Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand

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About this report

This report is an investigation of industry self-regulation in workplace health and safety in New Zealand. The report defines industry self-regulation in a continuum from pure forms of self-regulation to government "command and control" regulation. It discusses different forms of governance within this spectrum, including co-regulation models. The bulk of the report looks at how international evidence points to the strengths and weaknesses of self-governance and investigates when industry self-regulation is likely to be a viable approach. It includes a number of examples from overseas jurisdictions. The report also briefly explores the attractions and risks of industry self-regulation in the New Zealand context.

This report was commissioned under The Workplace Health and Safety Strategy for NZ to 2015, and is an action under the National Action Agenda 2010-2013 (Action Area 4: Supporting a Robust Health and Safety System). Along with the Pike River Royal Commission Report and the recommendations of the Independent Taskforce reviewing New Zealand's health and safety system (due in April 2013), this report will inform future policy decisions on the design and implementation of the health and safety regulatory framework.

Executive Summary

Self-regulation is the controlling of a process or activity by the people or organisations that are involved in it rather than by an outside organisation such as government.

There is no clear dichotomy between self-regulation on the one hand and government regulation on the other. Rather, there is a continuum, with pure forms of self-regulation and government command and control regulation at opposite ends. ***Co-regulation*** involves the points between the two ends, involving elements of both self and government regulation. There are therefore, multiple possibilities. For example, one might distinguish between:

- *Voluntary self-regulation* where the private firm or industry makes the rules and enforces, independent of direct government involvement

- *Mandated full self-regulation* where both rulemaking and enforcement are conducted by the firm or industry, but it is also officially sanctioned by the government, which monitors the program, and if necessary, will take steps to ensure its effectiveness

- *Mandated partial self-regulation* where the firm or industry either makes the rules or enforces them but not both, i.e. either public enforcement of privately written rules, or governmentally mandated *internal* enforcement of publicly written rules.

The first of these examples is a form of 'pure' self-regulation, while the second and third are examples of co-regulation.

Individual self-regulation involves a corporation or other business entity committing itself to do more than the law requires in terms of occupational health and safety or other social objectives. In contrast, *industry self-regulation* is where an industry-level (as opposed to a governmental or firm-level) organisation sets rules and standards (e.g. codes of practice) relating to the conduct of firms in the industry.

Strengths and weaknesses of self-regulation: In principle, self-regulation offers greater speed, flexibility, sensitivity to market circumstances and efficiency than government regulation. But according to its critics, self-regulatory standards are usually weak, enforcement is ineffective and lacking in accountability and punishment is secret and mild.

Assessing the evidence: The extent to which self-regulation in practice has either positive or negative attributes will depend very much on the social and economic context within which it operates and on the particular characteristics of the scheme itself.

Nevertheless it is fair to say that 'pure' self-regulation is rarely effective in achieving social objectives because of the gap between private industry interests and the public interest.

'Pure' *self-regulation by individual business entities*, with no state intervention, has a poor track record. While some companies will comply and indeed go 'beyond compliance', others, in the absence of outside incentives and sanctions, are driven to maximise profits. As a result they will invest far less in safety than they would under government regulation, falling far below an acceptable minimum standard of behaviour.

However, while there are clear and obvious dangers in permitting individual firms to self-regulate, sophisticated regulators recognise that different companies have different

motivations and capacities, and that 'good' firms should be treated differently from the recalcitrant. For example, regulators might: (i) employ a blend of persuasion and coercion depending upon the responsiveness of the individual firm; (ii) adopt a 'target analytic' approach that recognises that, for some firms at least, a degree of self-regulation may be appropriate: or (iii) 'meta regulate', seeking by law to stimulate modes of self-regulation within the firm rather than regulating prescriptively. For example, government inspectors might insist that industry puts in place safety management systems which are then scrutinised by regulators, rather than checking compliance with rules.

In the case of 'pure' *industry self-regulation*, its manifest shortcomings (not least the temptation to 'free ride') and the paucity of success stories should make governments reticent about providing any form of regulatory relief or other concessions to self-regulating industries, notwithstanding industry association suggestions that it should do so.

Trial and error and bitter experience has led to the realisation that rather than thinking in terms of industry self-regulation, we should think in terms of *industry co-regulation*, and the public policy debate is increasingly about how, and in what circumstances, it may be possible to design effective co-regulation and what forms this might take. This implies taking advantage of the strengths and virtues of industry self-regulation, while compensating for its weaknesses as a stand-alone mechanism.

This implies an underpinning of state intervention sufficient to ensure that it does operate in the public interest, that it is effective in achieving its purported social and economic goals and has credibility in the eyes of the public or its intended audience. Sometimes the mere threat of imposing legislation may provide sufficient incentive to the target group to make its actual imposition unnecessary.

Sometimes less direct forms of state oversight or control will be sufficient; government might act as a facilitator or catalyst, 'steering the boat rather than rowing'. For example, it may be appropriate for a state agency to endorse a particular self-regulatory program by permitting it to use the agency's logo or other official seal of approval, thereby giving the public greater confidence in the code's credibility

Another means of incorporating self-regulation into a broader co-regulatory strategy is that adopted under OHS legislation, whereby government prescribes a particular outcome (e.g. a very broad general duty to take 'all practicable steps' to ensure health and safety) but does not prescribe what method industry must adopt to achieve it. However, a code of practice is then developed in a tripartite process, identifying one acceptable way of meeting the general duty requirement but not precluding industry from designing some other, perhaps more cost-effective way of achieving it.

***The role of third parties*:** The state is not the only possible institution capable of compensating for the weaknesses of self-regulation in its pure form. Sometimes, there may also be a possibility of harnessing third parties to act as surrogate regulators; monitoring or policing the code as a complement or alternative to government involvement. Indeed, it is arguable that self-regulation is rarely effective without such involvement.

The most obvious third parties with an interest in playing this role are sectoral interest groups such as trade unions or public interest groups. This contribution may be through their direct involvement in administration of the code itself (in which case it has greater credibility as a genuinely self-regulatory scheme) or in their capacity as potential victims

of code malpractice, in taking direct action against firms that breach the self-regulatory programme.

Finally, the best solution is often to design *complementary combinations* using different instruments and integrating self-regulation, government regulation and third party oversight.

Selecting Appropriate Policy Instruments: Guidelines and Checklists: An increasing number of governments have recognised that different policy instruments can appropriately be invoked in different contexts and they have sought to develop guidelines and checklists for the assistance of policy-makers. These include the OECD's recommendations on the design of voluntary approaches, various checklists and 'how to' manuals produced particularly by UK and Australian governments. Also important are Regulatory Impact Assessments that are used as part of better regulation initiatives, and to structure regulatory choice.

The relationship between self-governance and the Department of Labour approach under the HSE Act: The HSE Act places positive duties on employers and others to manage hazards in their own workplaces, reflecting the approach that self-management of health and safety by businesses is preferable to relying on visits by inspectors to ensure compliance. Consistent with this, the Department aims to encourage organisations to establish processes of internal self-regulation in order to make them more responsive to OHS concerns. This is to engage in 'Meta-Regulation' (the 'regulation of self-regulation') with the aim of encouraging internal self-critical reflection within firms about their OHS performance.

While this approach has a number of attractions there are also risks in engaging in this approach in the New Zealand context.

First, while self-regulation (or at least co-regulation or enforced self-regulation) is a credible regulatory strategy when dealing with large sophisticated and reputation sensitive organisations which have the capacity and the incentive to self-regulate, it confronts challenges when dealing with modest-sized companies which might lack either the capacity to self-regulate, the incentive to do so or both. This latter point has particular resonance in a small country such as New Zealand where most companies fit within the latter group.

Second, a systems-based approach to regulation also has its critics. Notwithstanding the emphasis that many companies and regulators have placed on management systems, there is insufficient evidence in the published, peer-reviewed literature on the effectiveness of safety management systems to make recommendations either in favour of or against them.

