

Better regulation:

What is it? Are we achieving it?



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In most respects, New Zealand rates well on the usual measures of national governance. OECD indices of the quality of product market regulation typically place NZ well ahead of its comparator nations. Measures of economic and political freedom, ease of doing business and freedom from corruption routinely rank NZ at or near the top of the class. Given a single-house parliamentary system, and the lack of a formal constitution (or, at least, a single document regarded as such), it is as well that the institutional structures, governance practices and the less formal cultural mores and conventions of the nation appear to keep us on a reasonably straight and narrow path. But is the NZ regulatory system really as good as it should be?

The NZPC was asked to take a look over our regulatory institutions and practices. That report has recently been published. Our conclusion is that, however comforting the international comparisons may appear, the day-to-day realities of our regulatory governance look a lot less reassuring. And given our small size, isolation and serial productivity underperformance, we certainly can't afford to drag additional anchors in the form of ineffective, poorly targeted, misconceived or poorly implemented regulation.

Specifically, the Commission was asked to provide:

- Suggestions on how new regulations and regulators should be designed
- How to improve the way regulations work
- And how to better monitor the performance of regulators

The context for this inquiry included recognition that:

We regulate a lot, and it is costly. The NZ Parliament is busy. It sits for only around 90 days each year, but in that time passes 4 times more Public Acts than the UK parliament manages. We have occasional regulatory failures, with big consequences. We face increasing complexity from growing diversity - of expectations and risk appreciation/risk tolerance; rapid change, especially technology driven; inconsistencies in our statutes with respect to:

- Institutional form of regulators
- Appeal rights
- Consultation obligations
- Treaty of Waitangi provisions
- Funding mechanisms

Complex regulation is often poor regulation. And poor regulation undermines administrative fairness, social cohesion and a sense of political legitimacy.

Key themes

Our inquiry covered a great deal of ground. I won't attempt to cover all points in this address. But let me touch on a few of the key themes emerging in our work.

Quality control

Our terms of reference steered us towards the implementation and operation of regulatory regimes, but as the inquiry progressed, we found ourselves drawn increasingly back into the processes around the creation of regulation. A number of the mechanisms intended to ensure that regulation is properly conceived are under stress.

Even after 15 years of experience, our process of Regulatory Impact Analysis is not robust. Analysis of the merits of regulatory interventions versus alternative policy responses is too often weak, as are the assessments of the efficacy and costs associated with regulation. While RIA faces challenges everywhere, I think some Australian jurisdictions, such as Victoria, have had more success than New Zealand in injecting rigour, transparency and accountability into the development of regulatory policy.

Regulations Review Committee membership



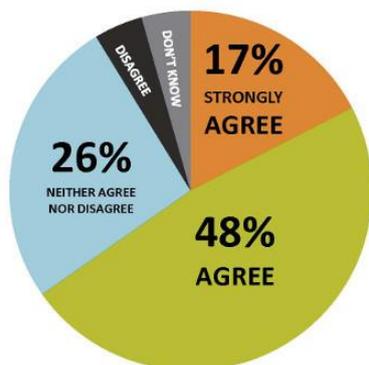
Parliament's Regulations Review select committee meets for only 1 hour per week, when the House is in session. It has little more than one dedicated policy researcher to support it and its membership has declined in recent years from 8 to 5 MPs. It operates with perfectly adequate guidelines and criteria for assessing the merits of new or existing regulation, but struggles to ensure that those guidelines are applied in practice.



**MORE THAN HALF
OF ALL BILLS
REVIEWED BY THE LAW
COMMISSION IN 2013
HAD SIGNIFICANT PROBLEMS**

The Law Commission is an independent body chaired by an eminent Judge. It draws upon a very satisfactory list of principles and criteria to assess the qualities of new statutes. In 2013, the Commission judged that more than 50% of the Bills it reviewed had significant deficiencies. The Commission’s work in this area has been curtailed more recently due to resourcing challenges. But regulators cannot deliver better regulation than their legislative frameworks allow.

