Chapter 5

Engagement

Good regulators have established mechanisms for engagement with stakeholders as part of achieving their objectives. The knowledge of regulated sectors and the businesses and citizens affected by regulatory schemes assists to regulate effectively. This chapter addresses how regulators should interact with stakeholders and the measures to avoid regulatory capture and conflicts of interest.
## Principles for engagement

### Fit for purpose

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<td>1.</td>
<td>Regulators should undertake regular and purposeful engagement with regulated entities and other stakeholders focused on improving the operation and outcomes of the regulatory framework or scheme.</td>
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<td>2.</td>
<td>Procedures and mechanisms for engagement should be institutionalised as consistent transparent practices. There should be a focus on establishing structured and regular consultation mechanisms with regulated entities.</td>
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### Avoiding capture and conflicts of interest

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<td>3.</td>
<td>Engagement processes used should protect against potential conflicts of interests of participants and guard against the risk that the regulator may be seen to be captured by special interests.</td>
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The relationship between engagement and governance

One objective of good regulator governance is to enhance public and stakeholder confidence in the regulator, its decisions and its actions. Effective engagement with regulated parties and other stakeholders helps achieve this.

The Australian National Audit Office (2003) has described the objective of public sector governance to be:

... to ensure that an organisation achieves its overall outcomes in such a way as to enhance confidence in the organisation, its decisions and its actions. Good governance therefore means that the organisation’s leadership, its staff, the government, the parliament and the population can rely on the organisation to do its work well and with full probity and accountability (p. 6).

Effective engagement with regulated parties and other stakeholders is important to inform the policy-making process and the decisions of the regulator. Communication with parties in the formal accountability system, that is, the legislature, ministers and the executive has been dealt with earlier in chapters 2 and 3. This chapter focuses on engagement with other stakeholders.

Depending on the regulator’s functions this engagement may relate to:

- matters relating to individual decisions (where information from stakeholders is necessary to inform a regulatory decision);
- the regulator’s operational policies (for example, to better understand community expectations relating to regulatory priorities); or
- the potential policy outcomes a regulator might seek to achieve (based on stakeholder input on what might be achievable in different circumstances).
- Moreover engagement between regulators and stakeholders is a way to improve the quality and efficiency of the rules and regulations that are implemented as well as a way to enhance the credibility of the regulatory framework.
Regular, genuine and fit for purpose engagement

The type and level of engagement used for a particular matter should reflect the intended purpose of that engagement. The nature of the legislative scheme and the regulatory style adopted by the regulator will affect the nature of any engagement. For example, more active engagement will be appropriate where the regulation is performance or management based rather than prescriptive, or the regulator is seeking to achieve a more “co-regulatory” approach to improving outcomes.

Advisory bodies

An advisory body may be used to provide insights from industry participants or the community on strategies to influence behaviour, or early warning on developments that may warrant a change in the compliance approach of the regulator. Community or industry engagement may also be useful to inform the development of the corporate plan. This may canvass the scope of the regulator’s activities to build greater understanding of the regulator’s operations.

Some regulators have formal advisory bodies established in legislation, or an explicit power in legislation enabling the minister or the regulator to create such formal advisory bodies from time to time. In some circumstances, formal and explicit recognition of the important role of effective and structured engagement can be a useful mechanism to build a shared commitment to regulatory objectives (Meloni, 2010). In other cases, the establishment of such bodies has been an important element of a transition to an expertise-based governing board, from a board previously made up largely of representatives of regulated entities.

However, mandating an arrangement in legislation may be unnecessarily rigid or prescriptive. Therefore it is important, when establishing a new body, to determine whether there is a strong case to mandate an advisory body in legislation and, if so, whether a sunset clause should be included. If an existing regulator is being reviewed, the need for an existing advisory body should be assessed. If the industry or other important stakeholders have gained confidence in the expertise-based board, its replacement by more flexible mechanisms may now be appropriate. It may be unnecessary to mandate onerous appointment processes for those in purely advisory roles.
Engagement policies and mechanisms

It is good practice to develop and release a consultation policy so that key stakeholders are aware of the regulator’s practices and any expectations that may be placed on stakeholders (OECD, 2012).


Reflecting the experience of financial services firms and their representatives during a period of intense regulatory activity, the Best Practices document emphasises several key aspects of the consultation process. This includes the need for regulators to ensure that:

1) sufficient time is allocated for the consultation process, particularly for consultations on major reforms;

2) any proposed measures have well designed policy objectives and are written in a clear and precise manner so that stakeholders are able to provide comprehensive comments; and

3) any proposed new regulations are consistent and coherent with the existing regulatory framework.

In addition, we note that impact assessments are an important part of the consultation process. While ICSA members recognise that conducting an impact assessment for a proposed regulation can be a challenging task, we believe such assessments are necessary since the information they provide enables stakeholders to comment in a sufficiently comprehensive manner on any proposed regulation. Impact assessments are also important since they allow regulators and policy makers to better understand the costs of a proposed regulation along with benefits.


Whatever mechanisms are used, engagement with key stakeholders should be institutionally structured to produce concrete, practical opportunities for dialogue based on achieving active participation and, where possible, exchange of empirical data, rather than on a desire to achieve consensus (Deighton-Smith, 2004).

The aim should be better informed, timely decision-making, underpinned by processes that build confidence that decisions are cognisant of the impacts on all affected parties. This is more likely to be achieved if there are structured consultation mechanisms that include a genuine invitation from regulators for comments from market participants and other
stakeholders and appropriate consideration of the comments that have been received.

**Avoiding capture and conflicts of interest**

While effective engagement is vital to good regulatory outcomes that have the support of the broader community and regulated entities, there are also risks with engagement that need to be managed (Pagliari, 2012). It is crucial that engagement processes do not favour particular interests – for example, some regulated entities over others, or regulated entities in general over the public interest. Even the appearance that engagement has favoured some interests can compromise the regulator’s ability to achieve broader outcomes, for example, by affecting the willingness of some regulated entities to support voluntary compliance efforts.

Engagement should be inclusive and transparent unless this would compromise the intended outcome. Inclusive consultation allows any regulated party or member of the public to contribute or comment on proposals, rather than just representative groups, building confidence that all interests are heard.

Transparent engagement involves publicly documenting who has been consulted and what their input has been and the release of the regulator’s responses to the main issues (OECD, 2010c). This can protect the regulator from suggestions of capture or failure to listen to the range of views, and also builds confidence in the regulatory process.
### Applying the principles - Engagement

#### Fit for purpose engagement

- What forms of engagement, if any, would benefit from legislative backing, or formal ministerial involvement (for example, in appointing members of a stakeholder advisory group)?

- Are structured engagement mechanisms permitted or encouraged?

#### Avoiding capture and conflicts of interest

- How do engagement processes address potential conflicts of interests of participants and guard against the risks that the regulator may be seen to be captured by special interests?

- What formal and informal engagement mechanisms are used?

- When are these engagement mechanisms used?

- Is engagement two-way?

- Is there a link between undertaking engagement and the policy cycle?

- Is feedback provided to those engaged on the results of the engagement?