

Leadership skills for regulators

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Abstract

Regulation plays a vital role in reducing harms and promoting public order. However, regulatory reform has been likened to painting the Sydney Harbour Bridge, it never ends. Coupling this reality with the increasing array of areas requiring regulation, there is an acute need for regulators to become more effective in how they work. We discuss the leadership skills needed to ensure regulators consistently contribute to the creation of public value.

KEYWORDS

leadership, regulation, regulatory practice

Points for practitioners

- Regulators can be more effective when they appreciate their authorising environment and the factors which make that environment dynamic.
- Careful calibration of enforcement practices to the capabilities of those being regulated can reduce conflicts and improve outcomes.
- Regulators with good communication skills can do much to resolve apparently intractable disputes.

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Regulation is crucial for reducing harms across society and our broader environment. Regulation is also used to promote public order and uphold agreed notions of good conduct. In Australia, as elsewhere, regulatory agencies operate at every level of government. All such agencies employ personnel to work on regulatory design, monitoring, and enforcement. Often, these regulators must work closely with specific industries and engage with diverse communities and organisations. Their work holds implications for public order, safety, fairness, human rights, economic efficiency, and environmental management.

Through multiple iterations of a course titled 'Leadership for Regulators', we recently interacted with mid-career professionals from 25 Victorian regulatory agencies and three other Australian jurisdictions. Our intention was to introduce core leadership skills to professionals currently in the middle ranks of regulatory agencies, to support their inclusion and progression within a broader public sector 'regulatory profession'. Here, we distil insights from those encounters and suggest how key academic contributions can inform the practice of those aspiring to be regulatory leaders. The academic contributions we highlight are distinguished by their effectiveness in marshalling diverse theoretical concepts into frameworks and guides that can be readily applied to address many of the real-world challenges regulators face day-to-day.

1 | BUILDING CONTEXTUAL AWARENESS

By gaining perspective on problems, leaders can identify the forces at work and potential entry points for effective interventions. Mark Moore's (1995) analysis of the forces that support or hinder creation of public value can provide perspective on many situations. Moore proposed that those seeking to create public value should identify the 'strategic triangle' of their (1) authorising environment, (2) operational capability, and (3) strategic goals.

The insight for practice here is that building contextual awareness can greatly assist regulators in how they design and enforce regulations. Our conversations with regulators suggest the strategic triangle has practical benefits and can be applied to good effect. While government ministers and senior officials shape the overall authorising environments of regulatory agencies, authority becomes more open to interpretation and contestation in the field. For some regulators, that is a daunting prospect. But for those who have cultivated contextual awareness, knowledge of the fluidity of authority can prompt new interpretations of problems and how they might be most effectively addressed.

2 | PRIORITISING THE REDUCTION OF SIGNIFICANT HARMS

A preponderance of regulations have their genesis in efforts to reduce harms. Malcolm Sparrow (2020) suggests regulatory agencies must both monitor and prosecute illegal behaviours, and scan their operating context for emerging harms. How agencies should allocate resources across these two areas is open to debate. One risk is that too much effort goes into policing minor infractions that would cause little or no harm. An alternative risk is that too much effort goes into scanning for new harms without supporting the systematic efforts that could reduce known harms. Given these risks, many regulators are now familiar with the 'regulatory pendulum', the swinging of focus and efforts from intensive to relaxed pending current crises and community opinions. Regulators have sought to reduce the pendulum's swing, incorporating new ideas and tools into their practice. For example, the emergence of new technology to support the monitoring and

assessment of harms (typically referred to as RegTech) is being rapidly embraced and could be of great benefit to regulators. However, jumping from fad-to-fad risks extending the pendulum's swing.

The insight for practice here is that regulators can improve their effectiveness by continuously reflecting on what constitute the most pressing and emerging harms within their agency's operating context. Building acuity around shifting harms, the suitability of existing regulation, and the appropriateness of novel approaches, is a useful leadership skill for regulators.

3 | UNDERSTANDING COMPLIANCE AND ENFORCEMENT

Compliance and enforcement are the bread and butter of regulatory agencies. Failure to implement regulatory duties can jeopardise an agency's social and thus ministerial licence to operate. Given the breadth of possible regulatory contraventions and the limited resources with which to act, what has come to be called Braithwaite's 'regulatory pyramid' depicts how to respond in a way now familiar to most regulators (Braithwaite & Ayers, 1992; see also Braithwaite, 2002). Correspondingly, awareness of the breadth of enforcement options has increased considerably, enabling regulators to more judiciously apply them.

