Australian Farm Institute

Australian Government
Land & Water Australia

Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers

July 2007

Overview

This overview was prepared for the Australian Farm Institute and Land & Water Australia

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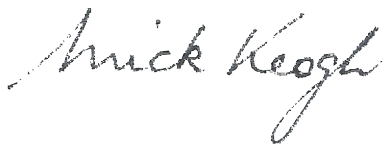
Foreword

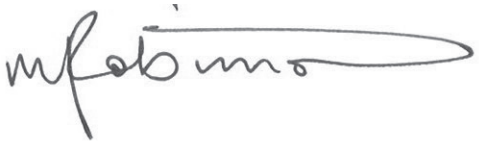
For Australian farmers, who are increasingly operating in global markets where competitor products are always less than 24 hours away, the need to retain competitiveness is acute, and the impact on competitiveness of poorly designed and implemented regulatory measures can mean the difference between success and failure. For that reason, Australian farmers and the broader agricultural sector have a very strong interest in making sure that when regulatory measures are developed, the process is such that all the potential impacts and costs are carefully considered and any negative impact on farm competitiveness is minimised.

Modern environmental law dates only from the 1970s, and the design and application of market instruments to achieve environmental outcomes is also a recent development. The timeliness of this report is paramount.

Australian Farm Institute and Land & Water Australia jointly commissioned this research, led by Professor Paul Martin, University of New England, to take stock of the domestic and international literature surrounding modern environmental regulation and make informed recommendations to improve the creation and implementation of environmental regulations in Australia. This research is expected to benefit policy-makers at all levels, farmers and other natural resource managers across Australia, and others with an interest in improving the efficiency and effectiveness of Australian environmental policy.

This research report provides a detailed analysis of the regulatory process literature in order to identify opportunities to improve environmental regulatory development. It draws on lessons within Australia and overseas to present comprehensive recommendations that could be utilised by governments to ensure better environmental regulatory outcomes for farmers and the wider community. Based on their analysis, the researchers propose reform of: the fundamentals of Australia's natural resource management system encompassing the architecture of environmental law; the way in which strategies are formulated and account for market instruments; the regulatory process; and the financing mechanisms used.





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Recommendations

Reform of Australia's environmental laws should aim to deliver four efficiency goals:

1. High levels of effectiveness in delivering system-wide behavioural changes in line with politically determined social, environmental and economic goals.

2. Minimise the transaction costs (including opportunity costs) to those being regulated and to those regulating.

3. The least possible cost to government, consistent with these first two goals.

4. An equitable allocation of the costs of achieving these aims.

On none of these criteria are present laws optimal,[1] but four reforms could move Australia towards substantial improvements in regulatory efficiency.

1. Reduce the number of natural resource use control laws.[2]

   The conceptual model previously proposed for this reform is corporations law, where a mixture of regulation, private rights and duties, and streamlined jurisdictional and administrative arrangements have created an efficient structure for the regulation of complex transactions (Martin & Verbeek 2000).

2. Use systems-focused multi-instrument strategies to create 'smart' regulation (for details see Gunningham & Grabosky 1998).

3. Design strategies that are feasible given available government resources, and the resources and capacity of those being regulated (Martin & Verbeek 2006).

4. Implement a principled approach to fair allocation of conservation costs and benefits.

These four reform proposals address the substance of rural natural resource regulation. A fifth goal is about regulatory process that is synergistic with those outlined above, and that makes their achievement more likely.

5. A regulatory process that puts pressure on regulators and parliaments to create laws that achieve the efficiency goals of systematic behaviour change, minimum transaction costs, minimum cost to government and fairness.

There is discernible movement towards a regulatory process that puts pressure on regulators and parliament to create laws that achieve the efficiency goals of systematic behaviour change, minimum transaction costs, minimum cost to government and fairness. The evidence of systematic progress towards improvement in the underlying design is less clear, with approaches being variable across organisations and little transparency about what approaches are being used and for what purposes.

These proposals will be costly to implement. They will add complexity to the process of creating new law, and they will bring to the surface problems that remain largely undebated in the present approach. These concerns are not, however, a justification for inaction, as it is clear that the economic costs, personal pressures and environmental costs of having suboptimal environmental regulation impacting on farmers (and on rural environments and communities) is far greater than any additional difficulties in the creation of new law.

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1 This is not to suggest that reform should be aimed at reducing environmental protection (one version of 'deregulation'). The desired extent of controls is a matter for elected officials.

