THE ECONOMIZATION OF POLITICS: META-REGULATION AS A FORM OF NONJUDICIAL LEGALITY

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ABSTRACT

Recent developments in regulatory reform strategies increasingly focus on controlling the process of regulation itself, rather than regulating social and individual action directly. This article explores the reflexive systematization of regulatory policy by focusing on institutions and processes that embed regulatory review mechanisms deploying economic rationality into the every-day routines of governmental policymaking. It explores both the social logic underlying this phenomenon of 'meta-regulation', and its political implications, primarily in relation to a particular instance of meta-regulation established in Australia in the 1990s. The social logic of meta-regulation is characterized as an instance of nonjudicial legality, situated at the intersection of two trends – an increasing legalization of politics and a growing reliance on nonjudicial mechanisms of accountability. The political implications can be summed up as an 'economization' of regulatory politics. Meta-regulation excludes competing ways of understanding regulatory policy choices, causing bureaucrats to 'translate' aspects of social welfare that previously may have been expressed in the language of need, vulnerability or harm into the language of market failures or market distortion. This process tends to silence certain critical modes of demanding justice, particularly those that rely on moral or distributive values.

INTRODUCTION

Regulation is by now so pervasive a technique of governance that it is to a greater and greater extent approached systemically. Governments formulate general principles of 'better regulation', create Better Regulation Units in executive departments, require regulatory impact analysis as a matter of everyday policymaking procedure. This article explores a particular
facet of systematizing regulatory policy, which I call meta-regulation. It is in some ways an ugly word, a dry, impersonal term redolent of bureaucratic jargon. That is appropriate. For meta-regulation is mostly an affair of technical bureaucratic minutiae, the thrust and parry of setting agendas, framing issues, and deciding priorities. But the stakes underlying meta-regulation are neither technical nor dry. In essence, meta-regulation manages the tensions between the ‘social’ and ‘economic’ goals of regulatory politics, tensions that enflame passionate and highly wrought political conflict over the ethical limits of global capitalism. Such conflict is fomenting broad-brush political change in many directions, from the emergence of new political parties or coalitions (One Nation in Australia, the Perot-Nader coalition on certain issues in the US) to the violent protests in Seattle and their progeny. But it is in the welter of technical decisions occurring day by day in the backstage committee rooms of political arenas that the real power to shape the ultimate ends of governance lies. And meta-regulation is a crucial forum of such power.

The notion of meta-regulation is simple at heart: it captures a desire to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated. The term has been used previously (Gunningham and Grabosky, 1998; Parker, 2002) to capture developments at the intersection of state regulation and self-regulation, where government controls the self-monitoring of corporations. Meta-regulation in this article is equally reflexive, but focused more on reflexivity within the confines of the state, and defined rather more narrowly in order to capture the specific political conflict between ‘social’ and ‘economic’ goals in regulatory policy. It encompasses any set of institutions and processes that embed regulatory review mechanisms on a systematic basis into the every-day routines of governmental policymaking, such that a particular form of economic rationality becomes part of the taken-for-granted ways of policymaking. For example, under the reforms introduced by the Australian government explored later in this article, governments require the application of a public benefit test to justify the maintenance of any public policy that prima facie restricts competition. Policies for which a public benefit cannot be demonstrated must be repealed or modified so that they do not reduce competition. This principle of regulatory reform is institutionalized as a general mechanism of governance, not confined to one-off efforts to reform particular policy sectors, but instantiating generally applicable, sector-neutral and continuously applied techniques of regulatory reform.

This article has three parts. In the first, I argue that sites of nonjudicial legality are important parts of what Colin Scott, following Hancher and Moran, calls ‘regulatory space’ (Hancher and Moran, 1998; Scott, 2001), and elaborate what I mean by this phrase in an expansive manner that captures not only developments that relate to the economic policymaking functions usually assumed to be the core of regulatory politics, but also in relation to the politics of fundamental rights. Fundamental rights are relevant because
although meta-regulation impacts in the first instance upon economic policymaking, its effects implicate rights because it functions as a site of conflict over the ethical limits of capitalism. Moreover, meta-regulation is only one species of nonjudicial legality. Nonjudicial legality will be fully elaborated in Part I. I build the concept via two avenues: the growing judicialization of politics, and a rising interest in nonjudicial mechanisms of accountability. In Part II of the article, I describe the meta-regulation established in Australia in some detail, with an eye to supporting my contention that it is an instance of nonjudicial legality.

In Part III, I illustrate how meta-regulation plays out in particular policy areas, in order to show how it affects the substantive political stakes that it aims to manage. Two principal effects can be demonstrated. First, meta-regulation tends to exclude or dominate competing ways of understanding regulatory policy choices. It institutionalizes a presumption in favour of market governance, and this causes bureaucrats to reframe or ‘translate’ aspects of social welfare that previously may have been expressed in the language of need, vulnerability or harm into the language of market failures or market distortion. Not only does this translation tend to silence certain critical modes of demanding justice, particularly those that rely on moral or distributive values, but the institutional solutions which bureaucrats advance to secure the ‘translated’ social welfare values render them politically vulnerable. The second effect of meta-regulation is more elusive, but relates to an attenuation of the sense of collective identity and social cohesion fostered by the overall pattern of regulatory policy choice in a particular political community. While in broad political debates about meta-regulation, attempts were made in the Australian context to ground alternatives to economic rationality on various conceptions of community morality, such alternatives had no power to ‘bite’ in the bureaucratic-technical machinations that were ultimately dispositive. The discourse of regulatory politics therefore was ultimately dominated by technocratic expertise articulated on behalf of highly differentiated sub-groups in society, in ways that sidestepped as far as possible the expression of collective values.

The article concludes by linking these substantive effects of meta-regulation back to the notion of nonjudicial legality, gesturing towards the broader implications of the economization of politics, a regulatory politics increasingly shaped by technocratic bargaining in apolitical terms. It stresses the significance of such a development given that it is even now unfolding on a mimetic basis across countries and up to international levels of governance.

PART I: NONJUDICIAL LEGALITY

Recent work in both law and political science suggests the importance of paying attention to the development and spread of meta-regulation. These regimes in effect adjudicate the economic policymaking functions of
government. I want to situate them at the intersection of two trends observed from different disciplinary standpoints, converging from opposite directions – particularly in the case of economic policymaking functions – at an intriguing intersection. That intersection is a site of nonjudicial legality: increasingly legalized politics without courts or judges. While from some perspectives, the domain of politics is increasingly populated by a growing number of courts and judges, at the same time the legal domain – especially from the viewpoint of those who write on regulation – has become a world of institutions other than courts or judges, both public and private. Observations of judicialization run parallel with commentary on the importance of nonjudicial mechanisms of accountability. My contention is that these observational trajectories are not incompatible but rather, intersect at sites of nonjudicial legality. Furthermore, as elaborated in Part III, nonjudicial legality in the realm of economic policymaking catalyzes an ‘economization’ of politics that has important implications for the value conflicts endemic to regulatory politics.

**JUDICIALIZATION**

For some time now, commentators have noted the increasing extent to which judicial decisions and institutions shape and constrain politics, at least in OECD countries. Colin Scott, for example, argues that juridification ‘describes a process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules’ (Scott, 1998: 19). Or, as Alec Stone Sweet argues, when ‘judges routinely intervene in legislative processes, [by] establishing limits on law-making behaviour, reconfiguring policy-making environments, even drafting the precise terms of legislation’, judicialization is taking place (Stone Sweet, 2000: 1). A trajectory of judicialization has both behavioural and normative consequences: not only do the pronouncements of judges and courts ‘come to shape how individuals interact with each other’, but they also ‘develop authority over the normative structure in place in any given community’ (Stone Sweet, 2000: 13).

Judicialization as a trajectory is most readily observable in relation to human rights. ‘Fundamental rights’, particularly those of political minorities, were the catalyst for building both international and national institutions in the aftermath of the Second World War. As one prominent comparative commentator notes:

> Judicial review was introduced in Europe after the Nazi-Fascist era shook the faith of Europeans in the legislature, making them reconsider the possibility of giving the judiciary the power to check the legislature’s respect for the fundamental rights of the people. (Cappelletti, 1989: 118)

By contrast with policy issues bearing upon fundamental rights, economic policymaking has typically been less judicialized. Most countries have preferred to shape economic policy via a dialogue between government and bureaucracy, subject to such legislative constraints as the institutional context
dictates. Bureaucratic consensualism dominates the policymaking process: courts are monitors of the later implementation of such policy, rather than architects. The US is an exception in this regard, and there is a wealth of literature on the excessive juridification of US regulatory politics (e.g. Stewart, 1988; Kagan, 2001; Moran, 2002). Indeed, much of the comparative literature on regulatory politics is structured by a strong contrast between the US and other jurisdictions (e.g. Kelman, 1981; Vogel, 1986), suggesting that the extent to which US courts have been involved in regulatory policymaking as a whole is viewed as exceptional. And even within the exceptional US, economic policymaking has traditionally received at least more constitutional deference from the courts than legislative initiatives affecting fundamental rights (Shapiro, 1983).

