SMART PRIVATIZATION: LESSONS FROM PRIVATE-SECTOR INVOLVEMENT IN AUSTRALIAN AND CANADIAN BUILDING REGULATORY ENFORCEMENT REGIMES

WORKING PAPER

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Abstract
Various scholars stress that traditional regulatory regimes will benefit from greater private-sector involvement. There has been little empirical study, however, on the impact of the "amount" of privatization on certain policy goals. This paper aims at filling that knowledge gap. Based on an analysis of private-sector involvement in the enforcement of Australian and Canadian building codes, it argues that a certain threshold exists after which more privatization no longer results in effectiveness and efficiency gains. It furthermore identifies that the relationship between the public and private sector within a regime matters in reaching certain policy goals.

Key words
regulation, governance, enforcement, privatization

Smart Privatization: Lessons from Private-Sector Involvement in Australian and Canadian Building Regulatory Enforcement Regimes

1 Introduction

In their highly influential work *Smart Regulation*, Gunningham and Grabosky state that "recruiting a range of regulatory actors to implement complementary combinations of policy instruments (…) will produce more effective and efficient policy outcomes" (1998: 15). Although this proposition was stated over a decade ago, it is still of topical interest. Many governments around the world have sought or seek an increase in the effectiveness and efficiency of regulatory policy through non-governmental involvement. Literally acting upon Gunningham and Grabosky's advice (1998: 449), private-sector actors are sought to take up regulatory enforcement tasks, with the expectation that they are the most capable of doing so.

This paper addresses Gunningham and Grabosky's assumption, and governments' expectation, that private-sector involvement in regulatory enforcement results in more effective and efficient regulatory policy. The paper starts with a brief discussion of private-sector involvement in regulatory governance. It finds that a wide range of regulatory regimes have originated and been described, which can be roughly categorized as: regimes with more governmental than non-governmental involvement; and, regimes with more non-governmental than governmental involvement. The question here is: how does the "amount" of private-sector involvement in a regime affect regulatory policy? Subsequently, an empirical analysis of private-sector involvement in the enforcement of Australian and Canadian building codes is presented. Here private-sector involvement was introduced as an addition to traditional governmental public regimes. Interestingly, the "amount" of private-sector involvement varies between the Australian and Canadian jurisdictions. In Australia and Canada eight different regimes have been identified, all of which aim at fulfilling a single task: guaranteeing the quality of the built environment. The main difference between the regimes is the extent to which this task has been privatized. The main difference between the countries is the relationship that exists between public- and private-sector actors that carry out this task: a competitive relationship in Australia; a complementary relationship in Canada. As such the research provides a unique opportunity to analyze a variety of different approaches to a single task within a comparable regime environment. The analysis suggests that private-sector involvement has indeed resulted in more efficient and effective regulatory enforcement in the Australian and Canadian cases. However, a certain threshold appears to exist after which, at least for this particular policy sector, more private-sector involvement does not result in more effectiveness or efficiency gains. After this point more private-sector involvement appears to result mainly in unintended impacts, especially related to accountability. Furthermore, the relationship between the public and private sector is found to impact upon social equity: different groups of regulatees experience a different level of service delivery. The research suggests that a complementary relationship is desirable over a competitive relationship between the public and private sector, when the same task can be carried out by both sectors. It has to be noted that the lessons drawn in this paper

have by no means theory status. However, private-sector involvement in Australian and Canadian building regulatory enforcement illustrates many of the impacts that might occur from low levels and high levels of private-sector involvement, and different relationships between the public and private sectors.

2 Regulatory theories and approaches

It is generally understood that, in order to make regulation work, it has to be enforced. Regulation and enforcement as a "means for achieving regulatory goals" can be referred to as a "regulatory regime". When comparing a variety of works that address regulatory regimes it becomes clear that authors tend to focus on a structure of interrelated actors. For instance, Gunningham and Grabosky (1998: chapter 3) make a distinction between parties, their roles and their interactions; May (2007: 9) mentions an institutional structure, assignment of responsibilities, standards to measure compliance, and sanctions; and Longo (2008: 194) distinguishes structures, processes, players and their interrelationships, rules, control, enforcement and accountability mechanisms, and incentives.

The elements used by these authors relate to the different elements of the "classic" enforcement pyramids: enforcement strategies and enforcement styles (Ayres and Braithwaite 1992: chapter 4), and enforcement actors (Gunningham and Grabosky 1998: chapter 6). By comparing these works a structure of regulatory regimes becomes clear: regulations are drawn up to express policy goals; enforcement is introduced to monitor regulatees' compliance with these regulations; and oversight is introduced to monitor enforcement by enforcement actors. Note that enforcement itself is often enforced as well; to avoid confusion in terminology, the enforcing of enforcement is here referred to as "oversight" (for an overview of literature on oversight, see Marvel and Marvel 2007).

