argues for a new regulatory sensibility that comes to terms with the psychology of people and their dislike for the loss of freedom that occurs when they come into contact with regulatory authorities. Two psychological principles are articulated.

The first involves deterrence. Deterrence works best if it is something that is in the background, to be feared as a possibility rather than something that is delivered as a negative sanction. With the experience of negative sanctions comes temptation to defy and challenge authority. A sensibility of being a good citizen is lost. Acts of non-compliance come to be regarded as clever, as a win, and sometimes even assume 'hero-like' status.

The second psychological principle is practicing the justice of respect. This idea comes from the procedural justice literature where communicating respect to regulated actors is crucial to eliciting their cooperation and earning legitimacy for the regulator and for the rules. Communicating respect to regulated actors goes beyond due process, however. It also means being open to deliberating on the purpose of the regulator and the demands made on the sector, and realigning demands where appropriate.

The purpose of the paper is to present a model of regulatory intervention in tertiary education that builds on strengths in the sector, that recognises both teaching professionalism and the responsibility of the sector to be responsive to labour market needs, and that restricts regulatory intervention to educational providers who fail to show commitment to quality education and skills development. Regulation no longer needs to conform to a one-size-fits-all package. It can be designed in such a way as to be tough on those abusing the system while supportive of those committed to the provision of quality education and training.

## Introduction

### ***Seeing regulation through a bigger lens***

For most people, government regulation means laws, rules and formal systems of control. This is but one slice of regulation. To understand regulation we need to start with a much bigger view of what it is and how it works. The purpose of regulation is to steer the flow of events (Parker & Braithwaite J 2003) so that harms are avoided and benefits realised. In the broadest sense, regulation then is commonplace. It can be informal and local, and most importantly responsive to individuals, contexts and environments. Most times, regulation is so low key and taken for granted that we would not even think of it as regulation (Braithwaite V 2006).

No one would be surprised at the statement that teachers regulate students through issuing grades for courses or certifying skills. But they may be surprised at the notion that when teachers invite students to ask questions in their class they are engaging in regulation. Teachers spontaneously empower students to participate in the learning process. At the same time they are regulating the learning process. Through question time, teachers take stock of what has been learnt and where students are struggling in their understanding. Teachers are engaging in a deliberate attempt to redirect the flow of events toward better learning in response to contextual factors that make learning difficult – the material may be complex, students may appear bored or lost, the teacher may have doubts about her delivery of the material, or disruption in the class may have led to a less than ideal learning environment.

Allowing for question time is not prescribed in a formal set of rules. Instead it is a practice that is embedded in the professional role of being a teacher with responsibilities to help with and check on students' learning.

A host of regulatory activities are of this kind, embedded in professional roles, cultural norms, and knowledge of best practice (Braithwaite J 1989). Certain ways of doing things become widely accepted in communities, and there is a clear expectation that people will cooperate and adopt these practices because doing so shapes the flow of events in meaningful ways for them.

The social system works to make sure no-one steps too far out of line through internal sanctions. If teachers don't turn up to class or students don't come to class, a range of strategies will be used to rectify the situation and communicate expected standards of behaviour. Some will be informal, such as a quiet word, some will be more formal, such as checking attendance rolls or counting hits on instruction web sites, and some will take the form of a reprimand for the misdemeanour, citing school rules or codes of conduct, and setting out expectations for future conduct. There may also be warnings of how sanctioning could escalate and be placed in the hands of an outside or higher authority. None of this necessarily requires the intervention of a regulatory body.

In most instances, people regulate themselves and each other successfully within their own organisational settings. Sometimes, however, informal social controls, even formal internal controls, are not enough. The controls may break down as professional cultures or learning cultures fragment (Akers 1998; Matza 1964; Reiss 1951). Or the risks of harm may be so new that informal and internal systems of control are not yet sufficiently well developed to protect the community. This is where government agencies step in. It could be argued that the learning and professional culture of the tertiary sector has been stressed by opening the market to private providers, low investment in the teaching profession, and an explosion in international students. At the very least the changes have brought new challenges to providers for which they were neither prepared nor adequately resourced.

When informal and local social control systems fail, however, it is not necessarily the case that everything about them is dysfunctional and should be replaced with a government-led solution. Getting to the bottom of the failure and understanding the root causes of a regulatory problem should highlight system weaknesses that need to be addressed. But such an analysis also can shed light on the parts of the informal system that can be strengthened and supported. Strengths can be used to counter or contain the impact of weaknesses. Building on strengths is usually more productive for a government regulator than cleaning the slate and starting again.

# A range of regulatory interventions

## ***Command-and-control regulation and its limitations***

Fortunately only a small amount of human activity needs to be regulated formally by government agencies. Formal government regulation imposes burdens when it makes demands on people to change their way of operating and when it authorises regulators to use sanctioning powers to bring those being regulated 'into compliance'. Command and control regulation describes the classic regulatory approach where law defines what is illicit and prescribes certain actions as necessary for compliance. These commands are enforced by regulatory authorities with powers to coerce through sanctioning. Command and control regulation, while necessary to prevent harm in some situations, is costly to both those being regulated and those doing the regulation, and is not necessarily the best option in all situations.

Costs of regulation are particularly draining on resources of a human, social and economic kind when cooperation with the regulatory authority is low.

