REGULATORY REVIEW: THE NEXT WAVE

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Introduction

As the 21st century looms, those in government charged with the responsibility of making regulation are under increasing pressure. This is reflected in the observation that "[t]o some business spokespeople, government interference in the marketplace is regarded as the embodiment of evil. Others adopt a more flexible approach, objecting strenuously to some forms of regulation, but tolerating, indeed, embracing, those forms of government involvement which happen to foster their own business interests".[1]

There is increasing pressure to improve the business environment by reducing costs and other impediments. There are increasing demands that regulations be "efficient and effective". In response, governments (or, at least, those that wish to be elected and re-elected) increasingly pledge that they will "cut red tape". However, there is a general business ignorance of what those in government are doing to make the regulatory process more efficient.

The best publicised project is the National Performance Review of the United States of America, chaired by Vice-President Al Gore, with its objective of "re-inventing government". However, even this project receives relatively little credit, leading to the title of the Vice-President's September 1996 report, "*The Best Kept Secrets in Government*".[2]

This is not true in my home jurisdiction of Victoria (Australia) where the Executive and the Parliament are actively involved in innovative approaches to the problems that face both regulators and the regulated in the late 20th century.

After eight years service on a parliamentary committee charged with scrutiny of regulation, I believe it is vital that parliamentary committees remain abreast of the multi-disciplinary work of regulatory reform and ensure that reform is not a guise for avoiding parliamentary and public scrutiny.

Thus, in this paper, I will focus on new developments in regulatory reform, including negotiated rulemaking, cost-benefit analysis and especially the concept of regulatory flexibility. I will touch on developments in rule-making in Victoria (and in Australia generally) to demonstrate that, rather than being swamped by the waves of criticism, regulators in Victoria are well-placed to ride those waves. This is because we have already implemented reforms including:

- mandatory cost-benefit analysis;
- mandatory consultation with interest groups and the general public;

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- ten year sunset clauses;
- a strong system of review by an all-party parliamentary committee with disallowance by either House of the (bicameral) Parliament.

However, while much has been achieved, we still grapple with the assessment of the costs and benefits of regulation, how such costs are changing over time, and what effect increasing complexity has on compliance.

I do not claim that Victoria has cornered the market on regulatory innovation. In May 1996, the NSW Government issued a Green Paper entitled *Regulatory innovation: Regulation for results.* In that paper, the NSW Government opened up discussion on the concept of "regulatory innovation strategies", the common thread of which is expressed to be "that they create room for businesses to influence the means by which they will satisfy the objectives of the regulation".[3] The paper canvasses various alternatives to the current system of regulation, including "performance based regulation", "negotiated rule making", "class exemptions" for small business, "regulatory flexibility" and "third party certification".

This is further evidence of the fact that governments and parliaments in Australia are aware of the demands of those being regulated, the pressures these demands place on the regulators, and also of the alternative compliance mechanisms that are available.

"Governments are not omnicompetent"

I believe current progress in regulatory reform is more than the knee-jerk reaction of politicians to the self-interested demands of business. Rather, governments must look at ways of improving their approach to regulation because regulation is increasingly believed to be beyond the capacity of governments to manage on their own (and from their own resources). That being so, there is a wider public interest in regulatory reform.

The thesis that the "business" of regulation is becoming too much for governments to handle has been put by Dr Peter Grabosky, an Australian commentator on regulatory policy. In his words, "governments are not omnicompetent". Nevertheless, governments of many countries have been torn between a pressure to reduce public spending, on the one hand, and an increasing pressure to deliver more, on the other. He has suggested that, this being so, one way of addressing the issue is to harness resources outside the public sector, to mobilise non-governmental resources and to enter into "co-productive" arrangements with those to be regulated.[4]

Thus, governments may achieve more efficient and effective regulation, with better compliance, if they engineer a regulatory system in which they themselves play a less dominant role, one in which they facilitate the "constructive regulatory participation of private interests",[5] in which their role is in "manipulating incentives in order to facilitate the constructive contributions of non-government interests"[6] and in which they "act as facilitators and brokers, rather than commanders".[7]

Negotiated rulemaking - "Reg-Neg"

There is increasing international support for what Grabosky calls "interest co-option" - the concept of building support for policy outcomes, by involving those who are to be regulated in the actual process of making the regulations.[8] This is a recognition of the basic nostrum that all law is ultimately dependent on consent for both legitimacy and enforceability. A good example is the concept of "negotiated rulemaking", also known as "*Reg-Neg*",

which operates under the (United States) Negotiated Rulemaking Act of 1990.