For a long time regulation, oversight and enforcement were considered governmental tasks and responsibilities. Regulatory regimes were organized as "pure public" structures in which all tasks and responsibilities came to governmental agencies (Baldwin and Cave 1999). Yet, from the 1970s onward these pure public regimes were criticized for being ineffective and inefficient (Sparrow 2000). In response to such critique new forms for organizing these tasks were introduced. The phrase "from government to governance" (Rhodes 1997, 2007) is illustrative here: governing was no longer synonymous with pure public command-and-control regimes, but became associated with steering society in new ways. A new paradigm emerged stating the advantages of entrepreneurial government and the introduction of the private-sector in former pure public regulatory regimes (Osborne and Gaebler 1992). Gunningham and Grabosky's *Smart Regulation* (1998) provides an excellent example. Their work addresses regulatory regimes in which tasks and responsibilities are taken up by public-sector sector agencies, private-sector agencies, or a combination of these.

Involving the private-sector in regulatory governance has consequences. Governments often seek gains in effectiveness and efficiency. Note that these are highly contested terms. The central problems are: what constitutes effectiveness and efficiency; what should be measured;

and, against which standards should the unit of analysis be evaluated (Hodge 2000: chapter 4, Lee and Whitford 2009)? In the following empirical research, I keep close to the terminology as used by Gunningham and Grabosky (1998: 26-31). Effectiveness is defined as the degree to which building regulations are complied with. Efficiency is understood as the resources needed to gain compliance with regulations. The unit of analysis is the new regulatory regime, which will be assessed across time by comparing the new situation with the old "pure public" situation; and across space by mutually comparing the new regimes. Effectiveness and efficiency will be measured through the use of elite perceptions (cf. Lee and Whitford 2009). Following on from existing literature, private-sector involvement is expected to increase compliance with regulations, against the same or lower costs (cf. Baldwin and Cave 1999: 126). However, bringing in the private-sector might result in unintended impacts, such as a decline of social equity (cf. Lefeber and Vietorisz 2007), credibility (cf. Baldwin and Cave 1999: 130) or accountability (cf. May 2007). Trade-offs between various policy impacts might occur. The challenge for governments is to balance the different impacts; to compensate the disadvantages with advantages of private-sector involvement (cf. Stone 2002: 62).

Interestingly, no ready-made solution is chosen when changing regulatory regimes. A broad variety of new regimes can be found in countries across the world. These are often characterized by an arrangement of tasks and responsibilities amongst *both* public- and private-sector parties. Following this introduction of private-sector involvement in regulatory governance, regulatory scholars have introduced a wide range of regimes to describe and analyze these "mixed" situations. A distinguishing characteristic of these regimes is the quantity of tasks and responsibilities assigned to private-sector actors; the "amount" of private-sector involvement (cf. Van der Heijden and De Jong 2009). A second distinguishing characteristic is that private-sector involvement either replaces public-sector involvement, or is added to it as an alternative layer (cf. Mahoney and Thelen 2010). When added to an existing regime, a relationship might arise between the various regulatory actors, such as: "competing", "complementing", "supporting" or "merging" (cf. Barnard 1938: 101-103; illustrative examples can be found in Wilson 1989: chapter 19).

Two major questions now arise: how does the amount of private-sector involvement in a regime affect regulatory policy? And, how does the relationship between public- and private-sector actors affect regulatory policy? These are the central questions of the empirical analysis, which reviews private-sector involvement in Australian and Canadian building regulatory enforcement.

3 A variety of regulatory regimes

This section provides a review of private-sector involvement in Canadian and Australian building regulatory enforcement. In total eight different regimes are reviewed. Cases in Australia and Canada were selected for their long experience with private sector involvement in building regulatory enforcement – since the 1990s in Australia, since the 1980s in Canada. The second reason to choose these cases is variance in the "amount of privatization" – the tasks private

sector agents are allowed to undertake differ amongst the cases. A third reason for case selection is the similarity of Australian and Canadian political and judicial systems (Jackson and Jackson 2003) and building regulation (ABCB 2004, CCBFC 2005) – this all adds to the comparability of the case findings (see also, Van der Heijden 2005: pp. 87-94). Existing information was gathered from different (governmental) inquiries, organization websites, journals and newspapers. New information was gathered through a series of elite-interviews with over 100 representatives of the Canadian and Australian building industries and building control industries, and a follow-up survey. Five regimes are in Australia: the States of South Australia, Victoria, New South Wales and Queensland, and the Australian Capital Territory. Three are in Canada: the City of Vancouver, and the Provinces of Alberta and Ontario. Note that the City of Vancouver has a population of 2.3 million, which is twice as much as the population of all of Alberta's metropolitan areas.

