

The Treasury

Productivity Commission Report on Regulatory Institutions and Practices Information Release

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Date: 12 March 2014

To: Minister of Finance
(Hon Bill English)

Minister for Economic Development
(Hon Steven Joyce)

Deadline: Before 12.00pm, Thursday 13 March

Aide Memoire: Productivity Commission draft report: Regulatory Institutions and Practices

Purpose

This note has been prepared jointly by Treasury and MBIE, in consultation with the State Services Commission, in preparation for your meeting with the Productivity Commission at 12.00 on Thursday 13 March. At this meeting the Productivity Commission will introduce their interim report "Regulatory Institutions and Practices", which was commissioned last July. Submissions are requested by 8 May, and the Commission expects to produce its final report on 30 June.

Overview

Officials have not had a chance to fully study the report, which runs to 466 pages with 42 recommendations. This briefing provides you with our initial perspective on the report and provides possible speaking points (also summarised in Annex Two) for your meeting with the Productivity Commission. We will provide you with further advice on the draft recommendations as part of a more comprehensive briefing on the draft report.

The Productivity Commission's Inquiry was commissioned in part to inform the further evolution of the regulatory management system. Broadly, the interim report finds examples of good practice and ongoing improvements, but also scope for stronger central leadership and greater consistency in implementation. The report suggests that the regulatory management system is evolving in the right direction, but that there is a long way to go yet to embed consistent performance in regulatory institutions and practices.

We share this perspective. The regulatory management system has evolved since Treasury assumed responsibility for it in 2008, with the initial focus of Treasury's work on the system being to:

- strengthen the existing government expectations for regulatory impact analysis, particularly through Treasury QA of significant regulatory proposals, and
- extend the set of standard system expectations, tools and processes to cover other good practice regulatory functions, such as the scanning and review of existing regulation, and the planning of regulatory policy development and implementation.

The focus and emphasis is now moving towards:

- more engagement, support and partnership with key regulatory agencies (rather than just enforcement of centrally-imposed rules), and
- a more active system leadership role by focussing departments on the performance of significant regulatory systems and associated key risks.

A summary of improvements to the regulatory quality management system since 2009 is included as Annex One.

Among wide ranging and detailed recommendations the Commission highlights in particular the role of Treasury and SSC in enabling and incentivising Departments to exercise greater oversight for the regulations and regulators for which they are responsible. This is an issue that we will provide our views on in our advice to you on the draft recommendations.

Speaking points:

- What does the Commission consider are the priority issues across the range of recommendations?
- Based on the submissions and their interviews with stakeholders, which are most likely to lead to benefits and be broadly supported?

Key issues

The Commission's own summary note highlights a number of areas where it finds scope for improvement.

Regulatory systems are neither flexible nor responsive enough

The Commission has identified that:

- regulation in New Zealand may become obsolete and fail to keep up with technology or public expectations
- regulators may lack important powers or be unable to tackle emerging problems
- regulatory regimes are not evaluated regularly enough

- Ministers and officials may not know where the emerging areas of risk are, or where they should focus their energy.

The Commission recommends:

- greater use of exposure drafts prior to the introduction of new regulatory regimes or significant changes (recommendation 4.1)
- regulators should publish and consult on statements that explain how they interpret their mandate (recommendation 4.2), and information about their regulatory decision making processes (recommendation 6.3)
- more delegation of rule-making powers to regulators, providing these powers are appropriately defined and controlled (recommendations 5.1 to 5.6)
- more focus on monitoring, evaluation and review in Department's proposals to introduce new legislation, supported by the Treasury – the Commission notes that there are examples of low effort, high payoff evaluation from overseas which could be used in New Zealand (recommendations 15.3 and 15.4).

Comment

- Approaches to setting legislative expectations for regulators and providing regulators with broader powers have been evolving, for example, through the Building Act 2004, the Financial Markets Authority Act 2011 and the recently released Health and Safety Reform Bill – this includes giving careful consideration to what principles should be in legislation, what detailed requirements should be in regulations and where rule making powers can be delegated to regulators.
- MBIE will frequently issue exposure drafts, for example with the recent Health and Safety Reform Bill.
- MBIE intends also to trial an approach to setting expectations for the workplace health and safety system through a *regulatory system statement of intent*, which will address many of the Commission's recommendations, including setting clear expectations for how the Ministry and WorkSafe will work together, and how the performance of the workplace health and safety system will be monitored.

Speaking points

- Are there particular types of regulation which the Commission thinks are more suitable to regulators being provided with broader rule-making powers?
- Are there examples of low effort, high payoff evaluation that the government could best focus on? Should any of these be prioritised?

There are too many unjustified inconsistencies across regulatory regimes

The Commission considers that inconsistencies in how regulations are designed and implemented increase costs for businesses, complicate the process of designing new regulation and make it harder to learn across regulatory regimes.

The Commission recommends:

- improving knowledge of existing regulatory regimes through standardised reporting requirements (recommendation 3.1, 3.2 and 3.3)
- clearer guidance on cost recovery, and stronger mechanisms to ensure that guidance is followed (recommendations 13.1 – 13.8).

Speaking points

- Does the Commission consider there are particular priority areas for addressing inconsistencies?
- What extent of benefits does the Commission expect would be realised from addressing inconsistencies?

Maintaining regulator independence is important

The Commission has recommended that:

- proposals to move regulatory roles into departmental agencies should be approached with caution, due to the possibility of reducing independence
- where political intervention in regulatory systems are necessary, transparent mechanisms should be preferred to fundamental overhauls of regulatory regimes.