But this relative immunity of economic policymaking from judicialization has undergone a distinct shift in recent years. Linkages between economic policymaking, regulatory reform and legal processes have intensified. Sometimes this is merely an intensification of the relative involvement of courts and judges in the implementation of economic policies, particularly when they are delivered via regulatory agencies. For example, utilities sectors particularly in the UK (Scott, 1998: 20) but also in other countries (Heritier and Leonor, 2001) have become increasingly juridified as policymaking in those sectors is shaped and delivered by independent regulatory agencies. The main factor here, as Colin Scott argues is liberalization:

Liberalisation has had the effect of multiplying the number of players participating in each sector (both regulatory and commercial) and tended to threaten the consensual, bureaucratic models of provision and regulation which carried over from the era of public ownership. Increasingly, these more numerous players are seeking to test their rights and obligations against the legal framework of each sector. (Scott, 1998: 20)

And while courts have always been a source of general legal constraints on specific implementation decisions, general non-sector-specific legal constraints also increasingly apply at a policymaking stage. One important source of such constraints are trade regimes such as the WTO or the internal market project of the European Union, which are regularly analyzed in terms of the growing ‘judicialization’ of their trajectories (McGinnis and Movsesian, 2000; Stone Sweet, 2000; Weatherill, 2000; Dillon, 2001). More diffusely, financial institutions involved in funding development, particularly in countries undergoing a transition from socialist to market economies, have emphasized the importance of establishing the ‘rule of law’ not so much as a safeguard against oppressing minority groups, but as a precondition for effective economic performance (Buscaglia, 1998 for Latin America; Sunstein, 1988 for Eastern Europe). Where once those guiding the reform of countries in transition might have focused principally on institutions such as independent central banks, now their energies are directed to the production of judicial regimes and legal systems that secure credible and predictable property rights. Judicialization seems, increasingly, just as critical to the promotion of economic development.
as to the protection of human rights, and not simply as a constitutive framework for market exchange, but also as the arbiter of the balance between competing values struck by economic policies.

**NONJUDICIAL REVIEW**

An important part of the story of regulatory politics in recent years, then, is the growing presence of judicialization. Another important strand, however, is increasing interest in nonjudicial forms of review. The point here is that just as domains of activity that used to be purely political are being invaded by the ever-pervasive presence of law, so too scholarship has also become increasingly sensitive to institutions that exist beyond a narrower conception of the ‘legal’ (courts and judges) but that nonetheless may serve analogous functions. In law, regulation scholars who along with criminologists are strongly influenced by socio-legal perspectives, have perhaps been most inclined to range beyond legal institutions narrowly conceived (Freeman, 2000; Scott, 2000; Vincent-Jones, 2000; Campbell and Picciotto, 2002). Common research foci of such scholars, all of which posit ostensibly non-legal institutions as crucial agents in a ‘legal’ field, include the conditions under which effective compliance is secured, the role of private and nongovernmental actors in regulatory spaces or the workings of independent regulatory agencies or quasi-governmental organizations. One particularly interesting focus in these forays beyond the domains of courts and judges is that of nonjudicial review.

Nonjudicial review has been noted in a range of policy areas, encompassing economic policymaking and fundamental rights. In relation to the carrying out of governmental functions generally, across a wide range of policy areas, Hood et al.’s exploration of bureaucratic regulation within government in effect takes note of a form of nonjudicial review, whose general features are specified as ‘oversight of bureaucracies by other public agencies operating at arm’s length from the direct line of command, the overseers being endowed with some sort of official authority over their charges’ (Hood, James and Scott, 2000: 284). In regulatory arenas that affect economic policymaking, prescriptions for the delegation of dispute resolution and even policymaking to politically insulated independent agencies, also a form of nonjudicial review, are pervasive (Spiller, 1998). Even in relation to fundamental rights, typically an area more readily delegated to courts and judges, a burgeoning interest in nonjudicial forms of review is apparent. In particular, scholars are noting with interest the ‘hybrid’ forms of review of fundamental rights institutionalised in New Zealand and the UK, which give a prominent role but not decisive role to courts and judges in reviewing governmental action bearing upon rights, supplementing the contribution of these legal actors with mandated inter-institutional dialogues with more purely political actors (Gardbaum, 2001; Tushnet, 2001). Tushnet goes as far as to cast the actions of these more purely political actors (such as US Senators...
debating points of order raised by constitutional questions) as forms of non-judicial review per se, even without a dimension of dialogue with courts and judges.

Interestingly, the underlying implication of the goal served by nonjudicial review is rather different as between economic policymaking and fundamental rights. In respect of the latter, the participation of nonjudicial institutions in review of fundamental rights is thought to ‘reinject matters of principle back into legislative . . . debates’ (Gardbaum, 2001, emphasis added), whereas the more common focus in matters of economic policymaking is the notion that a kind of a-normative, technical neutrality is secured by the participation of institutions of nonjudicial review. However, common to both those visions is an idea of neutrality or disinterestedness. This is most explicitly captured by Tushnet. What makes nonjudicial review different from ‘pure politics’ is, he argues, that the actors carrying it out possess incentives that push them in the direction of offering interpretations that are not substantially less disinterested than the interpretations offered by judges (Tushnet, 2001). What matters here is a ‘professional and bureaucratic interest in providing disinterested . . . interpretation’ (Tushnet, 2001: 3–4). Such an incentive may be secured by a blend of ideological commitment and bureaucratic mission vested in nonjudicial governmental actors possessing some institutionally secured independence.

It is important to realize that disinterestedness may not necessarily require that the actors performing judicial review do so with reference to some stable substantive set of knowledge (whether that be scientific expertise, ‘principled’ theories of human rights, or objective economic expertise). A more sparse account of what is important in this account of judicial review would focus simply on the institutional relationships between the reviewers and the reviewees. Guillermo O’Donnell captures this well in explaining his conception of horizontal accountability:

[Another dimension of accountability, which I call ‘horizontal’ . . . means the controls that state agencies are suppose to exercise over other state agencies . . . . The basic idea is that formal institutions have well-defined, legally established boundaries that delimit the proper exercise of their authority, and that there are state agencies empowered to control and redress trespasses of these boundaries by any official or agency . . . (O’Donnell, 1997: 185)

This ultimately is the essence of nonjudicial review that I am interested in highlighting here. Though he could be describing the functions of courts and judges, the quotation could also encompass the functions of a variety of nonjudicial governmental institutions. Notice that despite this capaciousness, O’Donnell still sees all forms of horizontal accountability as an expression of something fundamentally belonging in the legal domain: “[horizontal accountability] is an often overlooked expression of the rule of law in one of the areas where it is hardest to implant, i.e. over state agents, especially high ranking officials. (O’Donnell, 1997: 185, emphasis added). This links to the final step in building a theoretical framework for discussing the importance
of meta-regulation regimes: the notion that nonjudicial review is a manifesta-
tion of legalization. That is, judicialization is only one species of a more
basic genre: the ‘legal domain’ encompasses a wider range of institutions than
courts and judges. This is most easily grasped by observing not actors and
institutions, but an underlying social logic. What marks a domain out as legal
is a distinctive and observable texture to a set of social practices, rather than
the participation of a specified set of actors and institutions. Once the under-
lying social logic is exposed, its applicability to meta-regulation regimes is
more readily established.

**LEGALIZATION**

I stated earlier that organizations like the World Bank have recently come to
see judicial institutions as equally critical to effective economic policymak-
ing as independent central banks. I noted that as part of the trajectory of judi-
cialization, but I want to emphasize now that it should not be taken to imply
a contrast between independent central banks and judicialization. Rather, the
argument is leading in a direction that will emphasize the commonalities
between such institutions. What, in generalizable terms, is at stake when a
policymaking process is subjected to a trajectory of judicialization?

Most crucially, a trajectory of judicialization involves significant delega-
tion of decision-making power to an arms-length, neutral and independent
institution. Martin Shapiro’s characteristically terse analysis exposes the
triadic logic that underlies the position of courts as dispute-resolution insti-
tutions. As he summarizes it in a recent joint publication:

> If a conflict arises between two persons and they cannot resolve it themselves,
> then in all cultures and societies it is logical for those two persons to call upon
> a third to assist in its resolution. . . . The triad contains a basic tension. To the
> extent that the triadic figure appears to intervene in favour of one of the two
disputants and against the other, the perception of the situation will shift from
> the fairest to the most unfair of configurations: two against one. Therefore the
> principal characteristics of all triadic conflict resolvers will be determined by
> the need to avoid the perception of two against one, for only then can they rely
> on their basic social logic. (Shapiro and Stone Sweet, 2002: 211)

Where triadic institutions are relatively highly formalized, two devices are
especially important in preventing perceptions of ‘two against one’: office and
rules (p. 212). That is, the personal neutrality of the judge, and the resolution
of the dispute by reference to a pre-existing decision rule expressed in general
terms, together ensure that the triadic logic is maintained.

