
**THE EVOLUTION OF A MODERN (AND MORE LEGITIMATE) REGULATOR: A CASE STUDY
OF THE VICTORIAN ENVIRONMENT PROTECTION AUTHORITY**

ERIC L WINDHOLZ*

A growing body of research establishes that a regulator's legitimacy is important to its ability to discharge its regulatory responsibilities, and that regulatory compliance can depend significantly on people's perception of the legitimacy of the regulatory regime and the regulators within it. This makes understanding how regulators can repair damaged legitimacy critically important. This paper contributes to this goal: first, by developing a conceptual framework for better understanding and examining legitimacy's complex nature which can be used to construct and deconstruct legitimacy claims; and second, by applying that framework to examine the challenges faced by the Victorian Environment Protection Authority (EPA) to regain legitimacy in the eyes of those it regulates, those for whose benefit it regulates, and government bodies with whom it partners or interacts in the course of discharging its regulatory responsibilities. Through this case study, the paper contributes to a better understanding of how governments, businesses and community groups conceive of regulatory legitimacy, and the aspects of official regulatory action (or inaction) that influence their perceptions of regulatory legitimacy.

Key Words: Regulation; legitimacy; public value; regulatory practice; environment protection.

I INTRODUCTION

Legitimacy has always been an important theme in regulatory discourse. Early legitimacy debates focused on the circumstances in which the use of power by the state, or by regulators to which the state has delegated power, is appropriate, acceptable and accountable.¹ More recent legitimacy debates increasingly are focussing on the role legitimacy plays in securing regulatory compliance. A growing body of research has established that a regulator's

* Senior Lecturer and Associate, Monash Centre for Commercial Law and Regulatory Studies, Faculty of Law, Monash University. The author did not receive funding from any company or organisation towards the conduct of this research. However, the author would like to thank the Victorian Environment Protection Authority for their participation in, and support of, this research through making their staff and records available to the author, and facilitating the author's contact with the persons interviewed.

¹ See, eg, Rodney S Barker, *Political Legitimacy and the State* (Oxford University Press, 1990); David Beetham, *The Legitimation of Power* (Humanities Press International, 1991); Robert Baldwin, *Rules and Government* (Clarendon Press, 1995); Giandomenico Majone, 'Regulatory Legitimacy' in G Majone (ed), *Regulating Europe* (Routledge, 1996) 284; Giandomenico Majone, 'The regulatory state and its legitimacy problems' (1999) 22(1) *West European Politics* 1.

legitimacy is important to its ability to discharge its regulatory responsibilities, and that regulatory compliance can depend significantly on people's perception of the legitimacy of the regulatory regime and the regulators within it.² Regulatory legitimacy also builds credibility with the general public, community and advocacy groups, business associations, trade unions, and government. The benefits of this credibility are many and extend from assisting regulators to recruit talented people through to gaining public and political support for greater resources and authority.³ This makes understanding how legitimacy is constructed, managed and communicated an important topic for research.

This paper contributes to our understanding of regulatory legitimacy by examining recent legitimacy challenges faced by the Victorian Environment Protection Authority (EPA). The EPA provides a particularly interesting case study. First, environmental policy battle lines are no longer drawn around whether governments should or should not regulate to protect the environment. Environment protection today is a shared community goal, and no respectable business would now argue there should be no environment protection laws. Rather, the battle lines today are drawn around what constitutes 'good' environment protection regulation and a 'good' environment protection regulator. Businesses argue for regulation and regulators that are balanced, reasonable and which minimise the regulatory burden on them. Community and advocacy groups, on the other hand, adopt a 'better safe than sorry' attitude and argue for high standards and strict enforcement of those standards.

Second, the EPA is a regulator with a long and proud history. Established in 1971, the EPA is the second oldest independent environment protection regulatory agency in the world.⁴ Since its inception, the EPA has been recognised for its innovative approaches to environmental regulation.⁵ However, the EPA recently found itself with a legitimacy problem. Government confidence in it had been weakened by two inquiries that found it had failed in the discharge of its primary regulatory responsibilities; community groups believed it was failing to meet the community's aspirations for its environmental regulator; and businesses were frustrated by the EPA's reluctance to provide authoritative advice on compliance issues. These

² See, eg, Tom R Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Princeton University Press, 1990); Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29 *Law and Policy* 137; Neil Gunningham, Dorothy Thornton and Robert A Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27 *Law and Policy* 289; Kristina Murphy, Tom R Tyler and Amy Curtis, 'Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?' (2009) 3 *Regulation & Governance* 1; Christine Parker and Vibeke Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011), especially Chapter 4 (Tom R Tyler, 'The psychology of self-regulation: normative motivations for compliance') and Chapter 11 (Matthew Potoski and Aseem Prakash, 'Voluntary programs, regulatory compliance and the regulatory dilemma').

³ See, eg, Mark H Moore, *Creating Public Value: Strategic Management in Government* (Harvard University Press, 1995); William E Kovacic, 'Creating a Respected Brand: How Regulatory Agencies Signal Quality' (2015) 22 *George Mason Law Review* 237.

⁴ The EPA commenced operation on 1 July 1971. Only the United States Environmental Protection Agency is older, having commenced on 2 December 1970.

⁵ See, eg, Cameron Holley and Neil Gunningham, 'Environment Improvement Plans: Facilitative Regulation in Practice' (2006) 23 *Environmental and Planning Law Journal* 448; Neil Gunningham, Cameron Holley and Clifford Shearing, 'Neighbourhood Environment Improvement Plans: Community Empowerment, Voluntary Collaboration and Legislative Design' (2007) 24 *Environmental and Planning Law Journal* 125; Neil Gunningham, 'The New Collaborative Environmental Governance: The Localization of Regulation' (2009) 36 *Journal of Law and Society* 145.

concerns were reflected in the EPA's internal culture. Within the EPA, there was confusion as to the organisation's purpose, role and responsibilities.

Today the picture seems to be different. Recent government reviews have noted significant improvements in the EPA's performance, a view shared by key community and business groups. Internally, culture surveys reflect a more confident and assured workforce. This paper examines the strategic initiatives employed by the EPA to repair its legitimacy or, in its words, 'to transform itself into a modern regulator'.⁶ In doing so, the paper examines the different ways in which legitimacy is used and constructed, and the different legitimacy claims made on regulators by those they regulate, those for whose benefit they regulate, and government bodies with whom it partners or interacts in the course of discharging its regulatory responsibilities.

The paper commences in Part II by exploring the concept of regulatory legitimacy and developing a conceptual framework for examining the different ways legitimacy claims are constructed, and legitimacy is built, maintained and repaired. Part III then briefly outlines the EPA's statutory functions and powers before the legitimacy challenges faced by it are described in Part IV. The strategic initiatives employed by the EPA to repair its legitimacy are examined in Part V. Part VI then employs the frameworks developed in Part II to examine these strategic initiatives. How the EPA's different legitimacy communities conceive of regulatory legitimacy is explored, and the strategic initiatives that most influenced their perceptions of the EPA's legitimacy are identified and analysed. Part VII then distils from this analysis a number of broader insights and implications to assist regulators seeking legitimacy from multiple legitimacy communities with divergent legitimacy claims.

This paper adopts a general case study methodology that draws on several disciplines including regulation, law, public administration, political science and sociology. The examination also triangulates multiple sources of information. It draws on external reports into the EPA, as well as EPA internal records and performance reports. The empirical work on which this article is based involved thirty (30) semi-structured interviews conducted between November 2014 and April 2015. These interviews were with current and former EPA executives and staff (9 respondents), government officials who exercise oversight over the EPA or with whom the EPA partners in the discharge of its regulatory responsibilities (5 respondents), and business and community representatives (8 respondents each).⁷ The business and community respondents were members (or were recommended by members) of the EPA's key stakeholder consultation forums. All but one of the interviews was conducted in person.⁸ The interviews were discursive and qualitative. They involved asking open-ended questions designed to assess how respondents conceive of regulatory legitimacy generally, and the legitimacy of the EPA in particular. The questions were designed to delve into respondent's perceptions of the sources of legitimacy, and the aspects of regulatory action (or inaction) that influence their perceptions of regulatory legitimacy.

⁶ EPA Victoria, *Concise Annual Report 2010: Transforming into a modern regulator* (EPA Victoria, September 2010).

⁷ In this paper, respondents are coded as follows: E = EPA; G = Government; B = Business; and C = Community. The number at the end of the code is the identifier of the particular respondent.

⁸ One interview was by telephone.

II REGULATORY LEGITIMACY

A common theme in regulatory literature is that a regulator functions most effectively when it and its action are perceived as legitimate.⁹ Yet, as Suchman observes, for such an important concept, ‘legitimacy is more often invoked than described, and it is more often described than it is defined.’¹⁰ Defining legitimacy is a task fraught with many challenges. Its meaning is flexible and indeterminate outside a particular applied context. ‘[L]egitimacy can differ significantly across time and space, and between actors, systems and contexts.’¹¹ Central to dictionary definitions of ‘legitimacy’ are notions of acceptability and credibility; of actions that are proper and justifiable by reference to accepted rules, principles or standards.¹² Suchman (in one of the more frequently cited definitions) defines legitimacy as ‘a generalised perception that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’¹³ But socially constructed by whom? According to whose values and beliefs should a regulator be perceived as acceptable or credible for it to be legitimate? By what norm, principles or standards do these people assess whether a regulator’s actions are proper or justified? And what can a regulator do to build and maintain and, if necessary, repair, its legitimacy? It is to these questions that the paper now turns.

