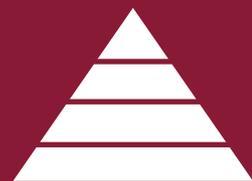# ACHIEVING COMPLIANCE

A Guide for Compliance Agencies in New Zealand

June 2011

The task of managing compliance is central to a broad range of governmental responsibilities, and yet relatively little attention is paid to the distinctive nature of the challenges such work presents. The practice of regulation is seldom acknowledged as a profession in its own right. The authors of New Zealand's 'Achieving compliance' *have pulled together a wealth of knowledge and insights about regulatory practice and compliance management, and organised it into an easy-to-navigate format, packed with practical examples. For regulators, this guide represents an important addition to the professional body of knowledge and will be appreciated as a rich resource.*

Professor Malcolm K. Sparrow, Harvard Kennedy School

http://www.hks.harvard.edu/fs/msparrow

Acknowledgements

Foreword

This guide is the result of collaboration among compliance[1] practitioners across the public sector. It reflects a significant effort to bring together their knowledge, experience, and examples of what works, for the greater good of the compliance community.

It has been a challenging document to produce. It is intended to be of interest to the most experienced and skilled leaders who have the capability and resources available to them to be at the cutting edge of operational compliance work through to those managers and staff who have limited experience of compliance work, or time to devote to it, but find that it is part of their portfolio of responsibilities.

The structure of the document and its focus on principles and examples in the areas of regulatory context, organisational design, and compliance strategy is intended to provide easy access to information about specific topics or matters of interest; as well as, in total, providing a comprehensive view of options for designing effective compliance organisations and strategies.

One of the key assumptions underpinning the guide is that while compliance agencies address different legislative frameworks, problems, and challenges, the 'what we do' is more likely to be similar than different. The work of an operational compliance agency at a high level 'simply' involves encouraging (using techniques from informing through to enforcing) people and organisations to behave according to prevailing policy and legal frameworks.

Good compliance agencies have a deep understanding of their place in the regulatory system; effective capability across the range of tools and techniques that allow them to achieve their goals; and a strong interest in supporting and informing the policy and regulatory frameworks they implement.

This guide will support compliance agencies to develop and constantly improve the way they work by capturing and sharing information that enables this to occur.

The first published version of this document represents a foundation and starting point for capturing and sharing knowledge and information in an unprecedented way within the compliance community. Thank you to all those involved in producing it, in particular the technical writer Marcus Pawson, in conjunction with Martin, Jenkins & Associates Ltd, Standards New Zealand who have facilitated the

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[1] 'Compliance' refers to a range of activities usually carried out by agencies within central and local government that have regulatory functions. Compliance activities include auditing, licensing, education, monitoring, surveillance, and investigation. The purpose of carrying out compliance work is to ensure that people and organisations adhere to rules and regulations for the public good. NZS/AS 3806:2006 *Compliance Programmes* defines compliance as: 'adhering to the requirements of laws, industry, and organisational standards and codes, principles of good governance, and accepted community and ethical standards'.

development process, and of course the Advisory Group who have overseen and contributed to the guide's development.

We look forward to the Guide continuing to be a vehicle for the sharing of developments and innovations for the ongoing benefit of the compliance sector in New Zealand.

Keith Manch

Chair of the Compliance Common Capability Programme Steering Group

Peter Burke

Chair, Advisory Group

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INTRODUCTION

AND CONTEXT

CH 1   ABOUT THIS GUIDE

This chapter explains:

- the purpose and context of this guide (1.1)

- the scope of this guide: what it covers and what it doesn't (1.2)

- who will benefit from the guide (1.3)

- how the guide has been structured (1.4)

- the key sources of information for the guide (1.5).

1.1   The purpose of this guide

1.1.A   BEST-PRACTICE GUIDE FOR EFFECTIVE COMPLIANCE AGENCIES

This best-practice guide presents a picture of what you would expect to find happening in an effective compliance agency where the necessary elements are aligned and working together successfully. The guide outlines the core components of best-practice compliance management.

