
BUILDING REGULATORY CAPACITY IN ENVIRONMENTAL AGENCIES: THROUGH TAILORED TRAINING

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SUMMARY

The Australian Government's Department of the Environment, Water, Heritage and the Arts is an emerging regulator. Upon commencement of its cornerstone legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Department of the Environment, Water, Heritage and the Arts inherited significant regulatory powers.² Concurrent to this was the groundswell from other local, State and Federal environmental regulators, all of which had identified a need for greater coordination and interoperability between co-regulators and partner agencies.

Arising out of this amalgam is a career path in its own right, which now includes a professional association of like-minded entities together with a hierarchy of nationally accredited vocational qualifications³ that have been customized for the environmental compliance professional⁴. These vocational qualifications articulate fully into a similarly customised post graduate qualification.

1 INTRODUCTION

1.1 The Department

Department of the Environment, Water, Heritage and the Arts is the Australian Government's (Federal level) premier environmental regulator. It has some 2500 staff, and while most of these are based in the nation's capital, Canberra, some are geographically dispersed in locations ranging from the Northern Territory through to Tasmania and even as far a field as Antarctica.

The Department administers some 17 pieces of environmental legislation. These relate to both terrestrial and marine environments, with the marine environment stretching to the 200 nautical mile Exclusive Economic Zone. Additionally Department of the Environment, Water, Heritage and the Arts administers and is responsible for numerous International Treaties and Conventions which the Australian Government is a signatory to.

The Department's cornerstone piece of legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Its focus relates to environmental issues which are of national environmental significance. This legislation is complimentary to and does not override Local, State, or Territory government environmental laws.⁵

1.2 The Network

The Australian Environmental Law Enforcement and Regulators Network is a network of environmental regulatory agencies. Collectively these agencies:

“...are responsible for the management of natural resources or the protection of the environment. It aims to build relationships between jurisdictions to facilitate the sharing of information and to improve the regulatory compliance capacity of member agencies. It also seeks to develop national standards for training and best practice in environmental regulation.”⁶

In November 2003 Australian Environmental Law Enforcement and Regulators Network consisted of 12 foundation member agencies. In just over four years this has grown to 35 member agencies. This, in combination with Department of the Environment, Water, Heritage and the Arts' expanding regulatory role, is evidence of the groundswell of demand for the building of capacity, in respect to environmental regulation in Australia. In relation to capacity, that is capacity which can be; built quickly, is robust and most importantly has utility across jurisdictions, agencies, commodities and sectors.

2 CHALLENGES FACING A NEW REGULATOR

In building capacity, any new regulator is typically required to address issues such as staff training, compliance culture, corporate knowledge, business continuity, and establishing credibility with co-regulators and the regulated community.

In addition to these generic challenges, with it, the environmental regulatory regime brings unique capacity building issues. In Department of the Environment, Water, Heritage and the Arts' experience this has included but is not limited to:

- An ever increasing environmental expectation by society.⁷
- A political imperative to address environmental concerns.⁸
- The requirement for a blend of traditional mainstream law enforcement capabilities coupled with significant scientific and natural resource expertise.⁹
- A requirement for internal cultural realignment from one with a policy, program and public administration focus, to one which is akin to more of an adversarial and confrontational enforcement role. The latter following the more traditional 'command and control' model of regulation.¹⁰

- The newness of our cornerstone legislation. Arising from this aspect is the fact that most compliance and enforcement activities addressed are firsts in their own right. Further there have been few matters legally tested; therefore as yet there are only a few persuasive and even less binding legal precedents which Department of the Environment, Water, Heritage and the Arts can use as a foundation.
- A steep corporate learning curve, exacerbated by the fact that it is a significant deviation from what was core business. Compliance and enforcement, has gone from 'no business, to new business, to core businesses'¹¹ in as little as four years.
- There are substantial risks associated for the Department and staff when their operating environment has been altered so dramatically.
- A lack of documented policies, protocols and standard operating procedures.
- No off the shelf training package customised for environmental regulation.
- As a burgeoning industry, the demand for staff with expertise, has meant that the Department must be a competitive employer (referred to as an 'employer of choice' by some) having to address issues of staff retention and facilitating professional and career development.
- Around this time there were concurrent pressures within the federal level for Australian Government regulatory agencies to tighten up issues surrounding case management and managing/supervising¹² *authorised officers*¹³ who have access to coercive powers,¹⁴ including the training of those staff, together with issues surrounding developing of an appropriate compliance culture.¹⁵

3 TRAINING AS A KEY AREA OF CAPACITY BUILDING: THE AUSTRALIAN EXPERIENCE

3.1 The Need

Once Department of the Environment, Water, Heritage and the Arts' increased role as a regulator became apparent, training was quickly identified as a major enabling factor in building of regulatory capacity. In the period between 2005 and 2007, the organisational focus with respect to training focused on the development and implementation of a suitable training regime for its authorised officers.