A *Legitimacy Communities*

‘Legitimacy communities’ is a term that has evolved to describe groups of persons in whose eyes it is important for a regulator to be perceived to be legitimate. Black states that legitimacy rests on the acceptability and credibility of the regulator by those it seeks to govern and those on whose behalf it purports to govern.¹⁴ Clearly these communities (duty-holder and beneficiary) are important and, in a simple, closed regulatory environment, might suffice. However, modern regulatory environments are much more complex. Regulatory regimes today are increasingly decentred, polycentric, networked and multi-nodal with regulatory functions undertaken by a variety of different actors (public and private; state and non-state) across multiple sites (local, national, international).¹⁵ The regulatory space in which the EPA operates is crowded, complex and contested. Threats to the environment

⁹ See, eg, Timothy H Jones, ‘Administrative Law, Regulation, and Legitimacy’ (1989) *Journal of Law and Society* 410; Baldwin, above n 1, 16-58; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007) 221-302. See also references at n 2 above.

¹⁰ Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 571, 573.

¹¹ Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) 2 *Regulation & Governance* 137, 145.

¹² See, eg, *Oxford Online Dictionary* < <http://www.oxforddictionaries.com> > accessed 23 April 2015; *Macquarie Dictionary* (Macquarie Library, 4th ed, 2005) 817; *The Oxford Thesaurus* (Oxford University Press, 2nd ed, 1997) 257.

¹³ Suchman, above n 10, 574.

¹⁴ Julia Black, ‘Legitimacy and the Competition for Regulatory Share’ (LSE Law, Society and Economy Working Papers No. 14/2009, London School of Economics and Political Science, Law Department, 2009) 9; Black, above n 11, 144.

¹⁵ See, eg, R A W Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, 1997); Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1; Mark Bevir and R A W Rhodes, *Interpreting British Governance* (Routledge, 2003); Julia Black, ‘The Decentred Regulatory State’ in P Vass (ed) 2006-2007 CRI Regulatory Review (Centre for Regulated Industries, 2007) 249; Black, above n 11; Christine Parker, ‘The Pluralization of Regulation’ (2008) 9(2) *Theoretical Inquiries in Law* 349.

come in many forms. Some are diffuse; others have a single source. Some are generated by business (large, medium and small); others by individuals. The space also is occupied by a variety of community and non-governmental environmental organisations - international, national, state and local. Other regulators also occupy the regulatory space with the EPA, including the EPA's mother department (Department of Environment, Land, Water and Planning),¹⁶ other federal and state regulators, and local government. To achieve its regulatory goals, the EPA must simultaneously compete for influence with, and co-opt the support of, these other actors occupying the regulatory space with it.¹⁷ The concept of regulatory space accords with Moore's concept of the 'authorising environment', the support of which, according to Moore, is necessary for public managers to create value.¹⁸ Moore's authorising environment also is crowded and contested. Political superiors, legislative overseers, department heads, other regulators, the media, interest groups and even the courts occupy it.¹⁹ It is a place where 'many different views and values struggle for acceptance and hegemony.'²⁰

This paper focuses on three legitimacy communities within the EPA's regulatory space or authorising environment: business duty-holders, community groups and government bodies that exercise oversight over the EPA or with whom the EPA partners in the discharge of its regulatory responsibilities. As we shall see, the support and cooperation of these legitimacy communities is critical to the EPA's ability effectively to discharge its regulatory responsibilities.

B *Legitimacy Claims*

Central to legitimacy are concepts of acceptability and credibility. However, how acceptability and credibility are assessed can vary according to subject matter,²¹ discipline,²² constitutional arrangements,²³ and ideology.²⁴ There can be normative judgments of when a regulator should be regarded as legitimate, and descriptions of legitimacy accorded a

¹⁶ During the period under examination, it was named the Department of Sustainability and Environment. It is hereafter referred to as 'the Department'.

¹⁷ Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in L Hancher and M Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, 1989); Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 329; Black, above n 11, 137; Parker, above n 15, 351-356.

¹⁸ Moore, above n 3. Moore's framework for public value creation is discussed in more detail in Part V.

¹⁹ Ibid 118-126.

²⁰ John Benington and Mark H Moore, 'Public Value in Complex and Changing Times' in J Benington and M H Moore (eds) *Public Value: Theory and Practice* (Palgrave Macmillan, 2011) 1, 6.

²¹ Different definitions have been applied when assessing the State as opposed to a regulatory agency of the State; when assessing state and non-state actors; and when assessing the legitimacy of laws and of the different organs of government charged with enforcing them. See Black, above n 11; Murray Gleeson, 'Judicial Legitimacy' (Speech delivered at the Australian Bar Association Conference, New York, New York, 2 July 2000).

²² Different disciplines ask different questions when assessing legitimacy. For example, Black points out that sociologists ask is an organisation legitimate, whereas lawyers and political scientists ask when should an organisation be considered legitimate (Black, above n 11, 144-146).

²³ The term can have different dimensions depending on the nature of the political regime (e.g., US, European or Westminster). See, eg, Majone, 'Regulatory Legitimacy', above n 1; Majone, 'The regulatory state and its legitimacy problems', above n 1; Tony Prosser, *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, 2010) 223-235.

²⁴ For example, the term can have different dimensions depending on whether it is viewed through the prism of economic liberalism or the welfare state (Majone, 'Regulatory Legitimacy', above n 1).

regulator by the public or a section of the public.²⁵ This paper is concerned primarily with the second form of legitimacy assessment. We are interested in the EPA's legitimacy viewed through the eyes of its three key legitimacy communities identified above. The paper asks: how do these communities conceive of the EPA's legitimacy, and to what extent has the EPA's actions enhanced its legitimacy in their eyes? These are primarily empirical questions premised on legitimacy being socially constructed. This is to be distinguished from the normative question of when the EPA should be regarded as legitimate although, as we shall see, the empirical question has a normative component.²⁶

In order to examine these questions, a conceptual framework for better understanding legitimacy's complex nature and constructing and deconstructing legitimacy claims was developed around which interviews could be structured and responses coded. That framework is set out in Table 1.

Table 1 – Constituent Elements of Legitimacy Claims

Domain / Type	Dimension	Attributes
Legal legitimacy	Legislative mandate	Regulator and its actions are authorised by Parliament through democratic processes
	Legal validity	The laws being enforced; the institutional arrangements that constitute the regulatory regime; and the decisions they make, are legally valid
Normative legitimacy	Consequential	Regulator is effective and efficient in producing desired outcomes; actions are consistent and predictable; decision making timely and decisive; minimises compliance burden on duty-holders
	Procedural	Regulator's procedures are fair, accessible, open and follow 'due process'; decisions are evidence based and made through rational and analytical decision-making processes
	Structural	Appropriate institutional arrangements - accountability mechanisms; independence from political interference; adequate budget and resources
	Expertise	Regulator possesses technical and regulatory expertise to enable it to come to balanced judgements when faced with competing values and incomplete information
	Role	Roles performed by the regulator are clearly communicated, appropriate and consistent with its legislative mandate
	Personal	Regulator's leaders are perceived to be

²⁵ Baldwin, above n 1, 48.

²⁶ Black observes that the empirical question is the domain of sociologists, and the normative question the domain of lawyers and political scientists. Black also argues that the empirical questions need to be asked and answered before we can address the normative question (Black, above n 11, 144).

		visionary, charismatic and inspirational
Pragmatic legitimacy	Exchange	Regulator will produce policies and outcomes aligned to legitimacy community's interests
	Influence	Regulator is responsive to legitimacy community's interests and is capable of being influenced by them
	Dispositional	Regulator shares the legitimacy community's values and has their best interests at heart
Cognitive legitimacy	Comprehensibility	Regulator's role makes sense given the nature of the issue or problem
	Taken-for-grantedness	Regulator's role and presence is taken as a given

As can be seen, the framework classifies legitimacy claims into four broad types or domains – legal, normative, pragmatic and cognitive - each with multiple dimensions. Each legitimacy domain is discussed below.

1 *Legal Legitimacy*

For state regulators, the clarity and scope of their legislative mandate, and the legal validity of the laws they enforce and their institutional arrangements, are central to their acceptability and credibility.²⁷ They are an authoritative declaration that the regulator is in the public interest,²⁸ and the conferral of state-sanctioned coercive power legitimates its use of force.²⁹ However, while legal legitimacy may be necessary, in many situations it is unlikely to be sufficient. Let us assume that a regulator validly created and with a clear legislative mandate, is considered legitimate on establishment by its key legitimacy communities. That legitimacy might be lost, however, depending on how the regulator discharges its mandate. For example, a regulator exercising its powers in a heavy-handed authoritarian manner may be seen as appropriate by those for whose benefit it regulates, but not by those it directly regulates. Alternatively, a regulator that is credible to, and accepted by, persons it regulates, may be perceived by those for whose benefit it regulates as too close to, and possibly captured by, those persons. Regulators also can lose legitimacy in the eyes of the government that conferred the legislative mandate upon it if it fails to discharge its regulatory responsibilities in accordance with that government's expectations or, in the case of a change of government, in accordance with the expectations of its new political masters. As such, it might be better to think of the legislative mandate creating a presumption of legitimacy.³⁰ Whether that presumption is affirmed or rebutted is determined by reference to the other domains of the framework - normative legitimacy; pragmatic legitimacy; and cognitive legitimacy.³¹

2 *Normative Legitimacy*

²⁷ This is to be distinguished from the case of non-state regulators such as exist in transnational regimes. Such regulators necessarily lack legal legitimacy and must look to the other legitimacy domains for their legitimacy. Black, *Legitimacy and the Competition for Regulatory Share*, above n 14, 9.

²⁸ Moore, above n 3, 17.

²⁹ Benington and Moore, above n 20, 6; Morgan and Yeung, above n 9, 4.

³⁰ Moore, above n 3, 30.

³¹ These domains mirror Suchman's three primary forms of legitimacy that he labels moral, pragmatic and cognitive (Suchman, above n 10). Although developed from an organisational management perspective, Suchman's analysis is, as Black observes, consistent with the regulatory compliance literature (Black, above n 11, 144).