Briefly, the basic idea behind *Reg-Neg* is that a government agency considering making a *rule* (which is the US equivalent of what most of us here would call a regulation) first brings together representatives of "*affected parties*" for discussions on the proposal. The concept of "*affected parties*" incorporates interest groups, as well as those to be regulated by the proposed rule. When the parties are brought together, the object of the exercise is to achieve consensus about the text of the proposed rule, with a view to avoiding costly litigation further down the track. This must be done carefully, lest the result be a reduction in regulatory quality through deal-doing by interest groups at the expense of objective policy formulation.

While *Reg-Neg* may be a relatively new concept in common law jurisdictions, several European countries have long histories of involving business and academic elites and other groups in a highly institutionalised structure with a consensus approach to rule-making. France has its Council of State and the Economic and Social Council, the Netherlands its Socio-Economic Council and Labor Foundation, Greece has a Council of State.[9]

An OECD commentator, Rex Deighton-Smith, has observed, "By contrast, the English speaking countries have not only not had many of these structures but have tended to look upon regulation-making as an activity which was more or less exclusively the concern of government".[10]

"Reg-Neg" Australian-style

A form of negotiated rule making has been operating in Victoria since 1985, under provisions of what is now the *Subordinate Legislation Act 1994*. The general scheme requires that government departments consider various matters (including the existence of alternative methods of achieving the desired ends) *before* introducing regulations. There is also a requirement that the making of the proposed regulations be publicised in advance and that interested parties be consulted.[11] Finally, in all substantial cases, a "Regulatory Impact Statement" (RIS) has to be prepared by the government department proposing the regulation, in which the costs and benefits of the regulation - both economic and social - have to be evaluated.[12] The availability of an RIS also has to be advertised, and comments sought from those affected by the proposal, before the regulation can be made.[13]

A similar system operates in New South Wales, under provisions of the (NSW) *Subordinate Legislation Act 1989*. There is also a regulatory reform Bill before the Australian Federal Parliament.[14] The Bill would require all "legislative instruments"[15] "directly affecting business, or having a substantial indirect effect on business"[16] to be subject to consultation procedures similar to those of Victoria. Unfortunately, due to the failure of the government to take account of the criticisms by the Senate Standing Committee on Regulations and Ordinances of other less desirable features,[17] that Bill may be defeated in the Senate.

Victoria's experience of negotiated rule making

The process of publication and public consultation in Victoria is monitored by the Scrutiny of Acts and Regulations Committee,[18] a Committee of the Victorian Parliament of which I was the foundation Chair. The Committee's role includes one of scrutinising regulations to ensure that the formal requirements of the Subordinate Legislation Act have been complied with. In turn this requires the Committee to assess the adequacy of the Regulatory Impact Statements.

Subsection 10(1) of the Subordinate Legislation Act prescribes that an RIS must include:

(a) a statement of the objectives of the proposed statutory rule;

(b) a statement explaining the effect of the proposed statutory rule, including in the case of a proposed statutory rule which is to amend an existing statutory rule the effect on the operation of the existing statutory rule;

(c) statement of *other practicable means* of achieving those objectives, including other regulatory as well as non-regulatory mechanisms;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;

(e) the reasons why the other means are not appropriate;

(f) any other matters specified by the guidelines;

(g) a draft copy of the proposed statutory rule.

With respect to "other practicable alternatives", I should note that the Office of Regulation Reform (ORR) has published a useful guide to what is envisaged by the concept. They include:

- performance-based regulation;
- co-regulation;
- extending the coverage of principal legislation;
- removing other legislative impediments;
- increased enforcement;
- tradeable permits/licences;
- voluntary codes/self-regulation;
- negative licensing;
- public education programmes;
- information disclosure;
- economic incentives;
- risk-based insurance or guarantee funds; and
- rewarding good behaviour.[19]

I want to focus for a moment on the requirement in paragraph (d) that an RIS contain a cost-benefit analysis of a proposed statutory rule and of its identified alternatives. The cost-benefit analysis can be quite substantial and may be particularly difficult in cases where the benefits are social rather than economic.