A regulator might struggle to gain cooperation for many reasons, but the systemic problem for regulators revolves around freedom (Braithwaite J 2002; Braithwaite V 2009a; Brehm S & Brehm J 1981). It is in the nature of human beings to react adversely to intrusions on their freedom, even when that intrusion comes from a legally constituted authority. Potential loss of freedom is a threat that triggers wariness and readiness to defend that freedom. At the same time, reasoned argument initiated by the regulator can put such fear to rest. Such argument would insist that regulation was needed to prevent widespread harm, that the regulation would provide *benefits*, be implemented with *justice*, and that it would not in any way threaten those with *moral obligation* to do the right thing (Braithwaite V; Braithwaite V 2009b & Wenzel 2008).

Acceptance of this perspective by those being regulated depends on the degree to which they see the regulator as trustworthy (Braithwaite J, Makkai & Braithwaite V 2007; Braithwaite V 2003; Tyler 1990). The public needs to be assured that they can trust the regulator's competence, commitment, and capability of acting in good faith and in the interests of the sector. Given that regulatory agencies are usually a branch of government, albeit operationally independent, earning the trust of the public can be a challenge in its own right. High levels of trust currently are not enjoyed by governments of the world (Dalton 2005). Many citizens are cynical about the benefits of government regulation. This is not unreasonable. There can be a host of unintended consequences of regulation that prove counterproductive to achieving the *benefits* that have been promised, particularly in times of social change (Grabosky 1995a). Counterproductive side effects can alienate the regulated community en masse.

If regulators succeed in convincing the public of benefits, there is still the need to clear the hurdle of *justice*. Regulation that intrudes on people's lives runs a high risk of perpetrating a sense of injustice (Wenzel 2003).

Injustice may relate to the decisions that regulators make. A command and control regulatory body often functions with little sensitivity to context, aiming for the consistent application of rules (Bardach & Kagan 2002; Braithwaite J 2005). Rules when applied in practice can fail to resonate with common sense notions of fairness and justice. Add to the rulebook mentality a failure to communicate respect for those at the other end of the regulatory encounter and the scene is set for grievance that can easily spread to create widespread resistance to change (Braithwaite J 2002; Braithwaite J, Makkai & Braithwaite V 2007; Braithwaite V 2009a; Tyler 1990).

Less common, though equally significant, is failure to hold any *moral obligation* to obey the law or respect the authority charged with administering the law, regardless of whether the regulation brings with it benefits or justice. Most regulated actors in stable democracies have such an obligation (Schwartz & Orleans 1967). There are segments of the population, however, who have disassociated from government institutions and adopt a view that government and its laws and rules are to be either ignored or gamed as one pursues one's interests and goals (Braithwaite V 2003; Braithwaite V 2009a; McBarnet & Whelan 1999). Those displaying a disrespectful attitude to law consume a disproportionate share of the regulator's attention because they openly challenge regulatory legitimacy.

For all these reasons - failure to be convincing on *benefits*, failure to generate perceptions of *justice* and failure to harness *moral obligation* - regulators can find it difficult to be beacons of hope, or even to be accepted as legitimate authorities. As a consequence, it becomes difficult to elicit meaningful change in people's ways of doing things, even when the authority overseeing the change has access to the full force of the law to back up its demands.

### ***Regulating at a distance***

In the face of such challenges, it is not surprising that governments have shown great interest in regulation that harnesses other mechanisms for bringing about change. Architectural regulation typifies this hands-off approach (Lessig 1999; Shearing & Stenning 1984). Systems are designed in such a way that it is impossible not to do the right thing. Common examples of architectural regulation are safety caps on bottles that cannot be opened by children and perspex panes with automatic doors that open only when trains pull into railway stations so that passengers and large objects are prevented from falling onto railway tracks. The education field has many of its own versions of architectural regulation. Most institutions prevent outsiders from accessing their resources: To do so they need a student card or email account that is provided only after enrolment. Libraries use electronic bar codes on books to protect their collections from being removed from the premises inappropriately. Lectures are videotaped for student convenience, but also provide verification that the lecture was given and that certain material was covered.

Markets are another example of a mechanism that can serve a regulatory function at arm's length from government (Braithwaite J 2005; Lessig 1999). Ideally markets will ensure that through open competition, those producing the best products flourish while those producing the worst fail. Governments may create markets where there has been little competition historically.

Through allowing more tertiary education providers to enter the market, government is using a regulatory tool to change options for accessing tertiary education.

As purchasers choose and express preferences, the expectation of government is that providers will be responsive and turn their activities to meet the demand.

Even in these circumstances, however, governments need not be totally hands-off. They may introduce controls to ensure that the market is a market in virtue, not in vice (Braithwaite J 2005). In the tertiary education sector, steps have been taken to ensure that all players offer quality tuition along with attractive courses and fee structures. Currently governments have set entry requirements for the registration of educational providers. Another approach, not incompatible with current practice, would be to strengthen systems for receiving and processing complaints from students and their families, possibly even employers of graduates, with heavy penalties imposed upon substantiation of these complaints. Audit may be triggered by complaints of a serious nature about a provider. Market mechanisms combined with government quality benchmarks provide a regulatory design that steers educational services in a direction that is more responsive to community needs, while putting in place some protections against the harm that can be done through deceptive, fraudulent or harmful practices of some educational providers.

