



# **Environment Law, Regulation, Governance: Shifting Architectures**

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# Explaining Shifting Architectures

- How has the architecture of environmental law, regulation and governance changed?
- Why have these changes taken place and what are their consequences
- from law, to state-centered regulation to polycentric governance?
- what sorts of architectures work and why?
- Implications for theory and policy

# A structure

- Roles of the state
- Roles of business
- Roles of civil society /NGOs
- An Integrated approach

# The State: First Generation Environmental Law and Regulation

- The Beginning: 1970 and beyond
- Characterised by direct ‘command and control’ regulation
- Focus on large point source polluters and ‘brown’ issues
- Focus on ‘end of pipe’
- Common approach in N America, Western Europe and Australasia but differential enforcement
- Did it work?



# Second Generation Environmental Regulation: A Return to Markets?

- The Shift to Neo-Liberalism
- Increase focus on economic instruments
- Voluntary instruments, negotiated Agreements and partnerships
- Industry self-regulation and co-regulation
- So less law, and more light handed regulation
- Did it work?

# Reinventing Environmental

# Regulation: A Transitional Strategy

- Light handed regulation
- Aim to nurture a cooperative relationship with business built on trust and reciprocity (Yorktown)
- Tacit assumption of ‘win-win’ and the desirability of going ‘beyond compliance’
- Emphasis on environmental management systems
- Incorporates pollution prevention, internal compliance auditing, and compliance assurance
- Engagement with third parties (communities etc)
- Collaboration rather than conflict

# Challenges to State Regulation:

1990s and beyond

- Increasingly complexity of the environmental challenge
- Responses: meta regulation, collaborative governance, engaging with SMEs
- Shift from dyadic approach to solutions involving business and civil society

# A Context: Shifting Regulatory Architecture

- The contracting state
- Increasing engagement of communities/civil society
- Increasing involvement of business/commercial third parties



# Civil Society

- organisations of civil society set standards for business behaviour
- Mechanisms include consumer boycotts, certification programs, partnerships and direct action
- State role to empower civil society eg the Toxic Release Inventory



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# Business

- Part of the problem or part of the solution?
- Business Case for Environment Responsibility
  - Environment protection as Risk Management
  - Environment Protection as Business Opportunity
  - CSR and going “Beyond compliance”
- Collective Initiatives: Responsible Care and INPO
- Protecting Social and Reputation Capital- TRI ,  
NIMBY pulp

# Bringing It All Together:

## 1. Smart Regulation

- Market failure/government failure
- A diversity of “next generation” instruments, but how do we select between them?
- One size does not fit all: eg size and sector matter

# Smart Regulation

- Solutions require:
  - broader range of strategies,
  - tailored to broader range of motivations,
  - harnessing broader range of social actors
- Recognises roles of ISO, supply-chain pressure, commercial institutions, financial markets, peer and NGO pressure
- ‘steering not rowing’: harnessing capacities of markets, civil society and other institutions