It makes available, to all those engaged in the business of achieving compliance, compliance expertise and best-practice principles.

Compliance work will be more prominent for some agencies than others; for some it will be only a secondary function. It's intended that any government agency (or unit within an agency) with compliance functions will be able to draw on the principles and guidelines stated in this guide, and tailor them to the agency's own particular character, functions and objectives, and to its own particular regulatory environment.

The guide is intended to be a living document. It will be updated as appropriate to cover, for example, major developments in the New Zealand public sector, other developments in best-practice thinking among compliance agencies, or changes in specific government or public-sector initiatives referred to in the guide.

The guide uses the term **'government agency'** in a generic sense to refer to any agency within either central or local government. The terms **'compliance agency'** and **'compliance organisation'** refer to any agency or organisation with compliance functions, even if those functions are secondary to it.

1.1.B   WHEN AND HOW THIS GUIDE MIGHT BE USED

The guide can be used for a variety of purposes:

- improving a compliance organisation's performance

- reviewing and redesigning an existing organisation, as a whole or in part

- designing a new compliance organisation.

This guide is also intended to be used as a supporting resource for:

- those seeking qualifications under the **National Compliance Qualifications (NCQ) framework** (see 1.1.D)

- central government agencies seeking to meet the expectations set out in the **Performance Improvement Framework (PIF)** (see 2.5).

1.1.C   THIS GUIDE IN THE CONTEXT OF THE COMPLIANCE COMMON CAPABILITY PROGRAMME

The work of government in achieving compliance with regulatory requirements in New Zealand today is a massive enterprise, representing a major investment in public services. It involves some 30 central government agencies, 85 local authorities, and approximately 12,000 individual staff.

However, the level of compliance expertise and the quality of performance across this range of agencies is varied. Although there is some, usually informal, sharing of best-practice information among government agencies, the New Zealand public sector has yet to fully develop a common compliance culture, a common understanding of what makes for successful compliance work.

Progress towards more effective compliance work has been piecemeal and fragmentary, involving pockets of expertise and individual cases of efforts to improve compliance strategy, systems, and operations. As a result, the wheel is being invented and reinvented in different agencies, and the learning and expertise gained in one agency is not easily available to others. There is therefore much duplication of effort.

The **Compliance Common Capability Programme**, which involves senior managers from a range of New Zealand government agencies, is intended to address those issues. Its aim is to increase the overall effectiveness of compliance activity across central and local government and to support the development of a community of compliance professionals. The development of common ways of operating will also allow for more successful cross-agency work.

This guide, *Achieving compliance,* is one key element of that programme.

1.1.D THIS GUIDE AS A SUPPORTING RESOURCE FOR THE NATIONAL COMPLIANCE QUALIFICATIONS FRAMEWORK

Another key element of the Compliance Common Capability Programme is the development of a National Compliance Qualifications (NCQ) framework.

The purpose of the NCQ project is to produce improved and common standards for compliance work by developing a common competency-based qualifications framework for people in all central and local government agencies that have regulatory and compliance functions. This framework will be supported by assessment and learning strategies.

This guide is intended to be a supporting resource for the NCQ framework.

Information about the National Compliance Qualifications Project and its deliverables can be found on the Learning State website: www.learningstate.govt.nz.

1.2 The scope of this guide

This guide, *Achieving compliance,* provides guidance on effective strategies, practices, and organisational design for compliance agencies.

It covers:

- compliance models and strategies

- governance and organisational design of compliance agencies

- key compliance functions and activities

- other organisational frameworks for compliance work.

This guide does **not** deal with the development of regulatory policy, although it does discuss ways in which compliance agencies' experiences in administering regulation feed back into and inform regulatory policy (see 2.2). Instead the guide deals with the work of agencies in administering and enforcing existing regulation, including encouraging voluntary compliance, monitoring non-compliance, and taking appropriate action in response to non-compliance.