Delegation of powers



ALMOST 2/3 OF PUBLIC SECTOR CEOS AGREE THAT AGENCIES OFTEN HAVE TO WORK WITH LEGISLATION THAT IS OUTDATED OR NOT FIT-FOR-PURPOSE

New Zealand’s Parliament is generally loath to delegate rule-making powers to regulatory bodies. So our statutes include more detail than is typically found in other jurisdictions. Two thirds of the Chief Executives of regulatory agencies we surveyed reported that the statutes and regulations they are charged with implementing are obsolete or not fit for purpose. Given the limited time available in the House, the work of “repairs and maintenance” of existing law tends to be low on the list of priorities. This means regulators are forced to devise “work-arounds” or otherwise compromise in their regulatory approaches.

An obvious solution to this issue of maintaining the currency of regulation is to focus the content of statutes on the purpose of the law and the principles to be applied in implementation, and delegate the creation of more detailed regulations and rules to a lower body, usually the regulator – with appropriate transparency and checks, of course. When we asked members of the Regulations Review Committee why there was not more delegation, the MPs replied that putting detail in primary legislation provided accountability and certainty for citizens.

Does limiting delegation or discretionary decision making by regulators provide better regulatory outcomes or greater certainty? I would say “no”, especially as technology and markets evolve so quickly. It is only this year that consumer legislation in NZ has been updated to provide customers of internet-based professional traders with the same protections enjoyed by people who purchase the same goods from a bricks- and-mortar store. Being certain about a forthcoming regulatory decision is poor compensation for it being wrong or inadequate as a consequence of the limitations of an obsolete statute.

Evaluation and review

So we regulate a lot and the “architecture” of our regulation could be designed better. We also pay inadequate attention to the functioning of our regulation once it has been enacted. Across a number of our inquiries we have found weak capability for, and limited attention to, evaluation. There is little to guide a post-implementation review of whether a particular regime is achieving its

intended outcomes – we are soft in specifying upfront what would constitute success. But the effort devoted to such review is limited and the feedback loops from review to regime adjustment are either non-existent or under-developed.

There have been a number of attempts in recent years to boost “stewardship” obligations of departments for the regulatory regimes they administer or oversee:

- Quality Regulation Review (2006-8)
- Transfer of RIA oversight to Treasury (2008)
- Introduction of Regulatory Reform minister (2008)
- Tightening of RIA process & standards (2009)
- New regulatory management tools (2009)
- Ministerial policy statement: ‘Better Regulation, Less Regulation’ (2009)
- Consideration of Regulatory Standards Bill (2009-10)
- ‘Regulatory stewardship’ obligations for departments (2013)

But these initiatives have struggled to gain traction in the face of other priorities and limited follow-up from central agencies. One symptom of this is that we pay relatively little attention to our large stock of regulatory regimes. There is a good deal more energy around the creation of new law and regulation than there is around the repairs, maintenance and repeal of what we already have.

Regulatory failures – common themes

Regulatory failures matter for a couple of reasons. First, there are consequences, sometimes catastrophic. But second, regulatory failures frequently result in further layers of regulation and often added complexity. What is less clear is that those responses boost the quality and effectiveness of the regulation.

In the course of our inquiry, we looked closely at 18 high profile examples of regulatory failure in the UK, USA, Australia and NZ. In collaboration with Professor Julia Black of LSE we reviewed the reports from the official inquiries into those failures, looking for the common themes. Common themes in regulatory failures indicate scope to reduce risks of future regulatory failures. The common themes evident in this review of past major regulatory failures include:

- Lack of clarity about the roles of the regulators
- Weak governance, culture and leadership
- Complex or obsolete regulation
- A lack of resources, and a lack of oversight of the regulation
- Poor risk assessment and enforcement

Our report deals with each of those factors in terms of the design and operation of regulatory regimes in the NZ context.

Skills, training and professionalism

Implementing regulation is an increasingly challenging task, and the academic thinking around good regulatory practice is an evolving field. For twenty years Ayres and Braithwaite’s Responsive Regulation has been the dominant influence in compliance and enforcement thinking in Australia,

New Zealand and the UK. The central idea is that compliance is more likely when the regulator operates an explicit enforcement pyramid based on the regulated party's willingness to comply.

'Risk-based regulation' was the next major development, calling on regulators to focus on actions or actors that pose the greatest risks to the public.

