SAFE
SECURE
CLEAN
WWW.MARITIMENZ.GOVT.NZ

MARITIME
NEW ZEALAND

25 October 2013

TEL +64 4 473 0111 FAX +64 4 494 1263
Level 10,1 Grey Street, PO Box 25620, Wellington 6141
New Zealand

Productivity Commission
info@productivity.govt.nz

By email

High level input to Productivity Commission Issues Paper – Regulatory Institutions and Practices

General comments

Need for uniformity of terminology - The use and adoption of uniform terminology that is clearly understood and accepted is an important aspect to ensuring the design and delivery of regulatory regimes is successful. Different agencies involved in different regulatory regimes use different terminology and concepts, often for the same things. The use of uniform terminology and concepts in developing a draft report for submissions would also be helpful.

On page 1 of the Issues Document the concept "regulatory regimes" is defined by three components namely: **Standard setting, monitoring and enforcement**. "Standard setting" is, in turn, defined as identifying the regulatory goal or target. This definition risks conflating the setting of policy objectives or outcomes with specific standards or requirements that might contribute to the achievement of the objectives or outcomes. It is recommended that the distinction between outcomes and standards be clearly made because the distinction is very relevant to regulatory design and practice as illustrated in a recent paper prepared by MNZ (*Maritime New Zealand comments on the rules system – September 2013*).

Institutional Arrangements

Choice of organisational/institutional arrangements – The Crown Entity model has been used to create a large number of regulatory bodies that are part of the State Services sector, but not subject to the State Sector Act (and by definition not Public Service Departments). Depending on the particular Crown Entity model (crown agent, autonomous or independent crown entity) they place the regulator at varying degrees of separation from the Minister. However, in some instances the retention of the policy function within a Department or Ministry can create a disconnect between policy design and delivery. From observation and experience in the transport sector, and more broadly, the extent of the disconnect seems to vary depending on the purpose and objectives of the policy agency and its interest in the functions of the entity at any particular time, Where the policy agency has limited or no vested interest in the operational delivery of the regulatory regime (whether due to the range of interests it has, or priorities of the day), and as a result invests less and less time in its development and review, the regulations can drift - causing problems for all concerned, including the operational regulator.

With increasing pressures on Government Departments to do more with less, agencies like the Ministry of Transport have increasingly reduced their internal specialist sector capability, resulting in more pressure on the operational Crown Entities to perform policy initiation and design functions. Over time this change has created a situation in which considerable effort, expense and time is invested in managing the relationships and reporting on progress. There is also a risk of overlap and duplication of effort, which places considerable additional burdens on a small crown entity. The primary risk is that it focuses more and more attention on reporting and policy engagement than on delivery of regulatory functions. Some of these institutional

challenges were highlighted in the recently published SSC PIF review of the Ministry of Transport a copy can be viewed at: http://www.ssc.govt.nz/pif

Regulatory design – In our view, regulatory design should seek to achieve the appropriate constitutional balance. One such example relates to the rules against sub-delegation. Many regulatory instruments are contained in delegated legislation (i.e. delegated law making powers given to them by Parliament). There appears to be no consistency across the NZ statute book for how this is done and it seems regulatory regimes are merely a product of the era in which their legislation was made, or possibly the style or approach of the policy agency, or policy adviser that advised on them. As all regulators with a public welfare focus have the primary objective to act to protect public interest and deliver a social welfare outcome it is unclear why some regulators are given the discretion to develop standards of compliance while others are not able to do so. In the transport sector the delegated legislative regime rests with the Minister of Transport, leaving little or no ability for the statutory regulators to issue standards that routinely change to meet technological advancements or changes in international requirements. This results in outdated, inefficient and sometimes harmful regimes that cannot maintain pace with industry and community expectations. (The views of Maritime New Zealand in respect to the current transport rules regime is set out in the attached paper entitled *"Maritime New Zealand's comments on the rules system – September 2013"*)

Regulatory failure – identifying barriers - Maritime NZ agrees that regulatory failure can arise as a result of both design failure and failure to implement properly. Some of the potential barriers to good delivery have been identified in the paper mentioned above. Other barriers that may contribute to regulatory failure include:

