

# **The Baby and the Bathwater**

## **ACTU comments on Draft OECD Recommendation on Regulatory Policy and Governance**

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23 June 2011**

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The Australian Council of Trade Unions (ACTU) is the peak council for organized labour in Australia, representing almost two million Australian workers. The ACTU is affiliated to the International Trade Union Confederation (ITUC) and the Trade Union Advisory Committee to the OECD (TUAC).

We welcome the opportunity to comment on the ‘Draft OECD Recommendations on Regulatory Policy and Governance’ (hereafter ‘*the Draft*’; par numbers refer to paragraphs in the Draft).

These are our comments.

### **Background and Need**

The OECD’s work on regulation originated during the years of neo-liberal policy ascendancy when belief in the efficient markets hypothesis was an article of faith and the Washington Consensus dominated prescriptions issued by international institutions. The *1995 Recommendation for Improving the Quality of Government Regulation*; the *Report to Ministers* of 1997, the *2005 Guiding Principles*, and the *APEC-OECD Checklist* all pre-date the global financial crisis.

While the occurrence of the crisis is noted in the Draft, there is nowhere to be found any *mea culpa*, any acknowledgement that the precepts driving those deregulationist policy prescriptions were flawed or may have been in any way responsible for causing the crisis.

The so-called ‘regulatory policy agenda’ (par 7, 11) is an artifact of neo-liberalism, of the rise to policy dominance of market-fundamentalism in the decades following the second OPEC oil crisis. Here the goal is to ‘reduce regulatory burdens’ (par 4) impeding the free functioning of markets. And so the regulations restricting savings banks from undertaking merchant banking activities were repealed, and the baby went out with the bathwater.

The Law of Parsimony is not exclusive to neo-liberalism. It is unexceptional to apply Occam's razor to regulation, to cut the unnecessary fat without damaging the functioning muscle. To do this is to endeavour to raise the regulatory benefit of an intervention; but this is not how the issue is couched in the Draft.

### **Explicit Policy on Regulatory Quality**

Principles of transparency, fairness, natural justice, simplicity, and fit-for-purpose are laudable and have generic relevance. They are germane for good government and good governance.

However the notion that 'a (single) central oversight body in charge of promoting regulatory policy' (par 16) is needed or useful to give effect to these principles, is quixotic at best.

Consider for example, 'regulation':

- of food premises to ensure public health and avoid epidemics;
- of on-line content proscribing child pornography;
- of workplaces to ensure occupational health and safety;
- of labour markets to set minimum wages and conditions of work;
- of capital adequacy requirements for holders of banking licences;
- of social insurance schemes delivering for health or pension benefits;
- of building codes to assure structural integrity or to preserve neighbourhood character;
- of occupational licences for plumbers, electricians, surgeons etc
- of advertising to proscribe deceptive and misleading conduct;
- of school leaving age to ensure children receive adequate education;
- of disclosure requirements in company reports;
- of motor vehicle emissions;
- of tobacco advertising

The sole commonality here is that some regulation is enacted. Detailed and expert knowledge is essential in each field, for effective regulation enacted consistent with the overarching generic principles. The case for creation of a central oversight body for regulation *per se*, is weak and unconvincing.

The stipulation that 'regulatory policy should include a preference for performance based regulation and the efficient functioning of markets' (1.4 in Box 1) is not supported by any discussion in the preceding text of this section.

The proposition that regulation across such profoundly different domains can be summed and compared with fiscal and monetary policy (par 12) is bizarre.

## Users of Regulation

This section is quite vacuous. Regulators are empowered by the State to make regulations; these directly or indirectly regulate (individual and corporate) citizens in their various capacities - as consumers, employers, representatives, advocates, etc.

It is just silly to try to fit the discussion into a supply-demand framework.

The presumption that regulation is bad permeates the entire Draft; here again if 'Reduction of unnecessary regulatory burdens' (par 28) were replaced by 'Raising (net) regulatory benefits' the remainder of the sentence would remain coherent with precisely the same message

## Regulatory Oversight

*"Big fleas have little fleas upon their backs to bite 'em"*

The assertion that 'there may be a need to locate the regulatory oversight body in a finance or economics-oriented ministry' is straight neo-liberal policy imperialism.

The assertion that 'regulatory oversight should be based on expertise, in the form of a trained professional staff capable of undertaking evaluation of regulatory proposals and options, as well as their impacts on business and society', is naïve. There is no value-free cadre at hand. All technicians bring their priors, *per force* neo-liberal acolytes.