The requirement to produce a document which, as best as possible, accurately assesses costs and benefits has been reinforced by the Supreme Court and, more particularly, by the Scrutiny of Acts and Regulations Committee (SARC). Over recent years the Committee has rejected Regulatory Impact Statements relating to pollution controls over ports[20] and over pollution controls over prescribed premises.[21] In both cases, the assumption of the agencies was that an assertion of benefit was sufficient. In the first case following consultation between the SARC and the relevant Ministers, the Regulations remained in place for an agreed period while a new RIS was prepared and a new process of consultation took place. In the second case, a new protocol for EPA/industry consultation was the extremely desirable result of a successful intervention by the scrutiny committee.

It is important to note that, in assessing whether the requirements of subsection 10(1) have been met, the Committee is assisted by the work of the Office of

Regulation Reform.[22] This office has a formal role in the process because of the requirement in subsection 10(3) of the Subordinate Legislation Act that "independent advice" be available as to the adequacy of an RIS. It is also important to note that, despite operating within the Government umbrella, ORR really does provide *independent* advice, and does not merely rubber-stamp RISs provided by Government departments and agencies.[23] Though it is not prescribed as the *only* source of such advice, ORR is the principal source of that advice. However, as a result of the operation of competition policy (and perhaps through some dissatisfaction by rule-makers with the stringent demands of ORR) its role is open to competition. There remains a danger that rule-making departments could seek to buy compliant advice.

While it is difficult to give precise quantitative evidence on the operation of the RIS procedures, it is my firm view (as Chairman of the Scrutiny of Acts and Regulations Committee) that the RIS procedures work and that they help to make regulations in Victoria both more effective and more efficient. Those rough quantitative estimates available support my assertion. ORR estimates about 20% of regulatory proposals coming to their attention via RIS drafts are either modified substantially or withdrawn, resulting in cost savings running into tens of millions of dollars. The 20% figure would underestimate the effect, in that many poor proposals do not proceed beyond a rough draft. Similarly, a United States Environment Protection Authority analysis of their experience with cost benefit analysis estimated that it had saved the economy $1000 for every $1 spent doing it.

Alternative compliance mechanisms

I now turn to the most recent regulatory reform proposal, namely, the concept of "Alternative Compliance Mechanisms" (ACM), which are embodied in the (Canadian) Regulatory Efficiency Bill (C-62). Under this 1994 Bill, Ministers would be able to approve alternative methods of complying with regulations pertaining to a particular business or industry. Before a draft "compliance order" is negotiated between the government agency and the relevant business or industry group, there must be consultation with affected parties. It is a key feature of an ACM that, while it does not meet the prescriptive requirements of the relevant regulations, it must nevertheless meet the **regulatory objectives** of the regulations. In that sense, it focuses on the ends, rather than the means.

However, the Canadian proposal is stalled or dead. The Bill was the subject of a scathing report by the Standing Joint Committee for the Scrutiny of Regulations (The Canadian Scrutiny Committee).[24]

While taking no issue with the goals of the Canadian Bill (ie to relieve the public, especially businesses, from the effects of unnecessarily burdensome or costly regulations, etc), the Canadian Scrutiny Committee stated that the Bill represented "a major departure from traditions of law and government" and, as a result, "ought to be very carefully examined and tested".[25] The particular problems that the Canadian Scrutiny Committee identified were that it would give the Executive a discretion to grant dispensations from the operation of subordinate laws in favour of individuals (which, the Committee said, amounted to a partial abrogation of the Bill of Rights of 1689) and that it was inconsistent with other constitutional values (including the rule of law and the principle of government accountability).[26] I need not tell an audience such as this that these are very serious matters, even if overstated in the report.