1.3 Who will benefit from this guide

This guide is intended to be used as a reference tool by:

- **senior managers** – that is, those in a position to design organisations and establish management frameworks

- **regulators** – those responsible for putting in place the regulatory settings for compliance with an agency's functions, such as agency staff with rule-making authority under legislation

- **operational managers** – those overseeing processes, project teams, and the exercise of discretion

- **compliance officers and other front-line staff** who make decisions and exercise discretion on a compliance agency's behalf

- those seeking qualifications under the **National Compliance Qualifications (NCQ)** framework

- all those who are part of the **wider community of government compliance professionals**.

The guide may also assist others working in the compliance environment or the regulatory cycle, such as:

- members of the regulated sector

- legislators and other policymakers

- stakeholder groups

- strategic and business planners.

1.4   Structure and contents of this guide

1.4.A   STRUCTURE OF THE GUIDE

The guide is divided into three Parts:

- **Part A** introduces the purpose of the guide and explains its context (this chapter). It places the role of compliance agencies in the wider regulatory context (see chapter 2), and introduces some key themes, in particular the importance of a risk-based, outcomes-focused approach to achieving compliance (chapter 3).

- **Part B** deals with governance and organisational design issues, such as managing risk, measuring performance and effectiveness, and managing information.

- **Part C** deals with the core activities and processes of compliance agencies, including stakeholder relationship management, the 'gatekeeper' function, monitoring and assessing compliance, and responding to non-compliance and adverse events.

1.4.B   THE KINDS OF INFORMATION AND MATERIALS INCLUDED IN THIS GUIDE

Each substantive chapter of the guide includes:

- best-practice guidelines

- case studies and examples from New Zealand compliance agencies

- checklists for effective agency practices

- lists of additional guidance material.

1.5   Acknowledgement of sources

The writers of this guide have drawn on:

- input from New Zealand government agencies provided specifically for the guide

- various documents and information made publicly available by New Zealand government agencies

- best-practice guides from overseas, including Britain, Australia, and the Organization for Economic Cooperation and Development (OECD)

- material on compliance functions written by international experts, particularly Malcolm Sparrow.

Australian guides that have been drawn on for this guide include:

- *Administering regulation: Best practice guide,* Australian National Audit Office (ANAO), 2007.

- *Measuring compliance effectiveness: Our methodology*, Australian Taxation Office, 2008.

- *Best practice regulation handbook,* Australian Government, 2010.

The ANAO's *Administering regulation* (see above) has been particularly helpful, as it has a similar purpose and breadth to this New Zealand guide, which has drawn on the structure and often the content of that Australian guide. Where particular chapters or sections in this guide have drawn extensively on *Administering regulation*, this has been specifically acknowledged in the appropriate places in the text.

A full list of reference material is included at the end of this guide.

CH 2 COMPLIANCE AGENCIES IN THE WIDER REGULATORY CONTEXT

This chapter discusses:

- the role of the compliance agency in the regulatory cycle (2.1)

- how the experience of compliance agencies in administering regulation feeds back into policy making (2.2)

- different types of regulatory regimes (2.3)

- specific government initiatives – the 2009 'Better Regulation, Less Regulation' statement (2.4)

- the Performance Improvement Framework (PIF) for government agencies (2.5).

2.1 The compliance agency's role in the regulatory cycle

The role of the compliance agency in administering regulation is an integral part of the wider regulatory cycle, which consists of the following stages:

- **Identify** – The cycle begins when policymakers identify the appropriate response to a particular social, economic, or environmental problem or opportunity.

- **Legislate** – That policy response is then legislated and implemented.

- **Administer** – The compliance agency administers the regulatory response, using its statutory powers.

- **Assess** – The success of the policy and the compliance agency's effectiveness in administering it is reviewed, so that problems and necessary improvements can be identified.

The quality of the compliance agency's strategies, practices, and processes is therefore a critical element in achieving the objectives of the policy.