This pared-back perspective on the social logic underlying judicial insti-
tutions is an approach that challenges too bright a distinction between courts
and other governmental organs, or between judges and other official policy-
makers. It emphasizes the political nature of legal institutions, their govern-
ance function as conflict resolvers, while still capturing their distinctiveness
– albeit in terms more general and abstracted than the presence of judges or
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courts. Other institutions and personnel within the modern state may, from this perspective, carry out analogous functions if they display the same social logic.

The notion that legality as a phenomenon may extend beyond courts and judges has since begun to spread within political science. In particular, a group of international relations scholars recently proposed the concept of ‘legalization’ as an analytic device that has the capacity to capture a broad variety of ways in which ‘law and politics are intertwined across a wide range of institutional forms’ (Goldstein et al., 2001: ix). Importantly, the institutional spectrum of phenomena captured by legalization extends well beyond courts and tribunals. Let us see how Goldstein and her colleagues define legalization in such a way that its net is cast wider than courts and tribunals. They focus on three criteria: obligation, precision and delegation:

[H]ighly legalised institutions are those in which rules are obligatory on parties . . . , in which rules are precise (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules. (Goldstein et al., 2001: 34)

The last of these three, like Shapiro, stresses how important it is that interpretive power is exercised by an arms-length third party. Indeed, the other two criteria, obligation and precision, can also be linked to the underlying social logic of the triad, that is to say, to preventing any perception of two-against-one. The more precisely a pre-existing rule specifies the outcome of particular modes of conduct, and the more such outcomes are imposed as a matter of obligation, the more constraints are placed on the personal preferences of the third party enforcer of precise obligations. Consequently, when a decision favours one or other party, as it must to some extent inevitably do, it will be all the less perceived as ‘two-against-one’, but rather as driven by precise guidance applied by a neutral office-holder. To summarize, then, the underlying social logic of judicialization, the triangulation of conflict, also characterizes legalization, since interactions shaped by obligatory, precise, arms-length applied rules, will minimize perceptions that raw power has determined the outcome.

In Part II of the paper, I will establish in detail that a meta-regulatory regime such as the one created in Australia is arguably a form of legalization, albeit not one which involves courts, judges or quasi-judicial panels. Once legalization is explicitly de-linked from courts and judges, a range of different forms become imaginable. Consider an elaboration by Goldstein and her colleagues on the nature of a ‘legalized’ policymaking process, and imagine an array of different referents:

Legal processes involve a discourse framed in terms of reason, interpretation, technical knowledge, and argument, often followed by deliberation and judgment by impartial parties. Different actors have access to the process, and they are constrained to make arguments different from those they would make in a nonlegal context. Legal decisions, too, must be based on reasons applicable to
Proofs only all similarly situated litigants, not merely the parties to the immediate disputes. (Goldstein et al., 2001: 35)

For a legal audience, the most ready referent of the above description is of course courts. For example, the process of justifying regulatory action to courts in accordance with the principles of judicial review encapsulated in administrative law is a classic facet of economic policymaking that is captured by the above quotation. Slightly looser but still recognizably legal in the terms quoted above, is the process of challenging or justifying economic policies that impact on cross-border trade before a panel of the World Trade Organization. What then, would we make of a requirement to justify regulatory policy before an economists’ commission appointed with relative independence of tenure, as Australia requires? Or a dialogue between specialized units in the executive branch and bipartisan parliamentary committees as to whether regulatory reform proposals retain the ‘necessary protection’ against harm required by the public interest, an innovation the UK recently implemented in its Regulatory Reform Act of 2001? Are these developments instances of legalization? This is the question that the detailed empirical illustration of Part II aims to answer in the positive. The Australian case will flesh out one concrete way in which the growth of nonjudicial review intersects with the trajectory of legalization.

PART II: AUSTRALIAN META-REGULATION THROUGH NATIONAL COMPETITION POLICY

The reader will be aware that I have mentioned several times the relevance of trajectories of legalization to issues of fundamental rights as well as to economic policymaking. That has not been an exercise in redundancy, but has been motivated by the political stakes underlying meta-regulation to which I referred in the introduction to this article. Those stakes involve deep conflicts over the social costs of economic productivity. A passionate sense of such conflict is revealed by a key moment in the parliamentary debates held at the time of putting in place the Australian regime that is the focus of this Part. From the perspective of the centre-left Democrats:

The intentions [of the reforms were] laudable but nonetheless dangerous and their corrosive effect on our culture and our social life is everywhere to be seen by those with eyes not blinded by the religious ecstasy of economic rationalist ideology. . . . One cannot legislate for goodness. A government can, over time however, pass a series of laws which so undermine the fabric of society that anti-social behaviour flourishes and the moral and cultural cement that binds citizens together in a society is inexorably dissolved. The bill before us today marks one of the stages of that dissolution. (Senator Coulter, Commonwealth Hansard, Senate, 22 June 1995: 1772–5)

In stark contrast, a somewhat triumphal view from the right of politics:

[The bill] spells an end to the opposition’s socialist dreams, the managed economy and public ownership. It spells the end of what opposition members talk about now and what they have talked about in past years. The bill signals
the inevitable victory of economic rationalism in Australia. (Victorian Hansard, 11 October 1995: 360)

Now the social costs of promoting economic competitiveness as a primary policy goal were not, at least at the outset of the Australian reforms, necessarily seen as an issue of ‘fundamental rights’. But interesting developments later in the life of the reforms did implicate rights, and the broader global settings in which non-judicial legality is becoming increasingly important quite explicitly frame opposition to the intensification of global capitalism in terms of human rights claims. In the third part of this article, then, the relevance of non-judicial legality to rights will return. But the focus of this section is the details of Australia’s meta-regulatory regime, which subjected its economic policymaking processes at both state and federal level to the disciplines of nonjudicial legality. In what follows, I describe different aspects of the regime in such a way as to highlight the three core features of delegation, precision and obligation, first in relation to design choices and second, in relation to key aspects of implementation patterns. The meta-regulation regime may not possess these characteristics in the same way that judicial regimes do, but they are sufficiently present, I argue, to constitute at least a species of incipient legality.

PRECISION, OBLIGATION AND DELEGATION IN DESIGN

In April 1995, to sonorous political credit-claiming and media fanfare, the Commonwealth (federal) and all Australian state governments signed a triad of intergovernmental agreements known as National Competition Policy (NCP). Although limited aspects of NCP are embodied in ‘mirror legislation’ (i.e. statutes passed in identical terms by the six states, two territories and federal government) the main outlines of the reforms are recorded in intergovernmental compacts, the legal status of which is not entirely clear. In form, they resemble most closely international treaties, but the parties are sub-units of one domestic state, rather than distinct national states. The Competition Principles Agreement (CPA) is the intergovernmental compact that puts in place meta-regulation, imposing pro-competitive disciplines not on individual or corporate behaviour, but on public rulemaking and policymaking processes. The CPA applies to rules that are made either formally through legislative processes, or by an accretion of policy decisions that treat government entities differently from private entities. It requires the application of a public benefit test to justify the maintenance of any public policy that prima facie restricts competition. Policies for which a public benefit cannot be demonstrated must be repealed or modified so that they do not reduce competition. This is required in clearly stated terms drafted as a legal agreement typically is. What follows is the core clause (5, slightly edited) of the CPA:

5.1 The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
a. the benefits of the restriction to the community as a whole outweigh the costs;
b. the objectives of the legislation can only be achieved by restricting competition . . .

(3) Subject to subclause (4) each Party will develop a timetable by June 1996 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000;

(4) Where a State or Territory becomes a Party at a date later than December 1995, that Party will develop its timetable within six months of becoming a Party.

(5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in 5(1).

The agreement applies not only on a continuing basis to new rules and programmes coming into force after April 1995, but also, on a rolling basis over five years, to the totality of existing rules and programs across all levels of government. Its scope is ambitious in the extreme: more than 1,700 pieces of legislation were initially listed for review and all new legislation is subject to the regime 3. While the legal status of intergovernmental impacts is not entirely clear, the obligatory nature of the commitments was a core assumption of the political debates predating the signing of the agreements. Moreover a novel enforcement mechanism intensifies the obligatory nature of the reform regime by linking compliance to substantial ‘competition payments’. The agreement provided for the payment of some Aus$16 billion between 1995 and 2000, and the payments have since been extended on a continuing basis. Receipt of the money, however, is conditional on satisfying a newly created national independent agency – the National Competition Council – on an annual basis that ‘effective implementation’ of the NCP reforms is taking place.

The existence of this newly created independent agency is an important facet of the delegation embedded in the institutional design of the meta-regulation regime. The National Competition Council (the NCC) is a statutory independent agency that holds primary responsibility for technical oversight of compliance with the CPA4. NCC is a statutory independent agency made up of five private sector appointees from business backgrounds and supported by 20–23 staff, most of whom are economists but some of whom are lawyers. The council is appointed for a three year term, by vote of all the states and territories, from a list approved by the (non-voting) federal government – it thus represents a ‘national’ perspective. The NCC makes annual assessments of the rate of progress of each jurisdiction in legislation review, and evaluates the justifications advanced by each state for retaining their regulatory programs. These assessments are public documents and do not need to be cleared by the government of the day, and it is upon them that the payment of the annual competition payments depends. Although the Commonwealth Treasurer formally authorizes the payment or non-payment
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of the competition payments, the NCC makes the final recommendation, in practice dispositive, as to whether any financial penalties for unsatisfactory compliance are to be levied.