# Optimal Mixes Involve

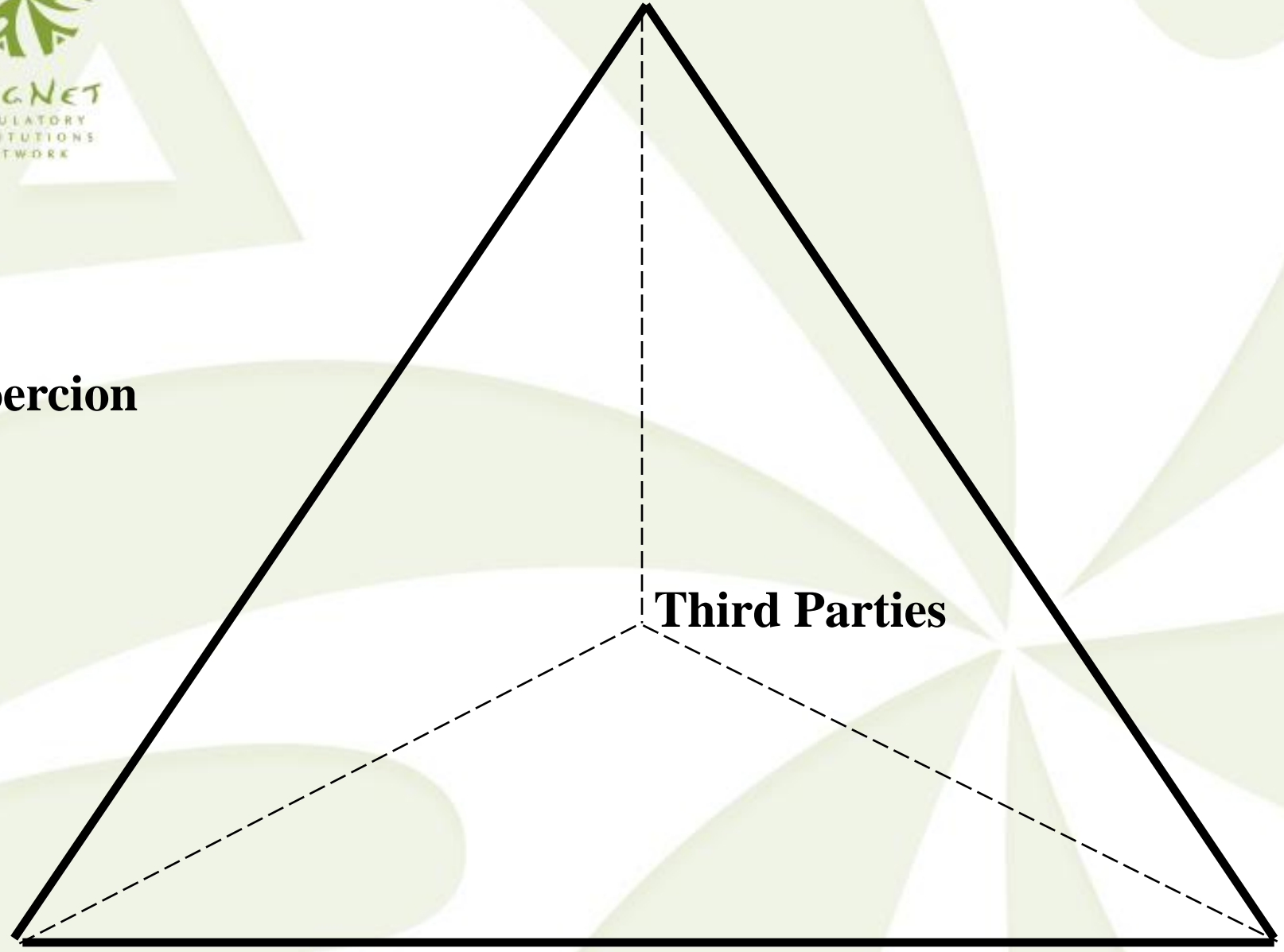
- build on strengths and compensate for weaknesses of individual instruments
- build on advantages of engaging broader range of parties
- matching tools with particular problem
- with the parties best capable of implementing them
- with each other

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**Coercion**



**Third Parties**

**L**

**Government**

**Business**

# Environment Improvement Plans:

- Public commitment by a company to enhance its environmental performance
- negotiated with the local community, local government, EPA and others
- clear time-lines for completion of improvements
- details of ongoing monitoring
- Tripartism, disclosure, consultation.