Improving the agency's performance in administering regulation also:

- means greater effectiveness and efficiency, which in turn means more cost-effective results for the agency and lower compliance costs for those the agency regulates

- increases the confidence of the regulated sector, stakeholders, and the wider public in the compliance agency and its practices.

2.2 How compliance agencies can influence policy-making

In most, if not all, areas of public policy, experience with delivery is an important source of information in developing and refining the policy. Experience with administering compliance regulation can provide insight into the underlying problem the regulation is trying to address and into whether the overall policy objective is being met. Where new policies are being considered, experience can provide insight into whether they can be readily and effectively implemented.

Minor changes to policy can often be effected reasonably simply – by Cabinet decision or through regulation. While opportunities for major policy changes requiring legislation are infrequent, they do occur, and experience from administration can be a key driver in determining the need for a major review. It's important that when an opportunity arises, the lessons of the compliance agency's experience are fully taken into account.

Feedback can work both ways. Acts and regulations invariably leave some degree of discretion for compliance agencies in administering them, and are therefore open to some interpretation. Policy-makers can provide useful feedback to the compliance agency on whether it is administering the regulation as the policymakers intended.

Feedback into policy making is more complex at the local government level, because in that context policy has both local and national aspects.

2.2.A FEEDBACK ON SPECIFIC REGULATORY ISSUES

At a practical level, experience with administering regulation under established policies can provide guidance on whether:

- the administrative arrangements support compliance and are cost-effective
  - For example, when one agency relies on another for inspection functions, are the two agencies' priorities sufficiently aligned?

- the powers and sanctions available to the compliance agency are adequate and proportionate
  - For example, are the agency's inspection powers overly intrusive?

- the policy is appropriately comprehensive in providing for differing circumstances
  - For example, are there opportunities for simplification? Are there any loopholes that need closing?

- the policy provides the regulated sector with consistency of compliance decisions

    - For example, where consenting processes are administered by local authorities, will comparable applications meet with the same response in different places?

- the policy or legislation has unintended consequences

    - For example, do regulations inadvertently capture a low-risk activity or omit a high-risk activity?

- the burden imposed on the regulated sector by process requirements is reasonable

    - For example, where a business must meet the requirements of a number of different regulatory regimes, are there opportunities to align requirements, and are the overall compliance requirements reasonable?

2.2.B   FEEDBACK MECHANISMS IN PRACTICE

There are a number of mechanisms – both formal and informal – by which a compliance agency can gather the information that contributes to useful feedback into policy making. These mechanisms are standard activities for any compliance agency, but applying some forethought can allow them to add greater value to the policy process.

- **Evaluation and monitoring processes** – These can provide information on the overall effectiveness of compliance regimes in achieving regulatory outcomes.

- **Feedback from the regulated sector** – Those being regulated can provide feedback on:

    - whether the design of the regulation needs to be improved

    - whether they are aware of the regulations and the specific benefits, penalties, and so on.

- **Intelligence gathering** – Intelligence can provide information on whether there are any loopholes in the policy.

- **Administrative data** – This can provide information on a range of matters, including whether or not inter-agency arrangements are effective.

Effective feedback depends on maintaining dialogue with the agency or unit that is responsible for the policy, being aware of whether there are any policy design issues for which feedback would be useful, and providing advice on issues as they emerge.

2.3   Different types of regulatory regimes

2.3.A   DESCRIPTION OF REGULATORY REGIMES

Most regulatory regimes, including the ones that are the focus of this guide, can be described as 'command and control'. Such regimes involve the setting, monitoring, and enforcement of standards. While the category of 'command and control' covers a broad spectrum, specific regulatory regimes within this category reflect two main dimensions:

- The degree to which the regime is:
    - outcome-based (the rules are principles, minimum standards, performance requirements, or duties), or
    - prescriptive (the rules describe how something must be done).

