Environmental Protection Authority
Te Mana Rauhī Taiao

New Zealand Productivity Commission Issues Paper: Regulatory Institutions and Practices

Submission of the Environmental Protection Authority

October 2013

Introduction

1. This submission focusses on contributing the Environmental Protection Authority's (EPA) experience in the implementation and workability of regulation in New Zealand. We are happy to provide further information if required.

About the EPA

2. The EPA is a Crown Agent established under the Environmental Protection Authority Act 2011. It is responsible for several regulatory functions concerning New Zealand's environmental management.

3. The EPA administers applications for proposals of national significance under the Resource Management Act 1991. We also provide support for other resource management processes at a national level including, consideration of proposed national policy statements and proposed water conservation orders, and technical input into the development of national environmental standards.

4. The EPA regulates new organisms (including genetically modified organisms) and hazardous substances and chemicals (including pesticides, cosmetics, fireworks, and explosives). It also regulates specific ozone depleting substances and the importing and exporting of hazardous waste.

5. The EPA administers the Emissions Trading Scheme and New Zealand Emission Unit Register, including processing emission returns and allocation applications.

6. We regulate the environmental impact of activities in the Exclusive Economic Zone, including oil, gas and mineral prospecting and extraction, seismic surveying and scientific research.

7. The EPA also provides advice on the implementation of government policy relating to environmental legislation and regulations. This includes providing advice to the Ministry of Foreign Affairs and Trade on environmental impact assessments for activities in Antarctica.

8. We participate, and help represent New Zealand's interests, in the work of international bodies dealing with climate change, chemicals and ozone-depleting substances governed by international conventions, and regulation of hazardous substances, hazardous waste, and new organisms.

Submission

9. It is important for regulators to be in an institutional and operating environment that allows for: the regulator to focus on their regulatory function; ring-fenced funding; clear accountability; and independence.

10. Ideally, appropriate regulation would:

- be commensurate with harm and risk, backed up by analysis of real data
- encourage innovation and feedback
- allow those being regulated to seek the least cost means of complying
- be simple to understand and
- be cheap and easy to administer.

11. Notwithstanding this goal, the workability of the regulatory regime is as important as the theory and principles behind the regime. Regulatory design, therefore, needs to work backwards from implementation.

12. For example, regulatory design needs to consider the likely outcomes when implemented of performance (outcome) based regulation versus prescriptive regulation. There may not be one regulatory approach that will suit individuals, small/medium businesses, and large corporate businesses to achieve the desired outcomes. As a general rule, performance based regulation can work well for larger well-resourced organisations. It is more likely to encourage innovation and allow for the least cost means of complying. However, for individuals and small business, performance based regulation can be too uncertain and expensive to engage and comply with. In some circumstances, there may be a better overall outcome (i.e. higher compliance with basic protections) if individuals/small businesses are given clear, simple obligations to keep themselves and others safe, and to protect the environment, despite the trade-off of less flexibility.

13. Having capable decision makers, enabled to exercise wise use of discretion and make good overall judgements, is key to a good regulatory regime. Complex decision-making processes in the guise of 'checks and balances' can disempower decision makers, can mean few participants understand the process, and those that do (and have the resources) can game the process. While the process may be adhered to, the result may be a poor decision, inconsistency, high process costs and general dissatisfaction with the process and the overall outcome.

14. Making changes to the regulatory regime needs to be simple and responsive when sector/public feedback and/or empirical data shows something is not working. Problems arise if only parts of the regulatory regime are able to be maintained efficiently. The Commission could consider the process for making technical changes to the Hazardous Substances and New Organisms Act 1996 (HSNO) regulations. Historically this has been time consuming and challenging due to the complex process required to amend regulations.

15. Regulatory regimes can be designed to involve different agencies undertaking different parts of the regime. This could occur for a number of practical reasons, for example, economies of scale in undertaking enforcement work across different functions. Similarly, there can be several agencies administering similar rules under different regimes for the same activity. For example: management of hazardous substances in the workplace under HSNO and the Health and Safety in Employment Act 1992; and aerial drops of 1080 pesticide which involve the EPA, councils, and local Public Health

Units. Regulatory design needs to consider how the agencies and regimes will align. The Commission will be aware of the *Report of the Independent Taskforce on Workplace Health and Safety* and the Government's response, which canvassed such issues in relation to occupational health and the management of hazardous substances.

16. Good compliance monitoring and enforcement can be expensive but the results are often not visible and tangible compared to when something goes wrong - so over time it can be devalued and underfunded compared to front end rule-making and decision-making processes. Investigation into ways to account for the intangible results of good monitoring and enforcement may help keep this politically fresh.

17. In relation to the task of mapping the current regulatory regime, the Commission could also consider differences between institutions in terms of: those institutions that undertake policy and rule setting versus those who administer, monitor and enforce the rules; and, the form and powers of the decision maker, including the independence of the decision maker and any appeal provisions relating to their decisions.

18. The Commission could consider the EPA's Ngā Kaihautū Tikanga Taiao as a case study of a partnership framework.

19. Private and public costs and benefits of different aspects of the regulatory regime, and therefore who pays and how, need to be considered up-front in regulatory design. This is particularly for aspects of: industry and consumer education; public involvement in administrative regulatory decision-making processes (i.e. applying the rules as opposed to making the rules); baseline environmental research and monitoring; and compliance monitoring and enforcement.

20. In some circumstances, it can become difficult to justify recovering all costs as actual and reasonable from individual applicants. For example, an application for reassessment of LPG to amend the controls on LPG, will affect all LPG users, not just the individual applicant. The use of fair funding mechanisms, such as industry levies, should be considered in regulatory design.

21. In summary, the key points are that regulatory design should:

- be simple and responsive
- be workable across the range of individuals, small/medium businesses, and large corporate businesses; each of which have different requirements
- empower capable decision makers to make good overall judgements, rather than umpire complex processes
- align across agencies and regimes
- value compliance monitoring and enforcement and
- factor in 'who pays' early in the design.