

12th Accident Compensation Seminar 2009 Rising to the Challenge

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Reflections on the Regulation of Compulsory Compensation Schemes

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Regulation of Schemes

- Introduction
- History lessons
- Regulatory tools
- Regulatory structure and governance



Introduction

- **Current regulatory structures**
- **Tort to no fault – judicial to administrative decision making – private sector to government**
- **Atiyah to Stevens**
- **Efficiency, affordability v moral and social values**
 - Regulatory theory and technique v content



History Lessons

- **The collapse of the New South Wales CTP Scheme 1983**
 - Price
 - Failure of systems and management
 - Benefit design
 - Behaviour of the legal profession (and others)
- **Crises generate change**
- **Common elements of failures**
- **Regulation to control behaviour adverse to objectives and norms**



History Lessons (Cont.)

Regulation in anticipation of failure

- **Clarity of scheme objectives and norms**
- **Identify areas of risk**
- **Choose the regulatory tool most likely to work**
- **Clarify who is responsible**
 - imposition of duties
- **Empower, resource and fund the regulator**
 - Supervisory role
- **Require data to measure performance against objectives and norms**
- **Provide for a process of review and adjustment**



Regulatory Tools

- **Too (big) important to fail**
 - Regardless of the structure an implicit government guarantee – HIH, NSW builder's warranty
- **Post Wallis – lessons from the financial sector**
 - Principles v prescription
 - Wide menu of enforcement tools
 - Personal responsibility
 - Linkage of statute to self regulation etc
 - More sophisticated oversight and supervision
 - Empowerment of regulators
 - Greater independence of regulators
 - Empowering regulator to alter law