- Where responsibilities lie – whether standards setting, monitoring, or enforcement (or all three) are:
    - undertaken by central or local government
    - some form of industry-led initiative, or
    - left to consumers and other affected parties to follow up (for example, the Consumer Guarantees Act 1993 establishes principles, but it is up to consumers to assert their rights – no regulator is involved).

2.3.B   FORMS OF REGULATION

The main text in this section is adapted from the Australian Government's *Best practice regulation handbook,* 2010, Canberra, pp 34 – 35.

Policy makers may take a range of approaches to regulating a particular environment, and explicit government regulation is not always necessary. In some cases self-regulation by the relevant industry may be sufficient. Quasi-regulation and co-regulation are other forms, involving intermediate levels of government intervention.

2.3.B.i   Explicit government regulation

This is the most common form of regulation. It consists of primary and subordinate legislation, and is sometimes referred to as 'black letter law'.

Explicit government regulation should be considered where:

- the problem is high risk, with high impact or significance – for example, a major public health and safety issue

- the community requires the certainty provided by rules and legal sanctions

- the regulation needs to apply universally, or at least to one or more entire sectors of society, or

- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches, and no possibility of effective sanctions being applied.

In some cases regulation is administered by local authorities under a legislative mandate, rather than by a central government agency – for example, the Dog Control Act 1996 and the Resource Management Act 1991.

Example of regulation
New Zealand Building Code

The New Zealand Building Code is an example of a performance-based set of requirements. It is part of the Building Regulations made under the Building Act 2004. The New Zealand Building Code sets out performance standards that all new building work must comply with. It states how a building and its components must perform, as opposed to prescribing how the building must be designed and constructed.

For more information see:

www.dbh.govt.nz

2.3.B.ii   Quasi-regulation

This includes various rules or arrangements where governments influence the regulated sector to comply, but which do not form part of explicit government regulation.

Examples include industry codes of practice developed with government involvement, guidance notes, and industry-government agreements.

Examples of quasi-regulation

The New Zealand Packaging Accord 2004

Part of a general drive towards sustainable development, the New Zealand Packaging Accord 2004 is a voluntary industry and government initiative to make more sustainable use of packaging. Parties to the Accord include central and local government and various industry organisations, including the Packaging Council of New Zealand and the Recycling Operators of New Zealand.

The Accord notes (at para 12, under 'Accord Foundations'): 'If a voluntary approach does not provide sufficient improvements in reducing packaging waste per New Zealander and encourage product stewardship, Government is prepared to consider doing so by regulation.' See:

www.mfe.govt.nz/publications/waste/packaging-accord-jul04/

Land Information New Zealand (LINZ)

LINZ has developed a suite of quasi-regulation to support appropriate compliance and best practice in the areas it regulates. This includes regulatory standards and guidelines. For more information, see:

www.linz.govt.nz/about-linz/news-publications-and-consultations/search-for-regulatory-documents/index.aspx?

2.3.B.iii Co-regulation

This typically refers to where industry develops and administers its own arrangements, such as codes and standards, but government provides legislative backing – or 'underpinning' – so that these arrangements can be enforced.

Sometimes legislation sets out mandatory government standards, but provides that those standards are met where an industry code is complied with.

Legislation may also provide for government-imposed arrangements if industry does not meet its own arrangements.

Codes of Practice approved under the Hazardous Substances and New Organisms Act 1996 (HSNO)

The HSNO Act provides for Codes of Practice to be approved by the Environmental Risk Management Authority (ERMA) New Zealand, to offer an approved method of achieving compliance with regulatory requirements set under the Act. Together with best practice, Codes of Practice are intended to eliminate or minimise the risk associated with the management of hazardous substances.

A Code of Practice may be developed by ERMA or by other organisations and then presented to ERMA for approval. The Code of Practice *Signage for premises storing hazardous substances*, for example, was developed by the New Zealand Chemical Industry Council (NZCIC), and approved by ERMA in 2004.