Governments also may regulate through labour markets (Braithwaite J, Makkai & Braithwaite V 2007). In the field of education, rewarding and retaining high quality teachers through offering support and opportunity serves a regulatory function. Raising the bar for teaching staff and maintaining a highly professional and skilled workforce brings experts into the regulatory fold. Professional bodies can set standards for teaching and assessment, offer in-service training, sponsor professional development, and, across institutions, moderate course results to ensure consistency in assessment. Regulating for quality through placing responsibility in the hands of those who recognise quality and know how to improve quality is a strategy that is particularly useful in areas where specialist knowledge and skills matter. Government relies heavily on proxy regulatory mechanisms in specialist fields like financial regulation and medicine. Interestingly, the transparency and accountability to the public that is a necessary component of regulation through professional bodies is likely to be far more readily realised in education than in finance and medicine. Consumers, at least once they are in the system, are in a far better position to assess how adequately education is being delivered than they are to judge the appropriateness of financial advice or the pros and cons of medical procedures.

Governments have always engaged in light touch regulation through strengthening alliances among leaders and representatives within the regulatory community (Braithwaite J & Drahos 2000). Tax authorities have special committees to represent business and tax practitioners for instance. The regulatory community in the tertiary education sphere refers to all stakeholders – governments, regulatory bodies, industry, educational providers, teachers, students and interested citizens. Within this regulatory community there will be several sub-communities.

They may have a different focus, perhaps the delivery of curricula, or the recruitment of students, or the evaluation of teaching and the assessment of skill attainment, or the usefulness of skills in the labour market

These sub-communities may operate in a disconnected fashion, oblivious to each other's activities. Yet, for all practical purposes they are connected in so far as successful outcomes for one depend on successful outcomes for others. Government may provide regulatory guidance through supporting these various sub-communities and providing channels for communication across them to achieve desired policy objectives. The committees, councils and research groups that examine and implement government policy in the tertiary education and skills sector illustrate the ways in which government regulates through other bodies, maintaining distance but never being out of touch.

### ***Leaping from regulating at a distance to command and control regulation***

In comparison to command and control regulation, the above measures to a greater or lesser degree place government at a distance from the task of regulating the learning that takes place in tertiary education institutions. Regulating at a distance through architectural design and through strengthening mechanisms and networks that are an accepted part of social life is often less confronting and costly than regulating directly through command and control structures.

But sometimes the harms being perpetrated or the risks posed to the community require more direct action from government. Recent experiences in giving the public greater assurance surrounding the quality and financial viability of educational providers represents such an example. In 2010 a number of tertiary education providers in Australia failed to show any commitment to imparting quality skills to their students, including international students. Some of the colleges were scam operations, others were poorly run and collapsed financially. The institutions closed their doors without warning or planning for the welfare of their students. Students, many of whom had paid course fees upfront, were abandoned with no arrangements made for them to complete their studies. Government stepped in to provide assistance.

The case was interesting from a regulatory perspective in a number of respects. First, it highlighted the need for regulators and policy makers to be open to a mix of regulatory strategies – market mechanisms created opportunity for exploitation and abuse of the system and needed to be combined with some government imposed constraints to ensure providers acted with integrity. Second, the case illustrated how exploitation of a regulatory weakness in the tertiary education sector could be exacerbated by policy decisions in a completely different sector, immigration. International students were attracted not only by the educational opportunity but also by the prospect of gaining resident status through studying in fields where labour was in short supply in Australia. Some were less interested in the educational process than achieving residency and unscrupulous providers saw the opportunity to meet this new wave of demand for 'qualifications for residency'. This case shows that effective regulation requires root cause analyses that go beyond the sector in which the problems manifest.



The case was also interesting because the public outcry called for government control (ABC News 2009, 2010; Australian Government 2010, 2012). Scandals of this kind often result in ratcheting up regulatory activity, often instigated by politicians who believe they need to respond to their constituents with tough measures.

Regulatory agencies are given the signal that they should crack down on abuse in a visible way. Culprits are caught and punished, and for a period at least, an oppressive regulatory regime flies into action. Rarely is such activity sustainable however. As scandal moves from one regulatory 'hot spot' to another, so do government resources. And regulatory agencies, once well-resourced to deal with their hot spot, are subsequently faced with the problem of having fewer resources to maintain what has probably become an expensive top-down command and control regulatory program. Such programs in time lose credibility. Communities see weaknesses, test limits, and adopt an uncooperative stance to regimes with a history of favouring coercion over relationship building. Some segments of the community create noise as they express grievance over past injustice. Other segments of the community see opportunity to abuse the system and do so: they can practice defiance without fear of consequence when regulators are swamped by complaints and distracted by many cases of suspected non-compliance (Braithwaite V 2009a).

### ***An alternative: Self-regulation for some, regulatory intervention for others***

In periods of failed regulation, the temptation to embrace a command and control style of regulation is great but is not necessarily the only answer nor the best. Regulation theory has moved beyond the traditional divide between self-regulation on the one hand and command and control on the other (Ayres & Braithwaite J 1992; Gunningham 1993). There are degrees to which people need to feel the intrusiveness of government in order for activities to be steered safely. Those who have been acting responsibly, for instance, should not be held hostage to those who have not; yet so often command and control solutions invoke a one-size-fits-all approach to compliance and surveillance (Ayres & Braithwaite J 1992; Bardach & Kagan 2002). Leaders in excellence and innovation are dragged into the same surveillance net as the laggards and abusers of the system (Gunningham & Grabosky 1998). The consequence is lost productivity across the board, to say nothing of drops in workforce morale and efficacy. The alternative approach is to target regulatory interventions where they are needed, and develop systems of light touch regulation elsewhere.

## **Mixing and matching different types of intervention**

Four big ideas have emerged in the past forty years that have changed regulatory practice. They are risk-based regulation, commitment and responsible self-regulation, nodal governance and meta-regulation, and responsive regulation and regulatory pyramids that enforce compliance and strengthen commitment. Before discussing each in turn, a body of theory and research is summarised below because it provides a psychological understanding of why these four ideas are useful ways of approaching regulatory design.

