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# Regulatory Failure:

Old Growth Forests and Possums – a tale of  
regulatory failure writ large

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## **Acknowledgement of Country**

UniSQ would like to acknowledge the traditional custodians of the land on which we gather.  
We would also like to pay our respect to Elders – past, present and emerging.



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# What is regulatory failure (RF)?

RF occurs when regulation fails to address a risk/objective it was designed for. This failure can arise in the following ways:

- Analytical failure - the analysis behind regulation is flawed
- Intervention failure – identifying when and how to intervene is wrong
- Co-ordination failure –jurisdictional over or underlap
- Political failure – often associated with incorrect timing when to intervene
- Design failure –statutory basis and resourcing for intervention is deficient.



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## RF added to by:

- Distorted risk preference
- Distorted perception of risk problem

= manifestation of harm



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# Extent of RF measured :

- Numerically
- By who and/or what is affected
- By the nature and extent of what is needed to fix the RF



# What I add on RF cause:

- Regulatory capture – prevalent in natural resource sector
- Human ignorance and limits on knowledge – e.g. science is not properly used in regulation
- Prevalence of anthropocentric views at a high political level
- Sloth



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# RF in Victorian Forests

- Introducing – *Sustainable Forests (Timber) Act 2004 (Vic)* (SFA) - the acronym is not what you are thinking
- Focus on two things:
  1. Non-mandatory application of ESD principles: s5
  2. Mandatory application of the Code of Practice for Timber Production: s46



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# Precautionary Principle

- Definition
- The Precautionary Principle is mandatory – the *Code* says it ‘must’ be applied – clause 2.2.2.2
- This presents a problem of – who, what, where and how it is applied
- That apparently is for us to work out somehow in the general scheme of things – this represents RF





## Brown Mountain Case – *Environment East Gippsland v VicForests*

- Clear evidence of endangered species in coupes proposed to be harvested – this should activate the PP
- Court acknowledged significant regulatory gaps in who when and how the PP is applied
- The Court also found a lack of clarity in enforcement procedure in the event of breach

# The *Code* requirements

- It was not disputed that presence of endangered species warranted application of the PP
- VicForests is required under the *Code* to consider what is necessary to avoid serious environmental damage
- Court identified specific instances where the PP had not been applied
- No precautionary measures were enacted by VicForests – why?

# Why? – Lets hear from VicForests

- Responsibility for threatened species was with DSE not them
- Challenged accuracy of data on presence of endangered species and PP did not give rise to an enforceable obligation
- Argued they had given effect to it – 100 metre buffer was present
- Argued once regulatory approval given for harvesting no stoppage - that their harvesting rights are set in stone

# Judgement

- Rejection of VicForests arguments
- Interlocutory injunction granted to halt logging
- Further surveys should have been done and a review of management area reserves taken
- In the course of the judgement the judge referred to the regulatory framework as 'labyrinthine'
- Court also referred to the scared landscape as reminiscent of the Somme landscape in WW1



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# Somme landscape

This is an example of RF





## Explanation of RF (part 1)

- Regulation does not address unusual one to one relationship between the regulator (DELWP) and the regulated (VicForests)
- This is a regulatory gap (part of RF)
- Within DELWP are 3 separate 'units' with connection to forest regulation including compliance – this is problematic
- The SFA is entirely silent on the role of a 'regulator' whether the DELWP or any other entity



## Explanation of RF (part 2)

- An independent report on harvesting regulation,\* referred to DELWP's operating model as:
  - *'...incoherent inconsistent and incomplete...'*

\*

*Independent Review of Timber Harvesting Regulation; Panel Report to the Secretary of the Department of Environment Land Water and Planning 24<sup>th</sup> October 2018*



## Explanation of RF (part 3)?

- This ‘incoherence’ extends to an ambiguous enforcement and compliance policy at DELWP
- The SFA does not address the enforcement and compliance process – in my view, an astounding regulatory gap
- The SFA has limited inclusions on governance structures. As a result decision making relevant to governance issues is mainly unregulated
- Relationship between DELWP and VicForests is too close – this leads to significant regulatory capture risk





## Explanation of RF (part 4)

- The SFA objective is sustainable forest management – it does not do this. This represents RF
- The lack of governance arrangements in the SFA increases the level of discretionary decision above acceptable levels
- There is no regulatory basis to monitor and measure sustainability performance.
- There is no objective criteria or indicators of sustainability performance



## Why has this RF occurred (1)?

- Extensive regulatory capture by forest industry interests places economic interests way above ecological protection
- Poor understanding of ‘practical sustainability’ which has led to a poorly drafted main forestry Act – the SFA
- Complete ignorance of what is – and how to deal with – conflicts of interest e.g. DELWP and VicForests are at anyone time some or all of the following: see next page:



## Why has this RF occurred (2)?

- Regulator and regulatee
- ‘Partners’ in forest management such as firefighting and other controls
- Contractor – principal
- Compliance auditor – audit subject

*This leads to conflicts of interest and a soft regulatory environment and increases regulatory capture risk*



## Why has this RF occurred (3)?

- Ultimately this RF is caused by:
- Ignorance of practical sustainability and how it is implemented
- An anthropogenic view of the world which allows for regulatory capture
- Questions??