



the Australia and New Zealand  
School of Government

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**The Role of The Privacy  
Regulator in an Era of  
Transparency**

**by**

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## 1. Introduction

Thank you.

My intention today is to focus upon how to accomplish effective performance as a regulator in the area of privacy.

My remarks will draw upon the lessons I learned about the art of regulation in my years as Chairman of Australia's consumer and competition regulatory body, the ACCC.

The core contention I would like to put to you today is that because privacy protection is at present an unsettled area of law, it is the regulator's responsibility to actively engage in policy formation and the development of standards of enforcement. It is my observation that the *value* a privacy regulator can deliver to the public is directly tied to this active engagement.

I shall run through some justifications for this position, focusing on the value of publicity and engagement as a tool for education, enforcement and accountability.

I will also put forward an argument for regulators committing to vigorous enforcement of the law. This may sound an obvious point. But as I shall explain later on in my presentation, there is a surprising reluctance on behalf of many regulatory agencies to seriously enforce the laws parliaments have established.

I will finish up with some discussion of why publicity is an important part of enforcement activities and why there are pitfalls in relying too heavily upon voluntary compliance.

## **2. Privacy Protection and Delivering 'Public Value'**

Understanding and defining 'public value' is never a straightforward exercise for regulators. More often than not regulators must work under legislation which leaves substantial ambiguity in the areas of implementation and enforcement. Parliaments rarely anticipate all the possible circumstances and applications of the laws they pass. This is almost always the case with reasonably new, unsettled laws. Privacy protection laws in most countries fall into this category.

In most countries, there general agreement on the right to privacy which flows into some notion of the right to protection of privacy. But neither right is absolute. There are limits – no one wants unnecessary intervention in the functioning of daily life and the functioning of the marketplace.

This means that privacy protection must go about their role knowing that to a greater or lesser degree what constitutes public value or 'good performance' in privacy protection is a contested notion. They must be conscious that there is not necessarily widespread understanding or agreement about ultimate goals and the appropriate scope of the regulator's authority.

With time, this ambiguity can often diminish. Norms emerge and stakeholders come to terms with the issues at stake. Regulators of privacy protection in the future will have a clearer view of privacy protection's public 'value' and will operate accordingly. But, in the next few years, this uncertainty is a feature of the landscape.

Contributing to this uncertainty is the presence in this area of rapid technological change.

I have entitled this paper *The Privacy Regulators Role in an Era of Transparency* because to my mind this is a good summary of the world we are in now.

This is a transparent era in the sense of biological clarity: science is revealing more and more about the character of our own genetic make-up and that of physical world around us.

It is also a transparent era in the sense of access to information. Communications and data storage technologies have lowered the barriers to sharing of information. These days, once a fact is discovered and recorded, it can be distributed across the globe to millions of people at almost zero marginal cost.

Until recently scientific and technological limits meant that most private information remained private or hidden unless a special effort was made to make it public. The 'default' outcome was privacy protection.

This 'default' protection is no longer universally present. More detailed information about more things is available than in previous eras and the volume. This cost of distributing this information is very low. The new 'default' position is increasingly

becoming widespread sharing of private information, with protection occurring only if we elect to obtain it.

Privacy regulators fit into the picture at the point where individuals and organizations confront the decision of whether or not to actively seek privacy protection.

Judgments about what constitutes appropriate regulatory intervention will very clearly shift over time as the technological environment shifts. Constant technological change means that 'best practice' for privacy regulators must change too. What is an effective approach this month, may well be redundant due to technological changes only one month later.

So, in summary, the unsettled nature of privacy protection laws and the shifting technological environment around privacy, mean that regulators cannot follow a predetermined path to deliver public value; the parameters aren't set.

Given this uncertain outlook, we must ask ourselves, what is the appropriate course of action?

I think a good way of answering this question is to use the framework that Mark Moore of Harvard University calls the 'authorizing environment'. The authorizing environment refers to all the sources of authority with which the regulator acts. It is customary to divide these sources into *Formal* sources of authority and *Informal* sources of authority.

The *Formal* sources of authority are the laws and regulations which establish the powers of the regulator. The *Informal* sources of authority are the wider set of

influences which shape the regulator's capacity to exercise power. These are factors such as interest groups in business or civil society, the media, and the political leaders with responsibility for the space and so on.

In an unsettled area of law like privacy protection, a regulator has substantial discretion in the implementation and enforcement of the dictates of the Formal authorizing environment.

In the privacy protection area, a regulator also has the capacity to shape the character of the Informal authorizing environment by engaging with government, interest groups and the media to test and establish standards of compliance and to assist in development of more detailed policy.

Some may suggest that a regulator should simply enforce the law and no more; they should carry out the will of the parliament.

I would argue however that this is not sufficient, especially in circumstances where there is significant uncertainty like privacy protection. My view is that active engagement in shaping the authorizing environment is itself delivers public value and is appropriate path for a regulator in an area like privacy protection to take.

There are several arguments underpinning this contention.

