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Risk, Responsibility and Regulation: Tackling the ‘Nanny State’

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Responsibility and public policy

Julie Novak

With the emergence of behavioural economics, popularly known as ‘nudge’ theory, fundamental questions about how consumers behave, and what, if anything, governments should do about it, have come to the fore of public policy debate.

Nudge theory – pioneered by the likes of Economics Nobel Prize winner Daniel Kahneman, Richard Thaler and Barack Obama’s new regulatory commission appointee Cass Sunstein – draw on the tools of behavioural psychology and neuroscience to explain human economic behaviour.

Using experimental and other investigative methods, they have found that people tend to use simple rules of thumb when making decisions, sometimes leading to systemic errors of judgment. For example:

- People tend to follow the herd, emulating consumptive decisions of those around them.
- Our choices are often made in the context in which they are presented to us.
- Some people are averse to changing their economic behaviour, and thus prefer the status quo.
- People tend to value a loss much more than an equivalent gain.
- We tend to underestimate the significance of future events.

These findings are in contrast to the neoclassical view of a rational economic man, an autonomous individual who routinely makes optimal self-interested economic decisions.

Nudge theorists are showing that consumers sometimes behave in ways that do not conform to conventional standards of economic behaviour. Ironically, because of this nonconformity, it is typically recommended that the state be called in to nudge individual behaviour in directions more befitting of the neoclassical standard.

That said, nudgers claim to be nuanced about what kind of nudging is permissible. A number of scholars in this field consider that 'it is both possible and legitimate for ... public institutions to affect behaviour while also respecting freedom of choice.'

In this context, nudge theorists would like to steer the paternalised person in a given direction, but always leaving open the option for the individual to choose another course.

The policies derived from such principles have been given the rather peculiar label of 'libertarian paternalism.' For example, nudge proponents have favourably cited moves by the American states of Michigan and Missouri to introduce legislation for individuals to voluntarily place themselves on casino gambling blacklists. Governments can then enforce these bans by prosecuting violators and confiscating their winnings.

In the food industry, some nudge theorists suggest a revamp of the taxation system to tax energy-dense, unhealthy foods at a higher rate and label them with a red circle, akin to a stop signal traffic light. Healthy foods would either be not taxed, or taxed at lower rates, with a green circle affixed to their packaging.

Julian Le Grand, a former senior policy advisor to Tony Blair, in 2007 suggested that various restrictions on alcohol trading would be consistent with libertarian paternalism. For example, supermarkets should be required by government to have a separate checkout for alcohol, forcing beer and spirits shoppers to endure the inconvenience of having to queue twice.

Of course, in Australia, bottle shops are typically either located away from a supermarket, or in a separate corner of a supermarket with its own check-out queues. While these arrangements had been put in place ostensibly to shield alcohol away from minors, nudgers now see the need to put obstacles in the way to protect adults from their own selves.

Whereas these ideas have been cited in the nudge literature overseas, there are obvious signs that similar ideas are infiltrating the Australian policy discourse:

- The national preventative health taskforce discussion and technical papers are replete with nudge language.
- Various states have included in new gambling legislation a provision that gambling operators must have self-exclusion programs.
- The federal government has been engaging in a ‘war on alcopops’ at home.

However, to use nudge theory as a platform for new regulation is problematic. Government agents are humans, too, and they are likely to display the same behavioural biases not only in their private lives, but in terms of their policy dispositions.

Repeatedly, Australian governments show a willingness to follow the international policy herd. Their ‘action biases’ toward taking action now, and not later, reveal a lack of wisdom and farsightedness in considering the long-term costs of policy. The display of behavioural biases by the public sector greatly weakens the notion that they can instigate policies to correct the biases of private sector agents.

More conventional problems commonly associated with public policy development, such as the distortionary effects of rent-seeking, also remain relevant.

Nanny state paternalists also face what economist Friedrich Hayek labeled the ‘knowledge problem.’ It is difficult for governments far removed from the circumstances

faced by consumers to correct for their idiosyncratic biases. Actions by those close to the problems at hand are far more suitable. This is why consumer initiative and industry self-regulation can be so much more effective than poorly targeted, one-size-fits-all government policies.

As British economist Robert Sugden explains, incoherent preferences are not sufficient to justify government paternalism. This is because market capitalism is a 'discovery procedure' that allows consumers and businesses, through repeated processes of trial and error, to learn about their preferences over time.

The process of government intervention in consumer preferences usually entails increasing prescription that erodes individual freedoms. Take gambling self-exclusion legislation as an example. The latest statistics suggest that about 80 per cent of people participate in gambling activities at least once in any twelve-month period. This implies that almost 20 per cent of people already routinely self-exclude themselves from any form of gambling, without any need for intervention by third parties.