There is, therefore, at the core of the meta-regulation regime, a national oversight institution insulated from electoral pressures. But further, more complex versions of delegation exist in the layers below the National Competition Council, within the confines of the federal and state governments. Here, separate executive units and independent agencies within government monitor and enforce the application of meta-regulatory criteria. For example, in the federal government, technical oversight of compliance with the CPA has been entrusted to the Office of Regulation Review, a unit employing 15 professional economists and one lawyer, and located in the independent statutory body now known as the Productivity Commission. The Productivity Commission, set up to promote micro-economic reform, has considerable insulation from the political process. Three particularly important facets of this are the statutory basis for the agency’s powers, the five-year tenure of the Chairman (election cycles are every three years) and the ability to publish sensitive policy recommendations, inquiries and reports without government clearance.

State governments, by contrast with the federal government, exhibited a preference for retaining more direct political control over the agenda-setting stage and subsequent oversight. This was reflected in the governmental location of NCP officials. For example, Victoria, under the auspices of the right-wing Kennett government, established a National Competition Policy Unit in the Treasury with a staff of between three or four economists. The Treasury location of oversight and control placed decisive power in officials who were, albeit not completely politically insulated, nonetheless at one remove from the much more direct lobbying by affected interest groups that characterized policy departments. Moreover the Victorian NCP Unit made strenuous efforts to ensure that legislative review at policy department level used independent review structures and arms-length economically qualified consultants, an approach that ensured a type of delegation in reform design at departmental level as well as that of oversight (Interview, 2001a).

Delegation did however vary with the colour of political control. New South Wales, under a minority Labour government, chose to retain relatively greater political input into the agenda-setting and oversight process, and secured this with a relatively decentralized institutional configuration. The government created a Regulatory Review and Intergovernmental Affairs Unit, employing between three and four staff (all economists) based in the Cabinet Office, and reporting directly to the Premier. With this direct line to final political decisions, the Unit had considerable power to annotate and thus influence review recommendations. But the Unit’s senior officials saw their role as facilitator of a change in bureaucratic culture from the inside, rather than as a policing gatekeeper of externally imposed criteria (Interview, 2001b). Thus the carriage of reviews was decentralized to a large extent, allowing departments and their relevant Ministers to make initial agenda-setting
choices without the constraint of centrally set guidelines, and to have final
decisions on the constitution of review teams. There was less emphasis on
‘independence from politics’ (meaning, usually, Ministers and the stake-
holders exerting influence through Ministers), and therefore a lower inten-
sity of delegation in the sense relevant to legality.

Despite the variations in the level of insulation from politics described
earlier 5, the more general point about incipient legality holds across the
spectra of political variation observed. The key position of the NCC – the
oversight institution most highly insulated from politics – is critical. NCC’s
relatively strong insulation combined with its fiscal enforcement powers cast
an insulating shadow over the other constituents of the oversight network, at
least at the level of day-to-day operating principles. Thus even where NCP
units were part of political decision-making environments, as with the states,
the professional orientation of their staff members as economists facilitated
‘common understandings, good relationships and a general consensus on
the main aims [of the meta-regulation]’ (Interview, 2001c). These shared
commitments had space to operate relatively autonomously of the political
pressures placed on the state NCP oversight decision-makers due to the tri-
angulating impact of NCC on the incentive structure. Because the ‘external,
independent’ judgment of the politically insulated NCC would impact
the state budget, the NCP units could insist on holding departments and
politicians to courses of actions that they might otherwise resist. As a result,
what emerged was a relatively politically insulated network of central agency
officials, in a context of semi-autonomous institutional structures.

Also very important to a persuasive account of this development as one of
incipient legality, are key aspects of how the reforms were implemented. In
the next section, I discuss three important aspects of implementation that
bolster the precision, obligatory nature and delegative aspects of the meta-
regulatory regime.

PRECISION, OBLIGATION AND DELEGATION IN
IMPLEMENTATION

The nub of this section is that written interpretative guidance regarding the
implementation of the Competition Principles Agreement catalyzed a pattern
of routinized dialogue amongst a network of central agency officials, all of
whom shared professional commitments to the tenets of economic ration-
ality. The combined effects of these aspects of implementing meta-regulation
was to create a texture of incipient legality, albeit one at times fragile, as might
be expected of a phenomenon not yet deeply institutionalized. Precision,
obligatoriness and delegation weave in and out of the effects of the implemen-
tation narrative.

WRITTEN GUIDANCE The precision of legislative review under the Com-
petition Principles Agreement was considerably fleshed out as the regime was
implemented by participating governments. Although the ‘guiding principle’ stated in Clause 5.1 (p. xxx) may seem broadly worded, it was implemented at member jurisdiction level by detailed documents providing ‘interpretive guidance’. Such guidelines were, in time, relied upon by all the central agency units overseeing the meta-regulatory regime. For example, Victoria produced a centrally approved document (Victorian Government, 1995) early on in the agenda-setting process and fleshed it out with a detailed template for regulatory analysis provided by independent consultants at a later stage later in the enforcement process (Centre for International Economics, 1999). New South Wales, while giving minimal guidance at first, later piggybacked on the guidelines produced by Victoria. The Office of Regulation Review at Commonwealth government level developed its own guidelines, and further guidelines were produced in the national arena for coordinating the review of professional services (Council of Australian Governments, 1997).

The greater precision thereby acquired facilitated a pattern of enforcement that lent obligatory weight to the meta-regulation programme. For example, in Victoria, all those departmental officials in charge of reviews carried out under the Competition Principles Agreement had to obtain signed consent by the NCP unit at three separate stages: when terms of reference were set and a review team constituted, when a draft report came in, and when final recommendations were made. In giving or refusing such consent, the Unit referred to the detailed centrally approved guidelines. The Unit therefore retained considerable policy control at the same time as it performed the gate-keeping function of ensuring technical compliance with meta-regulation (Interview, 2001a).

The various central agency guidelines all shared a conceptual template reflecting the shared professional commitments of the network of central agency officials, commitments flowing from training in neoclassical economics. This shared commitment made it possible for officials from different jurisdictions within Australia to establish connections and conduct informal dialogues as the reform programme unfolded, thereby building up a fund of experience that gave more predictability to its effects. First, consider the emphasis upon filling out the interpretative gaps of the guidelines with expertise derived from economic rationality. Victoria, for example, stated in its instruction manual:

> Each of the steps [taken in assessing legislation to determine if it comes within the review agenda] involves the application of economic concepts. It would therefore be advisable when assessing compliance with this guideline to obtain suitable economic advice. Such advice may be obtained from internal departmental resources, specialist bodies such as the Office of Regulation Reform (ORR) or economic consultants with expertise in microeconomic reform. (Victorian Government, 1995)

From the perspective of those central agency officials with key interpretive power, the aim of the meta-regulation regime was to require policy makers to think in terms of market competition as the first option for solving social
problems. The goal was to alter common sense intuitions about what justified policy, rather than to generate sophisticated cost-benefit modelling of precise quantitative costs. As one official said:

We want departments to think about the objective of regulation in terms of market failure, to think through the problem from an economic perspective rather than from a heavily quantitative basis. Questions like ‘what is the market failure justification? Or what is the legitimate social policy objective?’ are more important than numbers, costs or benefits. (Interview, 2001c: 3)

**TAKING WORDS SERIOUSLY** I will say more about the substantive effects of this altered ‘common sense’ upon actual policy decisions in the third section of the article. For now, I want to focus only on a particular interpretive stance with which the network of central agency officials infused their common commitments to the spirit of economic rationality. That stance, to quote one of the officials, was one of ‘taking words seriously’ (Interview, 2001c: 3). Indeed another official commented that at times the text of the intergovernmental agreements seemed to have acquired the status of being the object of quasi-biblical exegesis (Interview, 2001d: 3). More broadly, interviews supported the notion that building bureaucratic compliance around highly specific reliance on the meaning of particular phrases, in the context of the shared professional norms of the key officials, was one particular technique for securing the kind of insulation from direct political influence I have been emphasising as constitutive of ‘incipient legality’ (Interview, 2001a; 2001c: 37–9).

Two examples illustrate this stance vividly, both drawing upon debates that commonly emerge in forums of judicial legality, but are here also importantly shaped by the commitment to economic rationality. Both examples relate to the precise meaning of the key obligation imposed by the Competition Principles – the ‘guiding principle’ of Clause 5.1 cited earlier and repeated in brief here:

5.1 The guiding principle is that legislation . . . should not restrict competition unless it can be demonstrated that . . . the benefits of the restriction to the community as a whole outweigh the costs and . . . the objectives of the legislation can only be achieved by restricting competition.

The network of central agency officials expended significant energy debating and establishing the precise onus of proof implied by this wording, my first example of ‘taking words seriously’. And later in the life of the reforms, in my second example, a careful, strategic, and highly legalistic change in the weight of this ‘guiding principle’ was secured by amending the intergovernmental agreements at a juncture of political crisis.

