Regulating For A Culture Of High Reliability

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This Presentation

❑ The resources sector is being challenged to, in the words of the *Review of All Fatal Accidents in Queensland Mines and Quarries*, 'adopt the principles of High Reliability Organisational theory'

❑ The essential questions this presentation will address are:

   ❖ **What role, if any, should a regulator play in encouraging a culture of high reliability?**

   ❖ **Why?**

   ❖ **What will this entail in practice?**

   ❖ **What shouldn't regulators do?**

The main argument

❑ Primary drivers for change and high reliability rest with organisations themselves and their leaders

❑ However, it is contended that regulators also have a role to play in this space

❑ A secondary yet vital supportive role, where crucially they must work with industry in the drive to enhance a culture of reliability

❑ The reason?
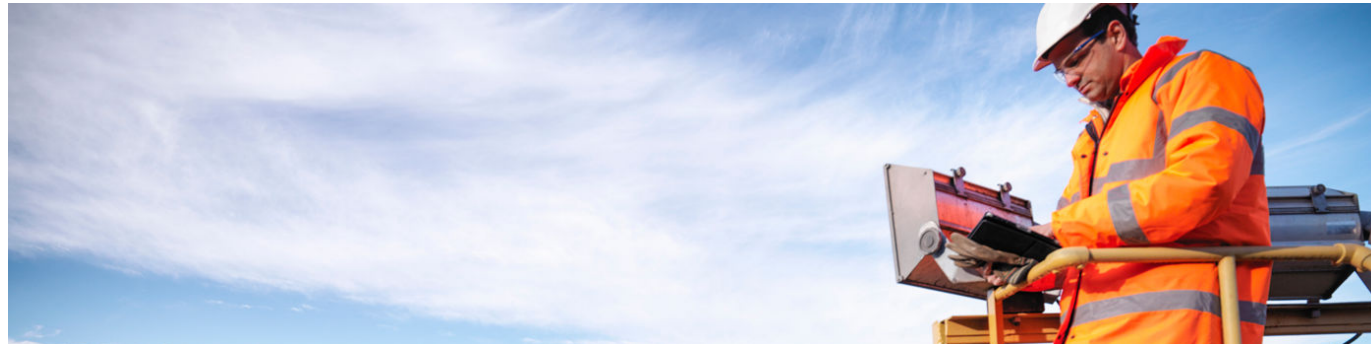
What will regulating for a culture of high reliability entail in practice?

❑ On the one hand, it might include:

- ❖ Being seen as able to work with industry (avoiding the 'them and us' dynamic), yet able to walk a fine line so as not to be 'captured' by industry

- ❖ Consistent, clear and transparent in their dealings with the regulated, especially in exercising their "discretion" and powers

- ❖ Ensuring that their own governance (including accountability and risk management systems) and culture are conducive to the achievement of a culture of HROs.

What regulators should not do

❑ On the other hand, what regulators should not arguably do:

❖ Act in ways that might lead to them being viewed negatively – as 'outsiders', 'bureaucratic' and/or 'remote'

❖ Exercising their "discretion" and powers in an inconsistent and opaque manner

These answers are supported by the regulatory scholarship, which this presentation will now canvass in addition to drawing on examples of concerns raised regarding regulators in other areas, most notably Australia's 'company law watchdog', ASIC.

Focus of the regulatory scholarship

❑ *If* regulators want to regulate in a particular way – for a culture of high reliability – the regulatory scholarship focuses attention on 2 matters:

1. How does a regulator operate internally?
2. How does it present itself externally?

This attention also requires a consideration of 3 critical issues:

(i) Why is it important to regulate 'corporate culture'/ 'organisational culture'?

(ii) The difficulties of using 'corporate culture' as a regulatory tool

(iii) The role of regulation – definition and the role that regulators can or should play?

Why is it important to regulate 'corporate culture'?

❑ Flawed 'corporate cultures' have been implicated as a root cause of wrongdoing in recent scandals, including:

  ❖ Banking and financial services

  ❖ Sport (e.g., cricket)

  ❖ Aged care

  ❖ Entertainment

  ❖ Casino business

❑ Lesson for regulators could not just command these corporations to have a sense of honesty and propriety. The answer needed to address the culture of the corporation.

❑ Similarly, with regulating for a culture of high reliability.