At its last "outing", the proposal was defeated in the governing Federal Liberal Party's caucus room. In 1996, I travelled to Ottawa to interview its authors (the Regulatory Affairs Division of the Treasury

Board of Canada), proponents, and opponents. Both before and after my visit, I used Internet and email to research the proposal and maintain contacts with those authors, proponents and opponents. It appears to me that the main reason for its defeat was a political assessment that the proposal would be bad politics in that it would be seen as the Liberal Party pandering to its business constituency. A secondary reason for its caucus defeat was a perceived lack of equity, in that only large corporations could afford the resources to successfully apply for and maintain an ACM.

Regulatory efficiency legislation - the Victorian proposal

While ACMs may have died in Canada, there is some impetus in Australia to take up the idea. This is, in part, a reflection of the fact that, as part of its platform for the 1996 election, the Victorian State Government pledged that it would:

> Introduce Regulatory Efficiency Legislation which allows business to propose alternative means of compliance with regulatory objectives. This will lower compliance costs across a range of regulations, by allowing business to tailor its method of compliance to suit its specific business circumstances and will build on flexibilities which are already being implemented in relation to specific legislation.
>
> For example, a road haulage firm with an integrated anti-fatigue program might have this accredited as an alternative to compliance with detailed driving log requirements, or a business might propose an inspection schedule for major machinery which suits its own maintenance schedule rather than meeting periodic requirements set in regulation.[27]

This commitment was, in turn, taken up by the Executive Council, which (on 28 June 1996) referred the issue of Regulatory Efficiency Legislation to the Law Reform Committee of the Victorian Parliament for inquiry, consideration and report.

A proposal prepared by the Office of Regulation Reform to the Victorian Government was made available to the Law Reform Committee. The proposal is similar to that in the Canadian Bill. This raises my suspicion that OECD meetings - which Australian and Canadian regulatory reformers attend - and the use of the Internet result in a process whereby a reform proposal stalled in one jurisdiction will spring up in another!

However, this is not necessarily a bad thing. An OECD Committee, the Public Management Committee has a Regulatory Management and Reform Group. This Group endeavours to ensure that regulation and regulatory systems are increasingly internationalised, with best practices being identified and information shared throughout the member countries. An important theme is that as economies globalise, so regulation must be harmonised if it is not to replace tariffs and quotas as the most significant barrier to trade.

In any event, we parliamentarians have taken to the Internet too and my Committee will use the Internet and its world-wide-web to undertake our process of consultation. You can be assured that we will be asking you to turn your minds to the acceptability of alternative compliance mechanisms.

The ORR proposal seems to have taken into account the reasons for the defeat of the Canadian proposal. There is a requirement that the proposal does not involve any lowering of regulatory standards and an assurance that proponents of Alternative Compliance Mechanisms would, in all cases, be required to demonstrate that their proposals would meet the identified regulatory objectives and performance standards *at least as effectively as the specific regulations that they seek to replace.*[28] In particular, an ACM would not be approved if it would compromise any safety, health or environmental objectives

of the relevant regulations. There is also a commitment that the principles of equality, fairness, competitive neutrality and government accountability will be respected and that government budgetary policy will not be compromised.

The scheme outlined by the ORR would apply only to statutory rules (within the meaning of the *Subordinate Legislation Act 1994*) and only to those statutory rules that are specifically "scheduled" by statute as being appropriate for the application of ACMs. A statutory rule would only be proposed for scheduling where it imposed an appreciable economic burden on business or another sector of the community. Proposals for scheduling would be made by the Minister responsible for the relevant legislation and would only be carried through after consultation with those persons and groups most likely to be affected by the scheduling.

The proposal includes a requirement that the relevant Minister must prescribe all the "relevant criteria" that would be taken into account in deciding whether or not to approve an ACM. Certain "minimum criteria" are suggested, namely:

- consistency with the stated statutory objectives;
- clear specification of the part(s) of the statutory rule(s) for which the ACM is to substitute;
- a clear explanation of the proposal, including a description of how the stated regulatory objectives will be achieved under the ACM and identification of businesses, activities or categories of persons to be subject to the ACM;
- adequate means of monitoring compliance with an ACM, including sufficient access to information necessary for monitoring performance.