First, then, the notion that the agreements created an ‘onus of proof’, and more specifically one *against* regulatory intervention. Broad as the ‘guiding principle’ of giving primacy to competitiveness goals in regulatory policymaking may seem, sharp debates took place within the bureaucracy regarding the precise onus of proof implied by the wording. Was the purpose of the
‘guiding principle’ to create a presumption against a decision to intervene politically into the economy, especially via command-and-control regulation? Many of those implementing the reform programme were committed to this interpretation. The general rules of meta-regulation may not preclude a decision to regulate, they argued, but they are intended to discourage it. For example, the National Competition Council insisted from its very first assessment of progress in implementing regulation that under Clause 5, unless actual empirical evidence was provided in support of government intervention, the presumption would be against government intervention (National Competition Council, 1996: 6). In the federal government, ORR personnel were strongly committed to the notion that the most important facet of the CPA involved its challenge to the status quo through the establishment of a burden of proof that militated in favour of change (Interview, 1997). Absent an ‘adequate’ case in favour of regulatory intervention, deregulation would be the presumptive solution.

Government intervention of any sort, therefore, required a threshold justification, a justification that had to be framed in precise terms of addressing a market failure. Furthermore, redressing the failure should only involve government intervention if absolutely necessary. ‘A command-and-control regulatory approach should be the last option. Economically they are the least efficient and may impose significant costs on the community’ (Council of Australian Governments, 1997: 24). Or, as the guidelines commissioned by the Victorian government insisted, ‘market failure is a necessary but not sufficient ground for government intervention’ (Victorian Government, 1995: Point 5 of Step 3). That is, government failure had to be disproved as well as market failure proved.

Some officials disagreed with this interpretation of a substantive onus of proof – notably those in New South Wales, the least politically insulated of all those in the network. But even their alternative interpretative stance was redolent of legality. They stressed that the ‘guiding principle’ had no substantive import but rather imposed a formal rationality on regulatory policymaking decisions. As one official argued: ‘At its heart, the NCP programme is not about economic rationalism gone mad, but about a culture of transparency and reasoned justification in economic policy’ (Interview, 2001b: 7). This reflects a type of due process emphasis familiar from sites of judicial legality.

The echo of judicial legality is intensified when we note a development that occurred later in the life of the Australian meta-regulatory regime. It touches not only upon due process concerns but also upon the legitimate scope for reasoned justification of policies by regulating governments: both matters at the heart of judicial review. In November 2000, five years into the reform programme, political hostility to the National Competition Policy ran high, especially in states with a high proportion of rural population who had been hard hit by the unbundling of cross-subsidies in essential services. At a closed meeting of heads of governments, some states came close to withdrawing from the intergovernmental agreements, but were mollified by the introduction of
‘several measures to clarify and fine-tune implementation arrangements for
NCP’ (Coalition of Australian Governments, 2000: 4). One of these measures
related to the oversight role of the National Competition Council and had
the effect of intensifying the incipient legality of its institutional nature. By
way of letters sent to the heads of participating jurisdictions, the intergov-
ernmental compacts were in effect amended by adding the following clause:

In assessing whether the threshold requirement of Clause 5 has been achieved,
the NCC should consider whether the conclusion reached in the report is
within a range of outcomes that could reasonably be reached based on the infor-
mation available to a properly constituted review process. Within the range of
outcomes that could reasonably be reached, it is a matter for Government to
determine what policy is in the public interest. (Coalition of Australian
Governments, 2000: attachment)

This clause in effect tries to soften the impact of the ‘onus of proof’ insisted
upon in earlier patterns of implementation. It does so by introducing the
notion of a ‘range of outcomes that could reasonably be reached’ by review-
ing bodies. This eases the ‘bite’ of the meta-regulatory regime, loosening some-
what the weight of the assumed onus in favour of competition. Under the
amended standard of assessment, even if there is a policy alternative available
to a department or government that is less restrictive of competition, the last
word on whether that choice is overall in the public interest is explicitly given
back to the government, rather than the NCC. There is, in other words, no
‘right answer’ divinable by the NCC but a range of possible answers, all of
which are justifiable under meta-regulation. Thus the amending clause lessens
the constraint imposed on regulatory policymaking by meta-regulation 7.

This ‘refinement’ of the Competition Principles Agreement is fascinatingly
analogous to the way in which judicial review constrains public decision-
making. Indeed, the precise phrasing of the amendment was, according to
some officials, inspired by the logic of judicial review (Interview, 2001b: 6).
Like a court, the NCC insists that it does not set policy, but merely requires
public justification in terms of a neutral rationality. Though this does con-
strain political choice, it does not direct it to specific ends. It leaves instead a
zone of flexibility, within which a range of justifiable regulatory policy
choices is feasible. Subsequent uncertainty over whether that zone of flexi-
bility entitles the NCC to take a ‘hard look’ at the rigour and logic of evi-
dence presented to it is also a familiar theme from judicial review.

AN IMPARTIAL NETWORK OF OFFICIALS? These two examples regarding the
energy and effort spent on debating the precise wording of the commitments
made under Australian meta-regulation are only part of the story of showing
how implementation patterns reinforce nonjudicial legality. An even more
important part of the shared professional commitments of the network of
central agency officials than ‘taking words seriously’, concerns the substan-
tive import of economic rationality. What I want to focus on here is the way
these commitments contribute to an ethic of disinterestedness. Such an ethic
is a critical aspect of triangulated delegation: that core logic of legality that
Proofs only

involves reliance on an arms-length third party for conflict resolution. What is important here is that the delegation is impartial. The quasi-obligatory precisely worded duties assist in constructing an impartial arena, but crucial to convincing actors affected by meta-regulation of its impartiality is the substantive rationality that animates the interpretation of those obligations. That rationality is an economic one, and core to its claim of disinterestedness are assumptions embedded in public choice approaches to regulation.

A public choice perspective on regulatory politics is one that emphasizes technocratic expertise, particularly that derived from specialist economic knowledge, and seeks to insulate economic policymaking choices from democratic politics. It is a perspective that resists politics having the ‘last word’ on regulatory justification, or at least seeks to ‘purify’ politics of factionalism, based on a set of assumptions about the nexus between democratic politics and regulatory legislation. The most important assumption is that much of what passes for democratic political choice is distorted by the influence of special interest groups. This builds on the observation that the winners and losers of binding political decisions are typically asymmetrically distributed, such that political decisions that will have concentrated costs and diffuse benefits are particularly difficult to secure, due to the intensity of resistance by those groups suffering the concentrated cost. As a corollary, political decision-making will tend to skew towards choices that award concentrated benefits to certain groups at the price of diffusely distributed costs. In the public choice schema, most regulatory legislation is precisely this: the product of a democratic process distorted by concentrated interest groups who arrogate ‘rent’ to their benefit by means of securing protectionist legislation (Stigler, 1971).

The design of the legislative review component of National Competition Policy in Australia did not entirely eliminate the political role of democratically elected officials in having the ‘last word’ on regulatory policy choice. Rather, it imposed an additional hurdle (a market-centred net benefit test) that constrained the making of those choices, and built institutions and incentives around the hurdle that come close to creating an actual veto point in the political process. This hurdle/veto sought to insulate regulatory policy choice not from politics per se, but from a certain kind of politics – that which reflects the disproportional influence of concentrated interest groups. Politicians can ultimately choose to retain or create new regulatory policies that do not pass the market-centred public interest test as interpreted by the National Competition Council, but in doing so they must both sacrifice considerable fiscal resources and expose themselves to public criticism. The rationale of the reforms is that these disincentives will facilitate political decisions that reflect the ‘true’ general interest of the (diffuse) public, and not the sectional interests of a powerful or disproportionately affected few. As the National Competition Council Council stated:

Governments should be congratulated for their continued commitment to the NCP reform programme. . . . This reflects a commitment to good government in the interests of all Australian, rather than the pursuit of narrow, short-term political interests. (NCC, 2001: vi)
This is increasingly presented as not simply a discipline that serves efficiency values, but also as one that enhances political legitimation. The argument here is that the constraints of processes like meta-regulation are put in place as a battle on behalf of the unrepresented, unorganized taxpayer or consumer. The underlying logic of such an argument is that due to collective action problems, diffuse and unorganized groups such as taxpayers and consumers are effectively suffering 'taxation without representation' when regulatory policies are implemented by governments (McGinnis and Movsesian 2000; Maduro, 2000; Lindseth, 2002)\(^8\). Meta-regulatory regimes thus 'represent' a set of otherwise silenced interests, placing a political gloss on the economic perspective. The link between this approach to regulatory politics and impartiality is vividly captured – with an explicit link to notions of legality – in an Australian senior Treasury official's comment:

There is a constitutional function for Treasury which is relatively independent of the government of the day . . . that doesn’t mean that we pursue our agenda independently of the government of the day . . . [but] I believe that my thoughts and actions stem from that set of stimuli [which make up the independent constitutional function] rather than from the government per se, although they are tempered by the policy programme of the government. (Campbell and Halligan, 1992: 24)

While this comment was not made in relation to the meta-regulatory reforms explored in this article, it captures the essence of the view powerful in public choice theory, that economic rationality places a constraint on politics and by so doing serves the 'true' public interest. The institutional design of National Competition Policy, with its oversight function given to an independent federal agency, intensifies the relevance of this view. And the written and oral history of the National Competition Policy reforms is pervaded by examples of this public choice perspective (e.g. Interview, 1997; 2001d; National Competition Council, 2001; Office of Regulation Review, n.d).