Third, there is growing evidence that workplace culture is far more important than management systems and that 'culture eats systems for breakfast'. Corporate health and safety management systems and other management tools only work well when safety is institutionalised, and when it gets into the 'bloodstream' of the organisation at site level. Only when the formal systems (audits, reporting, monitoring etc) are supported by informal systems (trust, commitment, buy-in, means of overcoming conflicting loyalties etc) will they be fully effective. This is important because it suggests that the claim that systems-based regulation – or Meta-Regulation more broadly – can overcome many of the traditional challenges of regulating complex organisations may be overstated.

1. Introduction

Self-regulation is the controlling of a process or activity by the people or organisations that are involved in it rather than by an outside organisation such as government[1]. The less commonly used term, self-governance is sometimes treated as synonymous with self-regulation but can be used more broadly to refer to political independence (for example by autonomous regions, or to autonomy and self-control). For present purposes, the use of the latter term, given its imprecision and multiple meanings, may lead to confusion, and the term self-regulation will be used throughout this document.

Self-regulation, and its close sibling, co-regulation, are important components of many regulatory regimes and are frequently used as a complement (though far less as an alternative) to direct government regulation. This has certainly been the case with regard to occupational health and safety (OHS), in large part because regulatory overload (and a political preference for less government intervention) makes exclusive reliance upon direct regulation problematic.

From a policy perspective, the increasing reliance on self- and co-regulation raises a number of important issues. Not least, how do they work, where do they work, what are their strengths and limitations and how can they best be used within the overall framework of OHS policy design? It is particularly important to ascertain how well self-regulatory approaches work compared to the available alternatives, how efficient or effective they are, to what extent they can they be relied upon as a substitute for other policy instruments and the extent and the circumstances in which they can be better used in complementary combinations.

The remainder of this paper addresses these questions. Part 2 seeks to define self-regulation and its close siblings and to distinguish their distinctive characteristics. Part 3 examines the principal strengths and weaknesses of self-regulation. Parts 4 and 5 examine the track record and challenges posed by individual and industry self-regulation respectively. Part 6 considers the importance of policy mixes and of the roles of the state and third parties in co-regulation. Part 7 canvasses the various checklists and policy guidelines developed by governments to assist decision makers to identify the best policy option(s) in given circumstances. Part 8 locates the current approach of the Department of Labour within the self-regulation—regulation continuum. Part 9 concludes.

2. What is Self-Regulation?

Self-regulation may take many forms, and for this reason, no single definition is entirely satisfactory. Rather, to appreciate the various dimensions of self-regulation, a number of important distinctions must be made.

First, it is necessary to distinguish between *individual self-regulation* (where an entity regulates itself, independent of others) and *self-regulation by groups*. Individual self-regulation is commonly couched in terms of corporate social responsibility, and involves a corporation or other business entity committing itself to do more than the law requires to achieve various social objectives, not least, delivering improved OHS outcomes. Self-regulation by groups usually takes the form of *industry self-regulation*. This may be defined as a regulatory process whereby an industry-level (as opposed to a governmental or firm-level) organisation sets rules and standards (e.g. codes of

[1] http://dictionary.reverso.net/english-cobuild/self-regulation

practice) relating to the conduct of firms in the industry. For such an approach to be effective, firms in the industry must cooperate with each other for the purpose of achieving the objectives of the code or scheme.

A second distinction must be made between *economic self-regulation* and *social self-regulation*. While the former is concerned with the control of markets or other facets of economic life, the latter aims to protect people from the adverse side effects of industrialisation. Thus social self-regulation is usually taken to include mechanisms whereby firms or their associations, in their undertaking of business activities, ensure that unacceptable consequences to the environment, the workforce, or the broader public, are avoided. Occupational health and safety is one of the principal issues with which social self-regulation is concerned.

Third, one can distinguish forms of self-regulation in terms of the degree of government involvement (for as we shall see, 'pure' self-regulation, without any form of external intervention, is very uncommon). Rees for example, identifies three main forms of self-regulation. One is *voluntary self-regulation*, which pictures rule-making and enforcement both carried out privately by the firm or industry itself, independent of direct government involvement. The second is *mandated full self-regulation*, where both rulemaking and enforcement are privatised. While this strategy resembles voluntary self-regulation to the extent that regulatory requirements are both developed and enforced internally by the firm or industry themselves, it differs from voluntary self-regulation insofar as the private regulatory programme is officially sanctioned by the government, which monitors the programme, and if necessary, will take steps to ensure its effectiveness. The third is *mandated partial self-regulation*. While mandated full self-regulation privatises rule-making and enforcement, mandated partial self-regulation limits privatisation to either regulatory function but not both. There are two basic approaches to mandated self-regulation: public enforcement of privately written rules, and governmentally mandated internal enforcement by the company of publicly written rules.[2]

Others have developed similar typologies. A particularly helpful recent classification of self- and co-regulation has been developed by Saurwein and is reproduced below (see Box 1). The Victorian Guide to Regulation[3] also contains a useful categorisation of regulatory instruments.

Box 1: Relationship between Self-Regulation and Government Regulation

In most cases, self-regulation is a misnomer, because alternative regulatory institutions are not set up completely without governmental influence or government pressure, and in many cases there are connections to governmental agencies during their ongoing operation. The role of government in alternative regulatory arrangements is therefore highlighted in many analytical classifications that suggest analysis of regulatory arrangements according to varying modes and degree of state involvement. Latzer, Just, Saurwein, and Slominski (2002), for instance, distinguish 'state regulation' from 'co-regulation' carried out by private actors that operate on an explicit unilateral legal basis (most notably by an Act), which explicitly *delegates* regulatory powers from government to nongovernmental actors. Co-regulation may be distinguished from two forms of self-regulation. There is 'self-regulation in a narrow sense,' which operates without any formal state involvement, and 'self-regulation in the wide sense,' which is characterised

[2] Rees (1988):10-11.
[3] The Victorian Guide to Regulation (2011): Ch 2 and Appx 2.

by other forms of state involvement in self-regulatory institutions apart from a legal basis—for example, personnel, financial, or contractual involvement of the state in a self-regulatory institution. This classification focuses on *formal* state contributions in alternative regulatory arrangements, and it proves useful for the classification of regulatory institutions, for identifying formal state involvement in alternative regulatory arrangements, and for monitoring institutional changes.

Additionally, it is important to take account of less formalised state action, which is a more implicit but nevertheless crucial ingredient in the formation and development of the regulatory scheme, as pointed out by Bartle and Vass (2007), who propose a category called 'tacitly supported self-regulation' (894). Altogether, state authorities can draw on a range of instruments to support alternative regulatory institutions, to make active use of them, and to control them. These may be applied in a differentiated manner along different stages of the policy cycle, from agenda-setting and problem identification via organisation building, rule-making, implementation/enforcement, and evaluation (Porter and Ronit, 2006). Potential options are marked by varying degrees of intensity of state involvement, with measures ranging from soft forms of symbolic support to direct control in a co-regulatory framework (Latzer and Saurwein, 2008):

- *Encouragement* of self-regulation by state authorities (carrot, inspiration);
- *Political appreciation* of the scheme or its outcomes by governmental agencies (symbolic support, endorsement);
- *Financial support* (subsidy, providing positive incentives);
- Involvement of government *personnel* (information);
- *Collaboration* between governmental agencies and alternative regulatory institutions (cooperation, facilitation);
- *Co-regulation* within a legal framework (lending authority via formal approval; direct control; accreditation of organisations and norms);
- *Periodic review* of a scheme by state authorities (continuing performance monitoring);
- Definition and enforcement of *fall-back scenarios* in the case of failure (providing negative incentives: threat, stick, government intervention).

Source: Saurwein (2011).

From the above, it will be apparent that there is no clear dichotomy between self-regulation on the one hand and government regulation on the other. Rather, there is a continuum, with pure forms of self-regulation and government regulation at opposite ends. However, those pure forms are rarely found in the real world, in which distinctions between self-regulation and government regulation are incremental rather than dichotomous. Thus, it is helpful to think in terms of typologies of social control, ranging from detailed government command and control regulation to 'pure' self-regulation, with different points on the continuum encapsulating various kinds of co-regulation. For example, towards the self-regulatory end are various forms of co-regulation and mandated self-regulation while toward the government regulation end one sees greater and greater degrees of government oversight and ultimately, direct intervention.

