

## 2004 Chief Health Officer Seminar Series

**Seminar One – 23 June 2004**

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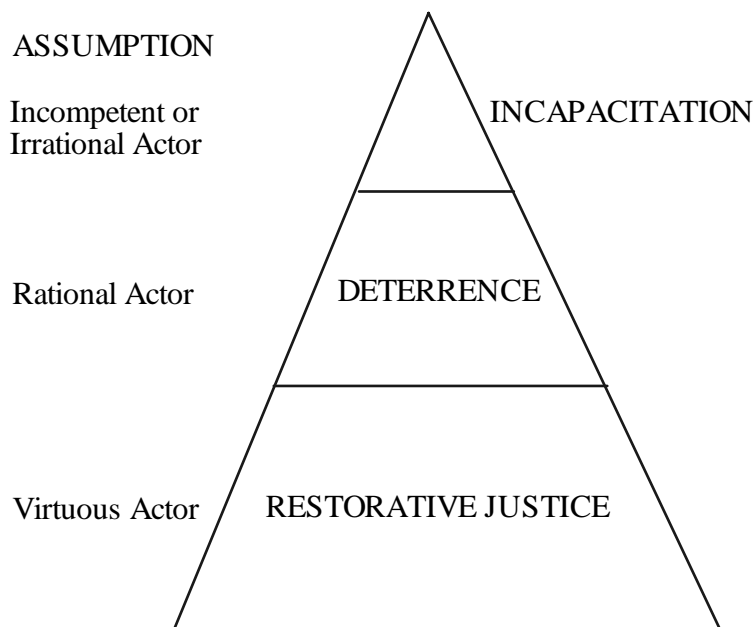
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**Abstract:**

### *Health System Regulation and Governance*

Regulation is seen in an information economy as becoming more reflexive. Regulated self-regulation – meta regulation – becomes more common than command and control by rules. Examples of meta regulation will be discussed such as the reduction in the levels of restraint use in US nursing homes. Meta regulation is connected to the idea of a responsive regulatory strategy. The basic idea of responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed. Part of responsive regulation is the regulatory pyramid. The hypothesis of the regulatory pyramid is that it is normally best to start with less interventionist policies at the base of the pyramid and only move up to more interventionist strategies when those lower in the pyramid fail.

Below is one abstract version of the pyramid that will be discussed:



## **Transcript:**

One of the things we see in a lot of areas of business regulation is a kind of a see-sawing back and forth between an approach to regulation that's based on persuasion and self-regulation and one that's based on rules and enforcement of those rules.

We perhaps see it at the moment with the ACCC where we're just coming out of the Fels era, which was a tough enforcement era, and into the Samuels era, which seems to be shaping up as a more benign era. So we are in that kind of process of see-sawing back and forth as we get changes in government and changes in philosophy between punishment and persuasion.

The theme of my work has been that see-sawing is not very productive and what regulation ought to be much more about is thinking about how to integrate more persuasion-oriented regulation and more enforcement-oriented regulation.

We see that debate occurring in occupational health and safety, which is one of those rather well researched areas of regulation where you have a lot of occupational health and safety inspectors who will say 'look, the only thing that business understands is the bottom line'.

Unless you have a safety enforcement regime that affects their bottom line, they just won't invest in health and safety for workers. Then you have those who say 'look, if inspectors go in and take upfront a tough enforcement attitude, then that's going to demotivate that majority of occupational health and safety folks who are genuinely concerned to improve the health and safety in the workplace'.

So if you march around the factory with the presumption that the regulated actors are untrustworthy and then something that is a breach of the regulations is detected, the health and safety manager, or if it's environmental regulation, the environmental manager, will drop their bundle. They will lose their motivation because they have been working hard in good faith, yet have been seen by the regulator as someone of bad faith.

In occupational health and safety regulation there's been some empirical support for the persuasion approach. The research by Sholtz and Gray looking at the effect of inspectors going around workplaces, and the impact of that on accident rates in workplaces, shows there's not an effect on the level of deterrent penalties imposed.

But there is an effect from inspectors just going there, so it matters having the inspectors turn up even when the average expected value of the punishment as a result of inspection is a matter of sense rather than a matter of dollars. And, of course, when the expected punishment costs are actually measured in cents rather than dollars, rational economic managers don't think about what's involved.

So it seems that regulation often works simply by a kind of a tap on the shoulder effect that motivates people. They often need to be reminded of their responsibilities and we need to invest in strategies that provide them with reminders.