The new regimes: four approaches to one task

The regulation of safety, health, and amenity of people in buildings are deemed the responsibility of the provinces and territories in Canada (Hansen 1985) and the states and territories in Australia (ABCB 2002). In both countries the national government has nevertheless drawn up (comparable) advisory National Building Codes. Currently all provinces, states and territories have implemented these National Codes. Responsibility for enforcement of the Building Codes lies with the Canadian provincial, and Australian state and territory governments. Traditionally, most of these governments have passed on many of their building regulatory powers to their municipal Councils (Hansen 1985, Lovegrove 1991). This resulted in a situation in which land use, planning, development and building regulations were enforced by local municipal building control departments (BCD) only: "pure public" regulatory regimes.

Typical sub-tasks in building regulatory enforcement are building plan assessment and assessment of construction work on-site. Building plan assessment is carried out to check if proposed construction work complies with building regulations. This assessment might result in the issuance of a building permit. On-site construction work assessment is carried out to check if construction work is carried out according to the building regulations *and* the issued building permit. Upon completion of a building, often, an occupancy permit is issued after a final assessment. Specific enforcement sub-tasks are follow-up enforcement when on-site assessment of construction work reveals violation of regulations. This might imply sending a letter to a violator, requesting the violator to end the violation, or starting legal proceedings against offenders.

In response to issues arising from municipal-led regulatory enforcement, governments in Canada have reformed their regimes of building regulation and control since the 1980s, and in Australia since the 1990s. This is in-line with the previously discussed literature. As a result, the private-sector has been introduced as an addition to local government building control. Under the new regimes, private-sector inspectors (PSI) can be involved in regulatory enforcement. However, the private-sector has been introduced with variances amongst jurisdictions. The main

difference is the amount of private-sector involvement, which for analytical purposes is distinguished as "low level private-sector involvement" and "high level private-sector involvement". The former relates to regimes in which only assessment tasks can be taken up by PSIs, the latter relates to regimes in which assessment tasks and other tasks, the issuing of permits and/or follow-up enforcement, can be taken up by PSIs.

The main difference between the countries is the relationship between the public and private sector within the regimes. In Australia a competitive relationship is in place (PC 2004). Under the new regimes, regulatees have a choice to involve either public- or private-sector actors in their construction projects. In practice this means that the municipal BCDs and PSIs have to compete for clientele. In the Canadian regimes analyzed, a complementary relationship is chosen. Here municipalities can choose to be involved in regulatory enforcement, either fully or partly, or not to be involved in regulatory enforcement. Private-sector involvement is only possible where the municipalities do not take up regulatory enforcement tasks (BRRAG 2000; OHCS 2007). Note that competition amongst PSIs exists in both Canada and Australia.

Combining the amount of private-sector involvement and the relationship between the public and private sector results in four approaches towards one task: (1) low level and (2) high level private-sector involvement in a competitive relationship with the public-sector; and (3) low level and (4) high level private-sector involvement in a complementary relationship with the public-sector. In figure 1 the regimes have been classified according to these distinctions.

		Relationship public/private	
		Competitive	*Complementary*
Amount of private-sector involvement	*Low level*	South Australia Australian Capital Territory	Vancouver Ontario
	High level	New South Wales Victoria Queensland	Alberta

Figure 1 – Distinguishing characteristics of the eight regimes analyzed

4 Experiences with private-sector involvement in Canadian and Australian built environment policy

Fully in-line with the previously discussed literature, both in Australia and Canada, private-sector involvement was introduced aiming to increase the effectiveness of regulatory enforcement, in terms of compliance with building regulations, and to increase the efficiency of regulatory enforcement, in terms of cost and speed. These are referred to as intended impacts. As expected from prior research, unintended impacts occurred as well. In this section, intended impacts will be discussed first, followed by the unintended impacts.

Intended impacts

With the exception of Ontario, where municipal officials effectively lobbied against the implementation of private-sector involvement [1], in all cases a majority of interviewees' accounts and survey questionnaire responses indicate a perceived gain in regulatory effectiveness due to private-sector involvement. However, these claims could not be verified by, for example, information on a decline of construction-related incidents. Where then does this perceived gain in regulatory effectiveness come from? Case data discusses the advantages of PSIs' ability to specialize (cf. EI 2002: 40). A PSI based in Victoria explained:

> [Compliance has improved] I think for the simple reason that you get the most appropriate building surveyor for the project with the private system; the private system shows the best compliance. That's not to say that the Council guys aren't good enough. If someone would say to me: "Hey, check a house", I'd probably struggle; and if they would say to me: "Hey, check a hospital" I wouldn't have a problem. And if we [the PSI and the Council employee] swap around, it [would] probably be the same thing.