3. Strengths and Weaknesses of Self-regulation

In principle, self-regulation offers greater speed, flexibility, sensitivity to market circumstances and efficiency than government regulation. Because standard setting and identification of breaches are the responsibility of practitioners, with detailed knowledge of the industry, this will arguably lead to more practicable standards, more effectively policed. There is also the potential for using peer pressure and for successfully internalising responsibility for compliance. Moreover, because self-regulation contemplates ethical standards of conduct which extend beyond the letter of the law, it may significantly raise standards of behaviour and lead to a greater integration of OHS

issues into the management process. It may be regarded as a form of 'Responsive Regulation': regulation which responds to the particular circumstances of the industry in question, including how effective an industry has been in the past in making private regulation work.

Yet in practice, pure self-regulation often fails to fulfil its theoretical promise and commonly serves the industry rather than the public interest. Indeed, self-regulation has an extremely tarnished image, and is often reviled by trade unionists and public interest groups for being a charade — a cynical attempt by self-interested parties to give the appearance of regulation (thereby warding off more direct and effective government intervention) while serving private interests at the expense of the public. As John Braithwaite has put it:

> Self-regulation is frequently an attempt to deceive the public into believing in the responsibility of an irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job.[4]

According to the critics, self-regulatory standards are usually weak, enforcement is ineffective and punishment is secret and mild. Moreover, self-regulation commonly lacks many of the virtues of conventional state regulation. It is usually not as visible or credible, it does not provide the same degree of accountability, and it is usually lacking in rigorous application and strong sanctions.

The extent to which self-regulation *in practice* has either the positive or the negative attributes identified by its proponents or detractors, will depend very much on the social and economic context within which it operates and on the particular characteristics of the scheme itself.

4. Self-Regulation in Individual Business Entities

In the case of *self-regulation by individual business entities*, the evidence suggests that 'pure' self-regulation, with no state intervention, has a poor track record. While some companies will comply and indeed go 'beyond compliance', others, in the absence of outside incentives and sanctions, will fall far below an acceptable minimum standard of behaviour.[5] The brutal history of the industrial revolution provides graphic evidence of the reasons why pure self-regulation will almost inevitably fail and little has occurred in more recent times that suggests that a less interventionist approach would provide better results today than it did in the nineteenth century.[6] The history of the British Power Press Regulations (where a dramatic reduction in reported injuries followed the replacement of a voluntary code by regulation in 1965),[7] and of US Mine Safety Regulation (where a sharp drop in fatalities followed the enactment *and enforcement* of new legislation)[8] are simply two reminders amongst many that business self-interest and investment in OHS are often in tension. In Australia, the recent history of James Hardies' wilful exposure of its workforce to lethal levels of asbestos dust and subsequent avoidance of its responsibilities with regard to compensation is a chilling reminder of the dangers of leaving individual companies to self-regulate.[9]

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[4] Braithwaite (1993): 91.
[5] See for example: Lyon and Maxwell (2006 & 2007); Lenox and Nash (2003).
[6] Gunningham (1984): Ch 4.
[7] Gunningham (1984): 320.
[8] Lewis-Beck and Alford (1980).
[9] Peacock (2009).

However, while there are clear and obvious dangers in permitting individual firms to self-regulate in the absence of government regulation, sophisticated regulators recognise that different companies have different motivations and capacities, and that 'good' firms should be treated differently from the recalcitrant. In particular, while there is a strong case for setting minimum acceptable standards by means of legislation, there is also a case for giving demonstrably good firms a degree of latitude and for encouraging, rewarding and facilitating leading firms to go 'beyond compliance'.

For example, 'Responsive Regulation' (an approach currently embraced by the New Zealand Department of Labour) recognises the importance of treating differently motivated firms differently, by employing a blend of persuasion and coercion, the actual mix being adjusted to the particular circumstances and motivations of the entity with whom they are dealing. This is based on a 'tit for tat' response whereby the regulatory agency approaches each organisation in a cooperative, flexible manner, but turns to deterrence if and when the organisation clearly defects from cooperation.[10] Responsive Regulation, in its more recent iterations, also emphasises the importance of rewarding virtue and encouraging improvements beyond compliance through the development of a 'pyramid of virtue' intended to take account of the different 'motivational postures' of different firms.[11]

A second approach that recognises that individual business entities differ, and that for some but not others, a degree of self-regulation may be appropriate, is the so called 'target analytic' approach. For example, in the case of reluctant compliers and the recalcitrant, relying on self-regulation is extremely unwise and firms must be closely scrutinised by government with the threat of direct intervention where they fail to take effective action to safeguard the workforce. However, for industry leaders, a more 'hands-off' approach may be appropriate, allowing them a considerable scope for self-regulation provided they can demonstrate that they are maintaining high OHS standards. For example, Black has shown how one agency effectively applied this approach by requiring different inspectoral stances depending upon the organisation's risk profile.[12]

A third approach, also consistent with the current practices of the Department of Labour, involves what is commonly termed 'Meta-Regulation' (although the Department does not use the term). Meta-Regulation encapsulates an approach whereby rather than regulating prescriptively, the regulator seeks by law to stimulate modes of self-regulation within the firm. For example, government inspectors rather than checking compliance with rules, insist that industry puts in place safety management systems which are then scrutinised by regulators. In so doing, it 'forces companies to evaluate … their own self-regulation strategies so that regulatory agencies can determine [that] the ultimate objectives of regulation are being met'.[13] That is, rather than responding reactively to events or directing particular behaviour on the part of duty holders, the Department's view is that more will be achieved by focusing on shaping and improving *systemic* aspects of a firm's OHS management.

At its best, such an approach has the capacity to influence the internal self-regulation and norms of organisations and to make them more responsive (rather than merely reactive) to OHS concerns. Indeed, it is increasingly recognised that well-functioning systems of safety management, particularly as they relate to core risks, are essential if there is to be an appreciable and reliable improvement in safety performance.

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[10] Ayres and Braithwaite (1992).
[11] Braithwaite, Makkai and Braithwaite (2007).
[12] Black (2005): 156.
[13] Parker (2002): 246.

Accordingly, under Meta-Regulation, the primary role of the inspectorate becomes that of 'regulating at a distance', relying upon the organisation itself to put in place appropriate systems and oversight mechanisms, but taking the necessary action to ensure that these mechanisms are working effectively. As such, Meta-Regulation involves 'the regulation of self-regulation'.

5. Industry Self-Regulation

Industry self-regulation as indicated above, involves commitments developed by an industry association which aspire to apply to the entire industry sector. The extent to which this approach has either the positive or the negative attributes identified by its proponents or detractors will depend very much on the social and economic context within which it operates and on the particular characteristics of the scheme itself.

We begin by examining 'pure' industry self-regulation, which does not involve any direct involvement of government. Existing research suggests a number of lessons with regard to the limitations of this approach.

A starting point is to recognise that there is commonly a substantial gap between the self-interest of an industry (or an individual enterprise), and that of the public. That gap is most commonly caused by 'negative externalities', as for example, where a firm is able to pass on (externalise) some of the costs of production to a subgroup of the public such as workers. The costs of occupational injury and disease are one well recognised externality: some businesses at least may seek to cut corners and minimise spending on safety equipment and procedures in the pursuit of profit and productivity. A higher incidence of work related injury and disease will be the likely consequence[14] In these circumstances it would be unwise to rely upon an individual enterprise or industry association taking steps voluntarily in the public interest, as an alternative to government regulation.

Put differently, a necessary (but as we will see, certainly not sufficient) condition for the success of 'pure' self-regulation is a strong natural coincidence between the public and private interest in establishing self-regulation. For example, probably the circumstances most conducive to successful self-regulation are those where an industry (or at least industry leaders) perceives the future prosperity and perhaps even the very survival of the industry, as dependent upon some form of collective self-control, as has been the case with the nuclear power and chemical industries. These are industries where there is a 'community of shared fate'— meaning circumstances in which poor performance on the part of one member reflects adversely upon, and indeed, may jeopardise the interests of, the entire industry. These circumstances facilitate the mobilisation of peer pressure to ensure that no one member 'lets the side down' (see Box 2 below).

Box 2: Institute of Nuclear Power Operations

Background and Compliance Problem

[14] Nichols and Armstrong (1973).