### ***Theory around deterrence and justice***

Traditionally, compliance depends on deterrence. Deterrence is intended to discourage people from breaking the law. Empirical work on whether deterrence works or not variously investigates deterrence as the perceived likelihood of being punished or sanctioned by the legal system. In reality, people experience deterrence in a broader and highly variable way. When a business owner is convicted of fraud, he will receive financial penalties, may be even a jail term through the legal system. But he is also likely to suffer the pain of seeing his family life descend into chaos, lose his livelihood, experience shame as friends and acquaintances learn of his fate, and possibly even guilt and remorse over taking an illegal course of action. These experiences of punishment and sanctions colour future perceptions of the consequences of fraud.

All of this is to say that while deterrence may be a simple construct when we consider the penalty that the legal system delivers, it is highly complex when one considers how it is experienced psychologically and the effect it has on future behaviour. The psychological impact of deterrence is clearly going to depend on many other factors – propensity to feel shame and guilt, the values of significant others and the social norms of one's group, tolerance for criticism, and quality of one's family life to name but a few.

Such factors differ from one person to another. Importantly it is the psychological meaning associated with the sum of these different pressures that will determine future behaviour, not the penalty imposed by the legal system (Kennedy 2008).

Amidst a complex set of findings from research investigating the effectiveness of various faces of deterrence in different contexts, the one factor that does seem to shine through is the person's perception of how likely it is that they will be caught for not complying, rather than how severe they think the penalties will be (Braithwaite J, Makkai & Braithwaite V 2007; Braithwaite V 2009a). In other words, belief that in the future one might be caught appears to be one of the best constraints on those who are contemplating breaking the law. Most people prefer not to be in trouble with the law.

This finding can be thought about psychologically as follows (Braithwaite V 2009a). Future behaviour can be guided by feared possible selves and hoped for possible selves. When laws are enforced, people are concerned about being caught for breaking the law and feared possible selves take shape. So too do hoped for possible selves which express a perception of oneself as law abiding and being considered as such by authority, that is, as the type of person who has nothing to fear from authority. In contrast, when laws are not enforced or are not successfully upheld in court, feared possible selves are not front stage – and perhaps hoped for selves about being law-abiding fade in importance also. The law and those enforcing it lose a 'mental presence' in the mind of the regulated actor and easily become tangential to mainstream business.

A feared possible self or believing that one could be caught for wrongdoing is a particularly effective cognition for self-regulation – imagining oneself in a role that is abhorrent or distressing or troublesome in some way is in and of itself a deterrent. In our rational moments, we steer our behaviour in directions that make it less likely that this feared possible self is realised. The desire to stay away from feared possible selves is a motivation of individuals that can inform the design of regulatory systems. So too is the hoped for self, particularly when that self is associated not only with lawfulness but also with performing better than regulators expect. In areas where quality matters such as health care or education or environmental preservation, minimum standards are not enough: regulators have the job of pushing laggards up above the floor (satisfying minimum standards) and enabling leaders to push through the ceiling and pull others up with them (Braithwaite J, Makkai & Braithwaite V 2007). Regulators enable through inspiring hoped for selves, selves that capture plans and actions that give meaning to continuous improvement.

But how can we be sure that these feared possible selves and hoped for possible selves line up with what regulators expect? Why should we not contemplate being caught and swell with pride at our courage at taking a stand against authority? Could we have a hoped for self that is exactly the opposite to what the regulator wants? It is at this point that the second body of literature enters the analysis. Tom Tyler and his colleagues have spent more than two decades showing how people are more likely to obey the law, share the goals of authorities and cooperate with them when they are treated with procedural justice (Tyler 1990, 2011).

Procedural justice for Tyler means believing that one has been treated with respect and that one has been looked upon as trustworthy and with impartiality. This meaning that emphasises how one interprets one's treatment at the hands of an authority sits alongside legal notions of procedural justice as fair and due process. Tyler's work has been important in demonstrating that how we are treated is far more important in determining our cooperation and law abidingness than whether or not authorities make decisions in our favour. When people are treated as valued members of a community, they come to view themselves as part of that community and want to keep their good standing with others in the group. Fair treatment paves the way for taking on board a pro-social hoped for self. When individuals are treated with procedural justice, they are more likely to be open to being persuaded that the laws are legitimate and are important to follow. They are more likely to put their best foot forward. Procedural justice provides an avenue for lowering resistance to and doubts about the regulator among members of a regulatory community. In the process, cooperation around regulatory reform is built.

These two literatures inform the design of regulatory systems and how such systems can manage the task of regulating. Deterrence is more effective in steering individual behaviour when it is something that could happen in the future and is feared as such. It may be feared because it brings transactional, social or economic costs or some combination thereof. As a consequence, planned action is corrected to avoid punishment. The actual experience of punishment may or may not elicit compliance.

It can give rise to beliefs that one's treatment lacks fairness, is oppressive and inhumane on multiple grounds. Punishment may therefore facilitate people's movement to the periphery or out of the regulatory community and generate defiance against the authority. This defiance inoculates against the regulator's endeavours to be procedurally fair, to educate and persuade that a certain course of action may be desirable or morally right.