The proposal envisages that there will be a requirement that the Minister publish (including in a daily newspaper circulating generally throughout Victoria) details of the statutory rule that is proposed to be scheduled, the stated statutory objectives and all "relevant criteria". It also proposes that the "relevant criteria" should be open to review by the Scrutiny of Acts and Regulations Committee, which would determine whether the criteria were adequate and whether they were consistent with both the stated regulatory objectives of the relevant statutory rule and the purposes and principles of the proposed Bill.

Approval of an ACM would not be possible unless the formal requirements discussed above have been satisfied. There would also be an obligation on the relevant department of agency to evaluate the ACM and recommend to the Minister whether or not it should be approved. Before making such a recommendation, the relevant department or agency would be required to consult with parties and groups affected directly and significantly by the proposed ACM (including other departments and agencies).

If a Minister decided to approve an ACM, he or she would be able to do so for whatever period he or she thought appropriate in a given case. The Minister would be required to publish notice of his or her approving the ACM and also to table such a notice in the Parliament. There would be an obligation on the relevant department or agency to make copies of the ACM available to the general public for inspection and purchase. There would also be an obligation on the proponent to inform all parties directly affected by the ACM (including the employees of the proponent, if relevant) of the details of the ACM.

Under the proposal as outlined to the Law Reform Committee, the ACM would operate to bind both the Government and the proponent to its terms. The legislation

would contain a statement to that effect. It is also proposed that there be a mechanism in the proposed legislation to ensure that a breach of the ACM will render the proponent liable to prosecution in the criminal courts for a breach of the relevant regulations (ie that the ACM operates as an alternative *to*) and/or to be subject to the forfeiture of security deposits and/or any other penalty prescribed in the relevant guarantee.

Finally, it is proposed that there be a discretionary power on the part of departments to recover the costs incurred in providing services relating to the preparation, finalisation evaluation and approval of a proposed ACM. There would be fees for any administrative action taken after the approval of an ACM, for example, where higher administrative costs are incurred or where requests are made to amend, vary, extend or cancel the approved ACM.

Critics of the proposal may consider that it is just a way of facilitating the watering-down of standards that currently operate to keep business in proper check. This will not be the case because any alternative will not be politically acceptable. If this proposal is to work, it must be on the basis that the proponents of ACMs can demonstrate that they meet the identified objectives of the relevant regulations (eg to keep the level of impurities in air or water below a certain percentage). A similar process already operates in Victoria, in the form of State environment protection policies (SEPPs) issued under the *Environment Protection Act 1970*. Under those SEPPs, "environmental quality indicators and objectives" are set and must be met by businesses and bodies that come within their jurisdiction.[29]

Further, if the proposal is ultimately adopted in Victoria, it will only work if it is in a form that ensures maximum transparency and accessibility to the general public and, in turn, maximum accountability of the Government to the electorate. It must not simply be a means for the Government to ingratiate itself with big business or a political party's financial backers.

The Canadian criticisms need to be examined closely. There must not involve any inappropriate delegation of legislative power to the Executive Government. Transparency and accountability must be guiding principles for any proposed legislation. It will be necessary for the Minister to be accountable to the Parliament and the general public for any exercise of that power. This would be achieved by ensuring that proposals - and the criteria by which they are to be judged - are published.

In my opinion, ACMs will only be politically acceptable if they are subject to the same level of parliamentary scrutiny as the primary regulation. Thus, they must be subject to disallowance by either House of Parliament, with appropriate examination by the Scrutiny of Acts and Regulations Committee.

Alternative compliance mechanisms in action?