Early in the morning of March 28, 1979, several water pumps stopped working at a nuclear plant near Harrisburg, Pennsylvania, setting in motion the chain of events that would make Three Mile Island (TMI) an indelible symbol of disaster for the public. The disaster not only cast doubt on the credibility of the existing system of government regulation, but also placed a cloud over the future of the USA nuclear power industry. Another such disaster could easily lead to a public and regulatory backlash capable of threatening the very viability of the industry itself. How could the industry prevent 'rogue' operators from putting the entire industry at risk?

The Compliance Innovation

Less than two weeks after the accident, a committee of nuclear utility chief executive officers gathered to coordinate the industry's response to the accident, and the efforts resulted in perhaps the single most important change that has taken place in the post-TMI nuclear regulatory regime. They created a private regulatory bureaucracy—the Institute of Nuclear Power Operations (INPO)—and today, with a very considerable budget, INPO's approximately four hundred employees develop standards, conduct inspections and investigate accidents.

The results

By all accounts, the safety of nuclear plants has increased significantly since TMI, and there is wide agreement among knowledgeable observers (proponents and critics of nuclear power alike) that INPO's contribution to improved nuclear safety has been highly significant. This has been achieved by education, persuasion, peer group pressure, gradual nagging from INPO, shaming, or the other instruments of informal social control at INPO's disposal.

However, even INPO is incapable of working effectively in isolation. There are, inevitably, industry laggards, who do not respond to such informal pressure. After some years of achieving very little progress in changing the behaviour of this minority, INPO faced a dilemma as a significant number of plants were ignoring the problems INPO had identified, yet getting tough seemed out of the question because that might drive the recalcitrants out of the association. INPO's ultimate response, after five years of frustration, was to turn to the government regulator, the Nuclear Regulatory Commission (NRC).

The result was the effective dismissal of top executives, plant shutdown and substantial improvements in safety. All this was achieved only by invoking the power of the NRC (which alone had the capacity to bring criminal proceedings and to shut the plant down). Had effective action not been taken against the recalcitrant few, and in the longer term, had free riders been allowed to flourish without sanction, then INPO's authority over other firms would have been jeopardised. As Rees notes, INPO's climb to power has been accomplished on the shoulders of the NRC.

Source: Rees (1994).

However, the evidence suggests that 'win-wins' of this nature are uncommon.[15] The history of safety, health and environment is littered with examples where no such win-

[15] Gunningham (2008), Vogel (2005).

wins were evident and where conflicts between the interests of employers and workers wreaked a substantial toll on the latter.[16]

Even in circumstances in which there would appear to be a substantial coincidence between the public and the private interest in self-regulation, there may still be a number of reasons why it will nevertheless fail to materialise, or function ineffectively.

First, whether it is economically rational for an enterprise to adopt self-regulation is more problematic than it might appear, because there may be a substantial gap between long term and short term self-interest. For example, it may be in the long term interests of firms to invest in OHS measures which would not only demonstrably reduce costs and increase profits of individual enterprises in the long term but would also enhance the OHS credentials of the entire industry. However, for those who are economically marginal, or for managers whose performance is judged in the short term, such investments may not be practicable in the absence of some form of external pressure. Short termism is much more prevalent in some business cultures than others.

Second, it would be a mistake to assume full rationality on the part of all the major players. Enterprises may not act as economic rationalists would predict because they are ignorant, irrational or incompetent. There may be, for example, a substantial gap between an enterprise's perception of its interests, and the reality. In any of these cases, enterprises may continue behaving in ways which are not in their 'best' interests, notwithstanding opportunities for either individual or collective 'win-win'.

Finally, even where win-wins potentially exist, and an industry self-regulatory initiative is established, it may be difficult to curb 'free-riding', whereby rogue firms seek to claim the public relations and other benefits of scheme membership while avoiding the obligations it entails. Unfortunately, free-riding is often an almost insurmountable problem. In practice, individual targets are often set to a lowest common denominator level and are not measurable, enforcement is often (but not invariably) weak, and such initiatives commonly lack many of the virtues of conventional state regulation in terms of transparency, accountability and rigour.

These problems are serious ones. The paucity of success stories in the empirical literature[17] should make governments reticent about relying on 'pure' industry self-regulation as a basis for providing any form of regulatory relief or other concessions, notwithstanding industry suggestions that it should do so. Nevertheless, there are exceptional circumstances where industry self-regulation has achieved positive outcomes, making it possible at least to identify what an 'ideal' industry association might do if it were committed to effective industry self-regulation. These lessons are summarised in Box 3.

Box 3: The role of industry associations in improving OHS performance

There is evidence that industry associations can and should play a role in improving the OHS performance of their members. Not all industry associations will have an enlightened self-interest in doing so. However, some industries, particularly those which are vulnerable to low frequency–high consequence events (which put the industry in the public spotlight and often lead to demands for tough regulation), and those which are

[16] Gunningham (1984): Ch 4.
[17] For an overview see Saurwein 2011 and references therein.

reputation-sensitive and have a need to protect their social licence, may see a good case for improving the collective OHS performance of their members.

Drawing from the experience of the nuclear power and chemical industries internationally, it is possible to identify a number of characteristics of those initiatives that have been most successful in improving industry OHS outcomes.

At their core is a capacity to nurture a common meaning system — a new industrial morality — at the industry level. While there is no single formula about how best to do this the most successful schemes have a number of features in common. First, there is the creation, over time, of clearly defined targets. Second, there is the development of accountability and transparency. This is achieved through a credible and transparent information system for collecting data on the progress of implementing the initiative, as well as mechanisms for monitoring performance (for example, through third party auditing). Although industry associations and their members have tended to resist the latter, without it, claims made by a company about its OHS performance may lack credibility.

Source: Gunningham and Rees (2008).

However, the history of the Institute of Nuclear Power Operations (INPO) which is arguably the most successful such initiative of all (see Box 2 above) suggests that an underpinning of government regulation and enforcement is crucial to maintain credibility and effectiveness, even in the most favourable circumstances.

Because there is very considerable evidence as to the serious shortcomings of 'pure' self-regulation, the public policy debate is increasingly about how, and in what circumstances, it may be possible to design effective *co*-regulation and what forms this might take.[18] This debate is explored in the following sections.

6. Co-Regulation: The Role of the State and Third Parties

It is tempting to think of industry self-regulation in dualistic terms – public regulation versus private regulation. However, when we look closely at the leading examples of industry self-regulation we see that they involve varying degrees of interaction with government regulation. The California Cooperative Compliance Program (Box 4) and the OSHA Federal Voluntary Protection Program (described below) are two examples but there are many others.[19] Even INPO's development into a powerful regulatory watchdog, was made possible by the NRC's commanding presence not too far from INPO's side (Box 2 above).

This is far from coincidence. Trial and error and bitter experience has led to the realisation that rather than thinking in terms of industry self-regulation, we should think in terms of industry co-regulation. As Ayres and Braithwaite put it:

[18] Co-regulation occurs usually where industry develops and administers a code and government provides the ability to enforce the code by giving it a legislative backing in some way. Under co-regulation government involvement usually falls short of prescribing the code in detail in legislation.
[19] Van der Heijden (2011).

> Good policy analysis is not about choosing between the free market and government regulation... If we accept that sound policy analysis is about understanding private regulation.... and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation. It is this mix, this interplay, that works to assist or impede solution of the policy problem. (Ayres & Braithwaite 1992: 3-4)

This insight leads directly to the possible role of 'Responsive Regulation', which, amongst other things, suggests that regulatory policy should be 'responsive to industry structure' and that 'different structures will be conducive to different degrees and forms of regulation'.[20] To be responsive to industry structure, most importantly, regulatory policy makers must learn to appreciate how the capacity for self-regulation varies among industries. For example, some industrial moralities[21] are more (or less) well-defined than others, more (or less) demanding than others, more (or less) institutionalised than others. Hence, some industrial moralities are more effective than others when it comes to restraining industrial conduct. From the standpoint of Responsive Regulation, regulatory policy makers should therefore take full account of these and other differences, both to diagnose an industry's capacity (or incapacity) for self-regulation, and to design institutional mechanisms that will delegate and oversee regulatory tasks in a way that is most consistent with the regulatory programme's overall purposes.