Normative legitimacy, as its name suggests, reflects an evaluation of the regulator and its activities against a normative set of criteria important and relevant to the particular legitimacy community.³² Over time, different commentators have developed different ways of summarising or categorising these criteria. According to Suchman, for example, these legitimacy claims takes one of four forms: (1) consequential legitimacy that evaluates regulators by their outcomes; (2) procedural legitimacy that focuses on whether these outcomes are produced by proper means and procedures;³³ (3) structural legitimacy that focuses on whether the overall organisational form conveys the message that the regulator 'is acting on collectively valued purposes in a proper and adequate manner';³⁴ and (4) personal legitimacy which is based on an evaluation of the regulator's leaders and whether they are perceived to be visionary, charismatic and inspirational.³⁵

Majone, in the context of discussing American regulation, identifies two distinct dimensions of normative legitimacy: procedural legitimacy that focuses on whether the regulator is created by democratically enacted statutes that define its legal authority and mandate, and whether its decision making processes are formalised, require public participation and are subject to judicial review; and substantive legitimacy that focusses on whether the regulator's mandate, expertise, credibility and problem-solving capacity enable it to make decisions fairly and independently.³⁶ Moore similarly differentiates between procedural and substantive legitimacy. According to Moore, a decision is procedurally legitimate if it is the product of a wide consultation process in which all interested parties have had a chance to be consulted, and all formal legal rules governing the decision making process have been met; and substantively legitimate if it is the product of a rational analytical process in which the problem is clearly defined, relevant facts gathered, and options developed and compared according to their consequences and relevant values.³⁷

Baldwin identifies five normative tests or criteria against which a regulator's legitimacy should be assessed: Is the regulatory regime supported by legislative authority (the legislative mandate claim)? Is there an appropriate accountability scheme (the accountability or control claim)? Are its procedures fair, accessible and open (the due process claim)? Is the regulator acting with sufficient expertise (the expertise claim)? Is the regime efficient (the efficiency claim)?³⁸ Black similarly summarises normative assessments of regulatory legitimacy into four main claims: constitutional claims that focus on conformance with written norms and constitutional and legal values; justice claims that emphasis the values or ends that the regulator is pursuing; functional or performance based claims that focus on the outcomes produced by the regulator; and democratic claims that focus on the extent to which the

³² Black, above n 11, 145.

³³ See also Tyler, above n 2; Moore, above n 3, 126-128.

³⁴ Suchman, above n 10, 581 quoting J W Meyer and B Rowan, 'Institutionalized organisations: Formal structure as myth and ceremony' in W W Powell and P J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (University of Chicago Press, 1991) 41, 50.

³⁵ Suchman, above n 10, 579-582. Suchman uses the term 'moral' to describe these types of legitimacy claims arguing it avoids ambiguities that exist in the literature concerning the nature of normative claims (Suchman, above n 10, 577). However, I prefer the 'normative' label as it better describes the nature of the criteria against which this head of legitimacy is assessed.

³⁶ Majone, *Regulatory Legitimacy*, above n 1.

³⁷ Moore, above n 3, 163-167.

³⁸ Baldwin, above n 1, 41-49. See also Jones, above n 9; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 26-34.

regulator conforms with norms of democratic governance.³⁹ Elsewhere Black adds another dimension - role legitimacy – that the roles performed by the regulator are appropriate.⁴⁰ This is important where regulators are asked to perform roles with no clear connection to its primary regulatory role or, worse, a role that might be perceived by some to conflict with that primary regulatory role.

The six dimensions of normative legitimacy included in the conceptual framework draw on and distil this earlier thinking.

3 Pragmatic Legitimacy

Pragmatic legitimacy is based on each legitimacy community's self-interest. The conceptual framework reflects Suchman's three dimensions of pragmatic legitimacy: (1) exchange legitimacy that rests on the community's belief that the regulator will produce policies and outcomes aligned to their interests; (2) influence legitimacy that rests on the community's perception that the regulator is responsive to their interests and capable of being influenced by them; and (3) dispositional legitimacy that rests on the community's perception that the regulator shares their values and has their best interests at heart.⁴¹

4 Cognitive Legitimacy

Cognitive legitimacy is based on cognition rather than evaluation (as with normative legitimacy) or self-interest (as with pragmatic legitimacy). Suchman identifies two forms of cognitive legitimacy - one based on comprehensibility; and one based on taken-for-grantedness. Legitimacy based on comprehensibility is when the regulator's role makes sense given the nature of the issue or problem; when it brings a sense of stability and predictability to what would otherwise be a chaotic environment. Legitimacy based on taken-for-grantedness on the other hand describes a situation where an organisation is accepted as necessary or inevitable based on prevailing economic, social and cultural models; where its presence is 'so deeply rooted it is barely questioned.'⁴² This form of legitimacy tends to render alternatives impossible. This, Suchman argues, makes it the most powerful source of legitimacy.⁴³ Black similarly suggests that while cognitive legitimacy is perhaps the subtlest form of legitimacy, it also is the most resilient.⁴⁴

In putting this conceptual framework forward, it is recognised there has been some simplification. Legitimacy is a complex concept. It is not possible to develop a comprehensive definition capable of universal application in all circumstances. What is possible however - and what has been attempted in this section - is to draw on the thinking that has gone before to develop a conceptual framework for better understanding and examining legitimacy's complex nature. It also is recognised that legitimacy domains and dimensions are not as ordered as appears in the framework. Nor do they usually fit into neat categories. The domains and dimensions overlap. Nevertheless, the framework provides a useful tool with which to construct and deconstruct legitimacy claims without being overwhelmed by their complexity.

³⁹ Black, above n 11, 145-146.

⁴⁰ Ibid 145.

⁴¹ Suchman, above n 10, 578-579.

⁴² Black, above n 11, 145; Suchman, above n 10, 582-583.

⁴³ Suchman, above n 10, 583.

⁴⁴ Black, above n 11, 145.

C *Legitimacy Management*

As noted above, legitimacy is a valuable regulatory asset important to a regulator's ability to discharge its regulatory responsibilities. And like other valuable assets, it needs to be built, maintained and, if damaged, repaired.⁴⁵ This, in turn, requires a regulator to focus on improving its performance against those legitimacy domains upon which its legitimacy communities base their assessments of its legitimacy.

Baldwin, Cave and Lodge identify a number of substantive strategies that can be employed to improve a regulator's legal and normative legitimacy. These include improving the clarity of the legislative mandate by revising the regulator's vision and mission; improving accountability structures through the introduction of new external oversight mechanisms; providing for increased stakeholder participation in decision making processes and improving information flows to them; improving training and resources to improve the regulator's expertise level; and greater use of cost-benefit and other tools to improve its efficiency.⁴⁶

Suchman also identifies a number of different strategies an organisation can employ to manage its legitimacy. According to Suchman, organisations seeking to gain legitimacy need to better align their operations with the needs and expectations of their legitimacy communities through a combination of 'concrete organizational changes and persuasive organizational communications'.⁴⁷ This is consistent with the emphasis Moore places on aligning an organisation's public value proposition with the expectations of its authorising environment. Moore suggests that if they are out of alignment a regulator either can seek to persuade key stakeholders to change their position, or revise the value proposition to be more in line with their expectations, or a combination of the two.⁴⁸

For those seeking to maintain their legitimacy, Suchman recommends strategies for predicting and pre-empting future changes and protecting past achievements. Repairing legitimacy is more complex. While it involves (re)gaining legitimacy and therefore employing legitimacy gaining type strategies, Suchman suggests a circuit breaker is first required to create a 'firewall' between the legitimacy damaging event(s) and the organisation's future efforts to repair and regain its legitimacy. Suchman identifies restructuring as central to the creation of this firewall – either in the form of the establishment of an independent watchdog, replacement of key executives and/or disassociation from delegitimised programs and procedures.⁴⁹

As can be seen, some legitimacy management strategies are external to the regulator (e.g., revising the legislative mandate; establishing independent oversight mechanisms; changing leadership). Most, however, are within the regulator's own power to control. This is consistent with the view that legitimacy cannot be conferred (legislatively or otherwise), but must be built and maintained.⁵⁰

⁴⁵ Suchman, above n 10, 585-599.

⁴⁶ Baldwin, Cave and Lodge, above n 38, 33-34.

⁴⁷ Suchman, above n 10, 587.

⁴⁸ Moore, above n 3, 105-134; Benington and Moore, above n 20, 4-6.

⁴⁹ Suchman, above n 10, 585-599.

⁵⁰ *Ibid*; Black, above n 11.

III EPA'S MANDATE, FUNCTIONS AND POWERS

Before examining the legitimacy challenges faced by the EPA, it is first necessary to explain by way of context the EPA's legislative mandate, functions and powers. The EPA is an independent regulatory agency established by the *Environment Protection Act 1970* (Vic) ('EP Act').⁵¹ The EP Act creates a legislative framework for the protection of the environment in Victoria.⁵² The Act sets out the principles of environment protection in accordance with which it is to be administered and enforced, and the functions and powers of the EPA.