In Vancouver BCD officials even advise clients to involve private-sector agents in complex construction work (CPP 2003). This occurs because the BCD lacks specialist expertise to assess complex construction work. Prior research, discussed in the previous section, finds that greater inspectorial depth is gained due to such specialist knowledge (cf. Ayres and Braithwaite 1992: 104, Baldwin and Cave 1999: 126). Greater inspectorial depth might result in finding more deviances, which then can be solved. As a New South Wales architect explained:

> Some of the [PSIs] do it better, because they are more qualified and better specialized. They would deal in specialized areas, whereas Council has to deal with everything; so Council officers come across stuff that they don't know about.

Here it should be noted that municipal BCDs often have a limited number of staff, but have to be able to deal with all assessment work provided. This means that BCDs often employ staff that has general knowledge instead of specialist knowledge.

Interviewees indicated that assessment tasks, in particular building plan assessment and construction work assessment, influence effectiveness gains. These are the tasks that were regarded as providing private-sector agents the possibility to specialize. Case findings suggest that it is the combination of building plan assessment and on-site construction work assessment that results in most effectiveness gains. Knowledge gained in the first phase can then be applied in the latter phase. In South Australia, for example, private-sector involvement was experienced as "a cog in a large governmental machine", since PSIs are only allowed to be involved in building plan assessment. Information is lost when a BCD takes over in a later phase of the enforcement process.

Other tasks in the enforcement process do not seem to add to effectiveness gains. Permit issuance was regarded a general administrative task; and follow-up enforcement, such as issuing warning letters, or instituting proceedings against offenders, was regarded a legal task. Both these administrative tasks and legal tasks are not related to the particular *skills* of PSIs. Even more, follow-up enforcement by PSIs might be counterproductive, as the Queensland case teaches.

In Queensland a PSI who finds a violation of regulations has to take follow-up enforcement. This might, eventually, imply bringing the offender, who is often the PSI's client, to court. Yet, a PSI who takes this measure has to pay for the trial. As different interviewees explained, to avoid ending up in expensive lawsuits PSIs make provisions in contracts to avoid legal issues by making it possible to end the contracts. If a contract is ended, the client has to search for a new PSI or turn to the BCD having jurisdiction. Finding another PSI is hindered since others know that "something is wrong" when a client moves to another PSI halfway through a project. The obvious choice is to turn to the local BCD, which is then handed a difficult case, and often has difficulty in obtaining or understanding assessment documentation from the initial PSI.

Closely related to these effectiveness gains are efficiency gains. In all cases, again with the exception of Ontario, case data indicates a perceived gain of efficiency as a result of private-sector involvement in the new regimes. Private-sector involvement was mentioned to have made the assessment and permit process more streamlined and to have resulted in time savings for applicants (cf. KPMG 2002: 3-4, PC 2004: 221). This underlines the findings discussed in the previous section. Again here case findings suggest that the PSIs' ability to specialize has a positive impact on efficiency: more knowledge of and experience with a certain construction type may result in a speedier assessment process since the PSI knows "where to look and what to look for", as some interviewees indicated. A Vancouver-based engineer said:

> It might be more a "following rules for the sake of rules" attitude for some [BCD officials]. [PSIs] might have a more broad view and a better understanding of the important issues in the process.

Differences in incentives and administrative procedures were also mentioned as reasons why PSIs could provide a speedier and less expensive service. A PSI might be willing to speed up a process when it results in more income, whereas a municipal BCD charges regulated fees and pays out its staff a regulated salary. Furthermore, PSIs might face less time delays in administrative procedures or channels. In short, as a Queensland state official mentioned:

> [PSIs] just provide a better seamless service. They are more client focused, and I hate the term, but they are more of a one-shop-stop. (…) In essence that's what it is.

As with effectiveness, the amount of private-sector involvement appears related to the impact of efficiency gains. Interviewees mentioned that efficiency gains could be lost due to overlapping tasks. Particularly the passing on of assessment documentation to municipal BCDs,

who then issue a permit, was regarded a loss of the advantages of private-sector involvement. The loss here relates to, at least, a doubling of administrative tasks. Following on from Leibenstein (1966), it may be argued that welfare maximization could be optimized if unique resources were used for unique goals.

Here we thus find a potential tradeoff. The most efficient regimes appear to be those with a high level of private-sector involvement, little passing on of tasks, and little overlap of tasks. Maybe even those with no passing on and overlap of tasks at all – "pure private" regimes. At the same time the most effective regimes appear to be those which allow for private-sector involvement in all assessment tasks, but keep administrative and legal tasks with the government – regimes characterized by a low level of private-sector involvement.