Box 4: California OSHA's Cooperative Compliance Program

Some years ago the California OSHA (CAL/OSHA) tested a strategy of industry co-regulation known as the Cooperative Compliance Program (CCP). The CCP was a three-way arrangement involving unions, management, and CAL/OSHA. The program's key feature was a job site labor-management safety committee (consisting of two representatives each from labor and management) that assumed many of OSHA's regulatory responsibilities, such as conducting inspections and investigating complaints. Meanwhile, CAL/OSHA stopped routine compliance inspections and assumed a 'monitoring' role. The seven job sites participating in the CCP were large construction projects, ranging in cost from $36 million to over $2.4 billion. They employed from 250 to 4500 workers on each site, all of whom belonged to construction unions. The types of project included one nuclear power plant, three fossil fuel processing plants, two buildings for 'high tech' research, and one thirty storey condominium. In terms of outcomes, at each project accident rates dropped significantly as a result of the CCP.

Source: Rees (1998).

So how should co-regulatory mechanisms best be designed, in order to take advantage of the strengths and virtues of industry self-regulation, while compensating for its weaknesses as a stand-alone mechanism? This implies an underpinning of state intervention sufficient to ensure that it does operate in the public interest, that it is effective in achieving its purported social and economic goals and has credibility in the eyes of the public or its intended audience. As we have indicated, precisely what form of state intervention will provide the most appropriate underpinning is likely to vary with the particular circumstances of the case. Unfortunately, there are no magic bullets or universally appropriate prescriptions. However, it is at least possible to identify some of

[20] Ayres and Braithwaite (1992):4.

[21] One of the most important characteristic of industry associations is their capacity 'to unify the industry around a distinctive set of shared values, beliefs, and practices [and to] build … a distinctive kind of community' (Rees, 1994: 42). Put differently, they can raise OHS standards by developing an effective normative framework for their members and by seeking to institutionalise responsibility.

the most commonly important variables, and to illustrate by example, how co-regulation might operate to optimal effect in particular circumstances.

The role of the general law: First, it is often crucial that self-regulation operates in the shadow of rules and sanctions provided by the general law, for it is these which are the most obvious and visible (but not the only) means of giving regulatees the incentive to comply with the self-regulatory programme. For example, the Australian Supermarkets (Checkout) Scanning Code of Practice operates against the backdrop of the general law, which makes misleading pricing an offence.

As one astute commentator has put it:

> Society cannot expect miracles from self-regulation when the substantive law is weak. Traders will be part of a self regulatory code when it offers an alternative to legislation and/or litigation. In many ways the best thing Government can do for self-regulation is to provide for effective general laws. No trader will submit her/himself to stringent standards if she or he has little liability at general law... All codes have to work against the background that the law itself will provide a less palatable sanction to industry than will self regulatory codes. This is the incentive to make self regulatory codes operate effectively.[22]

Certainly, there is considerable evidence from a variety of jurisdictions, that it is largely fear of government regulation that drives the large majority of self-regulatory initiatives, and it seems unlikely that they will perform well, in the absence of continuing government oversight and the threat of direct intervention.

Other co-regulatory strategies: While a legislative underpinning to self-regulation is perhaps the most obvious way of giving it 'bite' and credibility, it is not necessarily the only way. In some circumstances, the mere threat of imposing legislation may provide sufficient incentive to the target group to make its actual imposition unnecessary.

Sometimes less direct forms of state oversight or control will be sufficient; government might act as a facilitator or catalyst, 'steering the boat rather than rowing'. For example, it may be appropriate for a state agency to endorse a particular self-regulatory programme by permitting it to use the agency's logo or other official seal of approval, thereby giving the public greater confidence in the code's credibility. This in turn may help the industry sell its product or provide other commercial benefits. In these circumstances, the capacity of the agency to withdraw its endorsement may provide a significant inducement to the target group to self-regulate effectively.

Another means of incorporating self-regulation into a broader co-regulatory strategy is that adopted under OHS legislation, whereby government prescribes a particular outcome (e.g. a very broad general duty to take 'all practicable steps' to ensure health and safety) but does not prescribe what method industry must adopt to achieve it. However, a code of practice is developed in a tripartite process by industry, trade unions and government, which is of evidentiary value – i.e. it identifies one acceptable way of meeting the general duty requirement but does not preclude industry from designing some other, perhaps more cost-effective way of achieving it (what in New Zealand takes the form of an Approved Code of Practice[23]). Similarly, compliance with a voluntary code might be taken as evidence of 'due diligence', where this is a defence to a penal charge.

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[22] Pengilley (1990): 281.
[23] See HSE Act s 20.

In the United States, a good (albeit somewhat dated) example of how government can help foster successful self-regulation is the Occupational Health and Safety Administration's (OSHA)'s Voluntary Protection Program (VPP), whose purpose was to emphasise the importance of encouraging and facilitating excellence in employer-provided, site-specific occupational safety and health programmes. For OSHA, in short, the purpose was to recognise and encourage self-regulation in the workplace. Under it, OSHA encouraged the self-regulatory efforts of industry in a variety of ways, such as ceasing routine compliance inspections in favour of a more consultative and problem-solving approach, and also by encouraging a mentoring programme in which companies with exemplary safety and health programmes shared their experience and expertise with those companies striving to improve their in-house programmes.

The role of third parties: The state is not the only possible institution capable of compensating for the weaknesses of self-regulation in its pure form. Sometimes, there may also be a possibility of harnessing third parties to act as surrogate regulators; monitoring or policing the code as a complement or alternative to government involvement. Indeed, it is arguable that self-regulation is rarely effective without such involvement.

The most obvious third parties with an interest in playing this role are sectoral interest groups such as trade unions or public interest groups. This contribution may be through their direct involvement in administration of the code itself (in which case it has greater credibility as a genuinely self-regulatory scheme) or in their capacity as potential victims of code malpractice, in taking direct action against firms that breach the self-regulatory programme. For example, under the Responsible Care programme, community groups and outside technical experts are given an important role in overseeing the chemical industry's safety, health and environmental performance. The independent oversight exercised by third parties may be essential to maintaining the credibility of a self-regulatory regime.

Finally, the importance of utilising a broader regulatory mix cannot be over-emphasised. Often, the best solution is to design complementary combinations using a number of different instruments. Thus, self-regulation, government regulation, and third party oversight, may be capable of being combined in complementary combinations that work better than any one or even two of these instruments acting together.

For example, in the case of the chemical industry's Responsible Care programme, even though the industry as a whole has a self-interest in improving its environmental performance, collective action problems and the temptation to free ride mean that self-regulation and its related codes of practice alone, will be insufficient to achieve that goal. However, a tripartite approach, involving co-regulation and a range of third party oversight mechanisms, may well be a viable option. This might involve: creating greater transparency (through a community right-to-know about chemical emissions), which in turn enables the community to act as a more effective countervailing force; greater accountability (through the introduction of independent third party audits which identify whether code participants are living up to their commitments under the code, and which involve methodologies for checking and verifying that responsibilities are being met); and through an underpinning of government regulation which, in the case of companies which are part of the scheme, need only 'kick in' to the extent that the code itself is failing or when individual companies seek to defect from their obligations under it and free ride.

Saurwein has gone further, and in a recent article seeks to assess alternative modes of regulation from a public policy perspective, showing how context matters by outlining the conditions that facilitate or inhibit the formation and the performance of alternative regulatory institutions. In particular, he identifies eleven *enabling contextual conditions*

for self- and co-regulation. These form a checklist for the assessment of alternative modes of regulation. The factors are derived from a comprehensive review of the literature drawing on theoretical and empirical analyses of advantages, disadvantages, success factors, and contextual conditions for alternative regulatory modes as well as case studies in a variety of policy fields. They are summarised in Box 5 below.