### ***Two principles to guide regulatory practice***

Together these bodies of research on deterrence and on procedural justice advise that the following two principles should guide the development of regulatory practice:

- > The regulatory system should be seen as a 'benign big gun', peopled by regulators who walk and talk softly – with respect and concern, but who are known to carry a big stick and are able to coerce compliance if they so choose (Ayres & Braithwaite J 1992; Braithwaite V 2009a). In other words, deterrence works through being feared more than through being used. When deterrence capacity is used against an individual or group, it loses much of its power and creates opportunity for defiance and rebellion. It is to be used sparingly, when other methods of influence fail. At the same time, regulated actors know it can and will be used if resolution to their differences with the regulator is not found.
- > The regulatory system should uphold the justice of respect through: communication within the regulatory community to ensure respectful, inclusive treatment; regulatory interventions that are transparent and in accord with previously agreed standards; and willingness to work to build commitment to regulatory goals (Braithwaite V, Harris & Ivec 2009; Harris, Braithwaite V & Ivec 2009; Tyler 1990). In other words, procedural justice (particularly the justice of respect) keeps members of the regulatory community at the table with hoped for selves drawing them down the path of compliance and feared possible selves keeping them away from paths of non-compliance.

These two principles are essentially psychological. In the sense that regulation involves changing human behaviour, psychological principles need to be accommodated in regulatory ideas of what works. The two principles are compatible with the well-established regulatory ideas or practices that are discussed in the remainder of the paper: risk management, commitment and self-regulation, nodal governance and meta-regulation, and responsive regulation. These four regulatory ideas have been developed within their own theoretical frameworks and have not been necessarily cognisant of psychological principles. Yet these principles about human behaviour and how it is changed through regulatory encounters are accommodated within these widely used practices – implicitly in the first three practices, more explicitly in responsive regulation.

### ***Risk-based regulation***

The idea of risk-based regulation is to assess where harm is most likely to occur and prioritise the importance of containing or reducing these harms. First, the most important risk is analysed with a view to clearly defining the problem, its causes and taking action to fix the problem. Resources permitting, the next most important risk is addressed in the same way, and so on. Invariably some risks will not rise to the top of the pile and receive attention, though there is no reason why a watching brief cannot be kept on lower level concerns (Sparrow 2000).

This approach is most often associated with using limited resources efficiently. But it also guards against over-regulating and creating harm through introducing controls where they are not necessarily beneficial. In order to use risk based regulation effectively, two auxiliary capacities are required. One is to have the intelligence capability to define risks, set priorities and analyse the problem (Sparrow 2000). It is difficult for a regulatory agency to do this without a network of support and relatively open information exchange within the regulatory community. Second, risks are not static (Sparrow 2000). The regulator has to diligently scan the environment and again relies on obtaining quality intelligence about newly emerging risks through regulatory community networks.

Within the tertiary education sector early risk detection was important in the case of providers who collapsed financially and left students at risk of not receiving the education for which they had paid. In terms of current risks in higher education, reporting burdens are reputed to be threatening the processes that have produced excellence and adaptability in the sector.

Compliance, it has been suggested, has brought rigidity to procedures and goals as well as redirecting resources away from the main business of training, teaching and research. Whether this problem really exists or not is irrelevant to this paper. What is important is whether or not the mechanisms are in place to pick up this intelligence in a routine regulatory scan for risks on the horizon and pre-emptively act against any harms that may be looming.

Risk-based regulation gives rise to the question of what happens to the others who fall under the regulator's umbrella but who are not receiving any attention because they pose a relatively low risk. It is here that the value of cooperative regulatory communities and shared hopes for selves comes to the fore. If those being regulated know what they should do, see benefits in what is being asked of them, and feel that the regulator respects them and trusts them to get on with the job, most will do so without the need for intervention. Good communication strategies in the form of newsletters from the regulator will keep everyone in the community mindful of the regulator's presence and provide a basis for reinforcing the feared and hoped for possible selves that lie at the psychological heart of self-regulation. Newsletters also provide opportunity to show appreciation for new initiatives and best practice that can raise standards voluntarily and further regulatory objectives with encouragement from the regulator, rather than through the imposition of burden (Braithwaite J, Makkai & Braithwaite V 2007).

To ensure that the regulator's presence is being felt everywhere and not exclusively by the high risk group, supplementary strategies can be used such as dob-in phone lines, random audits and benchmarking exercises. Deterrence resides in the belief that the regulator could be knocking at the door. This leads responsible individuals and organisations to value doing the right thing and to acting accordingly.

### ***Commitment and responsible self-regulation***

Commitment is a belief that the purpose of regulation is desirable and that the regulated actor will work with the regulatory agency in achieving its goals. One way of interpreting commitment is to say that those being regulated would want to pursue this course of action because it is intrinsically worthwhile, regardless of whether or not it is the law. A hoped for self is readily available to reinforce the importance of cooperating with the regulator.

Commitment can only be built through dialogue and shared understanding about the intent of the legislation and how the regulator is going to proceed. What is written in law rarely is sufficient to build commitment. It is the shared understanding, not simply the legal document, that brings meaning to the regulatory enterprise and creates a sensibility in regulated actors that they can have confidence that the regulator's purpose has integrity and their endeavours to do the right thing will be respected.

It is not expected in any regulatory domain that all will show commitment that will translate into high performance standards, but where there is commitment, regulators benefit in two ways. First, committed actors become barometers for how the regulatory process is faring. When committed actors have difficulty complying, a critical analysis of systems and processes is imperative. Either the regulatory settings are wrong or there has been failure to arrive at a mutual understanding of the benefits of the regulatory exercise and its fairness (Braithwaite V, Harris & Ivec 2009; Harris, Braithwaite V & Ivec 2009).