In addition, gambling businesses and their industry associations have long maintained their own self-exclusion policies that problem gamblers can use. It therefore seems unnecessary for governments to pass a law to require industry to have a self-exclusion program, when they already have one.

My reading of some of the state legislation over time suggests that governments are steadily imposing new reporting and other requirements on gambling businesses, as a way to enforce self-exclusion edicts.

The Productivity Commission Chair Gary Banks wrote in 2006, 'regulation has come to be seen as a panacea for many of society's ills and as a means of protecting people from inherent risks of daily life. ... In this climate, a 'regulate first, ask questions later' culture appears to have developed.'

This lax policy environment often gives rise to a situation where assessments of the costs and benefits of regulation are either not robust, or not developed at all. Yet, it must be emphasised that the burden of proof that new regulations will achieve their objectives, and will not place onerous cost burdens upon business and the community, always rests upon the proponents.

Academic findings of non-rational consumer behaviour are insufficient to justify an expanding public sector. In practice, however, governments seem happy to oblige different ways of advocating further restrictions on the freedoms of food, beverage, hospitality and gambling industries to trade, and the freedom of consumers to buy from producers in these industries.

Libertarian paternalism or nudging is no different to old-style paternalism, with the same consequences of an erosion of economic and social freedoms.

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The nanny state, old and new – or – the wowser in Australian history

By Richard Allsop

In any society there will always be attempts to define where the boundaries should be drawn on a whole range of activities.

I will attempt to provide some historical context to the discussion we are going to have and also look at the issues from a more narrowly Australian perspective.

While the term ‘nanny state’ is an internationally recognised critical term for the situation when that boundary is narrowed too much, one of Australia’s great home grown inventions is the word which so aptly describes those who seek greater restrictions on personal behaviour. The word is, of course, ‘wowser’.

There are various theories as to the derivation of the word. One claim, largely promoted by the wowsers themselves, was that the word evolved from the initials of the phrase, We Only Want Social Evils Remedied. Another theory was that the word was first coined by Ezra Norton, editor of the Sydney *Truth*, and it does seem the word’s first appearance in print was in that august journal on 8 October, 1899. Other theories point to derivations from Cornish words.

Whatever its origins, the word, wowser, became one of Australia’s more celebrated exports. HL Mencken, the celebrated American journalist, writer and linguist and strong Prohibition opponent loved the word. He thought it captured the image of:

A drab souled Philistine haunted by the mockery of others’ happiness... he must devote himself zealously to reforming the morals of his neighbours, and, in particular, to throwing obstacles in the way of their enjoyment of what they choose to regard as pleasures.

As recently as 2007 UCLA Professor Stephen Bainbridge was excited to learn about the word and saw that it could be applied to politicians of the Christian Right there.

Looked at historically in the Australian context, one can certainly identify periods where there has been a general movement towards defining the boundary on allowable personal behaviour more narrowly, while there have been other periods when there has clearly be a move towards greater liberalisation.

Then, there are other periods, arguably more ideologically confused, where the lines may have been simultaneously narrowed in relation to one activity, and loosened in relation to another.

In his 1962 book *Obscenity, Blasphemy, Sediton: The rise and fall of literary censorship in Australia*, Peter Coleman pointed out that the “the 1880s were one of the great turning points in Australian history”. Coleman explains how, in order to combat the rise of new more sensational journalism and more realistic literature, every colony/state passed obscenity laws between 1876 and 1902.

This period of the late 19th century and early twentieth century was also an era when significant new restrictions were imposed on the service of alcohol and the rights of citizens to gamble.

In relation to alcohol, the temperance movement’s influence climaxed in the First World War, with the introduction of 6 o’clock closing, bans on the employment of barmaids, the introduction of local preference provisions (allowing municipalities to exclude licensed premises) etc. Amusingly, on the issue of barmaids, their employment status was generally revived in the Second World War, prompting some wags to suggest that stopping them working was essential to defeating the Kaiser, and encouraging them to work was essential to defeating Hitler.

When it comes to gambling the similar pattern is reflected in the chapter titles of John O’Hara’s book *Mug’s Game: A History of Gaming and Betting in Australia*. It has chapters:

4. The Challenge to Gaming and Betting 1880-1900
5. Wowsers Reforms 1900-16

These two chapters are thankfully followed by chapter 6 - The Liberalisation of Gaming and Betting.

As historian Stuart Macintyre notes in the *Oxford History of Australia* "the achievements of the wowsers were impressive;" they passed laws that restricted obscenity and juvenile smoking, raised the age of consent, limited gambling, closed down many pubs, and in 1915-16 established a 6pm closing hour for pubs, which lasted for decades.

The decade that probably did the most to liberalise those late 19th century laws was the 1960s when citizens were allowed to read *Lady Chatterley’s Lover*, have a legal off-course bet on the horses and have a drink after 6pm.