But recently, Julia Black and Robert Baldwin have argued that while Responsive Regulation or risk-based regulation describe the approach regulators should take, they do not have a great deal to say about how a regulator should deal with resource constraints, conflicting institutional pressures, unclear objectives or changes in the regulatory environment. Black and Baldwin advocate a 'really responsive' approach, involving an analysis of the motivations, interactions and institutional environments of the regulatory actors in regulatory regimes. Being Really Responsive requires regulators to become much more attentive to the environment in which they are regulating – the factors that might shape the response of regulated parties to the regulatory regime and the need to be able to adapt to changing circumstances.

As the regulatory task becomes more sophisticated, regulators must become more skilled. When we asked the CEOs of NZ's regulatory agencies about the capability of their regulatory workforce, around 20% thought that they faced significant skill gaps amongst their staff. When we asked the regulatory personnel themselves, and businesses regularly engaging with regulators, the perception of inadequate skills and training was far more widespread.

10,000+
WORKERS



65

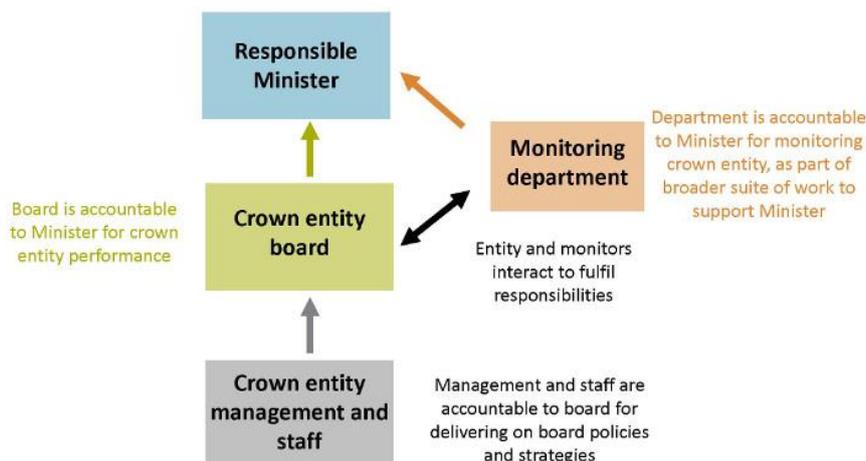


**PUBLIC SECTOR COMPLIANCE
QUALIFICATIONS COMPLETED
AUG 2012 – JAN 2014**

We found that while there is a good range of training opportunities around the NZ system, too many are not well aligned to current needs, and too few regulators are being exposed to them. Indeed, completion rates for courses within the programmes currently on offer are particularly low. To give you a sense of the gap, there are over 10,000 people employed in regulatory roles in New Zealand. But only 65 people completed national compliance qualifications – programmes explicitly designed for regulatory staff – between August 2012 and January this year.

Our analysis pointed to a need to lift the professionalisation of the regulatory workforce, through lifting professional leadership, building stronger communities of practice at different levels of the regulatory value chain and strengthening managerial focus on workforce capability within regulatory agencies.

Monitoring of regulators



A good deal of NZ's regulatory activity is carried out through Crown Agencies, at arms-length from Ministers. Each of those Crown Agencies is allocated to a core government department and subject to monitoring by the department. Crown Agencies also typically have an external board for governance purposes, and some have statutory independence from Ministerial involvement in their regulatory functions.

Our inquiry found a good deal of dissatisfaction by regulator board members with this monitoring function. Few felt that the monitoring effort of the lead department was adding much value either to the Minister, who is the intended beneficiary of the monitors' work, or to the Crown agency itself. This dissatisfaction is compounded by a good deal of role confusion with respect to Ministers, monitors, board chairs and chief executives. Too often boards and their chairs are disempowered by the monitoring and Ministers reach over boards to work directly with the chief executive of the agency concerned.

Working at the level of the "system"



When we look across NZ's public policy machinery, we find a number of well run "systems" with clear, coherent and functional governance supported by strong policy "brains". As examples, our tax system is well run and "owned" by the Inland Revenue Department. Treasury "owns" and is responsible for the fiscal system, while monetary policy is clearly the responsibility of the Reserve Bank of New Zealand. In each case, the agencies concerned are clear about their roles and are equipped to do the job. They are capable of thinking strategically about what they do, why they do it, how they judge success or failure and what they need to do to prepare for a different future.