Box 5: Regulatory Choice for Alternative Modes of Regulation

A. Economic Benefits for the Industry
The emergence of alternative regulatory solutions, in some cases, simply results from enlightened self-interest of the industry. This is when direct economic benefits outweigh the costs of self-regulation. In these cases self-regulation may create win–win regarding private/industry and public/state interests, for example, when improvements in environmental or social standards also enhance economic performance. Various examples show that self-regulatory regimes emerge in reaction to distinct problem structures that create industry demand for a type of regulatory framework that cannot be provided by governmental action, especially on the international level

B. Reputational Sensitivity of the Industry
The emergence of alternative modes of regulation may be driven by the intention to increase public trust in companies and industries. The reputational sensitivity of the industry is considered a central factor in the feasibility of the adoption of an alternative regulatory solution. The more the companies' success depends upon their own reputations and on the reputation of their industry segment, the greater are the incentives to adopt measures in order to avoid reputation losses.

In order to assess an industry's reputational sensitivity, regulators may be informed by considering the public awareness and *public concern* regarding regulatory issues. The existence or absence of … campaigns attacking a specific industry by threatening and launching boycotts and engaging in media campaigns has an impact on the industry's willingness to engage in self-regulation. Industry *investment* in the development of reputation and the *probability of detection* of malpractice also serve as assessment criteria.

C. Intervention Capacity of Government Actors
In many cases, the emergence of self-regulation is not a direct function of potential economic and reputational benefits to the industry. On the contrary, it is often argued that alternative modes of regulation take place 'in the shadow of hierarchy'. The provision of an alternative regulatory system becomes more attractive when there is the threat of government intervention, statutory standards, or litigation. Ayres and Braithwaite (1992) argued that state 'regulatory agencies are often best able to secure compliance when they are benign 'big guns' ... the bigger and the more various are the sticks, the greater the success regulators will achieve by speaking softly' (19). The performance of alternative regulation is linked to the *intervention capacity* of government, which may affect the industry's willingness to adopt self-regulatory solutions in order to pre-empt statutory regulation. A strong intervention capacity allows governments to apply stick-and-carrot strategies or to use the tactic of government by raised eyebrow.

D. Impact in Case of Regulatory Failure and the Need for Uniform and Binding Minimum Standards

The impact in the case of regulatory failure and the need for uniform and binding minimum standards determine the necessary level of governmental intervention. The higher the potential negative impact of regulatory failure, the greater is the need for minimum binding standards. High demand for minimum binding standards decreases regulatory flexibility and the suitability of alternative regulatory solutions. Hence, alternative modes of regulation are less suitable if the *costs* in the event of regulatory failure are considerable and if a product supplied is essential to the welfare of individuals, for instance, in the case of a major public health and safety issue or detrimental effects on public infrastructures. Problems of high risk and irreversibility demand minimum binding standards and require *universal application/participation* in order to assure the necessary level of goal achievement (Office of Regulation Review, 1998). Lower negative impact in the case of regulatory failure allows for more regulatory flexibility and increases the leeway for alternative regulatory solutions. Regulators may employ risk-based approaches to regulation for systematic assessments. In general, this includes an assessment of the hazard or adverse event and the likelihood of it occurring, for example, considering the *impact in a single case of noncompliance* with regulatory standards and the *degree of reversibility*.

E. Intensity of Regulatory Intervention Required

The intensity of the required regulatory intervention depends on the characteristics of the regulatory problem and the available means of intervention. Some regulatory challenges may be solved by rather soft modes of intervention, while others demand much stricter restrictions. From a democratic point of view, the demand for governmental oversight increases with the intensity of required regulatory intervention. The lower the intensity of regulatory intervention, the better is the suitability of alternative regulatory solutions. For a systematic analysis regulators may assess what is being regulated, entry, exit, behaviour, costs, content, preferences, technology, or performance. The intensity of intervention may vary for each aspect, but it can be assumed that it is greater if it restricts *market entry* or enforces market *exit*, if regulation of *costs/prices* has a significant impact on revenues, and if it constrains behaviour that is protected by *fundamental rights*.

F. Conflicts of Public and Private Interests

The degree of conflict between public and private interests for any given regulatory matter affects the feasibility and the suitability of alternative regulatory solutions. If companies share a common interest in avoiding market failure, their willingness to group together and to adopt alternative regulatory solutions will be high. Conversely, widely diverging interests between companies will hamper the emergence of self-regulation. But even if companies share a common interest and agree on an alternative regulatory mechanism, there is no certainty that there will be no conflict between their *private* interests and the general *public* interest. The lower the divergence between public and private interests, the more suitable is an alternative regulatory solution. In general, consumer protection and environmental protection are referred to as a policy field with a wide divergence between public and corporate interests. A wide divergence of interests involves a stronger demand for state oversight of alternative regulatory institutions.

G. Number of Participants and Market Fragmentation

The level of adoption of alternative regulatory modes depends on the number of market participants. Theoretical arguments and evidence suggest that self-regulation works less in *fragmented markets* with a wide and diverse range of providers. The higher the number of actors involved, the more difficult it is to arrive at a universally acceptable set of standards. Fragmentation decreases the feasibility of adopting self-regulatory

measures, and also 'an effective sanctioning system seems more manageable in small or federated organizations, where the visibility of each member is high'.[24]

H. Availability of Organisations to Assume Regulatory Tasks

The feasibility of adopting alternative modes of regulation depends on the existing industry environment. The practicability of adoption is higher if an industry already has experience with alternative modes of regulation. Taking over additional tasks is easier for an *already established organization* that can provide the 'bureaucratic capacity, resources, and ethos necessary to implement regulatory schemes'[25] for example, an already acknowledged *industry association* of high reputation and widespread support in the industry (near universal participation), which is adequately equipped (e.g. personnel) and able to reconcile diverging company interests. The *maturity* of a market is an influencing factor because the establishment of umbrella organizations proceeds with the formation of a market. Theoretical arguments suggest that industry regulation is more likely when it requires coordination among firms on an *intraindustry* rather than on an *interindustry* basis.

I. Intensity of Competition

The degree of competition affects alternative modes of regulation, but the literature regarding the effects of competition on the adoption and performance of self-regulation is inconclusive. The basic argument suggests that intensive competition decreases the willingness to accept any voluntary regulatory burden beyond mandatory standards. As Haufler (2001) finds, 'in highly competitive markets any additional cost is harder for management to justify in terms of bottom-line profits and market share. Self-regulatory programs often entail significant costs and may undermine a firm's competitive position — especially if no other player major market player adopts similar standards. Then corporations can agree on setting standards together, however, the competitive position of each is maintained. Consequently, oligopolistic markets might be the most candidates for collective self-regulatory action' (24). At the same time, it has to be considered that alternative regulatory institutions might entail or encourage *anticompetitive behaviour*. Depending on the maturity and structure of the market, certain market players might try to lock the market for their own convenience, closing it to newcomers. From the regulators' perspective, governmental oversight may be introduced to prevent cooperation in self-regulatory organizations from anticompetitive behaviour.

J. The Extent to which Public Policy Objectives are Supported by the Existing Industry Culture

The practicability of the adoption of alternative modes of regulation for a new regulatory challenge depends on the extent to which public policy objectives are supported by the existing industry culture. A pre-existing *sensitivity to public interests* and a *tradition of cooperation* between the private sector and state authorities will support the adoption of alternative regulatory solutions. Mayntz (2003) argues that for effective governance to emerge there must exist a minimal sense of identification with and responsibility for the greater whole. Both public and private actors must cooperate in policymaking instead of simply fighting each other. The intensity of commitment to public objectives varies from industry to industry as well as between individual corporations. Corporate social responsibility (CSR) is one of the catchwords for demonstrating sensitivity to public interests at the level of individual companies, and measures taken with CSR programs point to other contextual factors such as the incentives and benefits for the industry and its reputational sensitivity. Regarding the industry level, an unweakened culture of social

[24] Ronit and Schneider (1999): 262.
[25] Balleisen and Eisner (2009): 134.

responsibility is more probable in the case of *cohesive industries* with like-minded participants, motivated to achieve common goals.

