

# **Regulatory Institutions and Practices**

## **Focus Group Evaluation**

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# Contents

<b>Context</b> .....	3
<b>The Focus of the Inquiry</b> .....	4
<b>Process Management</b> .....	7
<b>Quality of Analysis, Findings and Recommendations</b> .....	8
<b>Engagement</b> .....	11
<b>Delivery of Message</b> .....	12
<b>Concluding Comments</b> .....	15

## Context

After submitting its final report on its Inquiry into Regulatory Institutions and Practices in June 2014, the Productivity Commission is now conducting an evaluation of its performance. The evaluation includes: a focus group of inquiry participants; a survey of inquiry participants; an independent expert evaluation; and administrative data.

This report presents the results of a focus group held on 9 September 2014 with the following participants:

Peter Mumford	Ministry of Business, Innovation & Employment
Keith Manch	MaritimeNZ
Jeremy Cain	Transpower
Brent Alderton	Commerce Commission
Jonathan Ayto	Treasury
Kirsten Windelov	PSA

Input was also gathered through a separate phone interview on 10 September with Mark Toner and Ed Willis of Webb Henderson (who had not been able to attend the focus group session in person).

The objective of the focus group was to provide feedback on the overall performance of the inquiry, with reference to the Commission's performance measures listed below.

1. The **focus** of the inquiry report, including:
  - the significance of the issues covered
  - whether they were covered in sufficient depth
  - the relevance of information sourced and people engaged with
2. Satisfaction with the **process management** for the inquiry
3. The **quality** of analysis of information and the quality of the findings and recommendations
4. The quality and effectiveness of the Commission's **engagement** in completing the inquiry
5. The effectiveness of **delivery of message**, as evidenced in the inquiry reports and supporting material (summary reports and supplementary papers).

These areas are considered in turn below.

## The Focus of the Inquiry

There was no real debate or discussion within the group about the significance of the issues covered in the Commission's inquiry: it was clear that the members of the focus group felt the issues were indeed significant and worthy of the Commission's attention. Similarly, there were no strong challenges to the relevance of the information sourced or people engaged with. Instead, under this heading, the main topics of discussion were:

- how the terms of reference for the inquiry had impacted on the shape and usefulness of the report;
- whether the issues were covered in sufficient depth; and
- whether the report functioned well as a guide for public servants working on regulatory issues.

### The terms of reference

Group participants agreed that the phrasing of the terms of reference had a big impact on the Commission's inquiry and final report. Two members of the focus group had been part of the process to develop them. One commented that while regulatory issues were definitely significant and worthy of an inquiry, it wasn't clear in advance what sort of product from the Commission would be the most useful. They had struggled with how best to formulate the terms of reference and may not have provided enough clarity to get the final terms quite right.

There was general agreement in the group that the terms of reference were very broad and some thought too broad. "Ambitious" was another word used. There was a consensus that the breadth of the terms of reference, together with the requirement that *recommendations will not be specific to particular regulations or regulators* had presented the Commission with a "very difficult task" and "a real challenge".

One person said that while pitching the inquiry at a system-wide level was good, it had resulted in the Commission being a little hamstrung. Another person said the Commission's ability to produce a useful report had been hamstrung by both the breadth of the terms of reference and the (relatively short) timeframe to complete it.

The group members involved in formulating the terms of reference commented that their breadth was intended to give the Commission scope to shape its inquiry and pursue the issues it considered important. It was clear the Commission would need to narrow the scope down to make the inquiry manageable and it had chosen to do so by excluding a number of areas such as Police and Inland Revenue, the policy process, and the parliamentary legislative process. Similarly, international regulations/conventions, while discussed in the report, had not been the subject of any recommendations.

One group member felt that the exclusions made by the Commission were somewhat arbitrary and that it was difficult to see where the boundaries had been

drawn and why. However, another group member said the exclusions were reasonable.