Unintended impacts

Not only intended outcomes and gains were identified from private-sector involvement in the Australian and Canadian regimes. As expected, unintended impacts were traced as well. To start with, case findings suggest a decline of social equity, or "treating like cases alike" (cf. Stone 2002: chapter 2), due to the competitive relationship between the public and private sectors in the Australian regimes.

Case data suggests that in building regulatory enforcement a broad distinction can be made between two groups of regulatees: professionals in the building industry, such as developers, contractors, architects, and engineers; and non-professionals, ordinary citizens, frequently referred to as "moms-and-pops". The former group is professionally and frequently involved in construction works and building regulatory enforcement; the latter group is more personally and occasionally involved. This broad distinction resembles Marc Galanter's typology of regulatees in legal systems and his expressive terminology, which clearly points to the distinctive characteristics of the two groups, is also applicable to the respective groups: "repeat-players" and "one-shotters" (Galanter 1974: 97). Subsequently, a broad distinction may be made between the type of work provided by these groups: the repeat-players are generally involved in major and often more complex construction works; the one-shotters are generally involved in minor and often less complex construction works. Major jobs are by and large more profitable to assess than minor jobs. Furthermore, Australian municipal BCDs face regulated fees under which the assessment of minor jobs is loss-making, whereas profitable fees for major jobs have to cover these losses. Besides, municipal BCDs are required to process *all* work supplied; whereas PSIs may choose whom to work with – a distinctive characteristic of the sectors (Wilson, 1989, 169).

Case data indicates that the Australian PSIs "cream" the market for profitable jobs leaving less profitable jobs to municipal BCDs (see similar findings in Bailey 1988: 304). A South Australian state official said:

> What you quite often find is that 20 per cent [of assessment work that is dealt with by] the Council will normally be composed of the small works: house extensions, alterations, and small structures – those sorts of things. (…) The [PSIs] don't want to

> know [the small works], because they're too messy and fiddly, and [they] would charge exorbitantly if you insisted them on doing [the small works]… They really don't want the work.

However, a South Australian PSI made clear:

> It is not that we don't like to do [the small works]. We're doing anything if there's a dollar in it. But the way fees are based on area… If someone is doing a 50 square meter house addition and the [BCD] therefore has to do it for a hundred dollars; we just can't do it for a hundred dollars.

In itself, creaming does not appear to be a negative effect. As we have seen: PSIs specialize in certain types of construction work and supply specialized services, sometimes even for a lower price than their public counterparts do. This makes PSIs the obvious choice when planning to construct a certain type of work – both in Australia and Canada.

However, the *combination* of competition between Australian PSIs and municipal BCDs, and the PSIs' attitude to creaming the market, appears to have resulted in a decline of equity. Under the new regimes it appears that one-shotters face a lower level of service delivery than the repeat-players. The repeat-players, preferred by PSIs, appear to gain from private-sector involvement: the quality of service delivery appears no longer "available on the basis of need [but] limited to those who can pay" (Abramovitz 1986: 259). Notably, the introduction of competitive private-sector involvement is sometimes regarded as having improved BCDs' service delivery: in order to be able to compete with private-sector actors, BCDs took over characteristics of the private-sector (which confirms other research findings, e.g. Price 2007: 1149-1150).

This particular situation was not found in the Canadian cases, presumably as a result of a different relationship between the public and private sectors. Under the new Vancouver regime, for example, the municipal BCD focuses on the less complex works, whilst PSIs are only allowed to assess complex construction works. By making this split it appears that the City of Vancouver has rightly estimated their own and the private-sector's strengths. A former Chief Building Official of Vancouver said: "It's not competition; it's working side by side". In the Albertan regime equity shortfalls appear forestalled by requiring PSIs to take all clientele. In Canada, it is not so much that the creaming attitude of PSIs has been averted, but creaming at the expense of municipal BCDs and one-shotters.

On the side, one could argue that the equity shortfalls traced in Australia are not an equity issue per se, but an issue of willingness to pay. Yet, case findings suggest that this decline of equity may be strengthened. Now that choice exists between municipal BCDs and PSIs the repeat-players move to the private-sector – they show "exit" behavior (cf. Hirschman 1970). This leaves BCDs with assessing minor construction works where the clients are often one-shotters. BCDs face a decline of revenue and often resources when well-trained staff move over to the more profitable private-sector agencies which provide better terms of employment:

"municipalities have become the breeding grounds of cadets", a South Australian BCD official mentioned. As a result BCDs might, in the future, be less able to deliver services at the required level. Under the current situation this appears to have led to a situation in which assessment is not equitably available to all regulatees; in the long term this situation may be strengthened when BCDs end up in a spiral of loosing revenue and resources. Furthermore, the one-shotters may have little possibility to challenge this situation since their possibilities to do so are limited. The repeat-players have a greater "voice", but have no incentive to use it since they have moved to the private-sector (cf. Hirschman 1970: 45-46).