What is interesting is that attitudes towards wowsers cut across the normal political divide. Wowsers were generally seen as conservative, but it was the Communist writer, Frank Hardy, who went after that great wowser-target, John Wren, in *Power without Glory*. As Wren’s most recent biographer, James Griffen, demonstrated most of Hardy’s charges against Wren were erroneous and scurrilous. The Hardy case against Wren was enthusiastically repeated by Manning Clark in his works. Griffen has written that wowsers were “oppressive and class conscious and responsible for such squalid features of social life as ubiquitous back-lane betting and the six-o’clock swill”.

In recent years, the major target of the anti-gambling lobby, a position for many previous decades taken by SP bookmaking, has been taken by poker machines. As I noted at the start of my article, “Class and Casinos” in the September, 2008 issue of the *IPA Review*, opposition to poker machines is one thing that unites a diverse range of conservatives and Leftists in knee-jerk opposition. What is intriguing is how poker machines only became controversial when introduced in traditionally wowsers states, such as Victoria and South Australia in the 1990s, despite having operated without any strong opposition in New South Wales for forty years.

In 1968, Melbourne journalist, Keith Dunstan, wrote a book called *Wowsers* that looked at all the areas which the wowsers had tried to restrict, but which, by then, were being liberalised. Dunstan had ten ‘evils’ that had been under wowsers attack:

- The Desecration of the Sabbath
- The Demon Drink
- Smoking
- Theatre
- Dancing
- Bathing
- Cremation
- The Social Evil
- The Printed Word
- Gambling

Looking back, forty years later, we can see that of those ten, smoking has become much more restricted, the other nine have been liberalised. However, two of the liberalised nine, alcohol and gambling, remain under constant ‘wowsers’ attack, attacks often prefaced with the words “I’m not a wowsers, but ...”

What I would argue was that each of the items on the Dunstan list was presented as a risk on Christian moral grounds. Now, even when some of the key participants in the debate may be religious leaders, their arguments against specific activities tend to use humanist rather than religious arguments.

What is also interesting about that list of evils is that it does not include anything to do with food. I think it is an intriguing question as to why the nanny state, or to use the Australian vernacular, wowsers, have turned their attention, for example, to the food industry.

From risk to “Nanny State”

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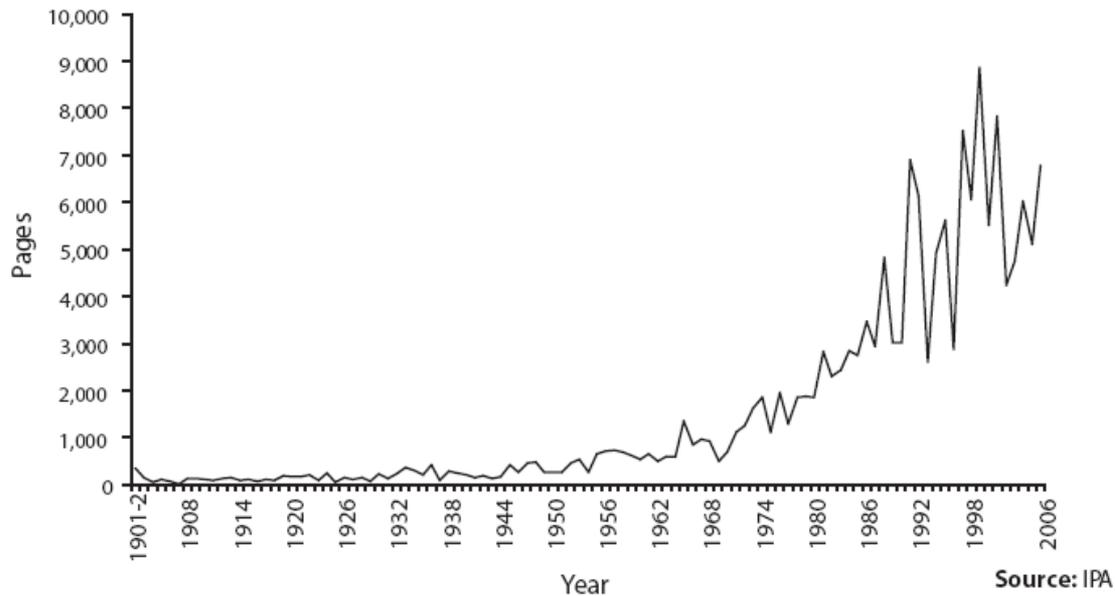
Editor, *IPA Review*

Institute of Public Affairs

The Big Picture

- Policy reform in last 30 years
= governments shift from ownership to regulation

Chart 2: Pages of Commonwealth Acts of Parliament passed per year, 1901-2006



The “Regulatory State”

