Regulating to the Lowest Common Denominator: Is it Appropriate?

Bruce G. Matthews, Real Estate Council of Ontario

Overview

• Right Touch Regulation - H. Cayton, PSA
• Pressures on the Regulator
• Perspectives from Practitioners
• The Time Factor
• Standards of Qualification vs. Standards of Practice
• Politics and Public Policy
• Promoting Excellence

"These new regulations will fundamentally change the way we get around them."

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Who is in the Audience?
Select the group to which you belong:

A: Staff member of a regulatory body
B: Board/Council member of a reg. body
C: Government employee (non-Board)
D: Service provider to a regulatory body
E: Other

Why Do We Regulate?
• Regulation is about risk management and risk mitigation
• Risks to individuals and risk to the “public welfare” and the “public interest”
• “Right Touch Regulation”

Right Touch Regulation
“Right touch regulation is based on a proper evaluation of risk, is proportionate and outcome focused; it creates a framework in which professionalism can flourish and organizations can be excellent. Excellence is the consistent performance of good practice combined with continuous improvement.”

- Harry Cayton, PSA(UK)
Right Touch Regulation

- Identify the problem first
- Assess and quantify the risks
- Focus on outcomes
- Use regulation only when necessary
- Keep it simple
- Be mindful of unintended consequences
- Review and be responsive to change

The Right Touch Process

- Identify the problem
  - Does it represent a risk?

- Assess the risks
  - What are they and how significant are they?
  - Are they being managed now?

The Right Touch Process

- Assess the scope of the problem
  - Local versus universal

- Is regulation an appropriate solution?

- Assess the potential for unintended consequences
  - Does the solution create its own risks?
Right Touch Principles

- Proportionate
- Targeted
- Transparent
- Accountable
- Fair
- Agile

Laws of Right Touch Regulation

1. Apply the minimum regulatory force necessary to achieve the desired outcome
2. Use regulation as a last resort
3. A list is not a solution

Pressures on the Regulator

- Accessibility versus public protection
- Perceptions of artificial barriers
- Fairness Commissioners / Oversight Authorities
- Accommodation requirements (e.g., ADA)
- Labour mobility agreements
- Mutual recognition agreements
Your Perspectives

I’m feeling the most pressure as a result of:

A: Oversight authorities
B: Accommodation requirements
C: Labour mobility agreements
D: Media scrutiny
E: Other

Perspectives from Practitioners

• Substandard performance by one practitioner reflects poorly on all practitioners
  - Standards need to be raised to weed out “bottom feeders”
  - Regulators have a role in safeguarding and maintaining the reputation of the profession

Perspectives from Practitioners

• I am only interested in meeting the standards set by the regulator
  - I want to be in compliance, but nothing more
  - Regulation is an imposition and constraint on my business/practice
Your Perspectives

Most regulated practitioners believe that regulatory standards of qualification and/or practice are set too low.

A: Agree
B: Disagree

Your Perspectives

Most regulated practitioners understand the need for regulation.

A: Agree
B: Disagree

The Time Factor

- A newly minted practitioner won’t have the same level of knowledge, skill or judgment as someone who has been practicing for 5, 10 or 20+ years.
- What are the implications for a regulator?
  - Is there a problem to be solved?
  - Are their risks?
  - What about CE / CPD?
Your Perspectives

Should an experienced practitioner be held to a higher standard than a newly-licensed practitioner?

A: Yes
B: No

Standards: Qualif. vs Practice

• Both involve issues of:
  - Knowledge ↔ Education
  - Skill ↔ Training
  - Judgment ↔ Experience

• Both should be established in accordance with Right Touch principles
  - Proportionate to the identified risk
  - Targeted, fair, agile, etc.

Standards: Qualif. vs Practice

• Standards of Qualification
  - Entry to Practice - gatekeeper function
  - Snapshot at a point in time

• Standards of Practice
  - Ongoing expectations - shepherd function
  - Enforce against sub-standard practice
Standards: Qualif. vs Practice

- Typically managed separately within a regulatory body
  - Qualification: Admissions/Registration
  - Practice: Inspection/Complaints/Discipline

- Are the two things independent?
  - Are they fundamentally the same?

Your Perspectives

Is it possible to raise (or lower) the standards of qualification without impacting the standards of practice?

A: Yes
B: No

Politics and Public Policy

- Regulators are accountable to government
- Government created the regulatory framework
- Government is ultimately accountable for the standards
Politics and Public Policy

• Issues which impact government’s interest in the setting of standards:
  - Labour mobility
  - High-profile incidents / accidents
  - Perspectives on accommodations / rights
  - Lobbying by associations / interest groups
• Impact may be direct (legislative change) or indirect (oversight body, study, etc.)

Your Perspectives

In my view, political and public policy issues are currently driving regulatory standards _________.

A: higher
B: lower

Promoting Excellence

• Regulators have an obligation to foster excellence among practitioners
  - Encourage high performance - above the minimum standard
• Regulators have an obligation to enforce against sub-standard performance
  - Vigorous enforcement is necessary as a deterrent
Promoting Excellence

- These two obligations are not mutually exclusive or otherwise incompatible
- It is not inappropriate for a regulator to espouse a sense of professionalism and high performance among its practitioners
- Standards must be enforced and must be seen to be enforced

Promoting Excellence

- Managing expectations / managing risks
  - Public - how will they perceive the promotion of high ideals by the regulator?
  - Practitioner - how will they perceive enforcement action against sub-standard practice?
- Communication is key!

Your Perspectives

Is it ______ for a regulator to successfully enforce standards of practice while fostering excellence among practitioners.

A: very easy
B: easy
C: challenging
D: difficult
E: impossible
Conclusion

- Working to the lowest common denominator is both undesirable and unnecessary

- Regulators can manage and mitigate risks while championing excellence within a profession or occupation

Speaker Contact Information

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