In contrast, our regulatory system has no clear ownership. Individual regulatory regimes have owners and much of the regulatory stewardship function referred to earlier exists in the silo of the

relevant department. But no-one has a clear responsibility for our regulatory system. With clear ownership could come:

- Focus on the system, its performance and a sense of applicable performance objectives
- Strategic prioritisation of effort across the system
- Specification and allocation of tasks for improving the system
- Promotion of continuous improvement in regulatory design and practice.

This needs properly-designed and resourced political, institutional, managerial and intellectual support. Our recommendations aimed to deal with those matters.

Key recommendations

We made 44 recommendations in our final report. These can be broadly grouped into four main themes.

The first theme is stronger ownership and leadership from the centre. A senior Minister in Cabinet needs to be given responsibility for the regulatory system. Their job would involve identifying areas of risk in the system, setting priorities or objectives to raise its performance, and allocating tasks to achieve those objectives. To carry out this role, the Minister would need more active support from central agencies, and we recommended an expanded and more prominent role for the Treasury in regulatory policy and management.

The second theme is a greater focus on improving the quality of legislation. If New Zealand is to continue basing its regulatory regimes heavily on primary legislation, it's important we get its design right. The Commission recommended a review of the quality checks and processes surrounding the preparation of laws, including RIA and external review by bodies such as the Law Commission. We also believed that more use of exposure drafts of Bills – as often occurs in Australia – would help identify and iron out problems in draft legislation. And we saw a case for looking back over existing statutes to check whether the right balance had been struck in allocating tasks and powers between primary and secondary legislation.

The third theme is greater professionalisation of the regulatory workforce. A great deal of valuable effort has been put into building capability by senior regulatory leaders, but this has depended on the dedication and professionalism of individuals. Our view was that these efforts needed to be given greater support from the government, and made a permanent part of the public sector landscape. We recommended that the government clarify and strengthen its expectations on regulators to develop their staff and to work with other regulatory agencies in building their capability.

Although each regulatory agency and task is different, there are a number of common activities, challenges and themes across the system. Given these commonalities, the Commission believed that there was room to appoint a 'head of profession' to provide intellectual leadership and promote good practice for the regulatory workforce.

And the final theme is review and evaluation. We need more of it, and we need to put more effort into targeting the most important regimes for review. We also need to extend the scope of review and evaluation. Much regulation is implemented and enforced by arms' length bodies, but as I noted earlier, oversight and review of these organisations could be improved. We proposed that a process of peer review be set up for regulatory agencies, in which senior leaders from other

regulators would assess their performance. This would also have the benefit of helping encourage a 'community of practice' amongst regulators. Finally, there needs to be greater transparency about the existing processes being used to promote better regulation.

Concluding comments

The theme of this session is "Better Regulation: Are We Achieving It?" Our inquiry has run a set of diagnostic tools over the New Zealand regulatory machinery, concluding with a "Could do better" grade. We've also concluded that doing regulation well matters – indeed, it matters a great deal. So the sense of some complacency around the performance of our regulatory apparatus is worrying.

There are many things we could do better and the rewards for doing so are likely to be substantial and widespread.

We have a pretty good sense of the characteristics of good regulation and good regulators. The front end of the regulatory process is critical. That includes strong links between problem identification, policy analysis (including options for how best to respond to the identified problem), and translation from that through to the design of a regulatory response where that is judged to be the best option.

Institutional design matters. But equally important is what goes on within and between the regulatory institutions: their capability, governance, leadership, professionalism, culture and training. As we ask more of our regulators, we should not be surprised that these softer skills become more important.

Political interest and energy is concentrated at the front end – on pushing through a visible response to a contemporary issue. This is the political imperative of being seen to be doing something.

What we found lacking was a strong focus on implementation, performance evaluation and the effective feedback loops to regulatory design which you should expect in a system committed to continuous improvement.

Leadership matters at many different levels. In the New Zealand context, as we evaluated the performance of our regulatory institutions, it became apparent that, while we had pockets of leadership excellence scattered throughout, the regulatory system overall was lacking leadership at the strategic level. In particular, it lacks a strong "owner" at Ministerial level.

Without strong strategic leadership, attempts to drive performance improvement will lack focus, commitment or energy. We already know what that environment looks like.

Thank you.