‘Purified politics’, then, is strained of factionalism and rendered transparent, by the application of economic rationality at arms-length from the political process and constrained by norms of due process. Justification in accordance with the terms of economic rationality was, in the Australian programme, obligatory under the terms of intergovernmental compacts the words of which were taken seriously, and the precision of which was hard-fought for, by key implementing officials. The network of these officials, though iterated dialogue and technical cooperation over time, built around written guidelines centrally enforced in a context of shared professional commitments, all came together to create a background constraint for regulatory decision-making that was, I have argued here, a clear instance of incipient nonjudicial legality.

PART III: THE ECONOMIZATION OF POLITICS

Now clearly, assumptions of the kind that typify a public choice perspective on regulation are politically controversial. Indeed, that is the reason for the
question mark I placed at the end of the last subheading, regarding the disinterested nature of the substantive commitments animating meta-regulation. But while the second part of this article opened with a reminder of the political stakes, the remainder of that section mostly stood back from substantive policy effects to analyze institutional design and underlying social logic. It is time now to turn to a brief overview of some examples of just how actual concrete policies fared under scrutiny through the ‘market spectacles’ mandated by the Australian meta-regulation regime. The main aim here is to show how an ‘economization of politics’ results. Meta-regulation tended to exclude or dominate competing ways of understanding regulatory policy choices and institutionalize a presumption in favour of market governance. In response, bureaucrats reframed or ‘translated’ aspects of social welfare that previously may have been expressed in the language of need, vulnerability or harm into the language of market failures or market distortion. Although it may seem that such ‘translation effects’ show the malleability of the discipline imposed by meta-regulation (at least as far as actual ‘winner and loser’ outcomes are concerned), there were two side-effects of translation that tend to reinforce a sense that the economization of politics leans to the right, so to speak. First, the institutional solutions that bureaucrats advanced to secure the ‘translated’ social welfare values rendered them politically vulnerable, and secondly, collective identity and social cohesion were gradually attenuated as the reform programme’s effects unfolded.

In what follows, I summarize two examples of the results of filtering then-existing regulatory policy in Australia through the ‘market lens’ of meta-regulation.

THE REGULATION OF MIGRATION AGENTS

The first example concerns the regulation of migration advice agents. A government-appointed board known as the Migration Agents’ Registration Board (the MAR Board) had the power to restrict entry into the business of giving immigration advice. The catalyst for regulation was the protection of a relatively diffuse group of end-users or consumers. The dilemma here was a classically typical case of the regulation of many other kinds of professional services: did the legislation provide ‘unnecessary protection’ for those consumers? The objective of the original scheme was ‘to improve standards of professional conduct and quality of service’ (Commonwealth Government, 1996: 3). The reason this was particularly necessary in the migration advice industry was due to the ‘vulnerability of the migration agent’s client group: a high proportion are unable to speak English, were fearful of authority and had meagre financial resources’ (House of Representatives, 1992, Hansard, 27 May: 2936). At the same time, regulation posed barriers to entry into the business of giving migration advice, and thus constituted a restraint on competition. Entry barriers enforced by the MAR Board included substantive knowledge of migration law (either through a law degree or passing an exam
approved by the Industry body), Australian citizenship and a demonstration of moral integrity. Were these requirements 'necessary' in order to protect vulnerable immigrants? This was the question at the heart of the review process.

The terms of reference required the Review Group to report on 'the nature, intent and impact of the legislation and regulations on the migration advice industry, consumers and the community', and to consider the options for regulation including self-regulation or alternatives for consumer redress if deregulation was recommended. They were required to take into account 'the effects of the Scheme on consumer interests, the competitiveness of businesses seeking to provide migration advice and efficient resource allocation' (Commonwealth Government, 1996: 39). As might be expected given these terms of reference, the analysis was formally framed largely in terms of competitive efficiency and market infrastructure improvement. But interestingly, the review came in over the top of a prior review process, unrelated to National Competition Policy, that had already produced an interim report entitled 'Protecting the Vulnerable'. The report that came out of the meta-regulatory review under the CPA blended two frames of discourse, in a way that suggested that the translation of concerns from one analytical framework to another was eminently possible.

For example, the report argued that regulation of migration advice 'addresses a "market failure" that leaves the consumer vulnerable to exploitation' (Commonwealth Government, 1996: 14). That market failure arose from several factors, the most important of which was 'inadequate consumer information and an imbalance of knowledge between consumers and agents'. This central market failure flowed from a number of features about migration advice – its technical nature, the long-term nature of the contract for advice, the fact that a distant outcome makes it difficult to evaluate the quality of service for a long period of time, and the fact that its recipients are often not proficient in English or may be fearful of challenging the agent’s authority due to uncertainty about the legality of their status. Thus the welfare state’s protective obligations of integrity towards vulnerable citizens were translated into the resolution of market failures in respect of information asymmetries that denied consumers the precondition of fully informed and autonomous choice necessary to participate in the market for migration advice. The maximization of consumer choice functioned to protect the vulnerable.

There was, however, one group of citizens or consumers that did not fare so well in the translation from 'security for the vulnerable' to 'redress of market failure': those with 'meagre financial resources', a factor which had been instrumental in the original motivation for regulation. Under the welfare state model, security for the vulnerable was the main focus, and this was provided for, in the case of those too poor to pay for it, by voluntary advice agencies. From the perspective of market infrastructure regulation, the emphasis on maximizing choice meant that price levels were of concern to the Review Group, but their analysis gave primacy to competitive efficiency as the solution to keeping prices down. But the voluntary agencies were
funded by the registration fee collected by the MAR Board, and the fee was deliberately set higher than the minimum needed to break even on the costs of administering registration and dispute resolution. This made free advice possible. When subjected to the scrutiny of ‘market spectacles’, however, a critical aspect of the free provision of advice was re-characterized as a cost rather than a benefit. It is worth quoting the translation in full:

Access and equity concerns prompted the decision to fund voluntary advice agencies to provide migration advice. The purpose was to assist the disadvantaged and vulnerable in obtaining advice from a qualified person in circumstances where they were not able to pay for that service or were disadvantaged in gaining access for social, cultural or language reasons. However the funding of voluntary advice from revenue generated by the Scheme creates a cross-subsidy which distorts the migration advice market, raising the costs to industry of registration and ultimately the price paid by the clients of fee-charging agents. If such an arrangement is in the public interest, i.e. delivers a public good, it should be publicly funded. (Commonwealth Government, 1996: 17, emphasis added)

This framework of analysis does not block altogether the possible public benefit of free advice. Rather, it insists that this should not be pursued by regulatory adjustment of the market infrastructure. Instead, it requires a separate institutional response – direct public funding. This makes the ongoing provision of free migration advice politically vulnerable. The clients most likely to take advantage of the voluntary advice agencies do not have much electoral clout, almost by definition since few would be eligible to vote. Furthermore, the desirability of direct public funding could not, under the terms imposed by meta-regulation, be assumed. Rather, it required empirical demonstration of some concrete public benefit (p. 17). Curiously, the benefit that indigent citizens might receive from the continuation of the ‘cross-subsidies’ did not count for the Review Group. In the ‘access and equity’ language of the welfare state, one might argue, for example, that the fulfilment of a community duty to protect the vulnerable counted as a public benefit. But the Review Group seemed to look for a different kind of ‘public interest argument’ to justify regulation and made no further mention of the ‘access and equity’ advantages once it had translated them into the language of ‘market distortion’. Instead, they looked at much broader benefits accruing to the community as a whole and drew on comparative analogies from the regulation of tax agents and securities advice agents. They identified what they considered to be strong public benefits in these cases: the risk to stable government revenue if tax advice were unregulated, or the risk for investor confidence if securities advice were unregulated (p. 20). By contrast in the migration advice case, they argued, the public benefit flowing from reduction of immigration fraud or malpractice was ‘difficult to demonstrate empirically’ (p. 20). This was so even though the impact of immigration fraud on discrete classes of consumers (particularly those who could not afford to go elsewhere) was severe and concrete and had been acknowledged as a cost to those consumers elsewhere in the report.
Overall, the framework of the review promoted primarily a consumer protection framework of values, motivated by a desire to redress market failures of informational asymmetry – but not inequity of economic resources. Despite the apparent inattention to ‘social’ issues built into the formal terms of reference, most relevant non-efficiency objectives were at least considered. But the redistributive facet of regulation turned out to be vulnerable to elimination once translation into the discourse of economic analysis occurred.