2 A structure involving no more than 14 main pieces of legislation, reflecting the structure of corporate and trade practices laws, has been previously proposed. A target of less than 10% of the current number of laws seems, on this basis, a realistic goal.

Overview

For every complex problem, there is a solution that is simple, neat and wrong (Henry Louis Mencken).

This research examines the regulatory process literature to identify how to improve environmental regulations impacting on farmers. Regulatory process is defined as the steps, procedures and policy guidelines that dictate how regulations are made and implemented by governments. Poor process makes it more likely that regulations will be poorly designed or implemented.

Regulatory performance is complex and many of the relationships between regulation and its outcomes are indirect. Factors influencing the outcome of regulation include: the political context; the attitudes of those regulated to the rules; the skill and resources available to the regulators; and the variability of economies, climate, markets and societies. Processes provide a framework within which the application of skilful design can result in better laws, particularly by assisting the transparent contesting of regulatory or other proposals so as to force improvement.

There are three interwoven components in regulatory process. The first is concerned with the formal processes for regulation, including regulatory review using regulatory impact assessment techniques. The second is concerned with the strategic design processes for the creation of regulation or other instruments. The third is concerned with the structure of the network of laws concerned with natural resource use and conservation, including jurisdictional arrangements.

In relation to the first of these themes, this research supports the general thrust of the recommendations of the Australian Office of Best Practice Regulation (formerly the Office of Regulation Review)[3] and steps being taken by state governments[4] in the direction of rigorous and transparent review. Such initiatives are important, but relatively new in their development. Formal regulatory impact assessment, coupled with comprehensive explanation in a regulatory impact statement, is essential to transparency. Within this framework, other elements of improved regulatory practice can be proposed. These elements address both the first theme of objective evaluation and the second theme of substantive design of NRM strategy and instruments, and include:

1. The goals of any form of government environmental policy intervention in the private operation of farming enterprises should be clearly specified in forms that are objective and measurable. Goals should address both the environmental and social outcomes, and the acceptable levels and distribution of costs of achieving these.

2. For each proposed intervention (whether regulatory, market or other) there should be quantified performance measures and there should be a defined review process and schedule with the option (or requirement) for the cancellation of the intervention should it fail.

3. Parliamentary principles for the use of regulation (and, arguably, any use of government resources to adjust private resource use) should be clear, specifying when and how regulatory intervention is justified, and how identified particular interests should be accommodated. There may be a case for the accommodation of disadvantaged people, such as indigenous people, or strategically important activities, which may include all or some farming and all or some rural communities. The decision about what principles should be used is a parliamentary matter.

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3 See, eg, Chapter 2 of Office of Best Practice Regulation (2006).

4 Specifically, the Victorian Competition and Efficiency Commission and the recently formed NSW Office of Better Regulation.

4. Regulatory intervention should be embedded within a program designed to change resource consumption behaviour across the total system of resource use, taking into account:

- management of the overall social and economic system within which the intervention is intended to work
- sound intelligence about the relevant characteristics of the social and industrial system characteristics
- reliable scientific data about the natural and farming systems concerned
- use of a suite of instruments to intervene in various parts of the system
- clearly identified contingencies and contingency plans, including for the management of unreasonable distributional impacts or unexpected costs.

5. The regulatory intervention should be the subject of transparent scrutiny using regulatory impact assessment techniques including:

- cost-benefit assessment, including consideration of the dynamic effects on innovation and competitiveness
- risk analysis
- objective consultation, using well-defined techniques that are common across all regulatory impact assessment processes so that they can be systematically refined through practice.

Within this context, the two key decisions should be addressed in the following manner.

6. The decision to regulate (the alternative choices being no action, market-based intervention, or other interventions) should be based on a proper assessment of:

- what interventions will be the most efficient and effective in generating the behaviours that parliament has signalled it requires in setting the goals of the intervention
- which forms of intervention will provide the greatest stimulus for innovation in the desired policy direction
- which interventions are most feasible given the available institutional arrangements and institutional capacity
- which interventions are most fair, in terms of the distributional effects of both cost and benefit, and community-accepted concepts of social justice (which includes consideration of the distribution of public and private costs and benefits)

7. The design of regulation should reflect the considerations noted earlier, but in particular should reflect a careful assessment of:

- transaction costs and efficiency of the design
- feasibility of implementation of the design
- the expected need to manage negative spillovers from the regulation, including adjustment mechanisms
- the overall intervention strategy
- the monitoring and review program.