One person had found the early stages of the inquiry the most valuable as the Commission went through the process of identifying the main areas and shaping its report. He thought the Commission had done this well.

### **Issues covered in sufficient depth?**

There were a number of comments about breadth versus depth of the report with some people thinking it may have been better for the Commission to identify a few key issues to address in greater depth, rather than cover the ground as widely as it did:

- one person expressed surprise at the large size of the draft report as he had expected the Commission to pick out a few key issues to examine in depth
- one member commented that funding of regulatory agencies was a critical issue that could usefully have been covered in greater depth
- another expressed the view that the Commission had traded-off depth in favour of breadth and wasn't sure why as it could have gone the other way. He thought it may have been due to the way the terms of reference were phrased to keep the inquiry at a system-wide level and avoid witch hunts of particular regulators/regimes.

### **Does it work as a guide?**

It was suggested that the Commission had read the terms of reference as calling for a fairly comprehensive guidebook for public servants working on the design and establishment of new regulatory regimes and institutions<sup>1</sup>. One member of the group thought the Commission had produced a credible guide and he had received feedback from colleagues involved in regulatory design and review that supported that view. However another person felt it did not work well as a guide.

While it was agreed that few would read it cover-to-cover, there was a consensus that people would dip into it for guidance on particular areas and that it was already being used that way by some. The report was a compendium of information bringing together a lot of material. The Commission's quality of analysis made it credible and it would undoubtedly be used to support arguments going on within agencies.

Because of its general nature, the report did not provide a template for any specific piece of regulation, however it did provide a useful list of topics and insights for people working on regulatory issues:

*“There is no 10-page guide (for developing a regulatory regime) but it is a really useful framework document. I would certainly use it if I was developing a regulatory regime.”*

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<sup>1</sup> The wording was: “Develop guidance that can be used to inform the design and establishment of new regulatory regimes and regulatory institutions, and the allocation of new regulatory functions to existing institutions. The guidance should take into account other existing work...”

There was agreement within the focus group that once people had pulled out the parts of the report that were useful for a particular regulatory problem or issue, they would need to do significant additional work to apply it.

One person commented they had found the draft report excellent and perhaps closer to a guide than the final report.

## Process Management

There was general agreement that the Commission manages its inquiries very effectively.

Two people were surprised the Commission had been able to deliver the final report within the timeframe: they felt that the Commission should perhaps have taken a bit longer in order to focus in on particular areas and make the report shorter and punchier.

One member of the group described the process, with its various phases, as exhausting. Coming from an organisation with limited resources, it was difficult to find the time needed to do engage properly, including reading large reports, liaising with other associated agencies, and following-up with the Commission. While the Commission had done a lot to facilitate the engagement, and that was much appreciated, the lengthy process still posed a challenge.

Other specific comments on aspects of the process included:

- it would have been useful to consult a little more widely on the terms of reference
- the timeframes were good – everyone had enough time to comment
- the process was well-signalled and all up on the website
- the Commission attracted a wide range of submissions, which showed that the process worked for people
- the process supported some serious submissions and achieved a good result
- there was a risk that Auckland-based businesses would see this as a Wellington exercise and not participate, but that didn't happen.

## Quality of Analysis, Findings and Recommendations

Group members agreed that the quality of analysis was very good with one person commenting:

*“It is clear there are some very committed smart people turning their mind to these issues. The quality of people and thinking shows through.”*

### Ideas to shift thinking

There was a sense that the Government was looking to the Commission to produce something that had eluded other agencies to date: a magic bullet that would deliver significant improvements to our regulatory regimes. Participants felt the Commission’s report did not deliver any magic bullet, but that it was unrealistic to expect it to. People around the world were wrestling with these issues and had not been able to solve them.

While agreeing that a magic bullet was an unrealistic expectation, one group member had been looking for the report to deliver *“one or two things that would help to shift thinking”*. They felt there was no key idea to latch onto nor was there a sense of what the Commission stood for.

