



Environmental  
Protection Authority  
*Te Mana Rauhi Taiao*

29 May 2014

File Ref# POL-01-32 PC

Mr Steven Bailey  
Inquiry Director  
NZ Productivity Commission  
PO Box 8036, The Terrace  
Wellington 6143

Dear Steven,

**Submission of the EPA**

Thank you for the opportunity for the EPA to provide a submission on the findings of the New Zealand Productivity Commission's draft report on regulatory institutions and practices.

We are happy to provide further information if required. The contact at the EPA is Dr John Appleby, Ph: 04-474 5485 or email: [John.Appleby@epa.govt.nz](mailto:John.Appleby@epa.govt.nz)

Yours sincerely,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Rob Forlong

**Chief Executive**

# New Zealand Productivity Commission Draft Report on Regulatory Institutions and Practices

## Submission of the Environmental Protection Authority

May 2014

### Introduction

1. This submission focuses on the views of the Environmental Protection Authority (EPA) with regard to the findings of the New Zealand Productivity Commission presented in its draft report on regulatory institutions and practices. We are happy to provide further information if required.

### The Productivity Commissions Findings

2. The EPA agrees with a number of the points raised by the Productivity Commission in its 'diagnosis of the problems' or regulatory institutions and practices. In this submission we discuss these points and provide examples, where appropriate, to highlight the relevant experiences of the EPA.

#### *Set & Forget Regulation*

3. Ongoing maintenance of regulation ensures that it remains appropriate to the purpose for which it was intended. Problems arise if only parts of the regulatory regime are able to be maintained efficiently, or if changes to the whole regime are overly time consuming and complex.
4. An example experienced by the EPA has been whilst adopting the Globally Harmonized System of Classification and Labelling of Chemicals (GHS), which addresses classification of chemicals by types of hazard and proposes harmonized hazard labels and safety data sheets. However, making technical changes to the Hazardous Substances and New Organisms Act 1996 (HSNO) regulations (specifically hazardous substance classifications) have, historically, been time consuming and challenging due to the complex process required to amend them. Making changes to the regulatory regime needs to be simple and responsive when sector or public feedback and empirical data shows something is not working or could be improved.

### *Consistency across Regimes*

5. A key point raised by the Commission is that New Zealand has applied different regulatory models across similar issues, rather than applying a coherent and consistent approach. This increases both compliance costs on organisations and individuals, and operating costs of regulators working across multiple regimes. It also limits the ability of regulators to learn from each other's experiences.
6. The EPA undertakes a number of similar functions across different regimes (e.g. HSNO, RMA and EEZ); all similar processes but all slightly different. Each of these regimes has its own legislation, differences in wording between which, requires the EPA to 'reset itself' when moving between regimes, even when undertaking a similar function, increasing costs and inefficiencies.

### *Role Clarity*

7. The EPA considers role clarity to be of great importance, both for regulators and for the companies, individuals or organisations being regulated. A number of the EPA's functions see it working in the same space as other regulators (e.g. The EPA and WorkSafe under the HSNO Act; The EPA and Maritime New Zealand (MNZ) under the EEZ Act). Role clarity and clear boundaries not only allow the regulators to do their job in the most efficient and effective way, but also provide certainty to those being regulated that there will be no duplicated or contradictory regulation.
8. It is important that regulators and the agency overseeing them (usually a Ministry) understand the limits and differences of their roles. In some circumstances there is a risk that a Ministry may become involved with implementation and regulatory issues beyond its role whilst in others the regulator may stray into policy advice that should be done by the Ministry. The jurisdiction between policy and implementation is further complicated by the role of Ministries as the monitoring agency.

### *Regulatory Independence*

9. Regulatory independence from government is important to engender confidence in robust, objective decision making. A potential monitoring bias can arise when the Government agencies responsible for the policy and legislation with which regulators work are also the Government agencies which have oversight and responsibility for monitoring the regulators performance. This can lead to a blind spot in the monitoring agency recognising the need for legislative and policy change.
10. In addition, the objectives of individual Ministers and Governments may influence (intentionally or otherwise) regulatory decision making if the regulator does not ensure it is working at 'arm's length'. It is also important to ensure sufficient funding is available to

undertake regulatory functions such as enforcement without having to seek ministerial or cabinet approval.