The case of Alberta provides an illustrative example of a lack of "exit" possibilities, in which not so much the clients, the regulatees, but the provincial government has lost its "exit". When the regime was introduced, it was expected that a large number of small PSI agencies, one- or two-person offices, would be set up, scattered around the province. It turned out that, due to competition, a small number of large agencies "survived" by buying out the smaller agencies. With only a small number of agencies in the field the provincial government faces difficulties to "steer" these agencies' behavior. The strongest measure the provincial government can take is withdrawal of their license, which in practice means that the PSI agency has to quit working. However, taking a PSI agency out of the regime would imply that building regulatory enforcement would no longer be carried out in parts of the province. A provincial official wondered: "What would we do if [the PSI agencies] close their doors?"

Furthermore, as a Queensland-based architect explained, too much privatization might result in a loss of information from the field back into the policy-making process. The "voice" of municipalities weakens. She explained:

> Local government used to have a large role in the input of regulations. This was based on experiences in the field. Now the loopback from Council to State or Federal government has been lost.

Another unintended impact of private-sector involvement in the new Canadian and Australian regimes that is frequently mentioned can be summed up under the term "accountability issues". Again this stresses findings from the literature discussed earlier. In general, interviewees expressed their concerns over PSIs being paid by their clients for carrying out building regulatory enforcement tasks. Questions were raised on the integrity of PSIs when a choice has to be made between their own private interest and guarding the public interest. Here the main difference described in the literature between the public and private sectors (e.g. Wilson 1989: chapter 17) manifests itself most clearly: the sectors have different goals – and interviewees experienced this as such.

The issuing of permits especially was regarded as a task that might give rise to conflicting interests. The building permit is, often, needed before construction work can start. The occupancy permit is needed before a building can be occupied. Permits therefore can be seen as highly valuable, and obtaining that permit might be reason for clients to put pressure on the PSI. A Queensland-based PSI explained:

> There's a lot of pressure on the [PSI] to circumvent the system, to speed up the process. (…) The developer and the engineer and the architect have had [years] to go over all the design and redesign that they're familiar with. And a week before construction is supposed to start on site, they lob eight inches of plans and paperwork on your desk and say: "We need this next week." (…) And if you find any faults in the design at that late state of the process, you are the worst bastard under the sun. You cost 'em their money, you cost 'em their time. [Imitating a bossy developer:] "Who do you think you are? We don't even need you in this process. We've got these top architects; they know what they're doing. And you are just this lowly building inspector. And I wouldn't even come to you if it wasn't necessary. So what are you going to do for me? I'm paying you good money to do this and I need my plans approved by then".

In Ontario this provided grounds for the Ontario Building Officials Association to lobby successfully against the implementation of private-sector involvement (cf. Hemson Consulting 2008). A representative of this association stated:

> We were concerned an independent builder could have someone working for him, he's paying him, they review his plans, and bring them in rolled up and we have to issue a permit without opening them up. We were concerned that that's the fox looking after the henhouse scenario.

No information was available on violations by PSIs. Yet, notably, many PSIs interviewed mentioned that although they had never crossed the line, they all knew that others did. As an Alberta PSI put it: "A handful makes us all look bad and drag us all down", and a South Australian state official explained:

> To [PSIs] it's an issue of competition; being on a level playing field. (…) From the way they see it, there are some [PSIs] that are cutting too many corners. Doing things they don't think are correct. (…) They have actually lost clients, they have lost people to another certifier who… is a bit more generous or a bit more lax in the way they [carry out assessments].

In order to monitor the situation, an additional level of oversight was introduced in all regimes – this approach was earlier referred to as enforcement of enforcement. However, this oversight was criticized by a majority of interviewees (cf. PC 2004: 207-208, NSW Government 2007: 96-97, 103). Making and holding PSIs accountable for carrying out delegated tasks was one of the most serious obstacles interviewees mentioned (cf. Mulgan 2000). Generally this related to two issues. First, the oversight models, auditing in general, were experienced to focus too much on PSIs' enforcement processes instead of the content of their work. This finding strengthens research by Power who notices that audits have become "rituals of verification" which provide

"comfort" instead of "proof" (1999: 38) that work is carried out according to and in alignment with delegated tasks. A statement by a Queensland BCD official is exemplary here:

> The auditing is a joke! One of the problems is that is easy to nail somebody for something that is easy [to find]. It is hard to know if someone has done something wrong when it is hard to find what is wrong. (…) [The auditors] come up and say: "Oh, look he didn't sign that form, we've got him!", or "He didn't lodge on a certain day, we've got him!", or "He didn't do this or that…". I look at this plan that doesn't comply and have someone to technically check it. But that never happens. (…) They don't tackle the hard things.