For more information see:

www.ermanz.govt.nz/publications-resources/publications/codes-of-practice/Pages/default.aspx

2.3.B.iv Self-regulation

Here, as well as formulating rules or codes of conduct, industry is also solely responsible for enforcing them.

Self-regulation may be a feasible option if:

- risks, such as to public health and safety, are easily managed

- highly technical and complex issues are involved, requiring industry expertise, and

- the problem can be fixed by the market itself – for example, where there is an incentive (such as industry survival or market advantage) for industry members to develop and comply with self-regulation.

Self-regulation is not likely to be effective if industry members have an incentive not to comply with the rules or codes of conduct.

2.4 'Better Regulation, Less Regulation' – Government Statement on Regulation (2009)

2.4.A THE ROLE OF COMPLIANCE AGENCIES IN ACHIEVING BETTER REGULATION

Key elements in the Government's 'Better Regulation, Less Regulation' approach are making regulation:

- more effective

- easier to access and understand

- easier and less costly to comply with.

The role played by compliance agencies in administering regulation is therefore a critical element in determining whether those goals are met.

2.4.B SPECIFIC EXPECTATIONS

The Government's statement set out some important expectations of compliance agencies:

> *We will also be looking for significant changes in the approach both Ministers and government agencies take to regulation. To this end we will:* […]

- *Ensure that all government agencies are fully aware of the commitments set out in this statement and understand the importance that the government attaches to them;*

- *Expect a culture from government agencies that:*
  - *recognises the importance of productivity in enhancing New Zealand's economic performance;*
  - *respects the value of individual autonomy and responsibility;*
  - *does not see regulation as the first resort for problem solving;*
  - *provides fearless advice on whether a regulatory proposal is consistent with this policy statement and meets appropriate standards of impact analysis and consultation; and*
  - *continually looks for opportunities to make existing regulation more effective, easier to access and understand, and easier and less costly to comply with;*

- *Require greater accountability from government agencies for the quality of the regulatory analysis they undertake, and for the consequences of poor implementation…*

The Government's 'Better Regulation, Less Regulation' statement is available at:

www.treasury.govt.nz/economy/regulation/statement

Case study

The LINZ Standards Rationalisation Programme

Over the period 2004–10, Land Information New Zealand (LINZ) rationalised all its existing regulatory interventions based on the principle of optimal regulation: 'As little as possible, as much as necessary'.

Taking a risk-based approach to regulation and applying the Standards New Zealand approach to developing standards, LINZ reduced its regulatory stock from 290 documents to 55. The process included substantial involvement from the regulated sector.

Compliance obligations for the regulated sector under the documents now in place are outcome-focused and performance-based.

2.5   The Performance Improvement Framework (PIF)

The State Services Commission, the Treasury, and the Department of the Prime Minister and Cabinet have jointly created the Performance Improvement Framework as a basis for assessing government agencies.

The PIF is designed to provide a systematic framework for better understanding an agency's capabilities and current achievements, as part of a continuous improvement cycle. The PIF was developed specifically for the New Zealand public sector, drawing on the strengths of private-sector models and on lessons learned and models used overseas, including in the UK.

This guide, *Achieving compliance,* is intended to assist compliance agency managers in meeting the expectations set out in the PIF.

The PIF applies only to central government agencies. Outcomes for local government agencies are determined through the public consultation processes required for Long-Term Council Community Plans (LTCCPs) under the Local Government Act 2002 (sections 93 to 97).

2.5.A   MAIN COMPONENTS OF THE FRAMEWORK

The PIF consists of a series of questions about capabilities and results. It also includes 'best practice indicators' to provide agencies with a sense of current good-practice expectations.

The PIF has two main components: **results** and **organisational management**.

The results component has two critical areas.

- Delivery of government priorities
- Delivery of core business

The organisational management component has four critical areas.