K. Involvement of Government Actors
Successful alternative regulation depends on an adequate level of support and involvement of governmental actors (See Box 1). From a conceptual point of view, the modes of state involvement scrape the borderline between contextual factors, on the one hand, and organizational success factors, on the other. State involvement may be *directly* displayed in the organizational design of an alternative regulatory institution (financial support, personnel involvement). But government involvement may also be an external, contextual factor (e.g. government threat), which *indirectly* affects adoption of and conduct in an alternative regulatory organization. Assessing the mode of governmental involvement is a task for positive analysis of regulatory arrangements as well as a crucial element in the course of regulatory choice. A successful institutional design depends on an appropriate mix of measures and an adequate intensity of state involvement. In order to determine an appropriate mix, it is helpful to derive conclusions from the assessment of other contextual factors. More intense modes of state involvement are justified, for example, if there is a serious negative impact in the case of regulatory failure or if there are major conflicts between public and private interests**.** In any case of state involvement, a clear *division of responsibilities* between private and state institutions contributes to the accountability of the regulatory arrangement.

Source: Saurwein 2011.

7. Selecting Appropriate Policy Instruments: The Role of Guidelines and Checklists

An increasing number of jurisdictions have recognised that different policy instruments (and increasingly mixes of instruments) have different strengths and weaknesses and can appropriately be invoked in different contexts and circumstances.

For example, the OECD has engaged in a considerable amount of work on voluntary approaches, and has developed a set of recommendations on the design of voluntary approaches. The OECD has identified a number of 'success' criteria, which if followed, may achieve more positive results in terms of the design not just of self-regulatory initiatives but of voluntary approaches more generally. These are reproduced at Appendix 2 below.

A number of Australian jurisdictions have also produced various helpful checklists and 'how to' manuals as have various government agencies in the UK. Most notable are the Australian Productivity Commission Office of Best Practice Regulation's Best Practice Regulation Handbook,[26] and various documents developed by the UK agencies Ofcom and Oftel.[27] More recently, in May 2011, the Victorian Government Competition and Efficiency Commission revised its own Victorian Guide to Regulation while retaining its Regulatory Impact Statement/Business Impact Assessment Initial Assessment Checklists.[28]

[26] Office of Best Practice Regulation, (2010).
http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf
[27] Office of Communications (Ofcom) (2008) and Office of Telecommunications (Oftel) (2001).
[28] Govt of Victoria (2011).

Also important are the diversity of Regulatory Impact Assessments that many governments are now using as good governance tools and as part of better regulation initiatives, and whose primary function is to structure regulatory choice. As Saurwein points out:

> RIA guidelines often contain provisions for the assessment of multiple regulatory options, including the zero option of not intervening, market-friendly alternatives to regulation, soft law, voluntary agreements, and traditional command-and-control regulation. The European Commission uses impact assessment guidelines that comprise the consideration of self and co-regulation when it comes to the identification of the appropriate policy instrument (European Commission 2009). The U.S. Office of Management and Budget (2003) provides a circular on regulatory analysis that assists regulatory agencies by standardising the way benefits and costs of regulatory actions are measured. The guidelines outline many regulatory alternatives available for state authorities.
>
> In the United Kingdom, guidance on evaluation in central government suggests identifying the full range of instruments including regulatory (or deregulatory) solutions, self-regulation, spending, or tax options. Alternatives to traditional state regulation (for example, self-regulation or voluntary codes) need to be properly considered from the outset. RIA guidelines typically suggest the assessment of alternative modes of regulation such as self- and co-regulation, but they have—with some exceptions—hardly specified the criteria against which the suitability of alternative regulatory institutions can be scrutinized in the early stages of the regulatory choice process (ex ante evaluation) and in the course of performance review once alternative regulatory organizations have been established (ex post evaluation).

Since access to such tools is widely available on multiple regulatory websites, they will not be further described here.

8. The relationship between self-regulation and the current Department of Labour approach under the HSE Act[29]

The current New Zealand regulatory regime, like those of the UK and Australia, was strongly influenced by the British Robens Report of 1972. This report resulted in widespread legislative change, from the traditional, 'command-and-control' model, imposing detailed obligations on firms enforced by a state inspectorate, to a more 'self-regulatory' regime, using less direct means to achieve broad social goals. As Robens put it:

> There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system. ... The objectives of future policy must therefore include not only increasing the effectiveness of the state's contribution to safety and

[29] Parts of this section draw on Gunningham and Neal (2011).

> health at work but also, and more importantly, creating the conditions for more effective self-regulation.[30]

Robens here is touching on the fundamental question of whether or to what extent employers and other duty holders should be allowed to decide for themselves what action to take with regard to workplace safety or whether the state should intervene to ensure compliance with prescribed minimum standards. Under the first approach, the role of the state would be to persuade, encourage and educate employers to improve their safety performance, employing the law rarely and as a last resort. Under the second, the state would intervene more forcefully to direct duty holders to comply, invoking sanctions when they fail to do so. Of course, as indicated earlier, self-regulation and state intervention are really two ends of a continuum and a preference for one of these policies does not preclude some use of the other. The Robens approach, while certainly not advocating 'pure' self-regulation (with no state role) nevertheless leans clearly towards the self-regulatory end of the continuum.

In adopting the 'Robens philosophy' through the HSE Act, New Zealand replaced heavily prescriptive standards (telling duty holders precisely what measures to take in a particular situation) with a *principles-based approach*, primarily by imposing *general duties* (sometimes referred to as 'goal setting' regulation) such as to take 'all practicable steps' to ensure health and safety, leaving it to the discretion of the duty holder how they achieve those principles or goals. This approach was coupled with greater use of *performance standards* that specify the outcome of the OHS improvement or the desired level of performance but leave the concrete measures to achieve this end open for the duty holder to adapt to varying local circumstances. There was also a focus on *systems-based standards.* These identify a particular process, or series of steps, to be followed in the pursuit of safety, and may include the use of formal OHS management systems. Section 5 for example, states that one of the objects of the Act is 'promoting excellence in health and safety management, in particular through promoting the *systematic* management of health and safety' (emphasis added). As such it requires employers and others to take the responsibility for developing and implementing such systems, to maintain safe working environments, and implement sound practice.

The reliance on duty holders to take primary responsibility for safety at work is also made clear by s.5(f) which states that: 'successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work'. This emphasis on self–management is also apparent from s.30, which states the functions of an inspector include helping employers, employees, and other persons 'to improve safety at places of work, and the safety of people at work, by providing information and education' although they must also take all reasonable steps to ensure that the Act is being complied with.

Accordingly, the Department's interpretation of the HSE Act is that it places positive duties on employers and others to manage hazards in their own workplaces, reflecting the approach that self-management of health and safety by businesses is preferable to relying on visits by inspectors to ensure compliance, no matter how frequent those visits might be (s.6-19)[31] the duty to ensure the safety of the workplace is placed on employers and others as set out under the HSE Act and regulations, and not on the Department.[32]

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[30]Robens Report (1972): 12.
[31] Department of Labour, (2010): 3.
[32]*Ibid.*

In recent years, the Department has also sought to become more effective in achieving best regulatory outcomes through transitioning from being a 'traditional' to being a 'modern' regulator, and shifting (consistent with the HSE Act emphasis on management systems) from a reactive event-based focus to positioning itself to better understand patterns of incidents, accidents and fatalities and to systematic means of addressing these. As such, the regulator aims to encourage organisations to establish processes of internal self-regulation in order to make them more responsive to OHS concerns. This, to return to one of the themes of Section 4, is to engage in 'Meta-Regulation' and the 'regulation of self-regulation' with the aim of stimulating modes of self-organisation within firms in such a way as to make them self-reflective and to encourage internal self-critical reflection about their OHS performance.

Finally, a number of cautions must be expressed about the value of self-regulation and Meta-Regulation in the New Zealand context.

First, while self-regulation (or at least co-regulation or enforced self-regulation) is arguably an entirely credible regulatory strategy when dealing with large sophisticated and reputation sensitive organisations which have the capacity and the incentive to self-regulate, it confronts particular challenges when dealing with modest-sized companies which might either lack the capacity to self-regulate, the incentive to do so, or both.[33]

This latter point has particular resonance in a small country such as New Zealand where most companies fit within the latter group. For example, none of the underground mines in New Zealand could be considered either large or sophisticated when judged against those in Australia. Many New Zealand firms, it has been suggested, may lack both the culture and the capacity for self-management. If so, then there may be limits to the effectiveness of 'regulating at a distance'. The challenge may be to develop different regulatory structures: one providing the necessary degree of guidance that small enterprises crave for, while also providing the greater process and outcomes based focus that is appropriate for larger companies. Codes of practice were intended to meet the needs of the former under a Robens based system but have not entirely done so (see Box 6).