Comment

- We agree that transparency mechanisms should be preferred. Transparency is one of the principles of Best Practice Regulation.
- Our public management system enables us to meet the twin objectives of safeguarding independence from Ministerial influence while having functions performed within an agency subject to Ministerial influence. For example, statutory functions are carried out independently, and by agencies at varying distances from, Ministerial influence (including departments and Crown entities).
- The Better Public Services programme led to amendments to the State Sector Act 1988 introducing the departmental agency model as a new organisation form. This model increases the system's flexibility to safeguard independence and maintain transparency, while enabling a stronger service delivery focus and economies of scale (e.g. through a shared back-office). It is a valuable addition to the range of potential governance and accountability arrangements and will be considered alongside other options.

Speaking points

- Are there any regulatory roles which the Commission considers are more amenable to the departmental agency form?

More attention needs to be paid to skills and implementation

The Commission found a number of skill and practice gaps across regulatory systems. The Commission considers there is a lack of responsibility for ensuring there is a conscious and strategic approach to developing skills and sharing knowledge.

The Commission has made a range of recommendations related to actions for:

- regulators forums or networks, including the Compliance Common Capability Programme (recommendations 11.1 and 11.2, 12.2, 12.4 and 12.6)
- individual regulators to focus on relating to staff recruitment, development and support (recommendation 12.1)
- the Skills Organisation, as the industry training organisation primarily involved in regulator skills development (recommendations 12.3 and 12.5).

The courts are strong, but other checks on regulation need strengthening

The Commission does not agree with perceptions that there are weak opportunities to challenge regulators' behaviour or decisions. Judicial review is available and used, and often there are rights of appeal.

However, the Commission suggests strengthening the checks on regulators through additional resourcing for the Ombudsman and the Regulations Review Committee (recommendations 10.1, 13.1).

Comment

- The report rehearses the arguments for and against "merits reviews". The report also recognises the trade off between a system of appeals and the more general process of reviewing regulator performance. The report asks for further input on people's experiences and suggestions on decision review.

Regulators could be better held to account

The Commission considers that there is scope for regulators to be better monitored and held to account – with greater oversight of Departmental performance in this area from the Treasury and SSC, including in chief executives' performance agreements and annual expectation letters (recommendations 14.1, 14.2, 14.3 and 14.4).

Comment

- This would continue and strengthen the processes that are already under way with the incorporation of regulatory stewardship expectations into the PIF. The expectations include departments having oversight of the regulators for which they are responsible.

Speaking points

- We suggest that the Commission recognise that its recommendations build on developing practice for monitoring and oversight of regulators.

The system needs leadership

The Commission considers that responsibility should remain with a senior Cabinet Minister who would be responsible for setting strategic objectives for the regulatory system, identifying priorities to raise performance, ensuring that these priorities are implemented and promoting good practice.

The Commission also suggests that the Government publishes an overall strategy for regulatory management with regular reports on progress against a work programme to deliver it (recommendation 16.2).

Comment

- Developing the overall strategy and work programme could be done relatively easily. The groundwork for this already exists. The challenge remains to communicate this effectively and ensure follow-through/accountability.

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Annex One: Activity already under way to improve management of the regulatory cycle

This annex lists some of the activity undertaken to improve the regulatory management system since 2009.

- We have continued to refine the regulatory impact analysis requirements, most recently in 2013. External reviews show the general quality of analysis is rising, though we are continuing to work to improve it further.
- We have identified the key features of 'best practice regulation' and assessed regulatory regimes against them. We are now reviewing the assessments made in 2011/12.
- We have in place processes to ensure that every department has a clear view of the state of the legislation it is responsible for and clear plans for reviewing and updating it as necessary.
- We have set out expectations as to how departments should exercise their stewardship role over government regulation. These cover, at a high level, how departments should be designing, implementing and administering regulatory regimes. We expect to revise the expectations in the light of experience and will take the Productivity Commission's ideas into account in that process.
- The Regulatory Impact element of the Performance Improvement Framework has been significantly upgraded to specifically focus on how well the agency exercises its stewardship role over regulation. The revised element has been used for the first time this year in the PIF review of MBIE.
- A wide-ranging regulatory review programme has already led to substantive reform, for example:
 - Resource Management Act reforms and changes to freshwater management (ongoing)
 - vehicle licensing
 - teacher workforce
 - occupational health and safety.
- We have introduced a new requirement for Disclosure Statements with new legislative proposals. Disclosure Statements:
 - point out specific features of a piece of proposed legislation and/or the key processes through which it was developed and tested
 - make this information publicly available in an accessible and cost-effective way, and
 - thereby facilitate greater and more effective scrutiny of that legislation by Parliament and the general public.

Annex Two: Summary of Suggested Talking Points

General

- What does the Commission consider are the priority issues across the range of recommendations? Based on the submissions and their interviews with stakeholders, which are most likely to lead to benefits and be broadly supported?

Regulatory systems are neither flexible nor responsive enough

- Are there particular types of regulation which the Commission thinks are more suitable to regulators being provided with broader rule-making powers?
- Are there examples of low effort, high payoff evaluation that the government could best focus on? Should any of these be prioritised?

There are too many unjustified inconsistencies across regulatory regimes

- Does the Commission consider there are particular priority areas for addressing inconsistencies?
- What extent of benefits does the Commission expect would be realised from addressing inconsistencies?

Maintaining regulator independence is important

- Are there any regulatory roles which the Commission considers are more amenable to the departmental agency form?

Regulators could be better held to account

- We suggest that the Commission recognise that its recommendations build on developing practice for monitoring and oversight of regulators.