# SMEs: Thinking Laterally

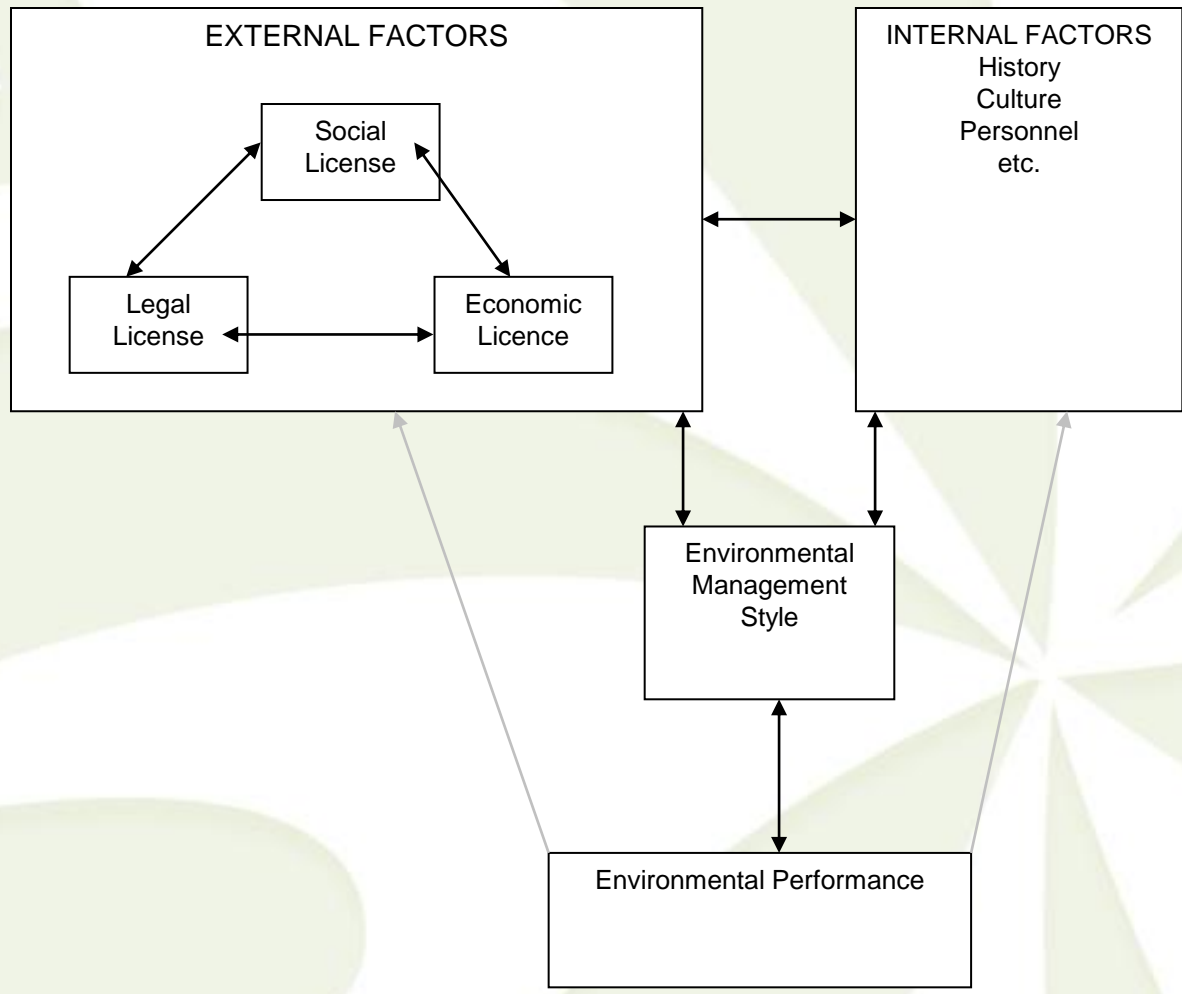
- Buyer Supplier Relationships
  - Powerful source of leverage over SMEs
- The Role of Surrogate Regulators:
  - MTA as de facto regulator
- Self-audit and self-management

## Bringing It All Together: (2) Explaining Corporate Environmental Behaviour

- Views businesses as constrained by a multi-faceted ‘license to operate’
- Corporate behaviour explained by interactions between regulatory, social and economic licenses
  - terms of legal and social licence commonly mutually reinforcing
  - terms of economic and regulatory licenses commonly in conflict but regulatory trumps the economic licence
- The importance of Social License: underpinned by Informational regulation, and empowering NGOs and communities



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# Bringing it all together (3) Meta Regulation

- Recognises the limitations of the state to deal with complex environmental issues
- Focus on procedures rather than prescribing behaviour
- State shifts to meta-regulation and meta-risk management
  - Government monitoring of self-monitoring, or the regulation of self-regulation
  - To monitor and seek to re-make the risk management systems of regulatees
  - Three Mile Island: from rule-following automatons to strategic thinkers
  - Piper Alpha and the 'safety case' for North Sea Oil

# Taking Stock

- Traditional regulation has largely been rejected in favour of ‘light handed’ regulation
- Neo-liberal mechanisms (voluntarism, self regulation, partnerships etc has not worked well)
- Contemporary environmental challenges are increasingly complex and do not lend themselves to direct regulation
- Are there alternative strategies better able to address such problems?



