

8 May 2014

Steven Bailey, Inquiry Director
Regulatory Institutions and Practices Inquiry
New Zealand Productivity Commission
The Terrace
Wellington

Dear Steven

Submission on the Regulatory Institutions and Practices Draft Report

Thank you for the opportunity to provide feedback on the New Zealand Productivity Commission's draft report on Regulatory Institutions and Practices. The NZ Transport Agency supports the Commission's view that "the regulatory system isn't broken", but that it could be working more effectively.

The draft report provides many findings and recommendations that we consider will make a significant contribution to improving regulatory institutions and practices in New Zealand. In our view, the following three issues identified in the draft report are critical to lifting regulatory performance in the transport sector.

Key issues

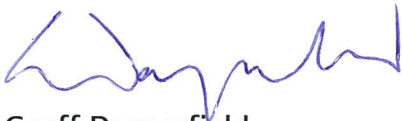
1. ***Role clarity*** – We agree that clear roles and objectives are crucial, particularly having a shared understanding of these between regulatory and oversight agencies. As recommended in the report, we think it would be a valuable exercise for regulators and oversight agencies to develop and maintain statements of their roles and responsibilities. This would help highlight and manage areas of overlap (especially between policy, regulatory functions and service delivery) or gaps, allow for improved coordination and, where necessary, reallocation of functions to the organisation with the most relevant and appropriate expertise.
2. ***Independence and institutional form*** – We agree that delegating greater rule-making power to regulators would help as a way of improving role clarity and underlining the independence of Crown entities. With appropriate monitoring by oversight agencies (the Ministry of Transport in our case), this would enable Crown agencies like the Transport Agency to better prioritise their resources to ensure technical rules are up to date and fit for purpose. In the transport sector, rapidly advancing technology requires an increasingly flexible regulatory regime. As noted in the draft report, the mechanism of rule-making is not the problem. In the Transport Agency's experience, rules can be made in six weeks if necessary. The current major constraint in the transport regulatory system is the lack of available policy development capacity to refresh primary legislative settings. Improved regulator

independence through greater delegation of rule-making (classified as 'other instruments' to distinguish them from 'legislative instruments') to Crown entities would also help to free up oversight agency resources for strategic policy and primary legislation projects.

3. ***Accountability and performance*** – We agree with the observation that regulatory performance monitoring is a weak link in the current regulatory system. This is an area the Transport Agency is already working to address in response to Cabinet's initial expectations for regulatory stewardship. We welcome the opportunity to engage with and learn from enhanced whole-of-government feedback on improving regulatory performance.

Please see our specific comments and responses to your questions **attached** below.

Yours sincerely



Geoff Dangerfield
Chief Executive

Transport Agency comment on draft report findings and recommendations

Please note where we have not commented on a finding or recommendation we have no specific comment to make.

Recommendation / Finding	Transport Agency's comment
Chapter 3 – Understanding the regulatory system	
F3.1, F3.2	We agree that no single set of categories can be applied to all regulation. We note that figure 3.1 (page 50) identifies only one area of regulation for which the Transport Agency is responsible – in addition to safety we also regulate economic and environmental outcomes under several statutory regimes. Several of the draft report recommendations (e.g. R3.1, R14.2 and R15.1) rely on that idea that categorising and standardising all regulatory regimes is possible and useful. We suggest that comparing and standardising should only be mandated where meaningful comparison and standardisation is possible and useful. This might be achieved by comparing and standardising within, rather than across, groupings (i.e. social regulation compared to and standardised with other social regimes rather than with economic regimes).
R3.1	We agree so long as meaningful standardised reporting can be achieved and does not impose disproportionate costs on regulators. We would like to see a recommendation for central agencies to develop standardised reporting requirements in partnership with regulatory agencies – so that the development of standardised requirements is undertaken with those responsible for meeting them (compare R14.2). Also, we note that there is a general move away from prescriptive reporting requirements to allow Crown entities to tell more relevant performance stories.
Chapter 4 – Role clarity	
R4.1	We agree this would be a helpful expectation. It can be challenging for Crown agencies to engage with departments on the detail of legislation after it enters the political sphere of a Select Committee.
R4.2	This recommendation could be made clearer by providing guidance on what is meant by regulatory regime –the definition provided on page 17 does not provide a sufficient sense of scale or scope.
Chapter 5 – Regulatory independence and institutional form	
F5.4	We agree and consider that this finding is sufficiently important to warrant development into a series of recommendations. For example, where regulatory independence is appropriate (with appropriate oversight and reporting) a regulator should have the ability to adjust technical regulatory settings, etc.
F5.7	We would like to see this finding made into a recommendation. This could be linked to R5.2.
R 5.1	We agree and also see this as a priority for land transport.
R5.4	We agree and note that figure 3.1 has both the Transport Agency and Ministry of Transport responsible for the same functions under the Land Transport Management Act. We suggest that the Transport Agency be listed as the regulator and the Ministry of Transport as the oversight agency.
Chapter 11 – Regulator Practice	
F11.9	This finding may be overstated; while performance over time is an area that deserves to be singled out, responsiveness to changes in the regulated environment can be inhibited by inflexible primary legislation. We consider that many of the recommendations in the draft