Second, committed actors, if empowered to improve their operations to a point of going beyond compliance, can provide valuable guidance for how the sector might improve its productivity and excellence. Regulators are rarely innovators of best practice themselves. Rather they are carriers and translators of innovation, recognising and praising new initiatives and suggesting to others that they learn from such initiatives and follow suit. It is even possible that leaders among regulated actors can set new regulatory standards. When Japanese manufacturers dramatically reduced car emissions and produced more fuel-efficient cars, it was not through punitive measures imposed by regulators. Instead government embraced the innovation of leaders in the field and set these improvements as benchmarks for the industry as a whole (Mikler 2009). When regulators recognise strengths and encourage further development of these strengths, they increase prospects of other competitors taking the ideas seriously and introducing them into their own operations.

Regulators can empower regulated actors to build on and share their strengths without commitment to the regulatory purpose, but commitment helps – commitment to both the regulator's mission and to cooperating with the regulator. Commitment ensures that ideas for improvement flow through

the sector and that there is sufficient trust to try these new ideas. Without trust and without commitment, innovation may happen, but it is likely to be kept out of sight of the regulator and be closeted away in some corner of the regulatory community out of public gaze.

### ***Nodal governance and meta-regulation***

Sometimes governments use the rich resources of regulatory communities to assist with regulation. Third parties may be trusted to take on regulatory responsibilities, or are recruited by government in the co-production of regulatory activity (Alford 2009; Grabosky 1990, 1995b, 1997). Regulation by third parties is a particularly attractive option in contexts where government lacks the necessary expertise. Sometimes areas of highest risk such as safety management of a nuclear reactor or management of air/sea rescue services and fire services, or management of the banking system require not regulator expertise in how to do these things but regulator skill in spotting weaknesses. Then regulators enable those with the hands-on expertise to function at optimal levels to transform weaknesses into strengths.

This way of thinking recognises that government is not the centre of all regulation (Wood & Shearing 2007). There are many nodes with resources, power and influence that impact on how things are done (Braithwaite J & Drahos 2000). If these nodes of governance can be persuaded to work with government to achieve desirable outcomes, regulatory effectiveness improves considerably. Through accepting active responsibility for outcomes within the regulatory community, nodes of governance work in partnership with regulators on projects of shared interest. They co-produce the desired outcomes. Third party regulation and co-production are used in the tertiary sector with industry councils contributing to curricula through training packages that detail required workforce skills.

Apart from offering expertise and resources, third parties may prove to be better relationship managers with regulated actors who are non-compliant or resentful of the regulator, yet need to be engaged with the regulatory agenda. Mutual dependencies and greater trust may mean that some third parties are more successful in eliciting cooperation and compliance with agreed standards than a government agency (Braithwaite J 2002).

Co-production involves parties working together (Alford 2009). In that process transparency is increased and regulated actors become aware of what each other is doing. In a lax regulatory environment this arrangement may mean that both regulated actors learn not to comply. An example of this would be a tax practitioner and a taxpayer who conspire to avoid taxes. But given appropriate signals from the regulator and the regulatory community more generally, co-production can also improve compliance, through building efficacy, feedback and learning loops that lead to better outcomes.

A more formal hierarchical arrangement that follows the same principle as co-production or cooperating nodes of governance is meta-regulation (Grabosky 1995b). Meta-regulation means regulated self-regulation.

Commonly meta-regulation is employed in complex regulatory contexts where specialised knowledge and responsibility is required to ensure compliance. Many regulatory agencies assess the financial health of an organisation through relying on an independent auditor's report rather than relying on their own auditors. Other examples occur when companies have internal compliance management departments. Outside regulatory bodies first check on the organisation's compliance management practices – how internal compliance officers identify non-compliance and deal with it, instead of duplicating the internal compliance officers' work.

Meta-regulation can be a particularly useful approach in the tertiary sector. For instance, an educational provider may have a number of colleges across the country. At each college, compliance issues will arise in relation to occupational health and safety, immigration, financial probity, governance, teaching quality, assessment processes, learning culture, pathways to work and the like. The provider may oversee an integrated compliance system that is in operation across these different sites. There is value in a tertiary education regulator interrogating the provider's internal compliance management system first, before doing piecemeal audits at particular sites. Furthermore, if problems arise at a particular college, for example with too many course incompletions and student complaints, it is more sensible for the regulator to work with the provider as the entity responsible for overseeing compliance across a number of colleges, and insist that they lead a root cause analysis of the problem at the local level. Meta-regulation provides a regulator with opportunity to use scarce resources efficiently. But it also serves an enabling function: the activation of responsibility at nodes of governance that are rich in experience and influence. Providers are required to accept responsibility for knowing about the activities of their various colleges and supporting their compliance efforts.

### ***Responsive regulation***

Responsive regulation means that the actions taken to deal with non-compliance are responsive to the moves made by the regulated actor, to the business context, to the industry and to the political and economic environment (Ayres & Braithwaite J 1992; Braithwaite J 2011). Responsive regulation is not simply about enforcement of rules, though that is part of it. Responsive regulation is about persuading, encouraging, supporting, partnering, sometimes sanctioning, and sometimes even negotiating a power sharing arrangement. 'Responsive' enters our thinking when we ask which mix of options is appropriate to bring the regulated party into compliance. The above practices of risk regulation, commitment and responsible self-regulation, and nodal governance and meta-regulation all have a place within a responsive regulatory framework.