Second, the lack of consequences from such auditing was generally regarded as bringing in too little awareness. In the Australian regimes, criticism was expressed towards the penalties issued as being too low and often coming too late; in the Albertan regime we have already seen that disciplinary actions cannot be, or are hardly ever, taken. These findings underline that an essential part of the accountability relationship is the possibility *and use* of disciplinary action (cf. Mulgan 2000: 555-556).

Furthermore, a specific situation occurs in the regimes in which municipal BCDs have to issue permits based on PSIs' assessment reports – South Australia, the Australian Capital Territory, Ontario and Vancouver. Liability issues may occur due to overlapping tasks. In general, liability law was regarded as an incentive that was needed to maintain the PSIs' integrity (cf. Faure and Hartlief 1998: 705). However, overlapping tasks might blur who is liable for what: "the problem of many hands" (Thompson 1980). At question is: to what extent is the BCD responsible when a permit is issued based on a faulty PSI's assessment? Especially under the model of joint and several liability, Canadian municipalities face severe liability risks and are regarded as "the deep pocket" (cf. Cerminara 1995: 17). To date, interviewees made clear, this question has not been fully answered – either in Australia or in Canada.

Finally, in all cases, as expected from the earlier literature review, the credibility of the public and private sectors was criticized. Case data indicates that credibility is interpreted differently by different interviewees and in different inquiries. However, especially in the Australian regimes it was explicitly stated in a number of interviews that ordinary citizens, the one-shotters, have more trust in municipal BCDs than in PSIs: "there's a perception amongst the public that the government always does things better. Because of the independence", an Australian Capital Territory PSI stated. At the same time, however, professionals in the building industry, the repeat-players, appear to have more trust in PSIs than their municipal counterparts: interviewees in all Australian cases indicate that 60–80% of all assessments, which roughly means all complex construction work, are carried out by PSIs (cf. EI 2002: 26, VCEC 2005: 82, NSW Government 2007: 115;).

This different perception of credibility might be related to exactly the plural meaning of the concept itself. Sometimes it is argued that credibility consists of "trustworthiness" and "expertise" (e.g. DeZoord et al. 2003, Nesler et al. 2006). In the Australian regimes it may be that

one-shotters value the trustworthiness of municipal BCDs, while at the same time repeat-players value the expertise of PSIs. The creaming attitude of PSIs here may strengthen the ordinary citizens' distrust of PSIs, whilst the "stigma", built up in the past, of municipal BCDs being cumbersome and having an almost dictatorial attitude may strengthen the professionals' distrust in these departments. This reasoning can also be applied in the case of Vancouver, where the credibility of PSIs was found to be a minor issue. Here the restricted choice between public- and private-sector involvement, the absence of competition, in building regulatory enforcement appears to be an answer to the different groups' needs.

5 Lessons to be learnt

There is a notion to be made, before drawing lessons from the previous section. The analysis is based on secondary and interview data. Both datasets are inherently qualitative. The strength of such datasets is their ability to provide answers to the "how" questions posed in section 2 (see a variety of discussions in Brady and Collier 2004). No quantitative data was available to cross-check the validity of these datasets, or to answer "how much" or "how often" questions.

As we have seen, in Australia and Canada private-sector involvement was experienced and found to have resulted in effectiveness and efficiency gains due to PSIs' ability to specialize. These findings underline conclusions, as discussed before, in other policy areas that private-sector involvement has a positive impact on the effectiveness and efficiency of a regulatory regime. However, interviewees' accounts also showed negative impacts as a result of private-sector involvement. Integrity issues were mentioned as a result of conflicting interests; accountability issues as a result of oversight deficits; and liability issues as a result of overlapping tasks. Like the positive impacts, these negative impacts are found to result from private-sector involvement in other policy areas as well, see the earlier discussion. As well as stressing findings in the literature cited, a number of specific conclusions might be drawn from the analysis presented.

Threshold

This analysis stresses that the strength of enforcement actors comes from their professionalism and expertise (cf. Sparrow 2000, Braithwaite et al. 2007). Private-sector enforcement actors here were found to have strengths, *skills*, that public-sector enforcement actors lacked – and vice versa. This was most clearly found in the "low level" private-sector involvement regimes. Other tasks in the enforcement process, issuing of permits and follow-up enforcement, might be considered tasks which do not benefit from PSIs' specialist knowledge and expertise. As such, privatizing these tasks does not add to regulatory effectiveness.