It is possible to argue that the concept of alternative compliance mechanisms already operates to some extent. A system of "accredited licensees" already operates in Victoria, under amendments made in 1994 to the *Environment Protection Act 1970* (Vic).[30] Under this system, companies subject to environmental regulation can be freed from "the standard prescriptive approach to works approval and licensing" if they can demonstrate a high level of environmental performance and an ongoing capacity to maintain and improve that performance.[31]

Three "cornerstones" are required of companies participating in the accredited licensee process: an environmental management system, an environmental audit program and an environmental

improvement plan. A company must be able to convince the Environment Protection Authority (EPA) that it meets these cornerstones to a sufficient standard. If the EPA is so convinced, it will issue a licence that grants the licensee "a high degree of operational freedom".[32]

Once issued with a licence, an operator must lodge performance reports to demonstrate to the EPA that they are complying with its terms. Continuation of the licence is assessed on the basis of actual environmental performance and is judged against factors such as licence compliance, implementation of environment improvement plans and legal compliance by the operator.[33]

The transparency aspect is met by a requirement for community participation, consultation and access, particularly in relation to the environment improvement plan. Accountability is facilitated by virtue of the cornerstones of the licence being the subject of review at a predetermined frequency that must not exceed 5 years.[34]

As at 3 February 1997, 5 accredited licences were operating in Victoria.[35] Anecdotal evidence is that the concept works to the satisfaction of all concerned. In this context, it is important to note that the Chairman of the EPA, Dr Brian Robinson, recently said that the overall aim of the accredited licence system is "environmental improvement *through co-operation between industry, government and the community*" [emphasis added].[36]

At the Australian Federal level, the National Road Transport Commission (NRTC) is also pursuing the concept of alternative compliance mechanisms. It issued a discussion paper on alternative compliance in May 1994[37] and an interim regulatory impact statement on alternative compliance options in April 1995.[38] My inquiries indicate that the NRTC is slowly but actively pursuing this proposal.[39]

The bottom line is that the concept of alternative compliance mechanisms can work because, in Victoria at least, it appears to work.

Regulatory budgets

The general theme of my paper is that governments are aware of the current challenges of regulation and are open to the alternatives that are being proposed to the system that currently exists. I should add, however, that this does not mean that I necessarily endorse all the reform options that are currently the subject of discussion in Australia and overseas.

One option that I have in mind is that of the "regulatory budget", a concept that has generated not only interest but draft legislation in the United States. Under this concept, government agencies would be required to estimate the economic cost of implementing their regulatory policies and then to weigh this cost against the benefit that those policies would produce.

Under this Republican proposal, a regulatory budget would be tabled annually along with the fiscal budget. Hardly radical is an obligation on government that only those policies whose benefits outweighed the net costs would be implemented. However, under the Republican proposal, there would be a net sum of money available to regulators from which the cost of regulation would have to be met. The effect of this would be that, in order to find the money to pay for new regulations, regulators would have to repeal some old ones.

There are fundamental problems with this proposal, the most obvious being that it is "perilously" difficult to measure the value of, for example, a clean beach or racial equality.[40] It is worrying that it is superficially attractive to economic commentators who believe that a regulatory budget would force Congress and administrators to take responsibility for the cost of new laws, by making "bad"

regulation as politically embarrassing as wasteful spending.[41]

The regulatory budget proposal is probably a political stunt in the hurly-burly of US politics. With the increasing prevalence of cost benefit-analysis in the case of each new and remade regulation, it is a proposal that has no merit in the context of our Commonwealth systems.

Conclusion

In 1995, Christopher Booker, an English author and journalist, asserted that the British government had:

> recently unleashed the greatest avalanche of regulations in peacetime history; and wherever we examine their working we see that they are using a sledgehammer to miss a nut.[42]

We can laugh at this hyperbole but, it seems, this thinking has a high level of credibility amongst our business constituency and even among the general public.

Parliamentarians are not oblivious to this concern. The Fourth Report of the UK House of Commons Procedure Committee, tabled in June 1996, observed that "There is widespread concern at the growing volume and complexity of delegated legislation, and the obvious deficiencies in its consideration and scrutiny by Parliament".[43]

While this may be true in the United Kingdom, in the Australian State jurisdictions of Victoria and New South Wales, the volume of regulation has been almost halved with the impact of sunset clauses and regulatory impact statements. We need to work hard to ensure that the general public and business understands what we are doing. Like the National Performance Review, Parliamentary Scrutiny Committees are amongst the best kept secrets of our parliaments.