- Regulation and regulatory spending increases define government over the last 3 decades
 - *Freer Markets, More Rules* (Steven K. Vogel)
 - *Regulatory Capitalism* (John Braithwaite)

Chart 9: Pages of new Commonwealth subordinate legislation, 1962-2006

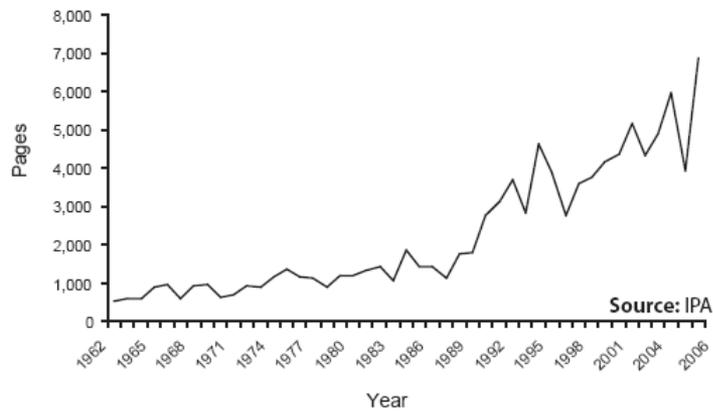
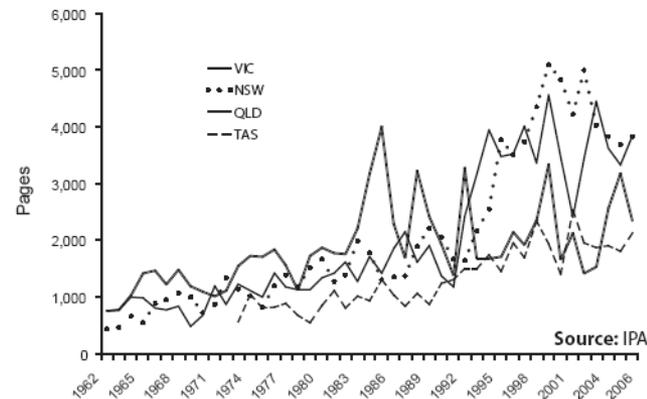


Chart 10: Pages of new state subordinate legislation, 1962-2006



Directions of the Regulatory State

- Ideology determines policy
 - More than just left vs. right
-
- Shift in what we regulate
 - privatised entities, environment, etc
 - Shift in how we regulate
 - black letter -> “responsive regulation”
 - Shift in why we regulate
 - from “market failure” to **risk**

Risk

- Governing as risk management
 - Epidemics
 - Environmental toxins
 - Climate Change
 - Mental & physical health
- Competing knowledge claims
 - Alcohol
 - Prevent heart attacks, strokes, dementia, Type 2 diabetes, stiffening of the arteries, prostate cancer, skin cancer, common cold.
 - “The science supporting the protective role of alcohol is indisputable; no one questions it anymore... There have been hundreds of studies, all consistent” ... “Abstinence is a risk factor for coronary heart disease” Dr. Curtis Ellison, professor of medicine and public health at the Boston University School of Medicine.

“Risk Society”

- Ulrich Beck, *Risk Society: Towards a New Modernity*, 1986
- Anthony Giddens “Risk and Responsibility” *Modern Law Review*, 1999
- Experts vs. Non-experts
 - Talking past each other

...in the eyes of the technological elite, the majority of the public still behaves like engineering students in their first semester. They are ignorant, or course, but well-intentioned; hard-working, but without a clue. In this view, the population is composed of nothing but would-be engineers, who do not possess sufficient knowledge. They only need to be stuffed full of technical details, and then they will share the expert’s viewpoint

- (Beck, *Risk Society*)

Experts and others

- Inputs to risk assessment
 - Scientific evidence (contested)
 - Individual values

Even in their highly mathematical or technical garb, statements on risks contain statements of the type *that is how we want to live – statements, that is, to which the natural and engineering sciences alone can provide answers only by overstepping the bounds of their disciplines.*

... scientists withdraw their *borrowed* notions of cultural acceptance from empirical criticism, elevate their views of other people's notions to a dogma and mount this shaky throne to serve as judges of the irrationality of the population, whose ideas they ought to ascertain and make the foundation of their work.

- (Beck, *Risk Society*)

The “Nanny State”

- Ad-hominem?
- Reflects a condition of the Risk Society
 - Nexus of
 - expertise,
 - state power &
 - paternalism



Where next?

- Broad, bipartisan ideological trend in government
- Policymakers not interested in delineations between industries
 - National Preventative Health Taskforce (alcohol, tobacco, obesity)
- Debate limited:
 - Utilitarian (what policies “work”)
 - Reactionary (“hands off my hamburger”)