Yes: Smart Regulation, License Pressures,  
Meta Regulation etc

But such innovative strategies still assume

- that the key actors in regulatory governance are state actors
- That the key instruments are underpinned by state law and hierarchy

# A post-regulatory state?

- Is it arguable that:
  - (i) The capacity of law to exert control is limited
  - (ii) Control based on law is marginal to contemporary processes of ordering
  - (iii) State law is only likely to be effective when linked to other ordering processes
  - (iv) From regulation to governance?



# The New Environmental Governance

Involves collaboration between a diversity of private, public and non-government stakeholders who, acting together towards commonly agreed (or mutually negotiated) goals, hope to achieve far more collectively than individually

# Regional Natural Resource Management (NRM) in Australia

- Recognition that NRM best addressed at ecosystem level
- Devolution of NRM decision-making to regional level (56 regional NRM bodies)- a ‘fourth sphere of governance’
- Regional bodies: partnership involving both government and non-government actors (community, rural and other stakeholders)
  - must develop a regional plan and investment strategy
  - Implement these under a collaborative partnership-based decision-making process
  - Subject to performance indicators and other controls imposed by Federal Government
  - Federal Government tight control over purse strings and strict accountability mechanisms

# The New Regional NRM

- Assumes that the state has only very limited ability to achieve its NRM objectives directly
- enlists non-state actors with local capacities and local knowledge
- involves a combination of government and non-state actors
- Multi-party, multi-level and multi-faceted
- Formal democratic accountability at top level and deliberative democracy at the regional level

# The New Collaborative Environmental Governance

- Participatory dialogue
  - Devolved decision-making
  - Flexibility
  - Inclusiveness
  - Transparency
  - Institutionalised consensus-building
- 
- Cf EU Open Method of Co-Ordination/Water Framework Directive

# Different architectures invoke different policy prescriptions

- Strengthen internal reflection and self-control (Meta Regulation)
- Use mix of instruments and harness third parties/points of leverage (Smart Regulation)
- Empower the institutions of civil society to make corporations more accountable (Civil Regulation)
- Empower local communities to engage in ‘on ground’ decision-making subject to central government oversight (collaborative governance)

# Different architectures are appropriate to different contexts

- Large reputation sensitive companies vs SMEs
- Integrated catchment management
- Major Hazard Facilities
- Diffuse source pollution



# Markets, Hierarchies, Networks/collaboration

- Hierarchy: is the state being decentred or simply shifting its roles?
- Markets? Have these moved from periphery to centre stage?
- Networks/collaboration?
- The Roles of Hybrids

# The State: From Law to Regulation to Governance?

- The state played different roles in different initiatives and with different degrees of success but remains central not peripheral
- Key roles of the state: (i) definitional guidance (ii) incentives to participate (iii) enforcement capability

# Enforcement under Neo-liberalism

- Effectiveness, efficiency, equity and political acceptability
- the Hampton Review: “Reducing Regulatory Burdens”
  - Hampton also urges a greater focus on advice and education and less emphasis on inspections and enforcement
  - Thus no inspection should take place unless there is a clearly demonstrated need
- Better Regulation Task Force report: “Regulation-Less is More: Reducing Burdens, Improving Outcomes”.

If a year and a half ago the FSA had wanted higher capital adequacy, more information on liquidity – had said that it was worried about the business models of Northern Rock – and had wanted to ask questions about remuneration, it would have been strongly criticised for harming the competitiveness of the City of London, for red tape, and for over-regulation ...over-regulation and red tape has been used as a polemical bludgeon. We have probably been over-deferential to that rhetoric”

Lord Adair Turner, FSA, 17 Oct 2008.

# A cautionary note

- Where should scarce regulatory resources be deployed- to leaders or laggards?
- How far will business go ‘beyond compliance’
- Locking in continuous improvement
- The importance of corporate commitment