The principles of environmental protection are many and expressed broadly. They include ecologically sustainable development, cost-effective and proportionate regulation, adherence to the precautionary principle and principles of intergenerational equity, shared responsibility, product stewardship and integrated environmental management.⁵³ The Act further provides that enforcement of environmental requirements should be undertaken for the purpose of better protecting the environment and its economic and social uses, ensuring people do not gain from their non-compliance, and influencing the attitudes and behaviours of persons whose actions may have adverse environmental impacts.⁵⁴ The Act also provides that the aspirations of the people for environmental quality should drive environmental improvement, and that members of the public should be given access to information to facilitate a good understanding of environmental issues and opportunities to participate in policy and program development.⁵⁵

The functions and powers conferred on the EPA to discharge its regulatory responsibilities also are many and broad. First, the EPA is made the coordinating body in Victoria for all regulatory activities relating to air, land and water pollution and industrial noise, and for the implementation of national environmental protection measures.⁵⁶ The EPA also is given a policy role with respect to the development of state environmental protection policies, waste management policies and the incorporation into state policies of national environment protection measures.⁵⁷ Second, the EPA is vested with a broad suite of powers and regulatory tools with which to discharge its regulatory functions. These include permissioning tools such as approvals, licences and permits;⁵⁸ and enforcement tools including pollution abatement notices and inspections, investigations and prosecutions.⁵⁹ The EPA also is empowered to incentivise compliance by providing economic incentives to avoid or minimise environmental harm, imposing levies on waste disposal and entering into financial contracts to provide assistance to reduce waste and pollution;⁶⁰ and to educate the public on environment protection, the causes, nature, extent and prevention of pollution, and greater resource efficiency.⁶¹

⁵¹ *Environmental Protection Act 1970* (Vic) Act ('EP Act') s 13(1)(a).

⁵² *Ibid* s 1A(1).

⁵³ *Ibid* ss 1B-1J.

⁵⁴ *Ibid* s 1K.

⁵⁵ *Ibid* s 1L.

⁵⁶ *Ibid* s 13(1)(a), (b).

⁵⁷ *Ibid* s 13(1)(c), (ca), (cb), (o), (p).

⁵⁸ *Ibid* s 13(1)(d).

⁵⁹ *Ibid* s 13(1)(k).

⁶⁰ *Ibid* s 13(1)(d), (na), (nb).

⁶¹ *Ibid* s 13(1)(d), (e), (ee), (f), (i), (l).

As can be seen, the EP Act does not prescribe specific rules to solve environmental problems. Rather, it empowers the EPA to solve them, and equips it with a set of regulatory tools to be applied in accordance with a broad suite of complex and sometimes conflicting environmental principles. Some commentators argue that expressing a regulator's legislative mandate in broad statutory terms detracts from its legitimacy because it makes the regulatory task 'inherently discretionary' and 'necessarily political'.⁶² Others, however, argue that 'legitimacy may flow from general statutory principles as well as from precise statutory rules.'⁶³ That much regulatory decision-making is political and discretionary is a reflection of modern day realities, however.⁶⁴ Many modern day policy issues, environment included, do not lend themselves to precise legislative standards and solutions. Rather, they involve weighing, balancing and sometimes trading-off competing principles, values and interests. This is an inherently political process that legislatures rarely have the time, information or expertise to do with respect to existing problems, let alone those that might arise in the future. Delegation of all or part of this task to regulators frequently is inevitable. This transfers to the regulator the role of deciding these complex and contested policy issues. This, in turn, amplifies the importance of legal and normative dimensions of legitimacy.

IV EPA'S LEGITIMACY CHALLENGE

'People give regulators legitimacy without knowing if they are doing it well. It takes a crisis to bring to their attention they are not doing a good job' [C08]. In the case of the EPA, that crisis was Brookland Greens.

Brookland Greens is a housing estate in Melbourne, Victoria. The estate was built on the edge of a closed landfill site. In June 2008, methane gas was detected in homes on the estate. Testing revealed the gas was leaking from the closed landfill site and was present in houses at dangerous levels. It was concluded that the landfill represented an imminent danger to residents in the estate. Emergency arrangements were implemented and dozens of residents were evacuating from their homes. These events gave rise to a class action law suit (settled for A\$23.5 million, to which the local government authority contributed \$13.5 million and the EPA \$A10 million),⁶⁵ costly remedial action (estimated to be in excess of A\$77 million)⁶⁶ and numerous investigations. The most extensive investigation was conducted by the Victorian Ombudsman.⁶⁷ The Ombudsman found the methane leak into the Brookland Greens estate was the result of a series of regulatory failures by a number of responsible agencies, of which the EPA was the most prominent.

⁶² R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1684 cited in Jones, above n 9, 415.

⁶³ J Mashaw, 'Prodelegation: Why Administrators should make political decisions' (1985) 1 *Journal of Law, Economics and Organisations* 81, 91; Jones, above n 9, 415

⁶⁴ David Levi-Faur, 'Regulation and Regulatory Governance' in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 14-16; Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990) 54-55.

⁶⁵ Jason Dowling and Adrian Lowe, 'Gas-leak win threat to councils', *The Age* (online), 26 March 2011 <<http://www.theage.com.au/victoria/gasleak-win-threat-to-councils-20110325-1ca4w.html>>.

⁶⁶ ABC Radio, 'Council apology for Cranbourne methane gas emergency', *Stateline Victoria*, 9 October 2009 (Josephine Cafagna) <<http://www.abc.net.au/stateline/vic/content/2006/s2709880.htm>>.

⁶⁷ Ombudsman Victoria, *Brookland Greens Estate - Investigation into methane gas leaks* (Victorian Government Printer, 2009).

The Ombudsman found the EPA had failed to properly process and assess the initial application for approval of the landfill. This, the Ombudsman said, was partly through lack of expertise, and partly the result of allowing the outcome to be the subject of negotiation where economic and reputational considerations outweighed environmental imperatives. The Ombudsman also found that the EPA did not effectively monitor compliance with the works approval for construction of the landfill and did not adequately oversight the landfill during its operational phase, as a result of which early signs of problems were missed and adequate enforcement action not taken. The Ombudsman attributed these failures to passive management, a lack of strategic direction and an inadequate knowledge management system. Finally, the Ombudsman found that the EPA effectively acquiesced to the developer of Brookland Greens obtaining approval to build houses within its recommended 200-metre buffer of the landfill. The Ombudsman described the EPA's decision not to seek to be joined as a party to tribunal proceedings determining the developer's application as negligent. The Ombudsman concluded that through inadequate regulatory activity, the EPA had failed to protect the environment and had placed residents of the estate at unnecessary risk.⁶⁸

Subsequent external and internal reviews of the EPA revealed that Brookland Greens 'was not the problem, but was symptomatic of bigger problems. These reviews revealed systems and capability weaknesses and an organisation that had lost sight of what it was there to do, which did not understand its regulatory role, which had lost confidence and felt disempowered' [E09]. For example, a 2010 performance audit of the EPA's regulation of hazardous waste by the Victorian Auditor-General found that the EPA was not effectively regulating commerce and industry's management of hazardous waste; that the EPA's monitoring and inspection activities lacked coherence, purpose and coordination; and that its information management systems were inadequate. The report was particularly critical of the degree of self-regulation afforded industry, and the inadequacy of the EPA's compliance program, given the level of risk hazardous waste poses for the environment and community.⁶⁹

A July 2010 Organisational Culture Inventory of the EPA concluded the EPA's culture was dominated by 'avoidance' behaviours (interacting with other people in cautious and tentative ways to protect their own security; being non-committal; pushing decisions upwards; and staying out of trouble) and 'oppositional' behaviours (approaching tasks in forceful ways to promote their status and security; opposing the ideas of others; and making 'safe' decisions). The Inventory also found there was disagreement and confusion as to the EPA's purpose and role.⁷⁰ That this was the case should not have come as a surprise, however. Over time the EPA's regulatory and compliance role had been deemphasized in favour of a 'client service' model that focused on assisting clients (duty-holders) to move 'beyond compliance' rather than enforcing minimum legal standards. Central to this approach was the appointment of Client Relationship Managers to work with better performers to develop 'innovative ways to reduce resource use and to better cope with climate change challenges'.⁷¹ So strong was the client service model that the EPA's 2009 Annual Report did not once refer to the EPA as a regulator.

These problems were evident in interviews with business and community groups. Notwithstanding the different perspectives from which business and community groups can

⁶⁸ Ibid 8-27. The developer successfully appealed a local government decision not to approve construction within the buffer zone. The Victorian Civil and Administrative Tribunal heard the appeal.

⁶⁹ Victorian Auditor-General, *Hazardous Waste Management* (Victorian Government Printer, 2010).

⁷⁰ Human Synergistic NZ Limited, *OCI Feedback Report: EPA Victoria* (2010).

⁷¹ EPA Victoria, *Annual Report 2009: We're listening to you* (EPA Victoria, 2009) 16.

view environmental issues and regulation, both groups described the EPA of that time in very similar terms. One business respondent described the EPA as ‘not having a clear direction’, ‘not sure of its job - trying to be everything to everyone’ and ‘not confident’ [B01]. Others described the EPA as not being decisive or authoritative [B04; B05]. Another consistent theme across business representatives was that the EPA had ‘lost its compliance focus’, that it had become too ‘customer focussed’, and would ‘negotiate compliance rather than enforce compliance’ [B01]. Another noted: ‘The EPA wanted to be your friend as well as the enforcer. This resulted in a lack of coherency in their approach to enforcement’ [B03]; and another still that the EPA ‘would work closely with business and therefore found it hard to hold them to account’ [B08]. Community groups similarly noted the EPA’s emphasising voluntary compliance over enforcement. One quipped that it was the ‘Environment Protection Advice Bureau’ [C04]; another that there was ‘too much carrot, not enough stick’ [C05]. Others variously described the EPA as ‘too close to industry’ [C07]; ‘favouring business’ [C02]; and ‘captured’ [C04]. They also described an EPA that was ‘very defensive; extremely defensive’ [C02], ‘closed off; adversarial’ [C04], and bureaucratic, indecisive and lacking in confidence and vision.