It quickly became apparent, however, that training was more than merely the transferral of information to individuals to arm them with the knowledge and skills they need to perform their regulatory functions. In the situation faced by Department of the Environment, Water, Heritage and the Arts – that of an organisation required to build capacity *quickly* in an *esoteric* discipline – the issue of training brought with it risks and opportunities beyond the norm.

The Department of the Environment, Water, Heritage and the Arts experience is that the success or otherwise of training for authorised officers can influence organisational success in numerous dimensions:

- **Individual Competence**, which is influenced by the rigour and utility of the training.
- **Group and Executive Competence** arising from the development of corporate knowledge, which is influenced by the scale, utility and consistency of the training.
- **Organisational Competence** associated with the development of a suitable culture,¹⁶ which is influenced by the quality, immediate relevance and delivery style of the training, and, in particular, the attitudes inculcated by the training staff.
- **Long-Term Capacity Building** which is influenced by the development of a supported career path for compliance and enforcement professionals which, in turn, affects attraction and retention in a competitive and increasingly specialised labour market.¹⁷

3.2 Addressing the Need

From the outset, any training developed had to conform with the national training framework¹⁸ so as to constitute nationally recognised (and accredited) vocational training. In essence, this meant it had to conform to a hierarchy of training levels that start with the foundation or entry level (Certificate) and migrate through to supervisor (Diploma) and executive (Advanced Diploma) levels.¹⁹

Within the context of the framework described above, whilst the initial preference of the Australian Environmental Law Enforcement and Regulators Network National Committee was to adopt the Diploma-level as its baseline, after consideration, given the needs of the entire network, it was felt that the Certificate-level qualification was more suitable. The common capacity-building problems faced by a number of the member agencies suggested that there was merit adopting a 'baby steps' or 'building block' approach to training. This approach was believed to compliment the change management initiatives directed towards building an appropriate culture of compliance and enforcement.

When it came to actually implementing the Certificate-level training, it became apparent that there was a dearth of suitable off-the-shelf training packages. The long-standing default Government certificate course that related to regulation was based on fraud control. This clearly offered little of relevance to non-fraud investigations, which had recently led to the development of a more generic (non-fraud) Government investigator qualification. While this was a significance

advance, it still failed to meet the needs of Department of the Environment, Water, Heritage and the Arts and other Australian Environmental Law Enforcement and Regulators Network agencies involved in environmental regulation. A uniquely tailored Certificate-level training course was required.

3.3 Managing the Tensions

Department of the Environment, Water, Heritage and the Arts, in consultation with Australian Environmental Law Enforcement and Regulators Network, primarily through the training sub-committee, coalesced cross-agency opinion into unified support for the Certificate course. Having done so, the training sub-committee took a “pick and mix” approach to selecting core and elective modules in sufficient quantity and proportion to satisfy the requirement for National accreditation. The committee then provided detailed and specific information to inform the course content.²⁰

Having developed the Certificate, Department of the Environment, Water, Heritage and the Arts trialed the course internally and following refinement, the product (the training course itself) was released to Australian Environmental Law Enforcement and Regulators Network member agencies, who undertook further local refinement²¹ based on factors such as agency role, jurisdiction, commodity, industry and sector. Agencies operated on this basis for several years. During this period (2006-07), whilst agencies ran their own courses, external participation rates from other member agencies continued to increase. The cross fertilisation of experiences and shared problems and the growing interoperability of environmental regulators prompted reconsideration of course content and structure to perhaps reflect a more harmonised version.

As part of the ongoing commitment to professional development the Diploma course was developed in a similar fashion to the Certificate course. The first of the Diploma courses was held in November 2007 and included participants from all three levels of Government and from each Australian jurisdiction. The level of participation coupled with course feedback reinforced the need to refine and harmonise the Certificate level course.

This assisted the environmental regulatory community to map out a career path for the environmental compliance and enforcement professional. This was made possible by balancing and working through the naturally occurring tensions between the need for the training to be customised for the member agency, and the need for it to conform to the broader requirements of an external accrediting body. This situation is distinguishable from that encountered in traditional post-graduate professional qualifications which are university-based.

The advances in professionalising the role of the environmental compliance and enforcement practitioner have been seized upon by at least one Australian

university. This university has recently developed the first post-graduate (university) qualification for environmental compliance and enforcement, which will be available in the latter part of 2008.

The benefit of this is twofold, in that, in addition to professionalising the workforce, it enhances staff personal development by allowing them to articulate purely *vocational* qualifications into *post-graduate* qualifications. This further reinforces the credibility and standing of the individual and the agency within the regulated community.

4 CONCLUSIONS

New regulators face a number of challenges when seeking to build capacity. It has been the Australian experience that environmental regulators face additional and unique challenges. These include; the ever-increasing profile of environmental issues, the speed at which capacity must be built, the esoteric nature of environmental regulation, and the relatively small pool of existing specialist knowledge from which to draw.