That's what the literature suggests that occupational health and safety inspectors do, the same with coal mine safety inspectors, a very well researched area. Having a coal mine inspected, and that's a different regulatory regime with a longer history, produces very similar sets of results.

One of the ways in my work that I've thought about integrating command and sole regulations and persuasion is with the idea of a regulatory permit.

When using regulations, which have a role, you want a number of layers. You want to project the capacity to escalate, so that whoever receives a warning letter has some comprehension that there is the possibility the slippery slope will bring them to a sticky end. They should know the warning letter won't be the end of the story and that just doing nothing about it is not an option, that bad things will happen until the problem is put right.

I like to use as a model a regulatory pyramid. The hypothesis is that it is normally best to start with less interventionist policies at the base of the pyramid and only move up to more interventionist strategies when those lower in the pyramid fail.

The idea of the regulatory pyramid is being ultimately able to escalate up to the pretty tough stuff at the top. But you actually drive regulation down to the base of the pyramid; you want to communicate that, although you have these layers of escalation at your disposal, you prefer to always try to start off the base of the pyramid.

Sometimes it would be wrong to start off the base of the pyramid because there are some good reasons to jump immediately higher up. But you should operate on the presumption that what you want to do is start at the base of the pyramid and that's what you are telling them. You are telling them that you want to trust them, you want trust-based regulation, you don't want punishment-based regulation.

But you also want them to know you're willing to escalate to more punitive options if there is no response. And if you don't have that capability to escalate up to something that's pretty credible, to, say, shut down operations or the operators who aren't playing by the rules, then you actually get a more adversarial form of regulation in the middle of the pyramid.

If we think about health regulation - I've done quite a bit of work on nursing home regulation - there are escalations that can actually improve the delivery of health services. In the nursing home area the most commonly used sanction in the United States, and it also gets used a bit here, is withdrawing Medicaid support for new admissions to nursing homes.

Now we know that's an escalation that improves our ability to solve the problem because we know that it's on admission that a patient poses the heaviest cost on the system, at least I think in general that's true.

So if what we do is say, 'well you can't admit any new patients, you can't get any more of our Medicaid patients until you fix up this wrong', then that's reducing their profits if they're a private operator. But importantly it's not depleting the resources available to solve the problem. If, in contrast, you slap a heavy fine on them, for example, and the reason they're not delivering quality health care is because they don't have the resources to deliver it, then you're actually taking the resources away.

But if you impose the ban on new admissions until they fix the problem then immediately they've actually got more resources and they're not having to deploy those resources on the new admissions. It means they've got to get things right for the patients they already have in their facility. As soon as they do that they can go back to making money and the effect is they get the problem solved very effectively.

So that's an example of the kind of escalation that can improve capability. Of course, an escalation that has the opposite effect is shutting down a nursing home. We have a lot of empirical evidence that if you move very old and frail people you actually increase the risks of

mortality. We're deluding ourselves in thinking that by actually shutting down the facility we're doing something to benefit the patient. We really would prefer to have a form of escalation that involves putting in a new management team as opposed to going as far as corporate capital punishment.

That's the nature of some of the choices involved there. Responsive regulation also goes to the nature of the standards themselves. Standards themselves can be more or less responsive and here I want to introduce the idea of meta-regulation – that's regulated self-regulation - in an organisation.

If you think of a more abstract regulatory pyramid, imagine self-regulation at the base of the pyramid where hospitals effectively regulate themselves.

Moving up through more meta-regulatory strategies, which involve regulated self-regulation where an outside regulator is checking that the self-regulation is done properly, we can continue to escalate up to command and control regulation.

We'd prefer self-regulation for a lot of problems. But where self-regulation fails we might want to escalate to meta-regulation. When such regulated self-regulation fails we might go straight to command and control. Then the government inspector goes in and checks that these particular things are actually done and gets rid of people if they are not doing those things that ought to be done. This occurs ultimately at the peak of their enforcement pyramid.

Now, a shift towards more meta and self-regulatory strategies away from command and control regulation has in the health sector, as elsewhere, traditionally been fairly command and control oriented and there have been case studies documenting the failure of command and control regulation.

One of them has been nuclear safety regulation. When the inquiry occurred into the Three Mile Island nuclear disaster in 1979 in the United States the nuclear industry was subject to very rigorous command and control. The reason it was such a tight and tough and enforcement-oriented command and control system is that the US Government thought that the one thing it couldn't afford to have was a nuclear meltdown. Such an occurrence would be such a catastrophe that they had to regulate it very tightly.