Before proceeding further, it is important not to be overly critical of the EPA of the 2000s. In many ways, the EPA was emblematic of its time. During this period, government opposition to ‘tough’ regulation had become institutionalised - all Australian governments having established regulatory reform initiatives variously labelled ‘better regulation’, ‘de-regulation’ or ‘red-tape reduction’. Market-based and less direct and burdensome regulatory tools were all the fashion, as were voluntary initiatives and flexible co-operative regulatory endeavours. Indeed, at the same time the EPA was being criticised by the Victorian Auditor-General for affording industry too much latitude to self-regulate,⁷² another Victorian Government oversight agency, the Victorian Competition and Efficiency Commission (VCEC), was applauding the EPA’s innovative outcome based approaches and exhorting the EPA to adopt more such approaches to further reduce costs for business.⁷³

The EPA also was not unique amongst environmental regulators. As Gunningham explains in his examination of the evolution of environmental law, regulation and governance, the late 1990s and 2000s was a period in which environmental regulators in developed countries were experimenting with new regulatory techniques to satisfy simultaneously the apparently conflicting demands of the public for environmental protection and of business for relief from the economic burden of complying with environmental regulation.⁷⁴ The focus on regulatory flexibility and cost-effectiveness saw environmental regulators move their focus away from prescriptive and technology-based standards to performance-based standards designed to encourage innovation in the meeting of those standards. This period also saw less focus on ‘sanctions to persuade laggards to come up to a minimum legal standard’ and greater focus on ‘design[ing] environmental policies which reward, facilitate and encourage environmental leaders to go “beyond compliance” with regulation’.⁷⁵

V TRANSFORMING INTO A MODERN REGULATOR

⁷² See discussion at n 69 above.

⁷³ Victorian Competition and Efficiency Commission, *A Sustainable Future for Victoria: Getting Environmental Regulation Right, Final Report* (VCEC, 2009).

⁷⁴ Neil Gunningham, ‘Environmental Law, Regulation and Governance: Shifting Architectures’ (2009) 21(2) *Journal of Environmental Law* 179, 184-193.

⁷⁵ *Ibid* 188-189.

This Part outlines the initiatives implemented by the EPA to address the inadequacies and problems identified in Part IV. These initiatives conveniently can be mapped to the three inter-dependent processes that form Moore's strategic triangle, the alignment of which, according to Moore, is necessary for public managers to create public value, namely: (1) defining the public value to be produced; (2) building the operational capability to deliver that value; and (3) securing the support of the authorising environment (legitimacy communities) for that value proposition.⁷⁶ But before these initiatives could be implemented, and in accordance with Suchman's prescription for regaining legitimacy, a firewall first needed to be built between the delegitimising events and the implementation of the reform strategy.

A *Building the Firewall*

EPA's rebuild commenced with a change of its most senior executives. A new Chair and Chief Executive (a combined role at that time) was appointed in September 2009. Shortly thereafter, the role was split and a new Chief Executive with extensive regulatory experience was appointed in February 2010.⁷⁷ The new Chair and Chief Executive soon disassociated themselves from the signature approach of the previous administration. The client service model was abandoned, as were Client Relationship Managers. The symbolism of this decision was significant. Both business and community groups received it as a strong message of the change to come, as did EPA employees. One EPA employee described the manner with which the client service model was abandoned as 'dramatic and brutal' [E03]; another commented it signalled that 'resistance [to change] is futile' [E02].

B *Defining the Value Proposition*

We have seen that the EPA at that time was perceived as 'confused', 'not sure of its job' and 'not having a clear direction'. Therefore, it is not surprising that one of the first acts of the new leadership team was to define clearly the value outcomes the EPA was committed to achieving. They did this by confirming the primacy of the EPA's regulatory role, recasting its vision, and clearly articulating its strategic priorities (see Box 1).

Box 1 - EPA's new vision, role and strategic priorities

⁷⁶ Moore, above n 3. Moore's concept of public value is not without its critics. It has been criticised for, amongst other things, elevating public value over public values, being unclear whether it is based on normative or empirical reasoning, and not adequately allowing for differences in goals and accountabilities between private and public sector organisations, and between public sector organisations operating in the United States and other political systems. It is not the purpose of this paper to debate the merits of these criticisms. It suffices for present purposes to acknowledge the debate, and to recognise that public value ideas continue to have currency amongst regulators in many countries. See, eg, the debate in the *Australian Journal of Public Administration*: R. A. W. Rhodes and John Wanna, 'The Limits to Public Value, or Rescuing Responsible Government from the Platonic Guardians', (2007) 66 *Australian Journal of Public Administration* 406-421; John Alford, 'The Limits to Traditional Public Administration, or Rescuing Public Value from Misrepresentation', (2008) 67 *Australian Journal of Public Administration* 357-366; R. A. W. Rhodes and John Wanna, 'Stairways to Heaven: A Reply to Alford', (2008) 67 *Australian Journal of Public Administration* 367-370. See also: Richard Shaw, 'Another Size Fits All? Public Value and Challenges for Institutional Design' (2013) 15 *Public Management Review* 477.

⁷⁷ Pursuant to s 6(1) of the EP Act, the EPA consists of one member appointed as the Chair by the Governor-in-Council. Traditionally the Chair also operated as the EPA's Chief Executive. The roles were split in February 2010 with the appointment of a dedicated Chief Executive. The Chair still constitutes the EPA under the Act, but has delegated all powers under the Act to the Chief Executive.

Vision	A healthy environment that supports a liveable and prosperous Victoria
Role	Our role is to be an effective environmental regulator and an influential authority on environmental impacts
Strategic Priorities	Deal with past pollution - reduce environmental and health impacts of historical contamination Tackle current environmental issues - prevent pollution and improve efficiency of resource use Shape the environmental future - avoid future impacts by anticipating and acting

The EPA also took to describing itself as a ‘modern regulator’. As the EPA explained in its 2010-2011 Business Plan –

‘These potentially conflicting demands [of enforcing the law and making it easier to comply with the law] can be met with a regulatory approach that finds the right mix and application of our support and enforcement tools. We will be proportionate in the use of these tools and apply a risk-based approach to compliance and enforcement. We will take tough action against those who fail to meet acceptable standards, help those who need it and partner with high performers to set new standards. This approach is known as ‘modern regulation.’⁷⁸

The strength and manner with which the EPA articulated its new regulatory role, vision and strategic priorities was particularly noteworthy. Whereas the EPA’s 2009 Annual Report did not once refer to the EPA as a ‘regulator’, the 2010 Annual Report was titled ‘Transforming into a modern regulator’, and used the term ‘regulator’ to describe itself twenty-two (22) times.⁷⁹ As Moore observes, the ‘careful selection, repeated articulation, and consistent use of these simple concepts helps accomplish a great deal of managerial work.’⁸⁰ It highlights what are strategically most important, helps stakeholders and staff stay focussed on the most strategic issues, and provides a platform from which to mobilise the internal and external support the regulator needs to succeed in its mission.⁸¹ It also was a manifestation of a more confident EPA - one that was prepared to take ownership of its narrative and to clearly define its role and purpose, and the value outcomes it was committed to achieving.

To enable it to focus on its primary regulatory role, the EPA also worked with the Department to restructure its relationship with it and other state regulators operating within its regulatory space. Policy and legislative functions were transferred to the Department, and the delivery of programs to support environmental improvements was transferred to Sustainability Victoria.⁸²

C *Building Operational Capability*

⁷⁸ EPA Victoria, *EPA Business Plan 2010-2011* (EPA Victoria, 2011) 4.

⁷⁹ The term ‘modern regulator’ is used eighteen (18) times in the 2010 Annual Report (EPA, above n 6). Other adjectives used to describe the type of regulator to which the EPA aspired included ‘effective’, ‘energetic’, ‘strengthened’, ‘transparent’ and ‘robust’.

⁸⁰ Moore, above n 3, 89.

⁸¹ *Ibid* 89-94.

⁸² Sustainability Victoria is a statutory authority with the objective of facilitating and promoting environmental sustainability in the use of resources.

Having defined its public value proposition, the next step for the leadership team was to build the operational capacity to deliver it. This involved three significant and inter-dependent programs of work. The first program of work was culture change. This comprised numerous workshops and training sessions designed to define and inculcate a new positive and constructive culture, one that is solution and outcome orientated, and operates in an open, supportive, confident, decisive and accountable manner. Subsequent cultural surveys indicate the EPA is moving towards its preferred culture.⁸³ The surveys reveal strong constructive behaviours at the more senior levels of the organisation, but that avoidance and oppositional behaviours continue at less senior levels (which is to be expected of a change program being cascaded through the organisation, from top to bottom).

The second program of work was a complete overhaul of the EPA's approach to compliance and enforcement. The blueprint for this overhaul was a 425 page report that examined in detail all of the EPA's compliance and enforcement activities.⁸⁴ One EPA executive described the report as having '119 recommendations with one theme - fix everything' [E06]. The review recommended the EPA adopt a risk based and responsive regulatory model; significantly increase the level and quality of its compliance monitoring and enforcement activities; and make the investments in manpower, systems and training necessary to deliver at that higher level. 117 of the report's 119 recommendations were completed within two and a half years in a process one EPA executive described as 'exhaustive and exhausting' [E02].⁸⁵ A September 2014 Victorian Auditor-General report into the EPA's management of landfills (the area that got the EPA into so much trouble at Brookland Greens) found that the EPA had significantly improved its regulation and oversight. The report highlighted the EPA's development of a better practice risk-based framework and approach for the management and oversight of landfills, and its more targeted, active and transparent compliance and enforcement approach.⁸⁶ Such has been the EPA's improvement, the Victorian Auditor-General held out its 'better practice risk-based approach to regulating' as an example for other regulators.⁸⁷

The third major program of work was the development of a new business and information management system to address the Ombudsman's and Victorian Auditor-General's earlier criticisms. A subsequent June 2013 Victorian Auditor-General audit of performance reporting in the environment and sustainability sector found that the EPA publicly reported on a wide range of appropriate performance indicators and output measures, that it had developed a highly integrated information business management system, and that its approach to data collection, management and reporting was now 'best practice'. The report contained no improvement recommendations directed at the EPA.⁸⁸

Also instructive is what was not done. First, there were no amendments to the EPA's legislation to facilitate its transformation. Second, there has been no significant increase in

⁸³ The EPA commissions an annual Organisational Culture Inventory, is part of the Victorian Public Sector Commission's annual People Matters survey, and conducts its own quarterly culture pulse survey.