An example of the kind of idea hoped for was the ‘enforcement pyramid’ produced by Ayres and Braithwaite and illustrated with a triangle diagram (shown in the Commission’s final report on p56). The comment on the Commission’s report was:

*“There’s no triangle.”*

Rather, the report contained a collection of smaller ideas and recommendations that, while useful, would not shift thinking on how to move forward.

As a counter to this, one person commented that Chapters 3-5, covering regulatory practice, regulator culture and leadership, and workforce capability had succeeded in shifting the discussion and been a catalyst for these issues to be taken seriously.

It was felt that the Commission had successfully *“sold the idea that the system is not performing very well”*. That in itself was very useful in starting debate and discussion and potentially leading to the government making a step change in how it manages regulation and regulatory agencies. However, the main recommendations to move forward related to the role for a senior minister and a strengthened resource in Treasury, which may not be enough.

There was some discussion of the Australian Productivity Commission which was described as playing a long game and being expected to push the boundaries with its proposals. It was suggested the New Zealand Commission could have taken that approach to this inquiry.

In a similar vein one person commented that, while there were some tangible/specific recommendations in the report, the business community was probably looking for more of these. The Commission could have gone further by building a straw man that presented more of a challenge to the status quo. While they might



not have been accepted, recommendations that push the boundaries are useful if they prompt debate.

One group member thought there were some “big ideas” in the submissions and wasn’t sure why the Commission had not picked these up, at least for discussion; the reasons for this were not given in the report.

## **Analysis**

Some felt that the problems with the current set of regulatory regimes were well identified and described. However one person commented that the report lacked a clear definition of regulation and a clear identification of the problem. As a result, they thought it was not as focussed as it could have been.

The focus group discussion, and the phone call with Webb Henderson, touched on a range of specific aspects of the report’s analysis. These are outlined below.

### ***Too much law***

There was a strong message, or headline, in the report about New Zealand having “too much law”. This problem related both to the existing stock of law and the flow of new law adding to it at pace. One person felt the Commission had been given the opportunity to pursue this, and could have taken a number of approaches to the problem, leading to possible solutions. Instead of doing this, the Commission appeared to accept the fact of too much law, take it as a given, and focus on regulator performance. At the least, the group member felt the Commission should have made the assumption of a continuing large regulatory state explicit.

A contrary view was that an explicit statement along those lines could have limited the report’s uptake. It needed to be acceptable to people of different political standpoints in order to be useful long term.

Also, regardless of the amount of law, it is important that it be implemented well, so a focus on regulator performance is appropriate.

With regard to improving regulator performance, one group member had expected the Commission would make recommendations about changes needed to any or all of: the mandate, tools, resources, and checks and balances applying to regulators. The comment was that this was lacking and the report did not proceed coherently to a conclusion.

### ***Merits review vs judicial review***

One comment was that the Commission may have been a bit side-tracked by this issue – probably as a result of receiving submissions from organisations that were dissatisfied with the judicial review process. The focus group member felt that the Commission had addressed the role of judicial review as a constitutional measure, but had not fully considered its role as a regulatory measure.

A related comment was that it might have been better to keep this issue linked together with other means of holding regulators to account (governance, monitoring etc).

### ***Lack of a map***

There was some brief discussion about the Commission deciding against providing a thematic grouping or map of regulatory regimes/agencies. This was disappointing to at least one participant while another person was not overly concerned, noting that regulatory regimes are all so different.

### ***Case studies***

There was very little comment on the case studies however one person felt they were not well connected to the narrative and questioned their merits.

## **Findings and Recommendations**

It was noted that the report had identified a number of changes that could be made in the short-term, some medium term work on monitoring, and some longer term work to improve regulator capability. However one group member felt the report had not identified priorities for action other than those relating to a senior minister and strengthened central agency support, nor had it adequately discussed the cost of changes beyond the estimated size of the proposed extra Treasury resource.