Even more, it could be argued that a task such as permit issuance strengthens the negative impacts reported upon. A permit allows the owner to start construction work, or to occupy a finished building. As such a permit is a highly valuable document in the building process. This high value might put pressure on a PSI not to "bite the hand that feeds". In short, a certain "threshold" appears to exist after which more private-sector involvement does not result

in more regulatory effectiveness and efficiency. Even more, after this point more private-sector involvement appears to strengthen unintended impacts, such as accountability issues. This threshold may provide a valuable addition to the oft-cited "enforcement pyramids" (Ayres and Braithwaite 1992: 35, Gunningham and Grabosky 1998: 398).

When reforming regulatory regimes, policy makers face a wide variety of possible arrangements of regulatory tasks and responsibilities amongst *both* public- and private-sector parties. Understanding that there is "no one best way of organizing" (Wilson 1989: 26), the threshold notion might narrow down the range of choice of arrangements that can be expected to result in more effective and effective regulatory policy. Conflicting interests or overlapping tasks might be indicators for a threshold. Further empirical analysis might provide insight into other mechanisms and factors that might determine when such a threshold is likely to be reached. In regulatory practice the threshold notion might provide a focal point (Schelling 1980 [1960]: 57) to work towards when reforming regulatory regimes.

Relationships matter

The analysis once more stresses that private-sector involvement often does not replace a prior "pure public" regulatory regime, but is added to it as an additional layer (cf. Mahoney and Thelen 2010). As a result, a relationship might arise between public- and private-sector actors in the arrangement. As already illustrated, a variety of relationships is possible, which might result in different impacts. This analysis traced a competitive relationship in Australia and a complementary relationship in Canada.

Where the amount of privatization was found to impact mainly upon effectiveness, efficiency and accountability, these relationships were especially found to impact upon social equity. Competition in Australia appears to have resulted in a situation where PSIs cream the market at the expense of BCDs and their specific clientele: one-shotters. Given the presence of two distinct groups of regulatees in this specific policy area, the complementary relationship in Canada appears to have resulted in a situation where the needs of a group of regulatees meet the strengths of the respective sectors. Repeat-players find expertise and service in private-sector enforcement, one-shotters find trustworthiness and guidance in public-sector involvement. At the same time, both groups of regulatees face the lowest cost in these respective sectors.

With respect to this policy area, a complementary relationship appears preferable to a competitive relationship. This finding challenges traditional reasoning that competition is the best relationship when privatizing enforcement (Landes and Posner 1975). An expectation based on the assumption that competition rewards innovation – improving quality, keeping down costs – and thus becomes an incentive to do so (cf. Osborne and Gaebler 1992: 88-92). Based on the above analysis, this reasoning appears valid for competition amongst PSIs, but not for competition between municipal BCDs and PSIs.

Case-by-case analysis matters

From the above discussion one would expect that the combination of "low level" private-sector involvement and a complementary relationship results in the most "successful" or, to stick to Gunningham and Grabosky's terminology, "smart" approach when it comes to enforcing building regulations. However, although this "smart privatization" approach was chosen in Vancouver and Ontario, the former regime might be judged "successful" whereas the latter is not. Various reasons may underlie these differences, space limits prevent me exploring these in depth here. Most important seems to be the time of implementation, 1981 versus 2006; other policy measures taken when private-sector involvement was introduced; and other layers that were added to the existing regime (CPP 2003; Short 2005). This finding shows us, once more, that in order to understand regulatory policy and the impacts of various policy instruments, such as private-sector involvement, a case-by-case analysis is preferable to the broad brush of general labels (Wright and Head 2009: 193). Nevertheless, an intensive comparative analysis like the one presented here might provide reasons to rethink general theories or open up avenues less travelled – for instance, the discussed threshold notion and the impact of relationships amongst various regulatory actors.

6 Conclusion

This paper started by quoting Gunningham and Grabosky's proposition that "recruiting a range of regulatory actors to implement complementary combinations of policy instruments (…) will produce more effective and efficient policy outcomes" (1998: 15). This proposition is tenable with respect to the cases analyzed.

What this paper has added to our general knowledge on private-sector involvement in regulatory enforcement is that, at least with respect to built environment policy, a certain threshold appears to exist after which more private-sector involvement in a regulatory regime does not result in more effectiveness and efficiency gains. With respect to the cases analyzed, a low level of privatization appears preferable to a high level of privatization. We furthermore learned that different relationships between the public and private-sector affect regulatory policy. Here, again with respect to the cases analyzed, a complementary relationship appears preferable to a competitive relationship.

Based on these findings I argue that Gunningham and Grabosky's proposition can be narrowed down to:

> Recruiting a range of regulatory actors to implement complementary combinations of policy instruments only results in effective and efficient policy outcomes when the different regulatory actors are recruited because of their specialism, and when actors complement each other within the regulatory regime.

The validity of this assumption is ultimately a matter for further empirical inquiry.

Notes

[1] The possibility of private-sector involvement exists, but is hardly used. See discussion under "unintended impacts".

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