The essential feature of responsive regulation is that a regulator should start with 'opportunity for self-correction'. Starting with opportunity for self-correction does not mean that the regulator is weak, however, and can be deceived or manipulated or will back down. Regulators will incrementally increase pressure on regulated actors who refuse to comply. Increased pressure means that the regulator becomes increasingly interventionist in insisting on compliance, ultimately having the power to de-license or otherwise incapacitate the regulated actor.

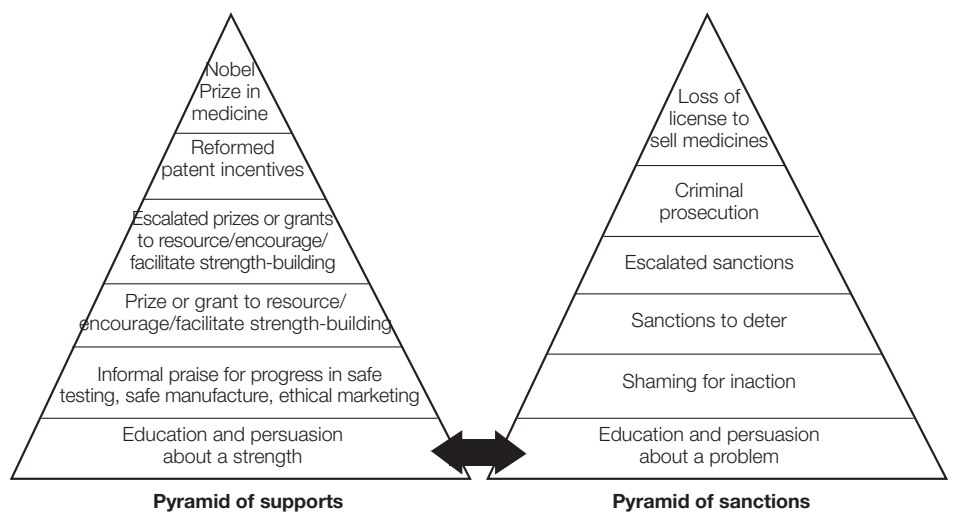


Responsive regulation is about persistence, being prepared to try many different things, while following the principle that less intrusive interventions should be tried before more intrusive ones. (There are exceptions. If a student was being sexually abused it would be unconscionable not to intervene to prevent a further occurrence immediately.)

The logic of the responsive regulatory approach is that regulated actors not in compliance see that their continued operation depends on their satisfying the compliance requirements of the regulator; and doing so sooner rather than later is the least costly or painful option. The approach avoids two common problems. First, using the full force of the law to elicit compliance from those willing to do the right thing is a waste of resources and an unnecessarily punitive act that risks humiliating and alienating those willing to cooperate with the regulator. Second, relying wholly on self-correction or on 'nattering' that certain standards have not been met without exerting regulatory powers to elicit compliance sends the message that non-compliance doesn't matter too much and that the regulator's requests can be readily dismissed without fear of consequence.

Responsive regulation follows the two psychological principles outlined earlier. Deterrence is in the background to be used if compliance is not forthcoming with lighter touch regulation. The justice of respect is enacted through giving those who are non-compliant an opportunity to accept responsibility for their failure and correct the situation. The justice of respect is further reinforced through the procedures followed to develop enforcement pyramids. The graduated steps that are used to nudge the non-compliant into compliance are neither arbitrary nor vindictive. They are known and have the support of the regulatory community. In this way, actions taken to deal with non-compliance come to be seen as fair and reasonable. When a regulated actor is sanctioned, the regulatory community has confidence that such an entity has had opportunity to be heard and helped, and more than likely is deliberately refusing to meet their obligations under the law.

These ideas are encapsulated in regulatory pyramids. There are pyramids of sanctions (sometimes called enforcement pyramids) and pyramids of supports (sometimes called strengths-based pyramids). An example of both types of pyramids appears in Figure 1 in the context of the regulation of medicines. The idea of a pyramid of supports is that it recognises and rewards virtue, each step representing a higher achievement than the one below and each step conferring more status than the one below. The recognition offered through a pyramid of supports to those doing the right thing plus the incentive structure provided through rewards and awards have the effect of motivating high performers to strive for excellence and average performers to do better. A pyramid of supports not only raises the bar, but it supports organisations as they try to get over that bar (Braithwaite J 2008). It nurtures hoped for possible selves while the pyramid of sanctions brings to the fore feared possible selves.



**Figure 1:** Pyramids of supports and sanctions being developed by John Braithwaite in his work with Graham Dukes and James Maloney on the regulation of medicines.

Regulatory pyramids need to focus on particular problems: there is no one size fits all with responsive regulation. To illustrate, one particular risk for a tertiary education regulator may be assessment of training skills. A responsive regulatory approach would begin through understanding the problem. Are there economic or political pressures that are contributing to the problem? Is the problem widespread in the industry and if so why? Or is the problem restricted to businesses of a certain kind?

Critically analysing these issues would involve bringing together nodes of expertise and influence from across the sector – teachers, students, providers, employers and workforce participants with knowledge of how skills were translating into the workforce. Knowledge of best practice would be exchanged and evaluated.

Next would be conversations with providers who had been identified as using inadequate assessment procedures. The first step would not involve sanctioning but rather an opportunity for the provider to work with the regulator to develop an action plan to address the problem.

Others may be involved in this process: training of staff may be necessary, assessment protocols may be shared. It may even be possible for a group of regional providers to cooperate in setting up an assessment process for all students in the region.