#### *Accountability & Performance Monitoring*

11. The capability of central Government agencies to undertake an auditing or monitoring role of the performance of regulators may be questionable. Central Government agencies may not necessarily have the experience or expertise in regulation. Our experience is that these agencies lack 'practical' experience. A peer review system between regulators may be more useful in driving improved performance.

#### *Governance & Decision Making*

12. The dual role of a board making regulatory decisions as well as governance decisions has both advantages and disadvantages. The advantages are that a board is connected to the business in an operational sense through understanding the issues and constraints that decision makers face. The disadvantage is that the time, costs and technical knowledge requirements of acting in the decision maker and governance roles are a challenge for Board members.
13. The EPA Board have at times been uncomfortable with their name being put against a decision when, in reality, they did not make that decision themselves. This occurs where a decision is made on a Nationally Significant Proposal (NSP) by a board of inquiry approved by the Minister and independent of the EPA Board; however the EPA Board are still considered to have 'made the decision' because the EPA provide secretarial services to the inquiry and announcements are 'EPA branded' through the media and the EPA website.

#### *The need for Consultation and Engagement*

14. Much of the regulatory work undertaken by the EPA is of high public interest and is often controversial in nature (e.g. petroleum exploration, genetic modification, or new infrastructure) and so a great deal of emphasis is placed on the need for appropriate consultation and engagement with a range of interested parties. It is important for the EPA to reassure both the applicant and the general public that good regulatory process is being followed, and that the decisions of the EPA are robust, transparent, well informed and in the public interest. This can be challenging under tight statutory timeframes.

#### *Regulatory Capability Development*

15. Capability development with an emphasis on evaluation of regulatory management, as suggested by the Commission, should be encouraged across New Zealand's regulatory institutions. Additional, targeted training of staff in the evaluation and analysis of how well an organisation's regulatory systems are working would result in

better, more professional regulatory practice. Cooperation with other jurisdictions may be a way of improving capability in New Zealand.

## Really Responsive Regulation

16. Really responsive regulation is certainly a possible way forward for regulatory practice in New Zealand, and could be of benefit to the EPA as it works across a number of Acts and industries.
17. Responsive regulation should be tailored to particular sectors. For example, the responsive regulatory practices adopted by the EPA may not be suitable for the Civil Aviation Authority or Maritime New Zealand. That is not to say that the responsive regulatory practices adopted by individual agencies should be mutually exclusive, however. Regulators working closely together to develop and apply responsive regulation allows for pooled experience and knowledge, leading to more appropriate and informed discretion and judgement when deciding on enforcement actions.
18. The main challenge to applying the responsive approach to regulation is a heavy reliance on the regulators discretion and judgement when deciding on the level and type of response to failures in compliance. This reliance assumes that the regulator has an appropriate level of capability (technical, legal, etc.) to make informed decisions on responsive enforcement.
19. In addition, there is significant reputational risk to regulators using their discretion when deciding the level and type of enforcement. For example, the public may question why a regulator chose to issue a fine rather than take out a prosecution against a company who failed to comply with a regulation when that particular failure has a high level of public interest. Conversely, the public may question why a regulator 'wasted money' pursuing a prosecution rather than issuing a fine or abatement notice.
20. A further limitation is the range of enforcement tools a regulator may have available to them. A limited range of enforcement tools means limited discretion on the part of the regulator when deciding on which tool is most appropriate for the given situation.

## How the EPA can become a better regulator

21. The EPA continually seeks to improve how it carries out its regulatory functions and responsibilities. Considering the findings of the Productivity Commission, the EPA believes opportunities to improve its own regulatory performance, along with the performance of other New Zealand regulators, should include:

- Continuing to learn from overseas jurisdictions (e.g. The UK Government's Better Regulation Delivery Office (BRDO))
- Benchmarking regulatory practice with other regulators, both within New Zealand and overseas.
- Working towards increasingly 'professionalised' regulatory practice, including an emphasis on regulation-specific capability development.
- Sharing experiences with other regulators.