The insight for practice here is that leaders of regulatory agencies should strive to establish a regulatory posture and internal culture which ensures individual officers know the range of enforcement options they can pursue. A vital corollary is that individual officers feel confident in exercising their judgement of what actions are appropriate. They need to trust that their superiors will 'have their back' if decisions are questioned. Even with sliding scales of enforcement action, however, there will likely always be more need for enforcement activity than can be met by available officers. Here, upskilling and mentoring programs can be effective for triaging cases to the most experienced staff, and for sensitising new staff to the nuances of specific regulatory domains.

4 | ADVANCING DESIGN OF THE REGULATORY RESPONSE

Some regulators are evolving their approaches to compliance and enforcement. This is happening due to both internal constraints imposed by their agencies and stakeholder expectations they will do what is necessary to reduce harms but otherwise get out of the way. This evolution has seen a shift from command and control or prescriptive regulatory models to performance- and principle-based approaches (Frieberg, 2017) and even towards self- and co-regulation (Sparrow 2020).

The insight for practice here is that co-operating with regulated entities can improve compliance without the need for significant regulatory intervention (Coglianese, 2016). For example, employing industry codes of practice as regulatory standards leaves the determination of what is acceptable to the majority of good actors. In turn, this can improve regulatory relationships through increased collaboration and the demonstrated trust that comes through working together to agree suitable standards. It also enlarges the pool of actors who can influence recalcitrants. Afterall, it reflects poorly on a profession or an industry sector when a few bad apples do not comply with standards they and their peers worked to establish.

These choices about resource deployment, posture, and the suitability of partnership need to be considered within the context of the regulatory environment, and the levels of deliberate recalcitrance versus unintentional non-compliance of regulated entities. Parker and Neilsen's (2017)

questions on compliance offer further practical insights on why specific regulatory practices might not work well with particular stakeholders and how to instigate more effective ones.

5 | COMMUNICATING FOR IMPACT

Even where regulators have a clear sense of their context, the harms they seek to prevent, and the tools at their disposal, regulatory practices are often undermined by ineffective communication. Best practice tools can be useless in the hands of those who cannot communicate clearly to those impacted by them. Moreover, communication is not only about telling others what you want them to hear, it also involves listening and being willing to change your approach in response. As one Senior Official told our course participants, “*put yourself in others’ shoes*”. When regulators do this, previously unseen issues with regulatory postures become clearer. This unearthing of ‘issues’ can be daunting.

The insight for practice here is that regulatory leaders can benefit in a variety of ways from practicing reflexive communication. Those benefits include: identifying where regulated individuals and entities do not fully appreciate the harms caused by their actions; the emergence of out-of-the box solutions to local problems; and the potential to nurture closer engagement and co-operation with communities and regulated entities. We heard stories of how specific problems causing regulatory violations were most effectively resolved through collaborative actions. Sometimes those collaborations arose between regulators and regulated entities. Other times they involved regulators reaching out to other government agencies to deliver solutions. Such initiatives call for ongoing and effective engagements. They also suggest all regulators should recognise the educative and collaborative potentials of their roles. Possession of sound communication skills is foundational to realisation of those potentials.

6 | CONCLUSION

Effective regulation is vital for the pursuit of good economic, social, and environmental outcomes. Regulators can benefit from developing their leadership skills, particularly (1) building contextual awareness; (2) prioritising the reduction of significant harms; (3) understanding compliance and enforcement options; (4) advancing design of the regulatory response; and (5) communicating for impact. These skills assist regulators to become more adept at interpreting their operating contexts and the factors that make them dynamic. They can calibrate enforcement practices to the capabilities of those being regulated, and can do much to resolve apparently intractable disputes. Put simply, they better understand the system and are able to employ points of leverage within it to deliver improved regulatory outcomes. We anticipate that regulators exhibiting such skills will be in high demand at every level of government over the foreseeable future.

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CONFLICT OF INTEREST

The authors declare no conflict of interest.

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