One participant had looked through the findings and recommendations very recently in search of assistance with a particular issue but had been unable to find anything. Their comment was:

*“The findings and recommendations hang just above being practical”.*

One person observed that a lot of the findings and recommendations were quite generic:

*“Some findings and recommendations will attract general agreement only because they don’t say much – like that regulations should be certain – no-one is going to disagree with that.”*

Another comment was that some of the findings were actually more like recommendations and it was unclear why they hadn’t been given that status.

The group’s views on how the analysis, findings and recommendations will be used going forward are presented in the final section: Concluding Comments.

## Engagement

The group was very positive about the way the Commission had engaged in the course of its inquiry. Group members had ample opportunity to engage, including in one case the chance to make a submission on other submissions.

The Commission was seen as wanting to engage, offering multiple ways to do it, and being very open and helpful to those wanting to participate. In one case this included a Commission staff member going through the Commission's draft report to pull out all the bits that were most relevant for that organisation. This saved time for the participant's organisation which was particularly appreciated because they have limited resources to apply to an inquiry like this.

One person passed on similar compliments from an associated organisation about the Commission's willingness to engage.

It was clear to group members that the Commission had listened to the input and changed its views in some areas, as evidenced by the differences between the draft and final reports.

One group member commented on the *"genuine spirit of inquiry"* and the Commission's welcoming approach to those wanting to engage. That group member said it was the best engagement they had been involved in and that the Commission did not seem to have any preconceptions about solutions and the way forward:

*"The Commission is particularly good at engaging".*

Another participant talked about Murray Sherwin and Commission staff making themselves available for round table and one-to-one meetings with members of the Auckland business community. They felt the Commission was really good at engaging in Auckland and they had received very positive feedback about the Commission's receptiveness. The one-to-one meetings provided an opportunity for frank discussions and it was important for these opportunities to continue to be available.

One person noted that because the terms of reference precluded the Commission from making recommendations specific to any regime, there was less incentive or need for some to engage. In other words, if it wasn't going to have any direct or immediate impact on the regime you worked in, there wasn't the same willingness to devote resources to the exercise.

A couple of reservations expressed within the group were:

- one person had a sense that there was strong engagement but from a small number of players
- while engagement with the PSA and CTU was very good, there could have been more engagement with other unions.

# Delivery of Message

## The message itself

The final report was seen as recommending “*incremental changes across the system*”. This was a difficult message to get people excited about or attract much media interest. Some of the other messages from the inquiry that were mentioned by members of the focus group were:

- *the system is not performing very well*
- *NZ regulation has suffered from a ‘set and forget’ mentality*
- *there is too much law*
- *regulation needs to be treated as a system*
- *regulation needs to be treated with a lot more importance.*

## Infographics, cut to the chase, videos

Members of the group felt that the infographics on the website, the videos and other summary material such as the ‘cut to the chase’ were all very useful:

*“the video clips are fantastic”*

*“loved all the infographics, cut to the chase etc”.*

People had found the infographic and the media release were a handy source of quotes to use in their work (things like “*1 in 4 businesses agree...*”). One person commented there must have been a marketing person involved.

A group member noted that the media release and the ‘cut to the chase’ document contained statements that were stronger than some of those in the report itself. This was endorsed by another participant who had noticed that a colleague had got a slightly misleading impression of the Commission’s final report from the briefer, punchier material prepared for a more general audience.

The group member who made this observation also said that, while they generally tried the shorter documents first, they usually needed to refer back to the full report when questions arose.

## The final report

The size of the final report and its accessibility to the various potential audiences for the material was discussed quite actively. The sheer size of the report meant there was a risk of people feeling that it was inaccessible or intimidating and not using it as a result.

One group member said it was difficult to get people in their organisation to focus on the report and that they may need to employ someone to read it and work out how their organisation can make use of it.