Should the problem of assessment not be dealt with responsibly by providers, regulators would increase their control over the process. They may audit courses to see how assessment is undertaken. Desk audits may be followed up through visits to observe the assessment process. Industry councils may be invited to accompany the regulator to observe assessment processes and certify their legitimacy. If improvements are not evident, penalties and fines may be applied. In the absence of compliance, next steps may involve restrictions on conditions of operation for the non-compliant provider, resulting eventually at the top of the compliance pyramid in removal of registration to operate.

It is useful at this point to consider what a non-responsive approach to the assessment problem might look like. The problem is illustrated by considering the limitations of web-based programs for education (for example, language teaching) that incorporate standard assessment modules so that one can gauge one's level of competence before proceeding to the next level. These are enjoyable and valuable learning tools, but as most of us who have used these programs know, they provide no assurance that in another context, when we are travelling or working, we can understand and speak our new language. Assessing whether we are ready to take on the world with our new found skills requires not a standard and rigid assessment process, but rather one that can test how we cope at the limits of our competence. Do we adapt, learn and engage with the challenge or do we become panic-stricken or withdraw in despair.

Assessment, like learning, gains much of its meaning and value in the hands of teaching professionals. The qualities required to judge who is ready, and who is not, to effectively use their skills in another environment cannot be scripted. A person could answer every question correctly on a computer based language test, but be totally incapable of applying that skill in a work context which requires group conversations and group problem solving. Extending testing to include all possible contexts for application of the skill is hardly feasible. Assessors need to make judgments not just about what a person can do at a particular point of time, but about their retention, understanding and application of that skill in the future. The 'learning to learn' factor is essential for knowledge transfer and adaptation. The problem cannot be addressed without teaching professionals who give students confidence in what they know and how to learn more. Exercises in assessment are an inherent part of developing the learning to learn skill.

Generally, strengthening professionalism and commitment is not achieved through legislation or coercion. Both require a regulator that is nurturing of these qualities. It is in the nature of regulation that regulators see both good and bad practices.

It makes sense for regulators to give attention to good things happening in the regulatory community and be open to the prospects of better things happening with a bit of support. Regulatory activity around recognising strengths and promoting good news stories for the sector can be organised around a pyramid of supports (Braithwaite J, Makkai & Braithwaite V 2007; Healy 2011).

Recognition of strengths by the regulator can be given in a variety of ways, but importantly, the ways must be valued and meaningful to the sector. In practice pyramids of supports like pyramids of sanctions need to be developed in consultation with the regulatory community. Nevertheless, the steps included in Figure 1 have applicability in most sectors including tertiary education where innovation, commitment and cooperation are critical for raising quality and extending best practice.

One point is worth emphasising in relation to pyramids of support. Regulators can develop an unhealthy focus on the negatives: they regard the positives as not within their remit and they fear that through recognising positives they weaken their case for sanctioning and leave themselves open to being challenged (Braithwaite J 2011; Braithwaite J, Makkai & Braithwaite V 2007). The answer to this argument lies in the regulatory purpose. The evidence shows that if the objective is to improve standards, a regulatory agency that ignores the positives and only notes the negatives does so at its own peril. It is surprising how few regulators praise those who are undertaking innovative steps to ensure compliance or improved outcomes that are beyond the standards expected by the regulator. Praise works: in a study of 410 Australian nursing homes, inspectors who made greater use of praise accomplished higher compliance rates two years after their inspection (Makkai & Braithwaite J 1993).

Responsive regulatory pyramids work because they deal with the psychology of defiance, the desire to protect one's territory from an intrusive regulator. Where regulation is seen as an unnecessary burden – a not uncommon reaction, people turn away and don't want to know anything about it. 'Won't do' and 'can't do' become one because people place themselves at a social distance from either being persuaded of the benefits or learning what is required for compliance. Social distance prevents them from moving to the more compliant-ready states of 'want to do' and 'can do' (Braithwaite V 2009a).

The task of the good regulator is to reduce this social distance, to turn the situation around to one where the regulated party is willing to give it a go. Heavy-handed enforcement is often counterproductive to winning over the non-compliant (Braithwaite J & Makkai 1991; Makkai & Braithwaite J 1994). A good long chat, on the other hand, can work: (Bardach & Kagan 2002) the regulator may persuade the regulated party to comply. It is also possible that the regulated party will take the opportunity to persuade the regulator that the regulation is unreasonable and needs to be changed. Under such circumstances of knowing that their criticisms and grievances are being taken seriously, most law-abiding individuals will comply. They opt for deference with dissent (Braithwaite V 2010). Either way, a light touch to achieve compliance is superior to heavy-handed approaches that more often than not will ratchet-up tensions and defiance and increase the likelihood of protracted contestation. At times, protracted contestation cannot be avoided. At the heart of these battles at the top of the enforcement pyramid is the law, its interpretation and the decision as to who is right and who is wrong by the courts. Just as important for future compliance, however, is the disrespect that each party communicates to the other which often is not quickly forgotten (Braithwaite J 1989).

## **Conclusion**

This paper presents the argument that building a regulatory community that is supportive of the regulatory enterprise and that shares a sense of genuine commitment to the regulatory purpose is fundamentally important for any regulator and is an ongoing process. This outcome is not achieved exclusively through law and an enforcement rulebook. Rather it is achieved through dialogue about the benefits that the regulator will bring to the sector, the justice that will guide its decision-making and its processes, and the reasons why the sector should feel a moral obligation to work with and defer to the regulator's authority. The dialogue may be tense at times. But it is only through such a process that a regulator can establish its integrity, that is, its soundness of purpose, its dedication to holding standards high and improving them if possible, its commitment to operating with the justice of respect, and most importantly, its responsiveness to the regulatory community that it serves.

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