A serious omission from this section is any discussion about the dangers of regulatory capture. The Australian experience is a case in point. Originating in 1921 as the Tariff Board, with a remit to advise government on the narrow question of the level of tariffs that should be applied to various categories of imported goods, morphing through subsequent incarnations as the Industries Assistance Commission (1973), then the Industries Commission (1989), today's Productivity Commission has emerged, renewing and expanding its mandate at every opportunity. (See <http://www.pc.gov.au/about-us/history/thirtyyearhistory> )

In the 1960s the Tariff Board shone a light on the perverse effects of 'made-to-measure' tariffs. Since then it has arrogated to itself a monopoly in the provision of micro-economic Inquiry Services to Government and today seeks to pronounce on all aspects of economic, social and environmental policy, all the while calling for it to be given an ever broader remit. Formally within the Treasurer's portfolio, the Productivity Commission shapes the Terms of References it receives. Its driving concern is allocative efficiency of market processes, not their distributional outcomes. It seeks to cast its *laissez-faire* frame across all realms of policy debate – urban planning, public transport, occupational health and safety, charitable organisations, public housing, private health insurance, competitive tendering by public agencies.

The Productivity Commission claims to embody three core principles – independence, transparency and a community-wide focus. In fact the Commission substantially provides a home for displaced neo-liberal bureaucrats; relies on CGE modeling (whose development it subsidised for decades in a classic winner-picking strategy) the output of which is opaque to all but a handful of specialists yet is presented as ‘evidence’ in its Reports; and its ‘community-wide focus’ consists in the view the a society is no more than the sum of its atomistic individuals all intent as consumers on maximizing their own interests and *ipso facto* best placed to do so. It almost invariably advocates deregulatory policy, opposes government intervention, supports private over public solutions, market mechanisms over regulation.

Neo-liberal precepts imbue Productivity Commission staff and its holders of statutory office at every level from the top down. Prior to his appointment as Chairman of the Productivity Commission, Gary Banks (who has held that office since 1998 and whose appointment has 2 years to run) was an economist with the GATT Secretariat in Geneva, a consultant to the OECD and the World Bank, an employee of the Centre for International Economics, Canberra, and a Visiting Fellow at the Trade Policy Research Centre, London.

From its humble beginnings the Productivity Commission has burgeoned, engulfing and absorbing other agencies on the way. It never fails to congratulate itself on its contribution to ‘good public policy’. In 2010 its expenses were \$33.7 million (Australian dollars); of the \$25.2 million paid in employee benefits to its 188 staff, \$6.7 million (26%) was paid to just 29 Senior Executives. At 30 June 2010, 3 of its 18 senior executive staff were female; in contrast 23 of its 30 base level staff were female.

The role, functions, operation and administration of the Productivity Commission have never been subject to independent review. It has captured its own space in Australian polity.

### **Regulatory Impact Assessment**

Good design is a good thing. So is evidence based policy.

Ultimately, neither justice nor good regulation can be effected by application of formulae. As a rule, judgment – the exercise of discretion having regard to the available evidence and argument – will be required in reaching a decision whether to regulate and if so, how.

Beyond application of the Law of Parsimony, there can be no presumption that ‘light-handed’ regulation or ‘self-regulation’ is superior in any instance to strict prescription.

Market failure is not the sole justification for use of regulation and should not be the only example given of policy need (Box 4, par 4.2). If examples justifying need are to be given, avoiding epidemics, minimizing systemic risk, redressing endemic myopia and others should also be cited.

This section should explicitly recognize that diminishing returns from Regulatory Impact Assessments are to be expected.

### **Reviews of the Regulatory Stock**

Periodic housekeeping is good practice. As Ross Perot said, it is necessary to clean out the barn from time to time.

But it is plain dumb to insist that the wheel be reinvented repeatedly according to some rolling cycle.

Where the case for regulation has been made and is well established, the onus should be on those calling for ex post review to make the case in specific instances, lest such reviews become make-work schemes for idle econocrats.

To illustrate, minimum wage laws underwrite decent work. Minimum wage laws impede 'business flexibility' by removing the capacity of a (small or bigger) business to seek competitive advantage by undercutting the wages paid by its competitors. Minimum wage rates adjusted regularly, by moderate amounts, and predictably (ie broadly in line with past practice) promote productivity growth without adverse effects on employment and improve the lot of low paid workers. Provision of a sunset clause, or requirement to review periodically the *need* for minimum wages, is a crazy proposition.

The objectives of regulation are broader than promotion of economic efficiency (Box 5 par 5.1)

### **Reviewing Performance of Regulatory Programmes**

See preceding section

### **The Organisation of Regulators**

Regular reporting of outcomes against goals is a good thing. Like parenthood, natural justice, transparency, and review are sound and respectable principles.

### **Administrative Appeals**

Agree

## **Risk and Regulation**

The discussion in this section is seriously deficient in its failure to distinguish risk (computable probabilistic assessments such as performed by insurers) from uncertainty (genuine Keynesian uncertainty, including ‘unknown unknowns’ in Donald Rumsfeld speak).

Risk assessments are worthwhile but incapable of shedding light on genuine uncertainty. Mention of ‘the precautionary principle’ is welcome, but may be misleading without acknowledgement of the limitations inherent in risk analysis in an uncertain world.

## **Regulatory Coherence across Levels of Government**

Coherence is a good thing too. The Kremlin is not the answer.

## **Regulatory Management Capacity at the Sub-national Level**

OK. See above.

## **International Regulatory Cooperation**

More of this would be much better for the globe than beggar-thy-neighbour competition