⁸⁴ Stan Krpan, *Compliance and Enforcement Review: A Review of EPA Victoria's Approach* (EPA Victoria, 2011).

⁸⁵ Ibid; EPA Victoria, *Compliance and Enforcement Review Implementation* (EPA Victoria, 2013).

⁸⁶ Victorian Auditor-General, *Managing Landfills* (Victorian Government Printer, 2014).

⁸⁷ Victorian Auditor-General, *Managing Regulator Performance in the Health Portfolio* (Victorian Government Printer, 2015) vii.

⁸⁸ Victorian Auditor-General, *Environment and Sustainability Sector: Performance Reporting* (Victorian Government Printer, 2013).

the resources expended by the EPA in the discharge of its functions. Over the period of the transformation exercise, increases in the EPA's expenditure have been broadly in line with inflation and its headcount has reduced by approximately 22% since the commencement of the transformation exercise.⁸⁹ The extent to which inaction in these areas impacted perceptions of the EPA's legitimacy is discussed in Part VI below.

D *Securing the Support of Legitimacy Communities*

The third element of Moore's strategic triangle for creating public value is securing the support of one's authorising environment – that is, those legitimacy communities whose support is needed to achieve the desired public value outcomes. Building on the extensive consultation undertaken as part of the Compliance and Enforcement Review, the EPA established two new consultative forums – a Business Reference Group through which it engages business duty-holders; and a Community Reference Group through which it engages the broader community. In addition, the EPA engages with local communities impacted by specific duty-holders through issue or region specific reference groups and other forum. The Brookland Greens Community Reference Group established after the emergency declaration at the housing estate is an example of such a group. Through this network of reference groups and other consultative forums, the EPA engages with the three groups it sees as having legitimacy claims on the organisation: (1) duty-holders; (2) local communities impacted by duty-holders; and (3) the broader community [E01]. The EPA also has worked to build more constructive relationships with other agencies within the Victorian government's broader environmental portfolio (the Department and Sustainability Victoria), and with key oversight bodies such as the Victorian Auditor-General and the Victorian Competition and Efficiency Commission. These engagement efforts have been supported by increased transparency in what the EPA does, why, when and how. Central to this has been the publication of Annual Compliance Plans identifying the EPA's compliance priorities for the next year and explaining how the EPA will perform its regulatory role in those priority areas.

Clearly the EPA has done a lot to transform itself into a modern regulator, and its internal performance data indicates improvement across a wide range of metrics. For example, pollution response rates have improved, as has the time taken for the EPA to process works approvals and review environmental audits. There also is evidence that the proportion of duty-holders complying with notices has improved.⁹⁰ But have these actions translated into improved legitimacy? Are the improvements visible and meaningful to its legitimacy communities? The answer to these questions will depend on how the different legitimacy communities construct their legitimacy claims, and the manner and degree to which the EPA's improvements speak to the dimensions of legitimacy important to them. It is to these issues that the paper now turns.

VI EPA, TRANSFORMATION AND LEGITIMACY

A *Construction of Legitimacy Claims*

⁸⁹ These statements relate to a five-year period from 2010/2011 to 2013/2014 and mask an initial increase in expenditure in the first two years of the transformation exercise, and in headcount in its first year. See EPA Annual Reports 2010/2011 to 2013/2014 available from its website www.epa.vic.gov.au.

⁹⁰ EPA Victoria, *2012-2013 Annual Report* (EPA Victoria, 2013); EPA Victoria, *Annual Report 2013-2014* (EPA Victoria, 2014).

The legitimacy claims made on the EPA by each of its legitimacy communities are constructed differently, as shown in Table 2 below.

Table 2 – Legitimacy Communities’ Construction of Legitimacy Claims on EPA

Business	Community	Government
1. Legal 2. Normative 3. Cognitive 4. Pragmatic	1. Cognitive 2. Pragmatic 3. Normative 4. Legal	1. Legal 2. Normative 3. Cognitive

For business respondents, legal legitimacy is the most important legitimacy domain, followed closely by normative legitimacy. Cognitive and pragmatic legitimacy were a distant third and fourth. The importance of a clear legislative basis for the exercise of the state’s coercive powers was central to business respondents’ conception of regulatory legitimacy. At the same time, however, business respondents also recognised that legal legitimacy was necessary but not sufficient. As one business respondent observed: ‘The Act is the source of legitimacy but it can be lost by poor enforcement and especially if the Act is not consistently implemented.’ [B03] All dimensions of normative legitimacy are important to business respondents, with the exception of personal legitimacy. Especially important are consequences (efficiency more so than effectiveness); role clarity; decisiveness in decision-making; transparency and clarity of what the EPA plans to do, how, when and why; expertise with respect to both the science and industries it is regulating; consultative and inclusive decision making processes; and independence from both government and community influence. Cognitive dimensions of legitimacy, while important, are much weaker. Most business respondents acknowledged the need for (or at least did not object to) environmental protection laws and regulators to enforce them. For example, one business respondent acknowledged the ‘logical rationale for the law’ [B04]; another ‘community expectations that there be an EPA to do what it does’ [B08]. Pragmatic legitimacy was the weakest of business’ legitimacy claims and arose only in the form of an expectation that the EPA would produce policies and outcomes aligned to their interests in a level playing field. This articulation of businesses’ interests may be reflective of the business respondents interviewed being representatives of people committed to doing the right thing and accepting of the EPA’s authority. Query whether people with a different and less compliant motivational posture would have answered the same.⁹¹

For community groups, cognitive legitimacy is the most important legitimacy domain. For these groups, ‘[t]here was enormous legitimacy in the issue itself’, to borrow the words of William Ruckelshaus, first administrator of the US Environmental Protection Agency.⁹² One community respondent summed up the sentiment of most community representatives thus: ‘The community wants the environment protected and are comforted by the fact there is a thing called the Environment Protection Authority. The fact we have an EPA is evidence of a mature society’ [C06]. Another similarly said: ‘The environment is everything. It’s a “me” issue. The body that protects the environment is, by definition, legitimate’ [C02]. Pragmatic legitimacy also is important to community groups. There is an expectation (sometimes overt but always implicit) that the EPA should share their values and concerns for the environment and should produce policies and outcomes aligned to their shared interests. However, community groups had different understandings of what is the ‘issue’, and different priorities

⁹¹ Braithwaite, Murphy and Reinhart, above n 2.

⁹² Cited in Moore, above n 3, 78.

for what should be protected. For some, it was protecting public health from pollutants; for others, it was protecting amenities; and for others still, it was ensuring sustainability and addressing the causes of climate change. Normative legitimacy dimensions also are important to community groups, but to a lesser degree. The normative dimensions most important to them include consequences (effectiveness more so than efficiency), role clarity, consultative, inclusive and transparent decision-making processes, and independence from business. Community representatives were split on the importance of legal legitimacy. Some did not mention it, while others ranked it from most to least important. For example, one community respondent stated: ‘Legislation is not a source. Legislated enforcement tools do not give you legitimacy if you do not have the courage, skills or attitude to use them’ [C07]. Others, however, acknowledged the importance of the EPA’s coercive powers, with one noting: ‘The EPA is the only regulatory body that can do what they do, the only one with the ability and power charged to do what they do’ [C03].

Government respondents viewed legal legitimacy (legislation and government policy) as the primary source of a regulator’s legitimacy, followed by normative legitimacy. With respect to normative legitimacy, the role, consequence and procedural dimensions featured most prominently. The only government respondents to discuss legitimacy in terms reflective of cognitive dimensions were agencies within the Victorian government’s broader environmental portfolio; and the pragmatic dimension was totally absent. As one government respondent stated: ‘Once government has clothed the regulator with legitimacy, it is not for us to question the government’s decision’ [G03].

With this understanding of how the EPA’s different legitimacy communities construct their legitimacy claims on the EPA, let us now turn to examine the extent to which the actions taken (and not taken) as part of the EPA’s transformation into a modern regulator influenced their perceptions of its legitimacy.

B *Legitimacy Repaired*

Nearly all respondents reported that their assessment of the EPA and its legitimacy had improved as a result of its transformation program. This view was unanimous amongst government respondents; and held by 7 out of 8 business respondents and 6 out of 8 community respondents. The specific actions taken or not taken by the EPA that influenced their assessments of the EPA’s legitimacy varied between and within legitimacy communities. Having said that though, a number of key factors emerged that are summarised in Table 3.