These guidelines were derived from the literature, which was the core resource used for this research. If implemented, such practices would materially improve the quality of environmental regulation that impacts on primary producers. But, if asked the question 'will the adoption of such practices fix the problems that are complained about?', then the answer has to be qualified in three ways:

1. The problems complained about for any particular piece of environmental regulation will range from 'the regulation is too complex and harsh' to 'the regulation is too simplistic and soft'. The complaints reflect political and other perspectives at least as much as they reflect the 'realities' of regulatory efficiency or effectiveness.

2. The description of a practice says little about how well it will be implemented. The variability in quality of (say) regulatory impact statements or cost-benefit analyses is a reflection of: political commitment; the skills of the individuals; time; and/or access to high quality information. The intrinsic complexities in regulation militate against any processes being robust enough to ensure efficiency and effectiveness.

3. There are significant institutional issues in Australian environmental regulation that materially increase the transaction costs, fragment the implementation effort and generate confusion and uncertainty. Unless practice improvement is married to architectural redesign of the regulatory system, it is difficult to be optimistic about the extent of possible improvement of either the natural resource or social outcome effectiveness of regulation, or its cost-effectiveness.

The empirical studies reviewed point to 'fit with context' as a key determinant of outcomes. This characteristic is not unique to NRM strategy. The mainstream literature about strategy (whether military or commercial) points in the same direction. The case studies and the literature raise several interrelated questions about Australia's national regulatory capacity that require serious consideration if cost-effective regulation is to be pursued.

Whilst improved regulatory practices are vitally important, these will only deliver the promised benefits if they sit within an institutional architecture that is efficient, and if they are appropriately resourced. Those conditions do not currently exist – Australia's national regulatory architecture is cumbersome and confused. Case studies on biodiversity and invasive plants (see Appendix 2) amply illustrate the problems – multiple interventions in different forms, carried out in different ways in different states, illustrate the potential efficiencies of integration of environmental law under a rationalised federal model. Other examples can easily be provided of the same suite of problems, which result in lack of clarity in the obligations of those being regulated, venue shopping, high transaction costs and diffusion of efforts by government to pursue sustainability and productivity objectives.

One consequence of the architecture of regulation is that scarce resources are, in all probability, not being optimally used. The case studies suggest that insufficiency of resources to do the job is endemic to regulatory and non-regulatory interventions to achieve natural resource conservation outcomes. The existing structures add to this problem by fragmentation, and by allowing the problems to be masked by cross-agency and cross-jurisdictional bickering over resourcing and consistency in standards.

The report's discussion and case studies highlight many shortcomings of the current system. It suggests that Australia is making fundamental mistakes in its approach to environmental laws that impact on farmers. The results of these mistakes are insufficient protection of environmental values, a waste of public resources, and unfair burdens being placed on many farmers. Unless these mistakes are corrected, outcomes from environmental law are likely to be less effective and fair, given likely future pressures on government budgets, farming and the environment. A process of regular review of not only new laws, but also the existing stock of law and quasi-law, is necessary.

Implicit in this research was the question: 'What works better: regulation, market instruments or voluntarism?'. The literature shows that there is no useful general answer to this question. This finding is not unexpected. Different types of instruments have different functions. For example, regulation is primarily a tool to constrain consumption, and market instruments promote innovation and distribute resources. Regardless of the instrument, all require efficient institutional backing and adequate implementation resources in order to be cost-effective and successful. Each instrument has its place, and the optimum result arises when various instruments for NRM work in tandem and are supported by credible, adequately resourced institutions.

In the researchers' view, piecemeal reforms of regulatory process will not be sufficient to meet the challenge of better NRM. Simplistic arguments for or against regulation (or any other instrument concerning property rights) are also of limited use in pointing to how sustainable farming will be achieved. What is needed is a reform of the fundamentals of Australia's NRM system, including: the architecture of environmental law; the way in which strategies are formulated and account for market instruments; the regulatory process; and the financing mechanisms used.

These ideas are intended to leapfrog current practice. The researchers accept that there will be criticism that this is 'a bridge too far' in terms of the costs and complexity of regulatory process, but believe that the costs of regulatory deficiencies impacting primary producers, rural communities and the environment are such that it is important to raise the bar higher.

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