Box 6: Codes of Practice in the New Zealand Context

Codes of practice provide non-mandatory guidance as to how to meet the principles and performance-based requirements set out in the general duties under the HSE Act and in regulations. These codes were intended by Robens to fill in much of the detail which was lacking in the general duties, but to do so in a more flexible and participatory fashion than had occurred in the past. Under most of the post-Robens legislation, these codes have a quasi-legal status, in that while failure to comply with a code does not in itself involve a breach of the Act, it nevertheless has evidentiary value (as is the case in New Zealand by virtue of the HSE Act s.20). This solution has the considerable attraction of providing more detailed guidance as to *one* acceptable way to comply with the general duties, while preserving duty holders' options to devise their own means of satisfying those duties. Such guidance is particularly important for small- and medium-sized organisations, and codes of practice are often seen as the best vehicle to provide more accessible information to such groups.[34]

[33] See for example, Gunningham (2007): Ch 3.

[34] Bluff and Gunningham (2007).

However, in recent years the Department has expressed no enthusiasm for the development of ACOPs (although some generalist ACOPs have nevertheless been developed). Its principal documentation on the role of standards and guidance states that:

'ACOPs are time-consuming and onerous to develop, maintain and revoke. To receive ministerial approval ACOPs must undergo a significant period of consultation. Once in place, ACOPs are difficult and costly to amend or revoke. Consequently the same process to approve must be used for change or revocation. For these reasons many ACOPs developed earlier in the life of the HSE Act have not been amended or revoked. ACOPs also offer very little by way of advantage over other forms of guidance'.[35]

Instead, the Department is increasingly pursuing another option, the development of guidance material. A conventional view would be that ACOPs play an important role in a 'Robens based' regulatory framework in large part because they have legal implications that result in their being taken seriously by duty holders. Whether that role can be adequately replaced by the introduction of guidelines remains to be seen.

Second, a systems-based approach to regulation also has its critics. Notwithstanding the emphasis that many companies and indeed regulators have placed on management systems in the last decade or so, there is 'insufficient evidence in the published, peer-reviewed literature on the effectiveness of OHSMSs to make recommendations either in favour of or against OHSMSs'.[36] Indeed, an undue faith in management systems can result in complacency or a failure to recognise important hazards and address them. At Longford in Victoria, where Esso's gas plant exploded, the Royal Commission found that Esso's world class OHSMS had taken on a life of its own, 'divorced from operations in the field' and 'diverting attention away from what was actually happening in the practical functioning of the plants at Longford'.[37] The Gretley mining disaster in New South Wales also suggests, according to Hopkins, that 'experience is now teaching us that safety management systems are not enough to ensure safety'.[38]

Third, it is also important to draw attention to the growing evidence that far more important than OHSMSs is workplace culture and that 'culture eats systems for breakfast'.[39] Here is not the place to explore the relationship between safety and culture at length. For present purposes, the main point is that corporate OHS management systems and other management tools only work well when OHS is institutionalised, and when it gets into the 'bloodstream' of the organisation at site level. Only when the formal systems (audits, reporting, monitoring etc) are supported by informal systems (trust, commitment, buy-in, means of overcoming conflicting loyalties etc) will they be fully effective. This is important because it suggests that the claim that systems based regulation – or Meta-Regulation more broadly – can overcome many of the traditional challenges of regulating complex organisations is overstated. On the contrary, systems-based regulation (or indeed Meta Regulation) may confront much the same challenges as other forms of regulation

[35] Department of Labour, (2008,): 10.
[36] Robson et al (2005).
[37] Dawson and Brooks (1999): 200.
[38] Hopkins (2007).
[39] Gunningham and Sinclair (2009).

9. Conclusion

We must take seriously the potential for self-regulation in industrial life. That means understanding the forms and limits of both individual and industry self-regulation. What are the ways in which self-regulation may be organised and conducted? Which forms of self-regulation are best suited to handle what types of problems? And what are the social conditions most (and least) conducive to effective individual and industry self-regulation?

In addressing these questions this paper has stressed that achieving effective industry self-regulation is never easy, as the large number of failed self-regulatory initiatives bears witness. Indeed, it has been argued that there are a substantial number of internal and external hurdles which must be overcome before self-regulation (or co-regulation) becomes a credible policy option.

Amongst the most important internal hurdles is the extent to which a particular scheme is capable of institutionalising responsibility. Here, critical variables will be the development of industry-wide policies and procedures to ensure a strong and effective commitment to the values or ideals the industry claims to uphold, the integration of accountability and transparency in corporate decision making, and the capacity to 'moralise social control' and institutionalise responsibility.

As to external hurdles, self-regulation is most likely to flourish when there is either strong coincidence between the public and private interest in self-regulation or there are external pressures sufficient to create such a coincidence of interest. However, these are necessary but not sufficient conditions for the success of self-regulation and unless, for example, adequate mechanisms can be put in place to deal with free riders, self-regulation may still fail. Related to this, it has been emphasised that self-regulation is very rarely successful as a 'stand alone' mechanism of social control. Rather, the most effective self-regulatory initiatives have involved an underpinning of government regulation, or third party oversight, or more commonly both.

This suggests that the interaction between public and private regulation is crucially important, raising broader questions about the state's proper role in all this and how can we determine the most harmonious fit between particular industry structures and different public/private regulatory strategies.

Appendix 1:

Terms of Reference

The consultant will prepare a review of the international research and policy-focused literature concerning industry self-governance in the fields of work health and safety and related areas (in particular environmental self-governance). On the basis of this review of the literature a report will be provided to the Department of Labour:

a) Defining industry self-governance and distinguishing it from other forms of governance (based on a continuum from self-regulation at one end and direct government regulation at the other, with various forms of co-regulation in between).

b) Distinguishing between the self-governance of individual enterprises and industry-level self-governance.

c) Exploring the relationship between self-governance and current DoL approach under the HSE Act. Extent to which self-governance is practicable under the HSE Act (e.g. including with regard to Codes of Practice).

d) Assessing the international evidence with regard to the strengths and weaknesses of self-governance (this would form the central part of the project).

e) Towards evidence-based policy: to what extent and in what circumstances is industry self-regulation likely to be a viable approach (i.e. efficient, effective and acceptable to the community).

Appendix 2:

Recommendations on the design of voluntary approaches

Clearly defined targets: the targets should be transparent and clearly-defined. Moreover, the setting of interim objectives is crucial since they permit all the parties to identify difficulties arising during implementation at an early stage. Government should take the initiative in target setting, obtaining information from a variety of sources, such as benchmarking.

Characterisation of a business-as-usual scenario: before setting the targets, estimates of a business-as-usual trend – what the target variables are likely to be, given natural technical progress within the industry in question – should be established in order to provide a baseline scenario.

Credible regulatory threats: made at the negotiation stage, a threat of regulation by public authorities provides companies with incentives to go beyond the business-as-usual trend: 'when the agency has a stick waiting in the wings, industry is more likely to accept the carrot'. That is, the existence of a regulatory threat as an alternative to an agreement, promotes voluntary action by industry.

Credible and reliable monitoring: provisions for monitoring and reporting are essential for keeping track of performance improvements. They constitute the key for avoiding failure to reach targets. Monitoring should be made at both the company level and the sector level in the case of collective voluntary approaches. In certain contexts, monitoring by independent organisations may be used.

Third party participation: involving third parties in the process of setting the voluntary approaches objectives and in its performance monitoring increases the credibility of voluntary approaches. More generally, OHS performance should be made public and transparent. It provides industry with additional incentives to respect their commitments.

Penalties for non-compliance: sanctions for non-complying firms should be set. This can be achieved by either making binding commitments or linkages between voluntary approaches commitments and regulatory requirements.

Information oriented provisions: in order to maximise the informational soft effects of voluntary approaches, support for activities in technical assistance, technical workshops, edition of best practice guides, etc should be promoted.[40]

[40] OECD (1999a): 134-135 and Covery and Leveque (2001).

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