

‘Good Regulatory Practice’: another casualty of COVID?

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Introduction

Last week, APEC held its 14th international conference on ‘good regulatory practice’, hosted (virtually) by New Zealand. I was invited to give an opening address reflecting on the state of regulation-making during the COVID crisis.

If good process and effective regulatory governance are pre-conditions for achieving the right regulatory outcomes – which APEC ministers endorse - the record for most member economies leaves a bit to be desired.

While I refrained from saying so in international company, Australia’s own experience is far from exemplary. Our COVID numbers have been comparatively good, but as an island continent with controllable borders, we are again a Lucky Country in this respect. When it comes to ‘good regulatory practice’, however, our performance has fallen short, even accounting for the exigencies of the pandemic.

What objective?

For example, a fundamental tenet of ‘good regulatory practice’ is to be clear about the *objective*. Such clarity has not always been apparent in governments’ responses to COVID and rarely so across jurisdictions, despite the exertions of the so-called National Cabinet.

Initially the stated goal was to ‘flatten the curve’ so as to limit the extent of serious illness and demands on hospitals. As this widely-supported objective was in sight, the goal morphed (unstated and unjustified) into completely eliminating the virus – symbolised by Victoria’s ‘double donut’ celebrations last year. No sooner had this objective been openly acknowledged, however, than the Delta variant arrived to demonstrate its futility.

This seems to have prompted National Cabinet to shift the goalposts recently to ‘living alongside the virus’. However this is predicated on

national vaccination rates and vaccine efficacy being such as to limit infections and deaths to acceptable levels. It remains uncertain what those levels will be, given their political dimensions, with more than one jurisdiction still signaling an attachment to zero. Clarity remains elusive.

Costs matter too

Central to the concept of 'good regulatory practice' is an assessment of the costs and benefits of different feasible options for addressing a policy problem. This can be challenging at the best of times and in my experience is rarely done well. When it comes to COVID, however, the question is whether it has been done at all.

Premiers have referred constantly to (unseen) 'health advice' and 'the science' as justification for lockdowns and other measures to contain the virus. The costs of the various options appear to have played little part in regulatory decisions. Yet the production and income foregone, as well as fiscal waste, have been enormous -- not to mention the social costs of a mental health 'epidemic'.

The Prime Minister noted that in devising the new 'four stage plan', the National Cabinet had available to it economic analysis by Treasury of the Doherty Institute's epidemiological modeling. This compares the (direct) costs of 'minimization' versus 'management' strategies for COVID. The scenarios and assumptions in these comparisons are challenging to reconcile, but what seems clear is that the impacts of lockdowns on GDP alone are very large.

Comprehensive cost-benefit analysis may have been a tall order in the early days of the pandemic, when uncertainty was at its greatest and modeling was indicating high death rates. But with the knowledge gained over the past 18 months, and in situations where *degrees* of restriction are at issue, assessing incremental benefits and costs is both possible and desirable. The Victorian Government's recent closure of children's playgrounds and imposition of a second curfew on Melburnians are cases in point. Not only could no evidence of likely net benefits from these extreme measures be produced, the Premier declared it was 'not up for debate'.

Consultation is not dispensable

A democracy has been famously defined as 'government by discussion'. Debate is fundamental to good public policy (even if, as in Clement Atlee's famous riposte, at some point the talking must stop).

Public consultation helps governments with three critical phases of a regulation's development: understanding the problem; determining the impacts of different 'solutions', and securing public acceptance of those being implemented. Such consultation needs to reach beyond the confines of government and the public health fraternity to include those with differing perspectives and with livelihoods at stake.

Consultation is especially valuable during a crisis, when uncertainty tends to be highest and evidence scarcest, and when novel interventions are more likely to be contemplated. Proper consultation takes time, however, and pressures on governments to 'do something' mean time and resources are inevitably at a premium. But in the case of COVID any such justifications for avoiding proper consultation should no longer hold.

Process failure must not become another 'new normal'

The emergency powers obtained by governments have afforded them extra latitude in responding to the crisis. But they have also facilitated the bypassing of processes put in place to avoid regulatory failure, with the risk of this becoming yet another 'new normal'. We know from experience where the neglect of good process leads: regulatory regimes that are overly prescriptive, complex, inconsistent, disproportionate or poorly targeted, or just unclear and hard to administer. Instances of each abound in every jurisdiction.

A further concerning 'unintended consequence' of the demise of good regulatory practice is lessened respect for regulation itself. Among other things, this is underlined by the military being brought in to assist police with compliance checking. When laws and regulations are perceived to lack legitimacy, it should come as no surprise if some citizens choose to treat them accordingly.

It is time not only to restore good process for any new regulatory initiatives, but for governments to review the cost-effectiveness of those previously implemented. This applies whether they have been temporary or not. Indeed, a comprehensive independent review of the whole national response will be essential if we are to learn lessons useful for next time – or indeed for living with COVID in the months and possibly years ahead.

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