We need to ensure that commentators and the press acknowledge that (in some jurisdictions at least) efforts are being made to address the kinds of criticisms that are generally (and easily) made. While there is ample evidence to support the general thrust of such arguments, criticisms about the volume of regulations, for example, fail to recognise that, in some jurisdictions at least, there is legislation in place to require that redundant regulations be repealed.[44] It is equally the case that not enough credit is paid to the efforts of governments who do explore and implement innovative regulatory strategies.

Government should ensure that the resourcefulness of the private sector is brought to bear on regulatory mechanisms - whether it be by consulting the private sector on the form and content of regulations or by inviting the private sector to use its own expertise (and resources) to develop alternative compliance mechanisms. Even if there are very few Alternative Compliance Mechanisms produced because of the high cost of preparation, we will have opened a door to business and an avenue of counter-attack to criticism. We will be able to invite critics of regulation to propose alternative means better benefiting the community and themselves. While this will not silence the radicals, most business leaders are moderate and socially-responsible and will see the sense in our work.

However, public confidence in such a system will only be developed and maintained if there is a vigorous parliamentary scrutiny committee, with a good profile and the trust of the media commentators. Bipartisanship and confidence are the keys. Regulatory reform will proceed. It is your task, ladies and gentlemen, to ensure that democratic principles are not set aside in the headlong rush to greater efficiency!

Endnotes

1 Grabosky, PN and Braithwaite, J, *Of manners gentle: Enforcement strategies of Australian Business regulatory agencies* (1986, Oxford University Press, Melbourne), p 1.

2 Gore, Al, *The Best Kept Secrets of Government*, (September 1996, US Government Printing Office).

3 New South Wales Government, *Regulatory innovation: Regulation for results - Discussion paper* (May 1996), Foreword.

4 Grabosky, PN, "Using non-governmental resources to foster regulatory compliance", *Governance: An International Journal of Policy and Administration*, Vol 8, No 4, October 1995, 527 at p 527. Similar themes are also discussed in Grabosky, PN, "Green markets: Environmental regulation by the private sector", *Law and policy*, Vol 16, No 4, October 1994, 419. For similar views from an alternative source, see Jonson, PD and Jonson EP, "Financial regulation and moral suasion", *Quadrant*, July-August 1994, 85 at p 89.

5 Grabosky (note 1), p 543.

6 Grabosky (note 1), p 544.

7 Grabosky (note 1), p 545. This idea was also taken up by the Chairman of the Environment Protection Authority (Victoria), Dr Brian Robinson, in a speech to the Australian Centre for Environmental Law on 2 July 1996, entitled "ISO 14000: Eagle or albatross", at pp 2-3.

8 Grabosky (note 1). p 533.

9 Deighton-Smith, Rex, "Co-operative Approaches to Regulation - The Good, The Bad and the Future", draft speech made available by the author.

10 Ibid.

11 *Subordinate Legislation Act 1994* (Vic), section 6.

12 There are "exceptions" and "exemptions" to the RIS process, under sections 8 and 9 of the *Subordinate Legislation Act 1994* (Vic). The exceptions include that the proposed statutory increases fees in respect of a financial year by an annual rate that does not exceed the annual rate approved by the Treasurer and that the proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal. The exemptions are that the proposed statutory rule (a) would not impose an appreciable economic or social burden on a sector of the public; or (b) is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme; or (c) is of a fundamentally declaratory or machinery nature; or (d) deals with administration or procedures within or as between departments or declared authorities within the meaning of the *Public Sector Management Act 1992* (Vic); or (e) that notice of the statutory rule would render the proposed statutory rule ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed statutory rule. Subsection 9(3) also provides an exemption if the Premier specifies, in writing, that in the special circumstances of the case, the public interest requires that the proposed statutory rule should be made without complying with the RIS procedures.

13 *Subordinate Legislation Act 1994* (Vic), sections 7-12.

14 Legislative Instruments Bill 1996 (Cth).

15 This term is defined in clause 5 of the Legislative Instruments Bill. In essence, it covers all forms of what we would generally refer to as "delegated legislation".

16 Legislative Instruments Bill 1996 (Cth), Explanatory Memorandum, paragraph 41.

17 O'Chee, Senator Bill, "Sir Humphrey Appleby is alive and well: the Legislative Instruments Bill 1996", Paper given at the Fourth Commonwealth Conference on Delegated Legislation, (Wellington, New Zealand, 11 February 1996).