- Leadership, direction and delivery
- External relationships
- People development
- Financial and resource management

2.5.B   LEAD QUESTIONS FOR COMPLIANCE AGENCIES

The framework addresses these areas by asking lead questions for each one. Lead questions for the 'government priorities' and 'core business' areas deal with the effectiveness and efficiency of an agency's work

1. How well has the agency identified and responded to current government priorities?

2. How effectively is the agency delivering this core business area?

3. How efficiently is the agency delivering this core business area?

4. How well does the agency's regulatory work achieve its required impact?

ADDITIONAL GUIDANCE MATERIAL

Performance Improvement Framework (PIF)

- Documents relevant to the Performance Improvement Framework are available at:

    – www.ssc.govt.nz/pif

Forms of regulation

- The Ministry of Consumer Affairs has published a discussion paper, *Review of industry-led regulation* (2005), setting out a draft framework to help consumers and industry establish, operate and evaluate industry-led regulatory schemes. It's available at:

    – www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/disscussion-papers/review-of-industry-led-regulation-discussion-paper

- The Department of Labour has published a report on the question of regulatory control of the adventure-tourism sector, *Review of risk management and safety in the adventure and outdoor commercial sectors in New Zealand 2009/10: Final Report* (June 2010). It's available at:

    – www.dol.govt.nz/consultation/adventure-tourism/final-report/01.asp

CH 3 INTRODUCING KEY FEATURES OF EFFECTIVE COMPLIANCE STRATEGIES

This chapter discusses:

- the key elements of, or choices that can be made about, approaches to achieving compliance, including the benefits of a risk-based approach to achieving compliance; a results-oriented approach; collaboration, cooperation and cross agency approaches; and a project-based approach to solving compliance problems (3.1)

- the 'Compliance Pyramid' model, and variations of the concepts it encapsulates (3.2)

- the importance of facilitating and encouraging voluntary compliance (3.3)

- dealing with non-compliance (3.4)

- the relevance of private sector operational and service delivery models (3.5).

3.1 Key features: Focusing on risk, proportionality, and outcomes

This section summarises key features of effective compliance strategy, and directs the reader to where particular areas are dealt with more fully in later chapters of this guide.

3.1.A FOCUSING ON RISK

Overall, compliance work is driven by laws and regulations that are essentially risk-management frameworks – intended to influence behaviours and control risks that would otherwise undermine desired societal outcomes. Thus, risk management is central to a successful and cost-effective compliance strategy. An intelligence-led, risk-based approach guides a compliance agency in choosing its compliance tools in individual cases or for particular segments of the regulated sector. It enables the agency to maximise its effectiveness, subject to the resources available to it.

The exceptions to this are specific cases where laws and regulations might require actions by compliance agencies, reducing their ability to prioritise and make risk-based judgements. This can occur in the application of criminal law. For example, the Land Transport Act 1998 (section 96) requires an enforcement officer, under

specific circumstances, to seize and impound a motor vehicle for 28 days. Under such circumstances, an enforcement officer cannot exercise discretion on the basis of priorities or risk.

By using a systematic approach to risk management, a compliance agency can:

- identify, analyse, and quantify risk

- prioritise risk, based on an assessment of its likelihood and potential consequences

- plan and conduct activities to eliminate or mitigate risk.

Effective risk management needs to be intelligence-led and evidence-based. It must include a clear understanding of the particular regulatory environment, of the drivers of compliance and non-compliance, and can go so far as segmenting regulated persons/organisations based on structured and evidence-based risk assessment, for specific targeting of interventions. This will enable the agency to address the causes of risk, rather than their symptoms.

Risk management is dealt with more fully in chapter 5 of this guide.

3.1.B   A GRADUATED, PROPORTIONATE APPROACH TO ACHIEVING COMPLIANCE

Centring a compliance strategy around risk in turn requires the proportionate and flexible use of a range of tools for achieving compliance. A compliance agency can select appropriate measures, tailoring its compliance tools to the attitudes and capabilities of different segments of the regulated sector and the different risks that are presented.

