



Addressing the Risk, Reading the Landscape: the Role of Agency in Regulation

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What's happening in Regulation

- ◆ Smart regulation, meta-regulation, responsive regulation, really responsive regulation... (Braithwaite, Parker, Gunningham, Baldwin, Black)
 - Can do! Just need the right techniques...
 - Assumption of agency
- ◆ Institutional, neo-institutionalist, risk society (Meyer and Rowan, Powell and DiMaggio, Scott, Beck)
 - Current regulatory state focussed on its own legitimacy
 - Beck, regulatory dyad ineffectual
 - Agency contingent and complex

Agency and regulation

- ◆ Agency as both goal directed and reflexive (Margaret Archer, Blumer).

Reflexive Agency

	Yes	No
Goal Agency Yes	"Ideal"	Needs help to find right solution
Goal Agency No	Ideas are not the problem	Ritualism

Regulatory/Compliance response to Longford, HIH and Sept 11th

- ◆ Safety Case regime (co-regulation)
- ◆ MHF “ideal response” (both reflexive and goal agency)
 - Regulator could exert their agency
 - ◆ political support
 - Sites could express agency, but challenging
 - ◆ ... we had two-and-a-half thousand different scenarios of getting killed on site and ten-and-a-half thousand control measures that prevents a major hazard incident happening”
 - ◆ Good people and good processes important

Counter-terrorism

- ◆ Transport Security Plans (TSPs)
- ◆ Goal agency rules! (but limited reflexive possibilities)
 - ... it's hard enough for me to get it right for this organisation and my Minister and that's at the end of the day with the public servants aim – what's the Minister's reaction going to be to this? And I guess I don't really care if for my friends in tax, if the treasurer said this is a crummy proposal or this is a ridiculous method of regulating this
 - "... if the Office of Transport Security says that security managers must wear yellow shirts with pink polka dots, they will wear yellow shirts with pink polka dots...."

But good opportunities for sites... reflexivity returns

- ◆ There's a lot of advantages that came in from that (security access regime) ... we've had a Minister for Ports from (other state) just got up by the gate, rang me and said, "Do you want to let me in?" "No, sorry. You haven't informed us. You haven't got the correct documentation, go away." (He said) "But I'm the Minister of Other State!" "I don't care – you could be God. Go away.... off you go!" And it's a waste of time – 'cause then you're going to have to go and look after him. And he was just – yeah I'll have a sticky-beak, you know. What the bloody hell is he doing there?

But – agency of the perpetrator?

- ◆ But in essence if the bad guys want to get on an aeroplane they'll still get on an aeroplane and there's not much that any level of security is going to do. Those guys will take advantage of the very latest technology and will circumvent whatever systems you've got in place. The best thing they (OTS) have done probably with all these regulations is to really build a bit like an onion of security. There are multiple layers of security. So to get through, you've got to penetrate multiple levels to actually succeed, but if you really want to succeed you can still get to the core (50).

Financial regulation

- ◆ CLERP 9, but then restrictions on goal agency develop
 - "... the Business Council of Australia is running out that there's far too much regulation in the country it's an overreaction, it's strangling business and burying our global aspirations under an unmanageable burden..." (6)
- ◆ Goal agency contingent on political will – and this not always forthcoming.

Financial regulation and sites

- ◆ Historical delegation of agency to market actors: Agency and the auditor
 - ... the motto of the Institute of Chartered Accountants is 'without fear or favour', right? Now that ethic was designed around independence. It was designed around not having conflicts of interest. It was designed around integrity... they're fundamental.
- ◆ Agency of the perpetrator (similarities with counter-terrorism)
 - "Once you've got collusion, you're in trouble"

Conclusion: Regulator and Site Agency

Reflexive Agency

Strong

Weak

Goal Agency

Strong

Weak

Safety case Vic:

Requires: political support, site support, necessary expertise

Sites: Good people/good processes

ASIC:

Choices framed by political response to industry demands – reading the political landscape important skill

Site counterterrorism: use regime for other site goals (replace goals)

Counter-terrorism:

Immediate response to the minister (or PM) fighting the last attack

Sites: Do what you are told

Ritualism

Conclusion: Perpetrator Agency

Regulatory Agency

Perpetrator
Agency

	Regulatory Agency	
	Stronger reflexivity	Stronger goal agency
Yes	ASIC: Regulatory escalation/game playing	Counter-terrorism Public assurance: fight the last battle
No	Vic MHU Negligence-based risk	