18 Set up under the *Parliamentary Committees Act 1968* (Vic).

19 Office of Regulation Reform, *Regulatory alternatives* (undated), pp 14-38.

20 Scrutiny of Acts and Regulations Committee, *Second Report on Subordinate Legislation concerning: Port of Melbourne Authority (Transport, Handling and Storage of Dangerous Substances and Oils) Regulations 1992* (1993, Government Printer, Melbourne).

21 Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994* (1995, Government Printer, Melbourne).

22 The Office of Regulation Reform operates within the Department of Business and Employment.

23 See, for example, Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994* (195, Government Printer. Melbourne). In that Report, the Committee received evidence from the ORR that it had concerns about the RIS prepared by the Environment Protection Authority in relation to the relevant regulations.

24 Standing Joint Committee for the Scrutiny of Regulations, *Report on Bill C-62* (16 February 1995).

25 Standing Joint Committee for the Scrutiny of Regulations (note 18), p 1.

26 Standing Joint Committee for the Scrutiny of Regulations (note 18), pp 4-5.

27 Liberal Party of Australia (Victorian Division), Small Business Policy, p 8.

28 See Office of Regulation Reform, *Discussion Paper: Regulatory Efficiency Legislation*, pp 2-3.

29 See, for example, Environment Protection Authority, *Protecting water quality in Central Gippsland*, Publication 519, December 1996.

30 The relevant amendments are set out in the *Environment Protection (General Amendment) Act 1994* (Vic).

31 See, for example, Environment Protection Authority, *A question of trust - Accredited licensee concept: A discussion paper*, Publication 385 (July 1993); and Environment Protection Authority, *EPA Information Bulletin*, Publication 424 (February 1996).

32 Robinson, B, "Is seamless regulation possible', speech to Annual Conference of The Textile Institute, Southern Australian Section, 18 June 1996, p 6.

33 Robinson, op cit, p 6.

34 Robinson, op cit, p 6.

35 As advised by a representative of the EPA. Accredited licences have been issued to (1) Generation of Victoria Newport Power Station; (2) BHP Steel Pty Ltd; (3) Yarra Valley Water; (4) Kemcor Australia Pty Ltd; and (5) Yallourn Energy Ltd.

36 Robinson, B, "Is seamless regulation possible". speech to Annual Conference of The Textile Institute, Southern Australia Section, 18 June 1996, p 7.

37 National Road Transport Commission, *Alternative compliance: Discussion paper* (May 1994).

38 National Road Transport Commission, *Interim regulatory impact statement on alternative compliance options* (April 1995; revised May 1995).

39 The NRTC advised that 3 areas are currently being worked on: (1) an RIS is being developed in relation to evaluating the economics of delivery for mass management and maintenance; (2) a discussion paper will shortly be published on "Maintenance and mass management". It will include an alternative regulation framework, which is proposed to be with the Ministers in August 1997. It is planned that there will be a Bill to amend the *Road Transport Reform (Vehicles and Traffic) Act 1993* (Vic) to provide the "hooks" for the adoption of alternative compliance mechanism. The enabling legislation is to form a template framework for other jurisdictions to adopt, if so minded; and (3) a fatigue management program is to be introduced in the future. The first stage is compiling the principles for the RIS, which is being undertaken by Queensland Transport.

40 See, for example, "The hidden cost of red tape", *The Economist*, 27 July 1996, p 11.

41 See, for example, "Over-regulating America: Tomorrow's economic argument", *The Economist*, 27 July 1996.

42 Quoted in Jay, A *The Oxford Dictionary of Political Quotations* (1996, Oxford University Press, Oxford), p 52.

43 Quoted in Bennet, MP, Andrew F, "Delegated Powers, Uses and Abuses of Regulations", paper delivered at the Fourth Commonwealth Conference on Delegated Legislation, Wellington, New Zealand, February 1996.

44 Victoria and New South Wales, for example. If the Legislative Instruments Bill 1996 (Cth) is enacted, the same can be said of the Federal jurisdiction in Australia.

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