Recommendation / Finding	Transport Agency's comment
	report should work to address these issues.
R11.1	Active monitoring by oversight agencies may cause participation in communities of practice to become a tick box activity. Another idea is to promote better regulatory practice through increasing secondment opportunities for regulatory staff and public sector awards for regulatory excellence.
Chapter 14 – Accountability and performance monitoring	
R14.2	2015/16 would not allow adequate time to identify and agree new performance measures, design new reporting indicators and requirements, and collect sufficient data.
Chapter 15 – System-wide regulatory review	
F15.1	In 2012, the Transport Agency and Ministry of Transport completed a principles-based review of the vehicle certification system (please update table 15.2). This led to reform of the warrant of fitness regime in 2013. Also, in our experience sunset clauses can require high effort and are unhelpful where well-functioning legislation requires Parliamentary time to reinstate (we suggest updating figure 15.1).

Transport Agency response to Productivity Commission questions

Question	Transport Agency's response
Chapter 3 – Understanding the regulatory system	
Q3.1	Yes, it would be helpful to better acknowledge throughout the report that regulation is broader than the design, implementation and enforcement of legal instruments. It includes non-legislative interventions such as information provision, incentives, and social marketing. Also, it would be good to include outcome based performance measures to measure effectiveness – it is hard to measure effectiveness via output based measures.
Q3.2	It is difficult to answer without an agreed definition or set of categories of what constitutes a regulatory regime. In our view, it makes sense to allow regulatory agencies, in collaboration with oversight agencies, to agree regime categories by sector. Regulatory agencies can then work with the central agencies to determine how best to report on regulatory performance.
Chapter 5 – Regulatory independence and institutional form	
Q5.1	The Regulations Review Committee has the appropriate powers to undertake this role. If regulators are delegated greater disallowable instrument-making powers (as we think they should) the Regulations Review Committee can employ enhanced risk identification processes to identify and act on any problematic instruments using information from improved regulatory performance reporting. We also note that greater delegation would not necessarily lead to increased legislative activity.
Chapter 7 – Regulatory culture and leadership	
Q7.1	One of the issues is workload and ensuring adequate time for communication and feedback. This is both procedural and cultural in nature. Recommendations already identified in the report will help to raise this as a priority.
Chapter 8 – Consultation and engagement	
Q8.2	The land transport rule-making provisions introduced in 1993, and refined in 2011 to allow more flexibility (including the use of online channels), are working well.
Chapter 10 – Decision review	
Q10.1	The Transport Agency has operational policies for internal review processes, which vary based on the issue at hand – for example, there is a different process for the issuing of exemptions than the revocation of permits. In general, the more significant the potential impact of the decision, the more formalised the process is and the higher in the Agency the decision-making power will be exercised. At the end of 2013, an independent review was undertaken of the Transport Agency's enforcement activities, in order to identify ways to strengthen the system. Some changes to operational policies and processes are being made as a result of the review's findings. The result of these changes will be a more transparent and consistent enforcement system, with improved information systems that enable more strategic regulatory decisions to be made. Apart from this review, there has been no formalised evaluation of the effectiveness of the internal review processes. However, a range of measures is used to provide insights into how well the processes are working – for example, examining court decisions on appeals.
Chapter 11 – Regulator Practice	
Q11.1	Yes, each of the identified developments highlights a valuable area in which to invest effort to improve the design and operation of the regulatory system.
Chapter 13 – Funding regulators	
Q13.1	There is no clear definition of fees and levies in the transport legislation, but this is not considered detrimental because guidelines on funding reviews provided by the Ministry of Transport in 2013 use definitions based on those provided by the Legislation Advisory Committee, the Office of the Auditor-General and the Treasury.
Q13.2	No, as we already do this.
Q13.3	The aim of managing memorandum accounts is to accommodate short-term differences between revenue and expenses. When viewed at a static point in time, very few memorandum accounts would be in perfect balance. A surplus or deficit in a memorandum

Question	Transport Agency's response
	<p>account does not signify a problem in itself, however, if it is significantly out of balance this can be a trigger for closer monitoring and review. Instead, the health of memorandum accounts should be considered over the medium term, such as 5-10 years. This timeframe provides sufficient time for the fee review process, which is the largest constraint on balancing memorandum accounts. There is a lag between business change/investment and the adjustment of fees and charges, often of between 12 and 24 months. Also, it can take significant time to recover the cost of a large project (5-7 years). The process to modify fees and charges requires considerable resource and effort. There would also be benefit in better enabling regulatory agencies to 'self-manage' and approve changes to (at least some) fees and charges themselves within the context of adherence to Treasury guidelines and principles.</p>
Chapter 15 – System-wide regulatory review	
Q15.1	<p>We consider that establishing an Office of Regulatory Assessment and Review is an interesting idea to explore. Depending on the role of such an office (i.e. review of every legislative development?) it may add unnecessary time and costs to the legislative process. It might be best to initially explore a review/audit function.</p>
Chapter 16 – Making it happen	
Q16.1	<p>Guidance on how such a role fits with existing Ministerial responsibilities would be required.</p>
Q16.2	<p>The State Services Commission or a new agency.</p>