One – Privacy protection is a constantly shifting area due to changes in the technological landscape. New information is being compiled in new ways. New methods of distributing and storing information are being developed at a rapid rate.

Regulators are ideally placed to keep abreast of these changes and to provide the public and policy makers with advice.

Two – An active role in policy formation is valuable because of the complexity of the issue of privacy protection. With its technological sophistication, diverse array of stakeholders, rapid rate of change and political sensitivity, privacy is a regulatory area with very detailed and difficult challenges. Again, no one is better placed to communicate these issues and offer advice and recommendations than the regulator and it is in my view incumbent on them to take this public education role seriously.

Three – Finally, there is clear value in a regulator engaging with public debates in order to balance the bias from special interest lobby groups which will inevitably be active in policy formation. Private information is a valuable commodity. Business has an interest in obtaining and controlling this information. This can occur in a perfectly legitimate way but there is room for abuse of privacy rights. A privacy regulator can provide an objective, disinterested perspective to political leaders and to the press as these issues are confronted and worked through.

It could be argued that my recommendations open up the possibility of the regulator over-extending its authority and empire-building in a way that is contrary to the public interest.

My sense is that if engagement in policy formation occurs in a transparent way, which gives a run to all perspectives on issues, there is little danger in this occurring.

Another counter argument could be that I'm advocating that regulators step into a role best performed by law reform commissions and the policy departments of the public service. In other words, policy formation is beyond the regulator's scope. My response to this is that these bodies are often not given terms of reference wide enough to encompass all the issues. They can also be somewhat isolated from the realities of implementation and enforcement. Because regulatory agencies are intimately involved in these areas on a daily basis, in my view they are very well placed to make a useful and balanced contribution.

### **3. The Importance of Vigorous Enforcement of the Law**

My second contention observation about the role privacy regulator concerns the importance of rigorously enforcing the law.

This may seem self-evident. However it is common for legislators to pass 'symbolic' laws. In reaction to developments in society, emerging pressure points and influence from lobby groups, parliaments do sometimes pass laws to ensure that they are seen to be 'getting something done'. It is surprisingly common how often they are subsequently prepared to allow these laws to be sidelined and not vigorously enforced. The influence of lobby groups or budgets constraints are major factors here. Politicians feel more comfortable if these laws are not enforced too strongly. Regulators are often happy to comply with these wishes because it can be messy and painful to introduce new standards, to apply new rules and enforcement.

It is my view that a regulator should not concede to this.

Strong enforcement has several flow on effects and should be pursued particularly when:

1. The law needs to be tested, and limits and standards need to be set. This is achieved most efficiently via the processes of enforcement.
2. There are serious breaches of the law occurring.
3. Where there is serious community harm occurring
4. Where a case can have useful educative value. A well chosen prosecution can illustrate to stakeholders very clearly what constitutes appropriate compliance.

It can be countered that over zealous, bloody-minded enforcement of unsettled, embryonic laws is unwise and costly. A more circumspect approach could be argued to be more appropriate.

My sense in the case of privacy is the will of parliaments to institute legislative mechanisms protecting private information should be backed up with robust enforcement. The mechanisms of enforcement may need testing and to be altered over time. But this can only be achieved through active enforcement.

#### **4. Different Approaches to Enforcement: Employing Publicity vs the 'Behind Closed Doors' Approach**

It is frequently suggested that in new areas of regulation, it is best to rely on voluntary compliance. Working closely with the groups who are subject to the regulation is the most efficient way to develop processes of compliance necessary to achieve the objectives of the relevant legislation.

It is my view that good regulatory practice is transparent and. To this end, I recommend communicating implantation and enforcement activities to the public via the media. The reasons for this approach are:

##### *One – Public Education.*

Publicity about privacy protection regulation will encourage people to learn about their rights and their obligations. Hopefully this will contribute to the building of a constituency for the laws and regulations on privacy protection. Members of the public who know the law will in my experience act to promote adherence to it in their communities and in their workplaces.

##### *Two – Publicity Assists Regulators to be Accountable*

Publicity is a means by which a regulator can give account of itself to parliament and the public. A privacy regulator needs to recognize that it been given important public resources – a budget and also the legal power to use the resources of the state to ensure compliance. This authority should be utilized in an accountable fashion. Annual reports and testimony before parliamentary committees provide a

limited form of accountability. But by using publicity and communicating with the public via the media such things as examples of enforcement and cases of non-compliance is a direct means of showing what is being achieved with public resources.

### *Three – Publicity and the Demonstration Effect*

Another motivation driving compliance with laws is the knowledge that law breakers will be caught and punished. The value of this effect in my experience, especially in the competitive world of business, cannot be over emphasized.

It would be wrong to suggest that direct consultation with interest groups is never an appropriate strategy to promote compliance. There is certainly merit to this view. One of the regulator's strongest allies can be a professional association or other leadership group which actively encourages respect for the law and the voluntary development of complying processes and procedures. By engaging in regular contact with these interest groups, a regulator in my experience can achieve excellent results with minimal expenditure of public resources.

But this approach should *compliment* not *replace* rigorous enforcement.