

Regulatory institutions and practices

Draft report – March 2014



This *Cut to the Chase* summarises the Commission's draft report on regulatory institutions and practices. The Commission seeks your input – particularly on the questions and draft findings and recommendations – by 8 May 2014.

The inquiry

The Productivity Commission was asked to develop guidance on how to improve the design of new regulatory regimes and make system-wide recommendations to improve the operation of existing regimes in New Zealand. The aim is to improve the performance of our regulation system, leading to better regulatory outcomes.

The Commission released an issues paper (August 2013) and has considered 53 submissions; met with 92 interested parties; and surveyed 1,526 businesses. The Commission will consider further submissions and talk to inquiry participants between March and May 2014. Government will receive the final report in late June.

Why regulation matters

Regulation touches all corners of New Zealanders' lives. It affects the food we eat, the houses we live in, the goods and services we buy and sell, and our ability to earn a living. Regulation plays an important role in guarding New Zealanders from harm, protecting our rights, and ensuring that markets work fairly and efficiently. However, when regulation is badly designed or implemented, it can fail to provide these protections or place unnecessary burdens on personal freedoms, property and business efficiency.

The system is not broken, but it could work much better

New Zealand has a big and complex regulatory system, with as many as 200 different regimes, a large number of regulatory agencies, and more than 10,000 people employed in administering regulation. It is a major piece of government infrastructure, and is as significant as the tax and spending systems in terms of its impact on the lives of New Zealanders.

However, the management of regulation differs from tax and spending in a number of important respects. Unlike those systems, there is no clear government strategy for regulation, no programme for its improvement, and no clear "owner" of the system.

Nor is there enough information on the performance and impacts of the regulatory system.

Not enough attention is being paid to the framing and performance of the regulatory system as a whole. Much of the effort to date has been directed at improving decision making at the front end (through Regulatory Impact Assessments). There needs to be more focus on checking how well regulation has been implemented, learning from past experience, and identifying causes of inadequate performance.

This report has reviewed the system and found a number of weaknesses. New Zealand's system is not broken, but it is "muddling through". There is scope to get more and better performance from the system and greater benefits for New Zealanders. The Commission's recommended improvements would also make the regulatory system simpler to design, operate and comply with.

The system is neither flexible nor responsive enough

Regulation in New Zealand can easily become obsolete and fail to keep up with technology or public expectations. Almost two-thirds of regulator chief executives that the Commission surveyed reported that agencies often work with legislation that is outdated or not fit-for-purpose. As a result, regulators may lack important powers or be unable to tackle emerging problems.

In addition, New Zealand regulation relies heavily on legislation. Parliamentary time is scarce, which means that it can be hard to deal with outdated legislation. In other countries, legislatures explicitly give regulators the power to make rules, allowing them to respond more quickly to emerging issues. There may be scope in New Zealand to delegate more rule-making powers to regulators, provided these powers are appropriately defined and controlled.

Regulatory regimes are not evaluated regularly enough. Governments tend to "set and forget" regulation. This means that ministers and officials may not know where the emerging areas of risk are, or where regulations are not having their intended effect. The Government has recently introduced a number of initiatives to improve evaluation, but New Zealand does not use a number of techniques that have been shown overseas to involve low effort and offer high payoffs. A more strategic approach to evaluation would allow governments to make better progress on keeping regimes current.

There are too many unjustified inconsistencies

The Commission found a range of inconsistencies in the way regulation is designed and implemented. Regulators face different obligations to consult people affected by regulation, or to acknowledge Treaty of Waitangi principles. A variety of governance, organisational and decision-making structures are in place across the system. Different rules and processes are applied to similar issues.

New Zealand cannot afford to run 200 bespoke regimes. The inconsistencies increase costs for business, complicate the process of designing new regulation, and make it harder for regulators and officials who design regimes to learn from each other's

experience. The draft report provides guidance in a number of areas to promote a more coherent and principled design approach.

Maintaining regulator independence is important

There can be strong political pressures for ministers to become directly engaged in regulatory processes, even where the regulatory function has been delegated to an independent body. It is important that the independence of these bodies continues to be respected. Tensions between the needs of politics and regulators are inevitable. If political intervention is necessary, providing transparent mechanisms for it is better than fundamentally overhauling regulatory regimes to solve specific or short-term political problems. Transparent mechanisms would also reduce the temptation to put pressure on regulators out of public sight.

Recent changes to public sector law allow for new bodies (“departmental agencies”) to be set up within government departments, and the Government has indicated that it will consider moving some roles carried out by arm’s length bodies into these agencies. Proposals to move regulatory roles into departmental agencies could reduce independence, complicate accountabilities and should be approached with great caution.

More attention needs to be paid to skills and implementation

The Commission found a number of skill and practice gaps across the system. Some regulators are not up-to-date with developments in regulatory practice, and have enforcement strategies that may not deliver the best results. Business surveys showed low levels of confidence in the skills and knowledge of regulatory staff. Surveys of chief executives and compliance staff revealed sharply different views about the prevalence of skills gaps and the availability of relevant training.

A well-functioning regulatory system takes a conscious and strategic approach to develop skills and share knowledge. Currently no agency is responsible for this task, and work carried out to date has been the product of individuals with a strong sense of professional duty. This is not sustainable. The draft report makes a number of recommendations to put more focus into improving skills and practice.

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

There is a perception that New Zealand’s system provides only weak opportunities to challenge the behaviour or decisions of regulators. The Commission found that this view is not correct. The courts play a significant role in checking regulator power in New Zealand. Judicial review in New Zealand can explore a wider range of issues than is the case elsewhere, and most regimes provide rights of appeal.

However, other checks could be stronger. New Zealand has a highly centralised constitution, and controls on regulation-making powers are weak compared to other countries. The Office of the Ombudsman plays an important role but it is under pressure. A key check is Parliament’s Regulations Review Committee, which reviews regulations and can recommend their cancellation, if they are unfair, unusual or a burden on resources. But this cancellation power is seldom successfully used. The

Commission considers the Committee should play a more active role, and needs more resources.

Regulators could be better held to account

Regulators are accountable to ministers, Parliament, regulated parties (especially through the courts) and the public. Ministers in particular have a number of tools they can use to ensure that regulators act efficiently and effectively. But ministers need good information if they are to use these tools well.

Current monitoring of regulators is not doing a good enough job of promoting high performance. Some departments do not understand their roles and responsibilities as monitors of independent regulators, and expectations on them to monitor effectively are too low. Performance expectations need to be clarified and strengthened. Regulators should be required to report on their performance and impacts in a common format and the Treasury and State Services Commission need to be more active in overseeing departments that implement regulatory regimes.

The system needs leadership

The regulatory system is large and distributed across a number of departments, agencies and ministerial portfolios. Lifting its performance will require stronger leadership at the centre and clearer accountability for the system as a whole.

Ministerial responsibility for the regulatory system should be clarified and re-energised. The current practice of giving responsibility to a senior Cabinet minister should become the norm. Only a senior minister will have the information and authority to ensure change occurs across the system. The minister should also 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.

To carry out these responsibilities, the minister will need better support from the public service. A number of functions important to regulatory quality are either not being carried out by the public service, or are not being carried out with sufficient rigour.

Read the full report ... and make a submission

Submissions on the draft report are invited by 8 May 2014. Government will receive the final report by the end of June.

Read the full version of the draft report and make a submission at www.productivity.govt.nz or call us on 04 903 5150.

The **New Zealand Productivity Commission** – an independent Crown Entity – conducts in-depth inquiries on topics selected by the Government, carries out productivity-related research, and promotes understanding of productivity issues.