What the commission that investigated it concluded was that the tight control was precisely the problem. The commission found that the controls were enforced in a very tough way so people working in the power plant were very rule compliance oriented.

As a result of this, when something went really wrong in the complex system of the nuclear power plant they were all running round like chooks with their heads cut off because no one had any systemic wisdom about how the safety system of that nuclear power plant worked.

They were running round asking the question 'well what rules have we not complied with?' which was the wrong question. They should have been running round saying, 'well systemically what's going wrong and how do we need to intervene to prevent this meltdown from occurring?'

So they moved to a more meta-regulatory approach where there was more emphasis on self-regulation, each nuclear plant seeing itself as a unique distinctive system and coming up with contextually attuned rules, principles, guidelines, ways of monitoring one another and peer review and peer support and learning from mistakes.

Most significant of all were the systems for learning from mistakes so that systemic learning was acquired and in different ways in the different complex systems which nuclear power plants, I would argue, like hospitals for example, actually are.

The effect was pretty dramatic. They have an outcome measure there called SCRAMS, which is automated shutdowns of power plants when there is a safety risk. The number of SCRAMS have been reduced from the time of the Three Mile Island incident, when there were seven per unit per year, to one per unit per year a decade later and 0.1 per unit per year a decade later again.

Financial regulation is another area where we've seen a shift to meta-regulation.

Well, are things like hospitals complex systems? The evidence suggests that there are still some problems that are best dealt with by simple command and control. An example of that in occupational health and safety is putting fencing around dangerous machinery in factories.

There's a very simple rule. There's a century and a half of experience that shows it works. If you impose fines on companies that fail to fence dangerous machinery you will reduce accidents. It works.

A simple command and control system will work because, in fencing off factory machinery you are not dealing with such a complex question.

This is not about saying there is not a place for command and control, it's about saying that as we move away from industrial organisation to a more knowledge economy - to a more information economy - meta-regulatory strategies will become more and more important in comparison to command and control inspection.

Here's a little example of why I think of hospitals as complex systems. A report came out last month in the UK from the National Safety Agency. They detected through their risk detection systems across British hospitals that a lot of patients were dying because nurses and other staff were misusing centralised infusion devices.

What they found was that the NHS was using 31 different brands of infusion devices. The problem was that the average nurse had only been trained to use six of these brands of infusion devices. There was a four in five chance that when they needed to grab hold of one it would be one that they didn't know how to use properly.

The simple solution was to realise there was a system that had been made unnecessarily complex. What they needed to do was standardise their purchases of infusion devices so there were only the best six. These became the only kind allowed and all staff had to be trained how to use them.

In the nursing home sector one of the biggest problems they had in the United States, which was in a much worse situation than we had in Australia or the UK, was that they were using extraordinary levels of restraint. When I started researching nursing home regulation in the United States nationally, 42 per cent of nursing home residents were being physically restrained, that's tied up for a substantial part of the day.

In the state of Nevada it was over 70 per cent. That's changed dramatically over a decade and it changed thanks to a meta-regulatory shift.

Now it's much lower than 20 per cent which is not as good as the UK, but it's less than half the problem that it was. This result was accomplished because, as part of the inspection process,

nursing homes were required to identify a quality problem that they wanted to improve. Regulations required even little facilities to do their own bit of deliberation about what their biggest problems were so they could design intervention programs and then see if that intervention reduced the problem.

There was an 'untie the elderly' campaign on Capitol Hill that NGOs got behind, forcing a lot of nursing homes to identify that as their problem. They knew they were doing it, but when it became transparent through the regulatory system that 70 per cent of the people in their nursing home were being tied up that was naturally something they chose for their studies.

They discovered their own ways of managing whatever problems they were trying to solve by treating those old people in some other way. They actually reduced rather than increased their tort liability risks as a result of doing so.

Using new technology, such as Palm pilots and so on, allows us more efficiently to harness management creativity in the health system so we can come up with new solutions - one of the things we hope to accomplish by meta-regulations.

The trouble with command and control regulation is it presumes we know the best way to solve problems. So the State tells us the best way to solve the problem - put a fence around dangerous machinery - and prevents future innovative ways of solving that problem.

But when we have more complex technological systems that are in flux, we actually want to harness management creativity in coming up with new solutions - that's part of the story about why we are and should be taking meta-regulation more seriously.