Table 3 - Main Factors Influencing Assessments of EPA’s Legitimacy

Factor	Business	Community	Government
Improve legitimacy	<ol style="list-style-type: none"> 1. Clear regulatory focus 2. Open, constructive, less defensive culture 3. Stronger stakeholder engagement 4. New leadership 	<ol style="list-style-type: none"> 1. Clear regulatory focus 2. Stronger stakeholder engagement 3. Open, constructive, less defensive culture 4. New leadership 	<ol style="list-style-type: none"> 1. Clear regulatory focus 2. Open, constructive, less defensive culture 3. New leadership

Weaken legitimacy	<ol style="list-style-type: none"> 1. Inter-governmental role confusion 2. Lack of independence 3. Inconsistent implementation 4. Loss of technical expertise 	<ol style="list-style-type: none"> 1. Inter-governmental role confusion 2. Lack of independence 3. Loss of technical expertise 4. Outdated legislation 	<ol style="list-style-type: none"> 1. Inter-governmental role confusion 2. Inconsistent implementation
-------------------	---	--	--

As can be seen, the single most important strategic initiative impacting positively on the EPA's legitimacy is the clarity and consistency with which the EPA repositioned itself as a regulator. That this was the case for community groups and government is to be expected. That business too welcomed a more robust regulator might at first seem counter-intuitive. However, there are two potential explanations. First, business craves certainty and predictability. As noted in Part IV, the previous EPA approach to compliance and enforcement was criticised by business for lacking direction and coherence. No such confusion exists today although, as will be discussed below, concerns remain about the consistency with which it is being implemented. Second, the new role statement and vision were drafted at a relatively high level of abstraction. By doing so, the EPA was able to obscure conflicts and differences that would become apparent if they were articulated at lower levels of abstraction.⁹³ They also were drafted in language into which each legitimacy community could read their objectives and aspirations, thus enabling the EPA to bring different communities together into a coalition to strengthen the legitimacy of, and provide support for, its change program.⁹⁴ Qualifying regulator with the adjective 'modern', for example, was designed to give a level of comfort to business that the EPA would be something other than a traditional 'command and control' regulator [E09]. It provided a platform from which the EPA could elicit their support, or at least quieten the voices of its harshest critics. After all, who does not want a 'modern' regulator?⁹⁵

However, just as the clarity the EPA brought to its role was the most important factor improving its legitimacy, a lack of clarity in the division of roles and responsibilities between it and other regulators within the environmental regulatory space was the most significant factor weakening its legitimacy. This challenge – which Thompson refers to as the problem of 'many hands'⁹⁶ – was evident in several respondents' anecdotes of 'buck passing' and 'blame shifting' between agencies, and especially between the EPA and local government that also has an enforcement role.

The next most important factor improving assessments of the EPA's legitimacy was the change in its culture. There was near unanimity among business, community and government respondents that the EPA's culture had improved, and that it was now a more confident,

⁹³ Moore, above n 3, 96-97.

⁹⁴ Benington and Moore, above n 20, 6.

⁹⁵ The term 'modern' has all the hallmarks of a magic concept of government, one that obscures traditional differences, eases the business of governing and makes it almost irresistible as a policy solution (Christopher Pollitt and John Hupe, 'Talking About Government: The Role of Magic Concepts' (2011) 13 *Public Management Review* 641. See also Murray Edelman, *Politics as Symbolic Action: Mass Arousal & Quiescence* (Institute for Research on Poverty, 1971); Eric Windholz and Graeme Hodge, 'The Magic of Harmonisation: A Case Study of Occupational Health and Safety in Australia' (2012) 34 *The Asia Pacific Journal of Public Administration* 137.

⁹⁶ D F Thompson, 'The Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74 *American Political Science Review* 905 cited in Black, above n 11, 143.

open, constructive and less defensive regulator. However, significant differences were expressed about the depth, breadth and sustainability of the change. Nearly all respondents described the transformation as a work-in-progress, part done or incomplete. Respondents commented that the change was strongest at the more senior levels, and had not fully cascaded through the organisation (something reflected in the EPA's own culture surveys).⁹⁷ A number of respondents commented that the new behaviours are not always observed at lower levels of the organisation, and in regional offices in particular. One government respondent referred to 'pockets of resistance' [G03]; another to a 'schizophrenic' organisation [G05]. Frustration with the inconsistent implementation of the new cultural behaviours was expressed most strongly by business respondents. One referred to 'implementation not matching the rhetoric' [B07]; another to a 'disconnect between senior people and policy drafters' [B06]. Yet another described the EPA as 'indecisive and hesitant to make decisions. They don't want to say "yes" or "no" to things' [B05]; and another commented that his 'members are not seeing the rubber on the road – not much in the way of practical change' [B02]. However, this was not universal with another business respondent commenting: 'Training of field staff has seen things improve. Centralised views are promulgated and applied consistently through the organisation' [B03].

All legitimacy communities also recognise the EPA's efforts to strengthen its engagement with its stakeholders. The Business and Community Reference Groups in particular were singled out as a tangible demonstration of the EPA's commitment to engage. However, as with other areas, there were differences of opinion between and within legitimacy communities about the extent to which the Groups are delivering on their promise. In theory, the Reference Groups and other like forums provide the EPA with an opportunity to account for its activities, and to obtain fresh endorsements for new activities. They also should give stakeholders involved an opportunity to express their aspirations thereby informing future decision-making. For some, this promise was being delivered. One community representative referred to it as 'the best group I am involved with' [C05]; another that 'the input is meaningful and can result in the EPA changing course although not always straight away' [C02]. Indeed, community respondents were stronger in their praise than business respondents, one of whom described the Reference Group as a 'nice to have but not particularly valuable' [B07]. In the main, business respondents criticised the Reference Group for being designed primarily to inform rather than elicit input, and for not being effective in generating a genuine two-way conversation. Both business and community respondents also expressed concern that the commitment dissipated and the engagement weakened the further one moved away from senior management. Consistency of implementation the deeper one ventures into the organisation and into the regions again was an issue for most respondents.

While personal legitimacy did not rank highly as an important dimension in the construction of any of the legitimacy community's legitimacy claims, several respondents within each legitimacy community identified the EPA's new leadership team (in particular, its Chair and Chief Executive) as important attributes improving their assessment of the EPA's legitimacy. Their vision for the organisation, and the passion and conviction with which they communicated it, was highlighted by a number of respondents, with some respondents querying whether the momentum for change could have been maintained without them. Others commented positively about the split of the Chair and Chief Executive roles, one

⁹⁷ See discussion at footnote 83 above.

noting that it both improved governance and enabled ‘a complimentary mix of environmental citizenship, regulatory and leadership skills to be brought to renew the organisation and refresh the vision’ [C04].

These were the main attributes improving the EPA’s legitimacy identified by respondents. On the other side of the ledger are attributes that weakened assessments of the EPA’s legitimacy. Reference already has been made to the inconsistent implementation of the change program, especially in the lower echelons of the organisation and in the regions. Other attributes identified as weakening the EPA’s legitimacy include concerns about its independence, the loss of technical and scientific skills, and the ongoing suitability of its governing legislation.

A number business and community respondents queried the independence of the EPA, although the nature and strength of the conviction with which they did so varied. For some, raising the EPA's independence is no more than recognition ‘that all regulators are amenable to the needs and values of the government of the day – the EPA no more or less so than other regulators’ [C04]. For others, however, it was more serious with one community representative referring to the EPA as ‘too sycophantic to its political master’s expectations and what business wants’ [C07]. As can be seen from the last comment, concerns about independence extend beyond government interference, to being too responsive to the interests of other protagonists in the environment debate. At times community respondents saw the EPA as too responsive to, and captured by, business; and at other times business respondents saw the EPA as too responsive to community concerns and social influences. As one business respondent commented: ‘The squeaky wheel gets the oil. Well-organised community groups attract the EPA’s focus distorting the EPA’s efforts to be a risk based regulator’ [B01].

Resourcing, or more precisely, the lack of resourcing, was another issue that impacted assessments of the EPA’s legitimacy. A number of community respondents expressed concerns that the EPA is not adequately resourced to carry out its mission of protecting the environment; and both community and business respondents expressed concern at the loss of technical and scientific expertise. Some business respondents saw this transferring compliance risk from the EPA to business. As one business respondent commented: ‘Business feel they have to wear the risk when they cannot get a definitive opinion from the EPA’ [B05]. Some community respondents also were critical of this transfer of risk and businesses’ (and the EPA’s) reliance on private sector consultants and auditors, the independence of whom they question, to advise on and monitor compliance.

Finally, and as noted in Part V, no amendments were made to the EPA’s governing legislation as part of the transformation exercise. The failure to modernise the EP Act was commented on by a number of respondents. Community respondents were critical of the failure to evolve the Act to address contemporary environmental challenges. As one commented: ‘The Act reflects 1970 ideas of what an environmental regulator should do. The legislation has not evolved to newer issues such as carbon emissions and mining’ [C04]. Another commented that the Act ‘does not address forward-looking issues such as brown coal and logging. It is too narrow and restrictive. It does not enable the EPA to do what people want it to do’ [C08]. Some business respondents also were critical of the Act that they perceive it to be a blunt instrument reflective of a by-gone era. For example, one business respondent reflected that the Act ‘is what was required 20-30 years ago when the environment was not so mainstream. Today, legislation should be the final straw’ [B05]; and another, that the ‘penalties under the Act do not allow sufficient flexibility to match penalty with harm and culpability’ [B03]. This is an example of the EPA’s scope to meet the

legitimacy claims being made on it being bounded by the institutional environment in which it operates.⁹⁸

Before concluding this section, two attributes not emphasised by respondents are worthy of mention – environmental outcomes and accountability. First, notwithstanding the importance most respondents attached to consequences when constructing their legitimacy claims, none expressly assessed the EPA's legitimacy by reference to improvements in environmental performance. This is not because of a failure by the EPA to communicate its progress against key environmental metrics to its stakeholders and the broader community. On the contrary, the EPA's Annual Reports and presentations to the Business and Community Reference Groups provide detailed accounts of its regulatory performance and environmental outcomes. What this demonstrates is the difficulty of having key messages absorbed by key stakeholders. Second, neither business nor community respondents identified accountability as a significant attribute in their assessment of the EPA's legitimacy. Only government respondents focussed on accountability, noting that the EPA had developed reporting systems that went beyond what was required of it by law. This is consistent with Black's observation that while accountability can be a critical element of legitimacy, legitimacy is not always dependent on there being robust accountability mechanisms in place.⁹⁹

VII DISCUSSIONS AND IMPLICATIONS

This paper's examination of the EPA's transformation initiatives reveals significant differences in how the EPA's key legitimacy communities construct the legitimacy claims they make on the regulator. These differences are a reflection of each community's different values, interests and perspectives. Businesses being asked to comply with policies and laws that run against their (short-term) economic interests view the EPA's legitimacy primarily as an aspect of the rule of law (legal legitimacy) and good governance practices (normative legitimacy, with a focus on role clarity, fair processes and efficiency). Community and environment groups, on the other hand, view the EPA's legitimacy in substantive policy terms (cognitive and pragmatic legitimacy). The history of environmental regulation is characterised by battles between competing economic and social interests. It should therefore not come as a surprise that the holders of these interests should construct their legitimacy claims differently. Nor is it surprising that government respondents prioritised legal and normative legitimacy to the near total exclusion of the other legitimacy domains. These domains mirror principles of good or better regulation found in most state, national and international guides that have popular currency within government regulatory circles.¹⁰⁰

The research also reveals that while business and government respondents identified legal legitimacy as the most important source of the EPA's legitimacy, and for community groups it was cognitive legitimacy, when it came to assess the EPA's actual performance, it was

⁹⁸ Black, above n 11, 157.