The training of environmental regulators – and particularly *environmental law enforcers* (authorised officers) has been found to be a key factor in organisational success. Indeed, it forms part of the critical path to becoming a competent, capable and credible regulator.

By failing to address training, or by using training that is not tailored for the target audience, agencies fail to inject the appropriate knowledge into the individual and they fail to up-skill groups. As a result the organisation itself fails to grow and restricts its ability to undertake its new business.

In addition, to the inherent risks associated with government compliance and enforcement work, failing to implement suitable training introduces higher order (strategic) risks including issues relating to maintenance of corporate knowledge and the retention of an engaged and motivated workforce.

Conversely, the implementation of a training regime, which includes an appropriate level of customisation, a hierarchy of nationally-accredited qualifications and therefore an identifiable and marketable career path, has proven to be a cornerstone of our success. This is highlighted by the fact that ‘training has without a doubt been the most significant factor influencing agencies to join the Australian Environmental Law Enforcement and Regulators Network network.’²²

5 REFERENCES

¹ The writer acknowledges the assistance of the following in the preparation of this paper: Mr. Neville Matthew, Assistant Secretary, Compliance and Enforcement Branch and Mr. Michael Tonge, Senior Policy Officer, Compliance Support Unit.

² Powers similar to those addressed by Professor Macrory in his analysis of the UK experience of sanctioning regimes; see Macrory, R.B, *Regulatory Justice: Making Sanctions Effective – Final Report*, Better Regulation Executive, London, 2006.

³ Nationally accredited vocational qualifications in Australia relevant to this paper are the Certificate IV, Diploma and Advanced Diploma. For further information see <http://www.ntis.gov.au/>.

⁴ Covering areas such as: monitoring and audit, compliance and investigations.

⁵ See section 10 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) at: <http://www.frlri.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/9A8645F9CEFE8EFBCA25730400834D6B?OpenDocument>.

⁶ For further information see <http://www.aelert.com.au/> homepage, welcome section.

⁷ See, for example, Harman, J., *The Relationship Between Good Governance and Environmental Compliance and Enforcement*, INECE 7th Conference Proceedings, p5.

⁸ News Article: *Australia Should Crack Down on Breaches of Green Laws*: OECD, see <http://au.news.yahoo.com/080319/21/1678f.html>.

⁹ As manifest in the tension between the need to ensure compliance with the regulatory framework and the need to provide enough flexibility to deliver outcomes. See Australian Public Service Commission (APSC) (2007) *Agency Health: Monitoring Agency Health and Improving Performance*, Canberra, p22.

¹⁰ See Gunningham, N, *Regulation: Enforcement and Compliance, Beyond Compliance: Next Generation Environmental Regulation*, Canberra, Australian Institute of Criminology. Retrieved 27 March 2008 from http://www.aic.gov.au/publications/rpp/57/08_sec4.html.

¹¹ Sullivan, Greg. Manager, Compliance Coordination Unit, Queensland Department of Natural Resources and Mines, personal comment, November 24 2006.

¹² Adequate controls on the exercise of coercive powers is one of the 10 lessons for public administration as detailed by Professor McMillan in his review of referred immigration cases. See McMillan J, *Lessons for Public Administration: The Ombudsman Investigation of Referred Immigration Cases*, *Public Administration Today*, Issue 12: July – September 2007, p37.

¹³ Authorised Officers refers to persons authorised (whether as Inspectors, Wardens or Rangers or similar) pursuant to Commonwealth legislation.

¹⁴ Coercive powers under the EPBC Act, 1999 include; arrest, monitoring and search warrants, and the power to compel persons to answer questions and provide information and material.

¹⁵ 'Good processes and procedures need to be complemented with a strong organisational culture and value set.' See Metcalf A, 2007 *Immigration Referred Cases: Lessons for Government*, *Public Administration Today*, Issue 12: July – September 2007, p40.

¹⁶ 'An agency's culture needs to be effectively aligned to its outcomes and business ... the culture in a regulatory and/or inspection agency, for example, will differ from the culture of an agency with a strong policy development focus.' See APSC (2007), *Agency Health: Monitoring Agency Health and Improving Performance*, Canberra, p20.

¹⁷ As evidenced by the difficulty regulators have reported in recruiting sufficient qualified staff. See for example Hampton, P (2005) *Reducing Administrative Burdens: Effective Inspection and Enforcement*, HM Treasury, Norwich, UK.

¹⁸ This is known as the Australian Quality Training Framework (AQTF).

¹⁹ Under the AQTF, all of these qualifications articulate upwards to a post-graduate (university-level) qualification.

²⁰ This included legislation, policy, industry and sector inputs.

²¹ The benefits of localised refinement are consistent with and have been incorporated into the development of other national regulators training manuals. See for example United States, Environment Protection Agency, *Conducting Environmental Compliance Inspections*, Inspectors Field Manual International Edition. Preface section, p. ii, ¶ 3.

²² Sullivan, Greg. Secretariat, AELERT National Committee, personal comment, November 26 2007.

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