Aged Care
Royal Commission

The difficulties of using 'corporate culture' as a regulatory tool

❑ Despite body of literature and commentary on 'corporate culture', use as a regulatory tool continues to face challenges, including:

❖ Nebulous nature of concept and definitional elusiveness

❖ Regulators and regulated may have very different ideas of what constitutes a healthy 'corporate culture'

❖ Lack of clear dividing line between 'criminal'/wrongful and 'routine' or 'normal' ways of doing business legitimising conduct – *R v Hayes*

❖ 'Decoupling' – organisations' practices do not align with their formal systems and/or espoused policies

❖ Range of corporations size and sub-cultures makes attempts at HRO difficult

❖ Behaviour and culture are deep-rooted, so the process of changing them (and sustaining that change) will take many years

The role of regulation

❑ Definition of 'regulation'

    ❖ Like 'corporate culture', no universally accepted definition of regulation

❑ A useful definition

    ❖ *'The sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes'* (Julia Black, 2002)

The role of regulation in the HRO literature

❑ *What is the role regulators can or should play in fostering a culture of high reliability that organisations want to embrace, as opposed to simply having to?*

❑ This issue is underexplored in the HRO literature and when it has been tackled, there is no consensus.

  ❖ Andrew Hopkins: 'A factor conducive to the emergence of HROs is the presence of aggressive, knowledgeable watchers.'

  ❖ Mark Chassin and Jerod Loeb: 'Regulation had only a modest and supportive role' in improvements to reliability and safety in high risk industries; and suggested that regulators' 'primary role' is limited to removing any unnecessary 'requirements that obstruct progress towards high reliability'; and 'publicly reporting reliable and valid measures of quality'.

The role of regulators regulating for a culture of high reliability

❑ Drawn on example of ASIC

❑ Has elements of both:

❖ Aggressive regulatory approach

❖ **Supportive approach**

-Findings of Hayne Royal Commission recognise the supportive approach by acknowledging the important supervisory role regulators can play, as they also aim to identify factors that create risks *before* they become breaches of the law, rather than reacting and sanctioning breaches after they occur.

-With the same approach found in HRO literature, this presentation argues for regulators in this space to be part of the regulatory project – having a vital supportive role, where crucially they must work with industry to foster a culture of high reliability.

Working with industry

❑ Example given by Chassin and Loeb of regulator's role to remove any unnecessary 'requirements that obstruct progress towards high reliability':

   ❖ **'requirements that impose unproductive work on regulated organisations that distract them from dealing more effectively with their challenges'**

❑ Emphasises that regulators **need to be seen as able to work with industry** and **that their requirements not be regarded as just another regulatory burden imposed on organisations from outside.**

   ❖ Not easy for any regulator
   ❖ Regulators generally perceived as 'outsiders', 'bureaucratic' and/or 'remote'
   ❖ Made harder by the nature of their work
   ❖ Something to be mindful of, though also need to be careful, lest they be accused of falling victim to 'regulatory capture'

What is "effective regulation"?

❑ Michael Mann, a former director the SEC argued:

  ❖ 'There are two aspects of any effective regulatory regime: its legal and structural framework (the rules), and the implementation of that framework (the regulation)'

  ❖ Further, the rules must be "easily understandable" and "the application of the rules must be done in a predictable manner"

-Regulators need to be **consistent, clear and transparent** in dealing with organisations and exercising their discretion

-The literature recognises that field-level regulatory staff do not operate in a vacuum and are not free from internal and external constraints, e.g., political, economic, social factors

-Problems arise for regulators when their decision-making is not transparent or consistent, e.g., concerns about the rule of law

How regulators should operate internally

❑ Considerations for regulating for a culture of high reliability:

❖ **Concerns about governance** (including accountability and risk management systems)

❖ **The culture of those regulators**

-Regulators should seek to align their own practices and culture with that stated in their official systems and policies, just as regulated entities should seek to do the same

Where to from here?

❑ Primary responsibility for change and high reliability in the resources sector remains with the organisations themselves and their leaders, **but regulators also have a significant role to play**.

❑ Important considerations for regulators:

❖ What is the purpose of regulating in this space?

❖ Are they regulating for the industry *or* imposing and enforcing the rules?

❖ Are they being seen as able to work with industry versus being perceived as 'outsiders', 'bureaucratic' and/or 'remote'?

❖ Are they being consistent, clear and transparent in their dealings with the regulated community?

❖ Are they striving to ensure their own governance systems and culture are in order so as to be conducive to fostering a culture of HROs?

❑ The legal and socio-legal scholarship on corporate culture is new and under-explored. More research is necessary to maximise the opportunity for regulators to play their part in the drive for a culture of high reliability.

Questions?

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