a) ***A disconnect between policy design and development and delivery***. Often regulatory interventions are designed in a context that is materially divorced from the operational frontline in which they are expected to be delivered. Such a disconnect increases the risk of regulatory failure because operational personnel may not be able to deliver to intended outcomes (even if conceptually understood) or may simply misinterpret the outcomes intended by policymakers. This may result in perverse behaviours or novel initiatives by operational regulators to try and achieve outcomes (whether understood or not) which undermines the underlying policy design. An example is illustrated in the reported District Court decision *Sinclair v Director of Maritime Safety* - [1999] DCR 282 involving a regulator's decision to revoke the licence of mariner following numerous incidents involving alleged unsafe behaviour. A key finding of the Court in that case was that the regulator failed to take any enforcement action of any kind to address safety concerns as soon as they became known and instead seemingly allowed the various events to go unchecked until the mariner's licence was suspended and then revoked. The regulatory design of the Maritime Transport Act is such that various regulatory tools are available to address safety concerns. The regulator made the choice to focus on licence removal rather than using other tools. Removing the licence of a commercial mariner is a significant step as it removes the person's livelihood. When the various alleged incidents were tested in court they were unable to be sustained as supporting such significant intervention and it does raise the question why no other steps were taken sooner to address the alleged unsafe acts. Clearly the regulator could have made different or better choices of how to intervene - however, the purpose of raising this example is that the regulator found the tools/choices rather difficult to work with at the operational level. The result in this case has been that it subsequently had a chilling effect on the operational regulatory staff as they felt unsure about what circumstances meet the proper test to take adverse decisions of this nature.

b) ***Policy design failure.*** Where policy makers fail to make difficult policy choices about priorities and areas of focus for regulatory outcomes, they create risks to achieving regulatory outcomes. This is because the policy failure results in a lack of clarity or purpose for the regulator. It therefore fails to identify outcomes or set desired standards. This results in operational regulatory bodies grappling with the issue and seeking to achieve potentially conflicting outcomes in whatever way they think is

expedient. Alternatively the operational regulatory body elects to prioritise one area of focus at the expense of others.

c) ***Lack of regulatory capability.*** The core capabilities required for regulators includes an understanding of the machinery of government, application of law, objective decision making, analytical thinking, knowledge of investigation and a clear focus on the regulatory objective. Many regulators employ individuals from the industries they regulate. There is no unified system of training and educating people in regulatory practices, which results in varied and patchy delivery and in some cases a lack of clarity about the role and function of the regulator (or even regulatory capture). People recruited from industry specific sectors, such the specialist maritime environment, are often not trained in such core competencies. With limited induction they are deployed as regulatory inspectors and find it challenging to deliver to expectations. In some instances their specialist knowledge is crucial but their ability to engage with industry in an impartial, objective and distanced yet constructive manner can be challenging.

d) ***Social and political complexity is such that regulatory regimes struggle to keep up as changes occur.*** There is so much legislation on the NZ statute book that even if changes were identified due to perception of risk, the ability to make fundamental shifts is often hampered by more urgent matters on the political and social landscape. This tends to lead to crisis driven law-making (i.e. policy initiatives that are only made in response to a significant event or crisis) at the expense of clearly programmed initiatives that ensure maintenance of regulatory stock. As a result regulators are often left to perform their functions within old, outdated regimes with seemingly increasing public and political expectations that they will "adjust" to the changes within those outdated regimes. For entities that are creatures of statute, this presents particular challenges because they are limited to perform the functions given to them by law. The result can be that entities feel compelled to interpret their law in a strained and unexpected manner to meet expectations causing them to breach the law and/or breach rights which in turn results in a diminished level of public confidence and in some cases can cause social harms. The other risk created by the crisis driven approach is that it results in ad-hoc updates to the regime overall, which creates a patchwork of disconnected policy frameworks which can in some instances be difficult to reconcile. Maritime New Zealand can cite two recent experiences it has with cases of fast law change following significant events. The first relates to the Marine Legislation Bill, which struggled for years to get priority for introduction into Parliament. It was then "fast tracked" (albeit it has taken a further two years – and is based on policy work done many years ago that is arguably no longer current!) after the ***Rena*** grounding because the bill included the crucial increase to limitation of liability limits. The second example relates to the very rapid changes (within 6 months) to certain maritime rules to address the management of alcohol or drug impairment in adventure tourism sector following a number of high profile events in that sector, which prompted the Prime Minister to request improved regulatory requirements relating to this sector.

e) ***Lack of coordination of regulatory regimes can be a significant barrier where those regimes seek to achieve different objectives***. For example a regime aimed at advancing trade or collection of revenue may generate behaviours that undermine safety initiatives. Another example is a regime aimed at occupational recognition which appears to be at odds with a multi-lateral regime on recognising certification within such occupations.

f) ***Lack of role clarity.*** Regulators with very clear functions and roles (such as transport safety regulators or environmental protection regulators) generally provide a better framework for ensuring delivery of regulatory outcomes. Where legislators/or governments incrementally add on roles and functions (to address maintenance issues mentioned in paragraph d above) there is a blurring of roles and functions which can create a significant barrier to effective regulatory operation due to conflicting mandates. This can in turn lead to regulatory failure. For example a regulator with a clear safety mandate is likely to have better focus than one given a

mandate for safety and economic advance of the sector it regulators. Where policy makers want both objectives to be pursued, they need to design the regulatory regime very carefully by making the difficult policy choices mentioned in paragraph b) above to demonstrate how the balance between those potentially competing objectives is to be achieved.