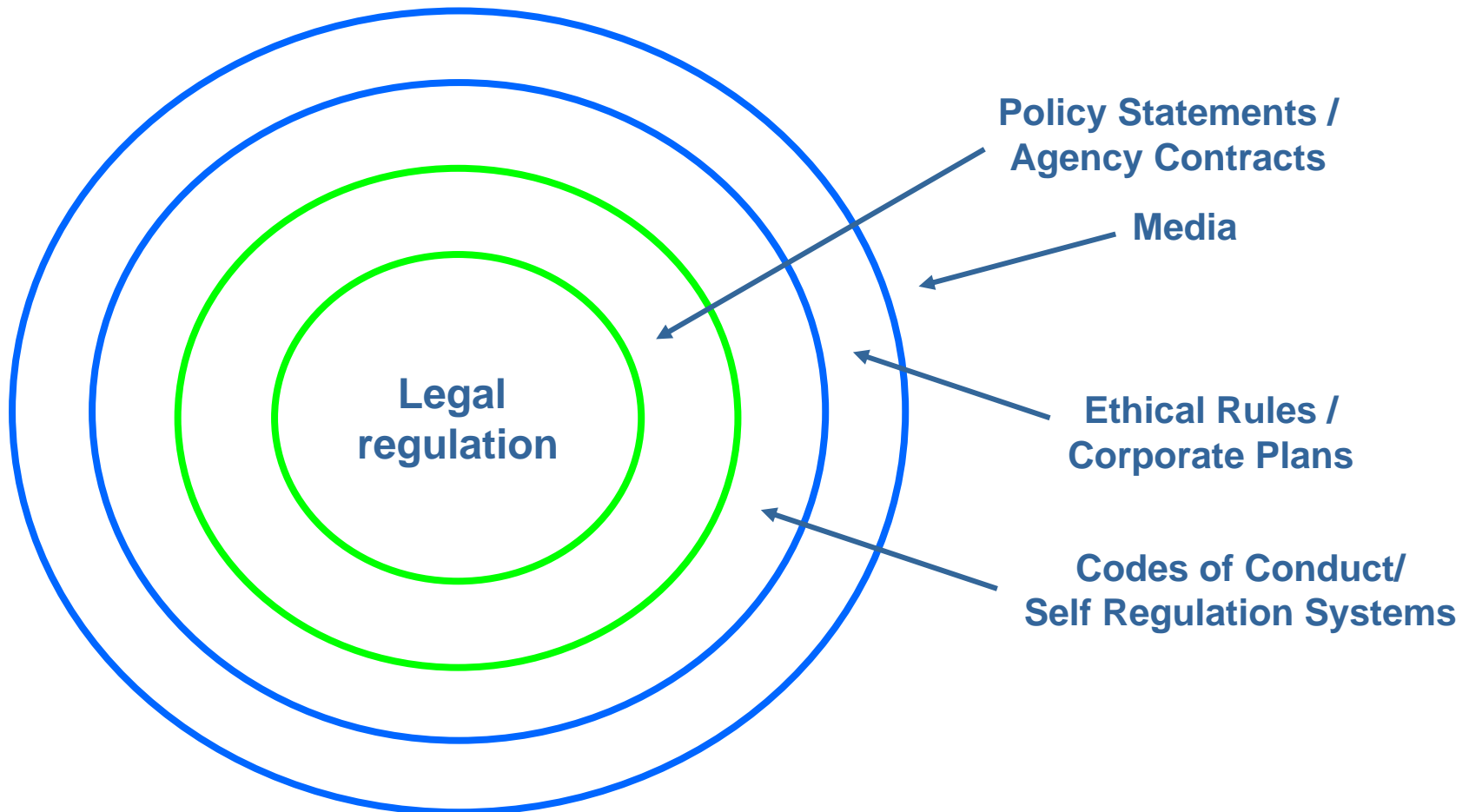


Regulatory Tools

- **Decentred regulation**
 - *Regulation is 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, which may involve mechanisms of standard setting, information-gathering and behaviour modification* (Julia Black, *Critical Reflections on Regulation*, (2002) 27 Aust. J Leg.Phil.1)
 - It is not just state centred legislation
- **Illustrated by adapting Prof John Farrar's diagram developed for corporate governance** (J Farrar, *Corporate Governance*, (2008), 3rd ed., Oxford University Press at p.4)



Regulatory Tools





Regulatory Tools

- Prescription – a hard rule that that specifies an obligation, duty or right
 - A driver must not exceed 100kph
- Principles based rule is one that sets an outcome or standard to be achieved
 - A driver must on average over the course of the journey not exceed 100kph
 - How this is achieved is left to the target of the rule
- From an enforcement perspective principles based rules are harder to enforce in traditional ways - middle management, compliance officers, auditors and the like often like prescription
- But the principles based approach favours competition and innovation – how brave are you?



Regulatory Tools

- **So rule selection involves**
 - What type of regulation – centred or decentred
 - Principle or prescription or a mixture
 - Thinking about how the rule is enforced
 - Selecting the enforcement mechanisms (often a graduated suite) – it may be outsourced in a decentred model
- **How is the decision aligned to and best able to achieve scheme objectives and norms**
 - There is a lot of judgement in this
 - so how are you going to assess success and compliance – the UK FSA problem



Issues of Regulatory Structure and Governance

- **The need to separate regulatory functions from operational functions**
 - Example of agency contracts that are a mixture of service/operational requirements, regulation of agent behaviour and requirements that the agents regulate the behaviour of others e.g. claimants, service providers
 - Particularly in government operated schemes
- **The structure of the regulator**
 - Level of independence from government
 - Composition of board/commission – skilled independence or representatives of interests/stakeholders
 - Align statutory duties to scheme objectives and norms



Issues of Regulatory Structure and Governance

- **Resource the regulator adequately**
- **Governance**
 - Transparency of decision making and processes
 - Clear processes of assessing performance of regulator and scheme
 - Processes for identifying, dealing with and resolving conflicts of interest and duty
- **Identify duties of board/commission members**
 - Duties to government v duties to claimants



Conclusion

- Regulate in anticipation of failure
- Align regulation to scheme objectives and norms
- Carefully select the regulatory tool for the particular purpose
- Divide regulatory functions from operational functions
- Focus on governance