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Enquiry into Regulatory Institutions and Practices
New Zealand Productivity Commission
PO Box 8036
The Terrace
WELLINGTON 6143

Dear Madam / Sir

ENQUIRY INTO REGULATORY INSTITUTIONS AND PRACTICES

Before seeking to answer some of the questions raised I would like to discuss the observation in the report that regulation can be carried out by Government or quasi-Government organisations. As noted it can also be "decentered" and carried out by a diverse array of non-state organisations such as professional bodies and industry groups.

In modelling the structure of regulatory institutions and the delivery of regulation it seems important to be clear about mandate. Where regulations are imposed in the public interest and seek to coerce people to act in a particular way, and where there are sanctions, including punitive sanctions, for failing to comply, then it seem this form of regulation should be confined to Government agencies. Regulations around the setting of standards to control professional behaviour, other forms of industry or trade-based performance may be conducted by non-Government agencies but it would be very important for those people who are expected to comply with the various regulations to be able to choose to decide whether they opt in or opt out in such situations. To this end some evaluation is necessary to distinguish regulations in the statutory sense with codes of practice in the voluntary sense.

Where regulation forms part of statutory law the mandate to develop, enact, and enforce should be conferred on a publicly accountable agency. Governments, central or local, are voted in "by the people for the people".

Perhaps the Commission has already consciously considered this given its focus is going to be on public agencies as regulators. Accordingly, this may presume some features of regulation that should be the preserve of public institutions that presumably exist for some public interest reason with powers of coercion not available to non-public agencies. I would agree therefore that regulation includes primary legislation, secondary regulation, deemed regulations, licences, consents, and rules. I am less clear as to what is meant by "informal instruments and agreements" particularly where these do not have any mandated sanction. By their very nature informal agreements are an agreement between two parties as opposed to one party coercing another party to behave in a particular way. Codes can be of both forms e.g. the Building Code and the Road Code which coercive effect. Industry "Codes of Practice" which imply "could do" or "should do" rather the "Must do" are of a different nature.

The report provides good examples of when regulation is designed poorly. One other instance is when rules are hard to apply because of ambiguity or lack of clarity (rather than over prescription). Uncertainty in rule design leads to uncertainty as to expectation as well as uncertainty around compliance (which is different from failure to enforce).

In relation to Question 3, New Zealand does not need to have a unique "regulatory style" - for the very reasons noted in Table 3.1. There are situations where New Zealand can benefit from examples in other jurisdictions. That is not to say however that there will not be New Zealand specific characteristics that influence the way in which regulation is designed and operated in New Zealand. Again for the reasons noted there are historical, cultural, and situational circumstances that will see regulation being developed to meet the needs of New Zealand and this is only right.

Question 5 invites comment on the ways of categorising New Zealand's regulatory regimes. It seems they can be categorised according to organisational type that focus more on the delivery agent or alternatively you could categorise them according to theme, which focuses more on the subject of regulation. As indicated in the Victorian example some regulations are easily classified into such things as safety, environment, animal welfare, but there will inevitability be a "general" or "other" category. The indicative grouping of New Zealand regulatory regimes into areas as shown in Figure 3.2 of economic environmental and social may be a more straightforward classification system. Whether this typology is useful however may be questionable. There will inevitability be differences in the nature and scope, structure and focus of regulations between and within the areas identified that would mean that it is going to be difficult to come up a typology for which uniform design and operation principles could be established.

The report's commentary in Section 4 around improving regulatory design and operation extends the thinking in the "Towards Better Local Regulation" enquiry. Figure 4.1 usefully identifies the matters that are central to creating a regulatory system.

Questions 6 and 7 address the issues of unclear regulatory objectives or those situations where regulators are allocated multiple objectives. With a growing tendency to specify principles in primary legislation, there is a danger that Parliament will provide a smorgasbord of outcomes that are to be achieved. The Resource Management Act is a very good example, but there is little guidance given as to how decision makers should decide between potentially conflicting outcomes.

Question 8 raises the issue of potential conflicts of interest inside organisations. Local Government is a classic case in point; the statutory presumption is that conflicts of interest are to be avoided "so far as is practicable" (see Section 42 Local Government 2002). The test therefore is practicability but who decides whether this is achieved? In Question 10 the report notes that policy and regulatory functions are sometimes difficult bedfellows. However, the design of sound and robust policy is surely enhanced when based on good operational regulatory experience and understanding. This may not necessarily mean that the policy agency needs to have direct operational experience, that would certainly help, but they certainly need to ensure they have good relations with those at the regulatory coalface. Again as the "Towards Better Local Regulation" enquiry demonstrated there are many examples where regulatory regimes are created at a Central Government level with inadequate consideration of the consequences or the costs of the regulation.

Questions 11 and 13 are related to situations where regulatory overlap occurs. There are many examples where different regulatory regimes deal with similar issues. Natural hazards for example is an issue under the Resource Management, Civil Defence, and Building Acts. There is no doubt an explanation as to the differences that each jurisdiction focuses on and the three systems can be made to work together. This is always likely when there is goodwill and commitment, but what are the alternatives? Perhaps overlap is not the correct characterisation, it is more a matter of "relatedness", but that in itself is not a reason to not have separate regulatory regimes. They just have to be made to work together and there is an imperative on the design process to ensure that conflict and duplication is avoided.