Regulatory Landscape

Global regulation – Page 12 correctly acknowledges that many regulatory systems are now global and that there has been a shift in regulatory authority away from the nation-state to global regulatory regimes and regulators (see the quote from MED, 2010). However, the discussion that follows this quote focusses only on voluntary regulatory coordination, such as harmonisation of standards, unilateral recognition and joint regulation. While this is no doubt how global regulatory systems works in some sectors, it leaves out a key type of global regulation which applies in the maritime sector (and other sectors such as the aviation sector). These regimes tend to apply to situations where there is a very strong interest in ensuring conformity across countries. This is the type of global regulatory regime whereby standards are adopted at the international level by intergovernmental organisation and the member states are then obliged to implement these standards within their domestic systems. This is how the international maritime regime operated by the International Maritime Organization (IMO) works. The IMO is responsible for a suite of maritime treaties governing safety at sea, environmental protection, and training standards for seafarers. The organisation regularly adopts new and revised technical standards under these main treaties. The annexes to these treaties are kept under review and new and revised technical standards are adopted on a regular basis which must be implemented by the member states (unless members avail themselves of the opt-out procedures within the appropriate timeframe).

Regulatory co-ordination – This is a core element to many public welfare regulatory regimes. In the maritime sector there is already a mixture of approaches depending on the purpose being served. For example bi-lateral/mutual recognition of occupations between Australia and New Zealand and multi-lateral adoption of standards and recognition of certificates issued within countries who apply the same standards. New Zealand is not unique and its regulatory landscape will be shaped and influenced by international events and regimes. Developing a generic regulatory style may not be sensible as it does not recognise the variety and diversity of global regulatory interventions that impact on New Zealand. For example in the maritime industry the regulatory regime is significantly shaped by the various Conventions and instruments developed through the International Maritime Organisation. New Zealand depends on shipping for much of its trade and it would be unwise to try and adopt an alternative or unique approach. That said, the recognition of public welfare regulatory regimes as a distinct style of regulation may assist in achieving increasing co-ordination and clarifying of regimes. It may also promote ideas which would allow New Zealand to influence international forums in which international regulations are developed.

Mapping New Zealand Regulation – The proposal to map the regulatory landscape is sensible as it may illustrate where there are regulatory gaps, overlaps or linkages in the regulatory system. Maritime New Zealand has the following comments on the suggested groupings identified in the issues document:

The organisational groupings in Figure 3.1 on page 16 of the issues document are a helpful approach to distinguishing in which category the regulatory functions lie within the New Zealand public sector. Maritime New Zealand wishes to point out an error in this diagram. Our primary statute is the Maritime Transport Act 1994 not the Maritime Security Act.

The proposed groupings in figure 3.2 might provide a helpful basis to distinguish regulatory regimes, but as many sit across the proposed subject area it is unclear what purpose such a grouping may serve. For example in the social category there are a mixture of safety, security and health regimes that provide an equally important social benefit to many of those in the environmental category. Maritime New Zealand wishes to point out that under the Maritime

Transport Act it has numerous functions and duties that relate to environmental protection, dumping at sea and regulating activities in the marine environment.

Understanding Regulatory regimes and types of regulators – There may be merit in exploring regulatory regimes on an additional basis to the definition mentioned on page 1 of the issues document. Options include defining them by their underlying policy objective or by sectors.

a) If the primary objective is a regime that serves a social welfare type function then its design and delivery may need to focus more readily on the relationship between the harm to society as a whole and the actions of the regulated party. This is a different focus to criminal enforcement regimes that tend to focus on the actions and intent of an offender and the harm suffered by an individual victim. In the latter case the State is involved to ensure public order (and to ensure the rule of law), while in the former case the State elects to create a regulatory framework to deal with behaviour that it feels needs to be controlled and monitored for general social benefit. In the enforcement environment, Courts in many commonwealth countries have since the late 1970's increasingly recognised a distinct category of offences called "public welfare regulatory offences". The offences are generally called strict liability offences in which the burden of proving absence of fault or due diligence rests with the alleged offender. This class of offending generally exists as a key tool for welfare regulatory agencies. These regimes have the following common elements:

- The need for rules to regulate behaviours in the interests of public health or safety
- The underlying policy is one that shifts the compliance focus from individual interests to the protection of public or social interests
- The fact that people involved in the regulated activity generally do so voluntarily (i.e. choosing to obtain a licence to pursue an occupation or conduct an activity)
- The ability to take punitive action against acts involving the lack of due diligence that cause harm to society or the public (i.e. as distinct from criminal conduct).