A similar comment was that some people in business have it sitting on their desks but are a bit intimidated: *“they will have read all the short documents but need the detail.”*

Other comments on the presentation of the final report were:

*“the report will suffer because of its size”*

*“the report is so big”*

*“the media won’t read the report”*

*“public servants will need to pull out bits and package them”*

*“it’s a comprehensive and good report but not one to read end to end”*

*“it is the most academic of the Commission’s reports to date”*

*“the report is aimed at ministers and public servants and the size and style of the report is appropriate for that audience”*

*“I don’t mind the size of the report. I would hate the Commission to feel pressured to only produce shorter reports. They should make them as long as they need to.”*

### **Use of quoted material**

One group member found the academic style and frequent use of sometimes lengthy quotes from academic sources interrupted the flow and made it more difficult to read.

Another comment was that quoting Julia Black to define regulation, for example, was pitching it too high and abstract for some readers: *“it’s like buying a Mercedes when a Toyota would have been fine.”*

It was noted that the Commission frequently quoted from submissions. The person raising this said that was fine as long as they went on to either endorse or refute the comment and draw some conclusions. Unless there was some follow-up it looked like the Commission was simply showing that it had read what people said.

### **Suggestions**

A number of group members made suggestions that might make the material more accessible for more audiences. Developing a wider range of material – something more than ‘cut to the chase’ but less than the whole report – could lead to a wider range of people using the Commission’s work and better pick-up by media.

A popular idea was to pick a number of issues and prepare custom summaries that pulled material together from the report into a more digestible form. Chapters 3-5, for example, could be turned into a useful stand-alone document. Another suggestion along these lines was:

*“could there be a series of 10 reports on specific issues, with a staggered release?”*

Other thoughts were:

*“it could be split into two documents: a shorter report and supporting appendices”*

*“the Commission could consider designing future reports to be read on an ipad. This would allow for a short succinct document with multiple links to more detailed material”*

and in response to that idea..

*“I’m not that keen on a lot of links as it’s easy to get lost: I like to read a report on paper”*

# Concluding Comments

## Views on next steps

Since the report was pitched at a system-wide level with many of the recommendations being quite generic, there were a number of comments made about what would happen next. Some of the comments were as follows:

- the report is a starting point
- the government will need to do a synthesis
- the government could go ahead and produce the guidance documents recommended in the report, however if that was all that happened, there is a risk it would make no difference whatsoever
- the government will need to be careful what it picks up
- Treasury will need to impose a simple construct to take the work forward.

These observations were all suggestive of a considerable amount of work still to be done. This could be difficult for Treasury and the other agencies involved as they have not been immersed in the inquiry like the Commission's team. However it was acknowledged that the Commission's mandate did not allow it to take its recommendations further. Inevitably the follow-up would fall to other agencies.

## Will it have longevity?

The group talked about whether the Commission's final report "hit or missed the mark", whether it would have longevity, and whether it would provide a basis for ongoing discussion and future changes. Some of the comments were:

- while there was a risk of it being set aside due to its length, there had been a positive response
- it will be used as a catalyst for conversations with ministers
- it has already become a textbook/bible on regulatory issues
- it will frame conversations in the public sector
- public servants working on regulatory design and in regulatory agencies will draw from it
- it will be equally useful regardless of the party or parties forming the government
- there has been a mixed response to the recommendations and trade-offs will need to be made
- we will use it in our role of providing advice to clients.

One person mentioned that a policy agency was already focussed on a number of elements of the report, and that the Commission's discussion of international regulations/conventions had usefully triggered further discussion within government.

Some comments about the Commission's overall performance on this inquiry were:

*"The Commission should be pleased with the report."*

*"This reports adds to the Commission's credibility."*

*"They are a small organisation with a tiny budget and they should be very proud of what they have produced."*

*"Yes I think it will have longevity and I really hope so. It covers the issues and sets the agenda. It is the logical starting place for work going forward."*

*"Overall the Commission is doing a fantastic job."*