Question 17 asks about the limits of regulator independence. As previously mentioned, the regulator should be a Government or quasi-Government institution where the regulation coerces private individuals to behave in a particular way for some public benefit. Such public agencies can be held publicly accountable through Parliamentary processes, including reviews by Parliamentary institutions, and the electoral cycle. Whether the decisions should be taken by elected representatives or officials is often a matter of how the decision making power is conferred through the various regulatory instruments, or whether delegations are in place to allow decisions for efficiency or other reasons. What makes something necessary that the Minister of Immigration should decide on whether or not to allow an over-stayer to remain in New Zealand, rather than that decision being made by an official within the department? Under the Building Act, building consents are issued by the local authority, yet it would be entirely inefficient for every decision to be signed off at a council meeting, which is why delegations exist to allow staff to make these decisions. Perhaps therefore there are some criteria around contentiousness, costs implications, sensitivity, that might assist in determining where the locus of decisions rests with an elected representative or a public official.

In relation to review and appeal arrangements, New Zealand does seem to have a plethora of bodies to whom people can go to have regulatory decisions reviewed. Many are specialists, including the Environment Court, Land Valuation Tribunal, the Medical Disciplinary Committee, and the list can go on. It might be quite salutatory to itemise such bodies as I am sure every Government department expends money on a vast range of review authorities. Intuitively, some consolidation into something like the Australian Administrative Appeals Tribunal is attractive, but only if it can reduce cost, improve efficiency and lead to good decision outcomes. Whether centralisation has advantages over and above the current myriad of review opportunities remains to be a line of enquiry.

The allocation of risk in regulatory arrangements is not easy. The example of EQC is a good one. Clearly the decisions made by local authorities over where development can proceed are important. In some cases it is not the local authority that decides where a development can proceed, but rather a decision from an Environment Court judge or perhaps a Department of Building and Housing/MBIE Determination. In these situations it comes down to the reason behind the regulatory intervention. If it is in the public interest that a regulator is making decision around what people can or cannot do and how, then are not the benefit costs and risks to lie were they fall? If they fall unfairly on an individual, then there needs to be a review mechanism to contest that decision. But at the end of the day a decision has to be made.

Question 32 talks about open and transparent funding arrangements for regulatory delivery. A recent example from the Ministry of Justice in setting out fees for the sale and supply of alcohol gives the appearance of openness and transparency. It was very detailed 68 page report. However, it does not necessarily mean that the resulting fees were fair, appropriate, or proportionate to either applicants or in this case the local authority regulators. Likewise, fees charged by the Department of Conservation for various licences or concessions have the appearance of transparency and robustness, but questions can still be asked about whether it is value for money. Lodging appeals with the Environment Court now costs a lot more than in previous years. These figures lack any transparency and simply seem to have been "plucked out of the air". In the Council's own experience in setting fees you can invest a lot of time and effort into apportioning costs in order to establish a fair charge, but this always involves an element of judgement and offset. From an applicant's point of view there would seem to be a preference to knowing what the charge is going to be upfront so appropriate budget arrangements can be made, rather than face an uncertain cost. Accordingly, perhaps it should be accepted that there may be less relationship between cost and effort, but more weight given to certainty of specification of any cost recovery. For both Central and Local Government agencies that mean that if income is less than total expenditure then either the tax payer or the rate payer has to met the difference. Perhaps improved disciplines around determining the public versus private benefit split in delivering regulation may have some merit.

Question 43 promotes a risk-based approach to regulation. One could mount an argument that resource management rules are in place to manage risks and effects, yet they are the focus of much criticism and debate. The term "risk-based" is just another way for exercising a discretion as to whether or not to make a decision in a particular way. The New Zealand Building Code is ostensibly a performance based code and yet it relies on many prescriptive Standards to give effect to what is being sought. There are situations where prescription and certainty is appropriate and equally there are situations where flexibility and discretion should likewise be possible. It is not a question of one without the other.

Consultation obligations in legislation are widespread but highly variable. RMA plan making proceses involve pre-notification consultation, submissions, further submissions. LGA, Building Act policy, Reserve Act processes simply invite people to submit to an invitation to be involved. Whether the consultation is too much or too little is not an easy question as it depends on what is at stake and who is involved. But there are inevitable costs and sometimes when there are many different processes underway at the same time, consultation fatigue can quickly set in.

Clearly regulations which impact on rights and obligations should involve consultation but why should local regulation be any different to central legislation? Is the Parliamentary process the model to apply or does that need to change?

Question 50 and 53 are directed to ensuring staff consistency in regulatory practice. The principles of delegation are important here as much as standard operating procedures, guidance manuals, and peer review. I am happy to expand on this if required and contribute in any other way to other matters arising.

Yours sincerely

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