THE REGULATION OF GOVERNMENT AUDIT

My second example of the economization of politics under meta-regulation concerns the review of government audit functions. This review raised questions that went to the heart of the very social logic of meta-regulation, because it catalyzed a competition between two different mechanisms (competitive pressures and legal insulation) for institutionalizing autonomy from politics. The key issue was the allegedly technical matter of whether or not government audits in the state of Victoria should be contracted out to private firms. This sparked a ‘jurisdictional’ argument over whether government audit was a policy appropriate for review under meta-regulation at all. The right-wing government then in power argued that it fell squarely within the CPA terms of reference. Since the Auditor-General currently held a monopoly over the provision of all auditing services in respect of government departments, it was an arrangement that ‘restricted competition’ and thus had to be reviewed. Although this was logically appealing, it was passionately contested. Opponents asserted that subjecting the Auditor-General to CPA review was a fundamental ‘category mistake’. As the reforms were drafted, they applied to all legislation, at least where ‘market restrictions’ existed. But one of the limits of precision of the Competition Principles Agreement was that there is no obvious answer to the question of when regulation entails encroachment on a market or not. Audit was a ‘limit case’; a case that threw up sharply the limits of defining good government with primary reference to efficiency values and the maximization of market competition. As Shane Green, the political editor of Melbourne’s most respected broadsheet, put it:

[The Premier is ]setting up national competition principles as the Ten Commandments of government. Forget all other principles underpinning parliamentary democracy and good government, competition policy rules. (Green, 1996: 8)

Opponents of the review argued that audit had nothing to do with a market for any service. The Australasian Council of Auditors, for example, argued that audit functions were analogous to the functions of the criminal justice system, or the constitutional and legal systems – non-market functions that were never intended to fall under the meta-regulatory lens of the CPA (Richards, 1996). The director of the Monash University Graduate School of Management remarked acidly:
To say that the Audit Act is monopolistic in providing for a single auditor-general is like saying the Catholic Church is monopolistic in having only one Pope. The auditor-general is the apex, the watchdog, the scrutineer and the spokesman for public audit. (Editorial, The Sunday Age, 25 November 1996: 3)

It was in fact reasonably clear that an uglier game of politics was at stake in this review 9. Bearing this in mind, the terms of analysis are an interesting example of ‘economizing’ deeply political questions. The overall objective of the Auditor-General legislation was construed as providing accountability to the taxpayer through oversight of the ‘appropriate (legal, efficient, effective) use of public monies’ (Victorian Government, 1997: 8). The question as framed by the CPA regime was therefore whether monopoly provision of accountability was the only way to secure the benefits of accountability. The question was complicated by the fact that ‘accountability’ through audit actually had two dimensions: discipline and feedback. In other words, audit of a government department was intended not only to deter misspending of public monies, but also to facilitate ways in which the money could be put to better use. The second aspect is more in the nature of an advisory, educative function, a ‘management consultant’ role; the first is a checking, constraining function, a ‘policing’ role.

In essence, the advocates of reform focused strongly on the ‘management consultant’ facet of auditing. With this focus, audit could be characterized primarily as a service to a client, and the notion of the client as a consumer for whom efficiency was paramount made sense. When looked at from the perspective of the ‘policeman’ role, however, the consumer-focused, service orientation of audit was less obvious. Discipline of a client was more in the nature of an oversight obligation than a service. A consumer chooses a service (bottom-up); but an oversight agency chooses its targets (top-down). The appropriate location of discretion is different, depending on whether discipline or feedback is emphasized. And when assessing the empirical case for a net public benefit, what counted as a cost and what as a benefit depended on one’s frame of reference. By focusing primarily on the service provision aspects of auditing, the Auditor-General’s monopoly of control over the ‘who, when and how’ of audits, was effectively framed as a cost. Similarly, the lack of scope for the auditee to exercise any choice in the process of selecting an auditor was also framed as a cost, reflecting the service provision focus but not the oversight perspective (Victorian Government, 1997: 28).

The different frames of reference also defined the relevant client in different ways. Critics of reform insisted that the true client of the Auditor-General was Parliament. The Review Committee on the other hand maintained that the Auditor-General had multiple clients: Parliament was the primary client but the public agency auditee and its responsible Minister were also significant and important clients (p. 21). By including the Executive in the array of ‘clients’, and by emphasizing the desirability of providing choice to those clients, the Review Committee was able to characterize the status quo monopoly provision of audit as an overly ‘binding constraint’ which limited contestability, competition and plural sources of audit expertise. But for the
The important point flowing from these two examples of the economization of politics is that meta-regulation, as a form of incipient legality, has important limitations. In the example of government audit, facets of political and constitutional accountability simply could not be considered effectively in the terms of economic discourse. The result was a highly politicized review process that ultimately proposed a 'segmented model' that, in its compromise between the status quo and a fully marketized model, increased considerably the bureaucratic complexity of government audit. Institutionally, this was a result somewhat counter to the original spirit of the reform programme's search for
the ‘least restrictive’ regulatory solution. Alternatively, as the example of
migration advice regulation demonstrated, the tendency to ‘translate’ aspects
of social welfare that previously may have been expressed in the language of
need, vulnerability or harm into the language of market failures or market dis-
tortion resulted in a particular insensitivity to issues of redistributive inequity.
Imbalances in information counted as market failures, while imbalances in
material resources were discounted as market distortions. The redress of such
imbalances through direct budget funding was politically vulnerable.

Over time in Australia, as National Competition Policy gradually bit harder,
these limitations created considerable political backlash, and the nature of
that backlash illustrates two things germane to the overall argument of this
article. Firstly, it links back to the argument that meta-regulation institu-
tionalizes a form of incipient non-judicial legality, and secondly it suggests
that fundamental rights are as important to regulatory policy decisions as
economic productivity. A key target of political backlash was the National
Competition Council, criticized in terms that resonate with arguments
relating to the legitimate role of judicial institutions in monitoring political
balancing decisions. When the NCC in its second tranche assessment in July
1999 recommended that Queensland lose AUS$113 million of competition
payments for its refusal to drop a dam proposal and to deregulate dairy milk
prices, the Queensland Premier called in the national press for the NCC to
be abolished. The Queensland Treasurer said:

The NCC has fundamentally exceeded its legitimate role and responsibilities,
as provided for under the [intergovernmental] agreements. Inappropriately, the
Council has sought . . . to ‘second guess’ the outcomes of public benefit tests.
Effectively, the NCC is an umpire which is seeking to determine the outcome
of the game, rather than just enforcing the rules. (Hamill, 1999)

The conflict over the legitimacy of NCC oversight is embedded in the issue
of who has the legitimate ‘last word’ on the balancing: the technical assess-
ment performed in the review itself, and shaped by the terms of economic
rationality, or politicians making a strategic electoral calculus? With the sub-
stitution of legal rationality for economic rationality, this is structurally
similar to the legitimacy conundrum that judicial review throws up. And
there are, as with debates over the legitimacy of judicial review, important
substantive political stakes of a principled kind. The conflicts arising around
meta-regulation are essentially ones between the collective welfare benefits
of increased economic productivity, and ‘social’ values such as community
cohesion, ecological integrity and redistributive equity. Within Australia, the
specific political backlash to National Competition Policy generated a debate
about ‘adjustment assistance’. This was partly a matter of monetary com-
ensation for disproportionately affected groups, but also of providing
services that would ‘help people feel more optimistic about their ability to
adapt in a world where ongoing change is a part of life, and perhaps most
important of all, to ensure that people don’t feel that they have been forgot-
ten or discarded by the rest of the community’ (Samuels, 2001: 13).
In the broader international forum, however, political conflicts over the social costs of prioritizing economic efficiency and competitiveness are more and more framed in terms of fundamental rights claims – albeit ‘second and third generational’ rights rather than individual rights – social and economic rights, rights to collective self-determination and the like. And there are signs that nonjudicial legality may be mobilized to manage these conflicts too. For example, the ‘trade and . . . ‘debate is increasingly focused (Petersmann, 2000; Alston, 2002; Cottier, 2002) on the question of whether the WTO, another important site of nonjudicial legality, is an appropriate forum for resolving the question of how much competing weight to give environmental or human rights claims that may conflict with the rules that open up trade in order to maximize global economic productivity. The question of what kind of institutions we want to decide such trade-offs is very important, and all the more so because the salience of meta-regulation is by no means confined to Australia. On the contrary, it is increasingly widespread, not only in developed industrialized economies (OECD, 1995; 1996; 1997; 1998) but also potentially in developing countries, driven by an intersection between policy imitation at a domestic level and emerging requirements of international trade law that ‘discipline’ domestic regulatory policymaking processes (OECD, 2000; n.d.). A full development of the international spread and salience of meta-regulation is beyond the scope of this article, but consider this: in 1980 only three OECD countries used regulatory impact analysis to guide their regulatory policy decision-making process, but by 1999, 24 were doing so (Jacobs, 1999), and 14 of these had established specific units and personnel in central bureaucracies to monitor and support the new routines (Deighton-Smith, 1997: 33). The implications of meta-regulation will clearly redound far beyond the borders of Australia.