Examples of public welfare regulatory regimes include: transport licensing, environmental permitting, fishing laws, occupational licensing, building regulations, liquor licensing, firearms licensing, health and safety law, and competition and fair trading rules..

b) Sector categorisations may be valuable to explore as a precursor because they already exist worldwide. International distinctions on a sector basis are domestically replicated and the regulatory regimes have evolved under the strong influence of those international models. Maritime and Aviation regulations are good examples of such sector specific categorisations that are directly linked to the international framework within which those sector categorisations have arisen. While there are many similarities between the regulatory regimes of these sectors, there may be merit in carefully identifying the distinguishing features also. This is because the people involved in the sectors are different and the nature of the activities being regulated are different. Regulatory interventions may prove very effective in one sector and less so in another. While this distinction may simply be a case of timing or maturity of an industry sector, the relevance of the distinction can be significant in ensuring that regulatory outcomes are sustainably achieved. An analysis of the distinction of regulatory approaches and concepts associated with "no blame" and "just culture" in the transport environment is set out in the attached MNZ paper presented at Maritime Law Conference in 2008 (*Coastal Regulation – The Kotuku Reports: An analysis*).

The need for a clear understanding of how constitutional and legal principles affect regulatory practice – Good regulatory design depends a uniform understanding of Constitutional and legal principles. For example Constitutional principles such as those set out in the Bill of Rights play an important role in the operation of law and its interpretation by the judiciary. Understanding the distinction between pure "criminal offending" versus "public welfare

safety regulatory offending" is not only important in getting regulatory design right (because it helps clarify which elements of offending the State is expected to be able to prove and which not), but it is also important in serving social policy by requiring compliance with objective standards for the promotion of public health/safety without punishing those who are genuinely acting in a socially responsible or diligent manner. The latter is an important aspect because it helps create the appropriate framework that distinguishes between intentional non-compliance and accidental breaches. Such a framework facilitates improved regulatory decision making, by introducing more objective elements, thus minimising the circumstances in which regulators are left to make subjective judgments about alleged non-compliance.

Regulatory design and operation

Regulatory clarity - Examples of very clear regulatory regimes include:

- Current Health and Safety law ("...law relating to the health and safety of employees, and other people at work or affected by the work of other people"),
- Maritime Regulation ("...objective of the Authority is to undertake its safety, security, marine protection, and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system).
- Civil Aviation safety regulation ("...objective of the Authority is to undertake its safety, security, and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system").
- Bio-security regulation (" ... law relating to the exclusion, eradication, and effective management of pests and unwanted organisms")
- Regulation of commerce (" ...to promote competition in markets for the long-term benefit of consumers within New Zealand").
- Regulation of Financial markets (FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets)

Regulatory clarity – regulatory clarity facilitates regulatory operation and the achievement of designed outcomes. However, it does not necessarily depend on singular objectives. An agency such as Maritime New Zealand has safety, security and environmental protection objectives. These objectives are very clearly articulated through the policy framework in the Maritime Transport Act and Maritime Security Act making it easier to deliver to the regulatory objectives. Where regulators are given clearly competing objectives this may not be as easily achieved and increases the risk of failure. The clarity around the objectives for MNZ has over time been eroded by amendments to the law. When the Maritime Transport Act was first made the objective of safe, secure and effective marine pollution prevention was premised only "at a reasonable cost". This was replaced in 2004 by the current objective which has reduced the singular clarity that existed before. Words like "sustainable" are not defined and increase the risk of reduced clarity around the regulatory objectives although in practice this has not presented material challenges.

Regulatory independence and institutional form

Regulatory independence – The creation of Crown Entities has provided an institutional framework for an apparent separation of political and regulatory functions. In practice this separation is more real in circumstances in which the regulator has express independence guaranteed by statutory means such as the independence of the Director of Maritime New Zealand in relation to certain regulatory powers (see section 439(4) of the Maritime Transport Act 1994). This independence from both the Minister and the Authority is relevant and significant as it provides an appropriate legislative split between the exercise of political, governance and regulatory powers and functions. This is even so in the case of Crown Entities in light of the various powers of direction granted to the responsible Minister. While there may be some merit in arguing for greater independence for regulators who also regulate the government (such as health and safety in employment law), it could be argued that increasingly

the distinction between matters in which the government may have an interest (and therefore a possible conflict) or not is more and more difficult to make. The public sector reach has expanded so far into the private sector that it may not be helpful to attempt to identify regulatory aspects that are more suited to independence than others. We would instead advocate the identification of key principles that apply to regulatory functions and the need for their independence, supported by Constitutional Conventions (such as the separation of powers) and the Rule of Law.

Please do not hesitate to contact us if you have any queries. Stephanie Winson, General Manager Legal & Policy is the point of contact for Maritime NZ. She can be reached by email on stephanie.winson@maritimenz.govt.nz or by telephone on 04 494 1244.

Yours sincerely

Keith Manch
Director / Chief Executive