⁹⁹ Ibid 149-150.

¹⁰⁰ See, e.g., at the state level: Government of Victoria, *Victorian Guide to Regulation* (Department of Treasury and Finance, 2014); Government of Victoria, *Improving Governance of Regulators: Principles and Guidelines* (Department of Premier and Cabinet, 2010); at the national level: Council of Australian Governments (COAG), *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (COAG, 2007); Australian Government, *The Australian Government Guide to Regulation* (2014); and internationally: UK Better Regulation Task Force, *Principles of Good Regulation* (2003); OECD, *Guiding Principles for Regulatory Quality and Performance* (2005).

dimensions of normative legitimacy that were the most influential. Moreover, the research reveals that how legitimacy communities assess the EPA's performance against the dimensions of normative legitimacy differs, both in terms of how they prioritised those dimensions (each community's selection of claims being shaped by the nature of their interests (e.g., economic or social) and by their political and personal philosophies) and how they perceived the EPA's performance against them (the primary factor shaping perceptions of legitimacy being the individual's experience, particularly of the procedural dimension of normative legitimacy¹⁰¹). This is consistent with Black's observation that 'the normative bases of legitimacy are frequently contested.'¹⁰²

It is clear from the above that the task of building, maintaining and, when necessary, repairing legitimacy is inherently complex and difficult. That different legitimacy communities construct their legitimacy claims differently poses a number of functional challenges for regulators.¹⁰³ However, a number of insights can be gleaned from the EPA's experience to assist regulators meet these challenges.

First, regulators should identify their various legitimacy communities and understand how those different legitimacy communities construct their legitimacy claims. Importantly, when doing so, regulators should delve beyond labels to understand the meaning each community ascribes to those labels. As we saw with the EPA, community groups have significantly different understandings of the environmental issues on which the EPA should be focussing. It is only by deconstructing each legitimacy community's legitimacy claims into its constituent dimensions that a regulator can be confident of designing and implementing strategies targeted at improving its performance in those areas of most importance to those communities.

Second, while it may seem somewhat obvious to observe that all regulation involves a balancing of sometimes contradictory values and interests, what this case study reveals is the importance of regulators acknowledging the tensions inherent in that conflict and dealing with them transparently. Not all legitimacy claims can be met, and regulators should not feel compelled to try to do so. EPA is typical of many regulators faced with multiple and sometimes conflicting legitimacy claims. Simultaneously satisfying all claims often is impossible, and satisfying only one set of legitimacy claims risks alienating the holders of conflicting claims.¹⁰⁴ The EPA's transformation program sought to avoid these pitfalls by creating a broad role statement and vision into which each legitimacy community could read their objectives and aspirations, while simultaneously acknowledging the differences that exist among them. The EPA's Chief Executive euphemistically employed the phrase 'balanced unhappiness' to describe an acceptable state of stakeholder relations. The phrase was intended to communicate to stakeholders that no one stakeholder group could expect to have all their legitimacy claims met all the time. The research reveals this has not always been universally successful.

Third, a regulator's legitimacy is not assessed in isolation. In regulatory regimes where regulatory roles are divided among different regulators, each regulator's legitimacy is, to a degree, impacted by the nature of the division of roles and responsibilities, and the manner with which the various regulators cooperate in the discharge of their responsibilities. In the

¹⁰¹ See e.g., Tyler, *The psychology of self-regulation*, above n 2.

¹⁰² Black, above n 11, 145. See also Baldwin, Cave and Lodge, above n 38, 32.

¹⁰³ Black, *Legitimacy and the competition for regulatory share*, above n 14, 13.

¹⁰⁴ Black, above n 11, 152-157; Baldwin, Cave and Lodge, above n 38, 32-34.

case of the EPA, we saw that clarity about its own role and purpose was the most influential factor contributing to the repair of its legitimacy, and lack of clarity about the role of other regulatory actors the most influential factor weakening its legitimacy. It is not enough for a regulator to be clear about its role. It also needs to be clear about its interrelationships with other regulators occupying the same regulatory space.

Fourth, the ‘cause’ is a double-edged sword. Black was right when she suggested cognitive legitimacy may be the most resilient form of legitimacy. At no point during the EPA’s legitimacy challenge did any legitimacy community advocate for its abolition. The ongoing need and rationale for a dedicated regulator responsible for protecting the environment was never seriously questioned by any of the respondents. At the same time, however, the ‘cause can be both a source of legitimacy and an albatross around its [the EPA’s] neck’, as one business respondent [B07] colourfully put it. Another respondent similarly observed: ‘The fact it is the “Environment Protection Authority” creates an expectation ... which is impossible to meet’ [C05]. Managing expectations is an important challenge for all regulators, but especially for those whose mission is accompanied by high and sometimes unrealistic expectations.

These insights point to the importance of regulators owning their narratives. This communicative element is central to (re)gaining and maintaining legitimacy.¹⁰⁵ Expectation management is a difficult enough challenge for regulators without them allowing others to set the expectations against which their legitimacy will be assessed. Regulators need to take responsibility for clearly articulating their role, purpose and the value they are committed to achieving, and why. They also should be clear about how they intend to create that value, both in terms of the outputs they will produce, and the manner in which they will produce them. Equally, regulators should articulate those things for which they are not assuming responsibility and which fall within the mandate of other regulatory actors occupying the regulatory space with them. Having set appropriate expectations, regulators should give an account of their performance against those expectations. For a regulator to effectively meet the legitimacy claims being made on it (or those which it chooses to meet), it needs to ensure that it does so in a manner that is readily understood and recognised by those communities.¹⁰⁶ Moreover, this communicative element needs to be repeated, sustained and consistent, some might say overwhelming, to be internalised by the legitimacy communities.

Of course, care must be taken to avoid elevating rhetoric above substance. A number of commentators observe that when regulatory legitimacy is assessed by reference to perceptions, scope exists for those perceptions to be gamed by manipulation, mystification or deception.¹⁰⁷ The use by a regulator of strategic communications to exaggerate the extent to which it has changed to accord with existing legitimacy claims is likely to be effective only in the short-term, and detrimental in the long-term. Rhetoric without action is not a recipe for success. Eventually some event or disaster will reveal if the emperor is not wearing clothes.

VIII CONCLUSION

¹⁰⁵ Black, above n 11, 139.

¹⁰⁶ Ibid 156.

¹⁰⁷ See, e.g., Baldwin, above n 1, 48; Suchman, above n 10, 591-593; Black, above n 11, 146.

This paper has examined the EPA's efforts to transform itself into a modern regulator through the prism of regulatory legitimacy. Through this examination, the paper has contributed to our understanding of how governments, businesses and community groups conceive of regulatory legitimacy, and the aspects of official regulatory action (or inaction) that influence their assessments of regulatory legitimacy. This research has confirmed that the power of regulators today does not rely solely on their legal mandate, but also on the broader legitimacy given to the institution by its stakeholders (legitimacy communities). This research also has demonstrated that different legitimacy communities construct legitimacy claims differently and that trade-offs between them may be need to be made. This makes the already difficult task of regulating all the more difficult.

In the case of the EPA, this challenge was met by a combination of concrete organisational changes and persuasive stakeholder communications (to paraphrase Suchman).¹⁰⁸ Organisationally, changes in senior leadership built a firewall from past delegitimising events; the EPA's regulatory role was recast and prioritised; and the EPA's enforcement and compliance activities, internal culture and supporting systems were overhauled. The changes were supported by a stakeholder engagement strategy that built support for the EPA's new modern regulatory role, and then communicated the EPA's progress fulfilling that role.

This research has revealed that these efforts largely have been well received by the EPA's key legitimacy communities in whose eyes the EPA enjoys enhanced legitimacy. Ultimately though, the success of these initiatives is not measured by perceptions. The true measure is whether these initiatives will contribute to producing a healthier environment. On this question, the existing body of research gives us reason to be hopeful.

IX POSTSCRIPT

In May 2015, the Minister for Environment, Climate Change and Water appointed a Ministerial Advisory Committee to undertake an independent Inquiry into the EPA's role, powers, functions and regulatory tools. The Inquiry delivered its report to the Minister on 31 March 2016. The report made 48 recommendations. Many of the recommendations touch on aspects identified in the paper as impacting the EPA's legitimacy, and include modernizing the EPA's governing legislation, bolstering its scientific and technical expertise, clarifying its environmental mandate, and improving coordination and collaboration across government on environment protection and associated public health issues. The government is now considering the report's findings.

¹⁰⁸ Suchman, above n 10, 587.