CONCLUSION

This article has explored the social logic underlying, and the political implications of, institutions and processes that embed regulatory review mechanisms relying on economic rationality on a systematic basis into the every-day routines of governmental policymaking. It has situated this development at the intersection of an increasing legalization of politics and a growing reliance on nonjudicial mechanisms of accountability. This intersection is a site of nonjudicial legality. Just as constitutions place extra-political constraints on the lawmaking process, so too the CPA regime in Australia placed a different kind of extra-political constraint on lawmaking. The constraint – which I have called meta-regulation – institutionalized scepticism about the efficacy of command-and-control regulation and the positive social benefits flowing from such regulation. Over time, meta-regulation in Australia has not only ‘come to shape how individuals interact with each other’ in economic policymaking fora, but has also ‘develop[ed] authority over the normative structure in place’ (Stone Sweet, 2000: 13), at least within the community of central
agency officials who shared a certain blend of ideological commitment and bureaucratic mission that gave them a ‘professional and bureaucratic interest in providing disinterested . . . interpretation (Tushnet, 2001: 3–4). Meta-regulation placed well-defined, mandatory boundaries upon the exercise of regulatory policymaking power, and ‘empowered state agencies to control and redress trespasses of these boundaries’ (O’Donnell, 1997: 185), thus institutionalizing one of the forms of horizontal accountability that O’Donnell argues is crucial to establishing the rule of law. Like legal processes more traditionally conceived, meta-regulation as it unfolded in Australia ‘involve[d] a discourse framed in terms of reason, interpretation, technical knowledge, and argument . . . [and was] followed by deliberation and judgment by impartial parties . . . based on reasons applicable to all similarly situated [policy-makers]’ (Goldstein et al., 2001: 35).

But the institutionalization of meta-regulation is yet fragile and its authority over the normative structure of economic policymaking is highly contested. Although interactions shaped by obligatory, precise, arms-length applied rules go some way towards minimizing any perception that raw power has determined the outcome, the perception of disinterested triangulation of conflict in the case of meta-regulation was undermined by the ‘economization of politics’ that resulted from its implementation. Substantively, meta-regulation fails to take account of a broad scope of values, especially those pertinent to fundamental rights. The difficulty of incorporating redistributive goals, and more broadly a sense of social cohesion and community, into the justificatory structure of meta-regulation is intimately linked to the social logic of incipient legality. It is arguably, a concomitant of the choice to delegate important portions of the interpretive power shaping regulatory policymaking decisions to arms-length actors who will dispose of them with technical precision in ways that mute their discretionary and value-laden dimensions. If meta-regulation in Australia might be a foretaste of institutional changes in the making at the international level, it will be crucially important to foster a space for modes of governance that link communities in ways other than the promise of economic growth through intensified market competition. The question of whether or not nonjudicial legality can be harnessed to a justificatory dialogue that admits a broad range of claims, including those of fundamental rights, is key to the future trajectory of international regulatory politics. And the lessons learnt from domestic experiences such as Australia’s help to illuminate what is at stake at the level that ultimately matters most: the backstage of bureaucracy where technical minutiae determine who gets what in the battle of regulatory politics.

Notes

Thanks to Josh Holmes, Karen Yeung and Simon Halliday for comments on this article, full responsibility for which remains with myself. Parts II and III of the article summarize key aspects of an argument made in much greater detail, and with much more attention to political nuance, in Morgan (2003). References to interviews in this
article stem from the empirical research carried out (in 1997, updated in 2001) for that book, which included a series of unstructured interviews with central agency officials, policymakers and affected interest groups, some of whom wished to retain anonymous.

1. See Froud, Boden, Ogus and Stubbs (1998) for an extended presentation of empirical evidence on how Compliance Costs Assessment procedures in the UK have affected the choice of regulatory technique and range of institutional solutions open to policymakers.

2. The full story of the politics of the NCP is beyond the scope of this article and is treated in depth in my book (Morgan, 2003). Suffice to say that the dynamics of federalism were as important as ideological colour. Nonetheless, it is ironic that the federal government that implemented the reforms was a Labour government, pursuing a classic ‘third way’ strategy that secured perhaps more support from the right than from the left. The left-wing opposition referred to in this quote was the Victorian Labour Party which at the time had not moved as far to the centre as had the federal level of the Labour Party.

3. The CPA had two general methods for excluding legislation from review, though for both, positive arguments had to be made; thus the substantive inclusion of ‘all legislation’ remains valid. Exemption required a department to demonstrate that the legislation had either been recently or currently under review, or that it was not cost-effective to review it. Exclusion required a substantive argument that the legislation had no relevance to issues of market competitiveness. This was obviously politically contentious: one instance of it is described in the third section of this article (audit review).

4. NCC was not the sole national oversight body. The Council of Australian Governments, a federal network of senior government representatives advised by a secretariat of senior bureaucrats (the Committee on Regulatory Reform), was responsible for overall policy direction and the forward work programme of NCC. However the implementation of the meta-regulatory regime of legislative review fell very largely to the remit of NCC’s day to day routines.

5. The book-length treatment of this point (Morgan, 2003) explores the nuances of such differences, as well as changes in political leadership that occurred within one jurisdiction within the lifetime of the reform programme. To give just one example, the Keating Labour government supplemented the ORR’s role in determining the priorities of legislative review under the CPA with a politically appointed advisory body called the Council on Business Regulation, but the conservative Coalition government that replaced Labour mid-reform implementation disbanded this Council. In assessing the impact of politics on institutional design, the book does conclude that left-wing governments were generally less inclined to insulate their meta-regulatory officials from direct political influence or direct community input, as well as more likely to decentralise to some extent central control of the agenda-setting process. Nonetheless, the more general point about incipient legality holds across the spectra of political variation observed.

6. In theory, a final decision not to intervene would still require governments to consider some of the ‘social’ facets of regulation listed in another part of the CPA: Clause 1.3. But while the NCC paid lip service to this clause, its modus operandi undermined its salience by treating the factors listed there as ‘add-ons’ to the core economic analysis of market failure.

7. The NCC’s response to this amendment provides even more evidence of an approach redolent of legality. Essentially the NCC, while conceding that there might well be less constraint on specific outcomes under the amended approach, exploited the potential for a tightening of constraints on process.
They noted that the wider feasibility in permissible outcomes is conditioned on the existence of 'information available to a properly constituted review process', and indicated that the notion of 'proper constitution' of review processes was intended to bear heavy interpretive weight. The NCC's guidelines for the June 2001 'third tranche assessment' of competition payments stressed three consequences of the requirement for proper constitution: transparency, independence and 'analytical rigour' (NCC, 2001: 5.2). Interviews with officials (Interview, 1997; 2001c: 7–8) fleshed this out as requiring that the search for the 'least restrictive' solution in regulatory policy choice involve publicly available reasoning undertaken by persons without a direct material interest in the outcomes. Though consultation with such 'stakeholder' groups was to be encouraged, they should not, for true 'independence' to obtain, have significant control over the review process. Further the publicly available reasoning would have to show 'analytical rigour', in the sense that there must be 'logical connections' between the evidence presented by the review and the outcome recommended. While quantitatively based proof of net benefit was not necessarily required, a chain of transparent justification had to be visible, at least if restrictions on competition were retained (Interview, 2001c: 8). This interpretation veers so close to consideration of the substantive policy choice at stake that it is difficult to categorise as purely procedural.

8. This argument has also found expression in English legal doctrine, for example in judicial review cases on fiduciary duty, e.g. Roberts v. Hopwood [1925] AC 578 and Bromley London Borough Council v. GLC [1983] 1 AC 768.

9. The Auditor-General in Victoria was responsible for auditing the activities of all government departments and public statutory bodies (some 139), as well as 35 educational institutions, 106 hospitals and nursing homes, 14 pension funds, 108 government companies and joint ventures, 78 local councils, 10 libraries and 40 water authorities (Victorian Government, 1997: 17). Its potential influence was thus extremely significant, and in fact the Auditor-General had often been highly critical of the impact of various market-based reforms that the Kennett government had already made to the provision of government services. For example, one of his recent reports had revealed that much of the money government had spent on 'marketing and promotion' of the delivery of services was essentially being spent on party-political advertising – AUS$130 million of taxpayers' funds. He had also recently released a damning report on child protection services (Richards, 1996). Much of his then current work program (Victorian Government, 1997: 104) focused on aspects of government policy and service provision which had already been subjected to reforms like privatization, contracting-out or compulsory competitive tendering (for example, public transport, emergency services, utilities, certain aspects of health funding, high school education). The quality of, and equitable access to, these services did not always emerge with a glowing report from the Auditor-General’s audit (Pinkney, 1997). It was therefore somewhat ironic that the Auditor-General himself was now threatened with the imposition of analogous reforms.

10. It is not the case that competition between regulators necessarily always dilutes effective oversight. For example, third party inspections of industry for compliance with the US Clean Air Act fostered greater efficiency, greater internalization of the costs of regulation and accidents to firms, and more socially cost effective accident prevention (Jweeping, 1996). However this model of regulation required complex roles for insurers as well as for firms and government, thus intensifying the rule-bound nature of the enterprise, a result directly at odds with the aim of the meta-regulation regime.
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