Low-level measures focused on providing accessible information and education will be cost-effective in achieving compliance for most members of the regulated sector. Prosecutions and other more severe enforcement tools will be necessary for individuals and businesses that deliberately choose not to comply. Intermediate actions will be available as appropriate – for example, placing conditions on the operations of a non-compliant manufacturer if the risks posed by non-compliance can be satisfactorily managed without more stringent measures.

A graduated, risk-based compliance strategy is discussed in 3.2.

3.1.C   A RESULTS-ORIENTED APPROACH

A compliance agency must be able to demonstrate to stakeholders that it is achieving its regulatory objectives and in a cost-effective manner. To do this it needs clearly defined **impacts and outcomes** by which to measure its effectiveness in managing or mitigating identified risks over time (longitudinally) and in achieving a positive change in compliance behaviour over time.

To ensure that it is meeting its objectives, a compliance agency requires a sound performance-management framework. This will enable the agency to:

- define its strategic and operational objectives and priorities

- plan its activities and manage its resources effectively and efficiently

- define and enforce quality standards

- measure and report on its regulatory and organisational performance.

Defining outcomes and measuring performance is dealt with more fully in chapter 6 of this guide.

3.1.D COLLABORATION AND COOPERATION WITH THE REGULATED SECTOR

Better compliance agencies are adept at working with the regulated sector to develop responses that promote the desired compliance outcomes. By increasing mutual understanding and achieving 'buy-in' from the compliance target, the agency will be more likely to achieve high levels of compliance.

The interaction involved in collaboration and cooperation increases the agency's knowledge of the person or business being regulated, and so improves its intelligence and contextual knowledge. Compliance targets may even provide solutions that improve compliance.

The Ministry of Fisheries' 'VADE' Model (Table 2, at the end of 3.3.C.iii) is a good example of bringing together a risk-based approach, proportionate responses, and collaboration in a way that ensures regulated parties 'know where they stand', and get the level of support and attention necessary to maximise compliance outcomes.

Relationship management is dealt with in chapter 11 of this guide.

3.1.E USE OF THE MEDIA

Used correctly, the media can be a powerful tool in designing and executing an effective compliance strategy. The media can be engaged as a proactive channel to communicate and promote your agency's objectives, compliance approach and strategies.

An effective way of doing this is planning to maximise the publicity associated, for example, with a successful investigation or prosecution outcome. Besides the facts of the case, press releases could emphasise the underlying risks and issues that are driving the need to comply and why it is important to do so. This potentially exposes your agency and its work to a wide range of audiences and could shape and influence public opinion in support of the agency's objectives.

The concept of shaming and the use of the media by regulators to do so is also a well known strategy that is discussed on more detail in section 3.4.C.

Case study

Creating an environment that makes it easier to comply

The New Zealand Police takes a proactive approach to crime reduction by planning responses to identified problems that are focused on prevention. The removal of 'opportunity' from the situation leads to reduction in crime and fewer problems. Police use two frameworks as part of the problem-solving approach to prevention:

1. Twenty-five steps to situational crime prevention (see Table 1)

2. Crime prevention through environmental design (CPTED).

Table 1 – Situational crime prevention framework

Increase effort	Increase risks	Reduce rewards	Reduce provocations	Remove excuses
Target hardening, control access to facilities, screen exits, deflect offenders, control weapons	Extend guardianship, assist natural surveillance, reduce anonymity, utilise place managers, strengthen formal surveillance	Conceal targets, remove targets, identify property, disrupt markets, deny benefits	Reduce frustrations and stress, avoid disputes, reduce emotional arousal, neutralise peer pressure, discourage imitation	Set rules, post instructions, alert conscience, assist compliance, control drugs and alcohol

CPTED

CPTED is a prevention strategy for problem solving based on evaluation of the environment in which the problem is occurring or may occur if not addressed. The preventive response is based on redesign of a geographical landscape and developing cohesive, community, and multi-partner connections to act together. The focus of CPTED is on environmental design, not safety, but creating safety and sustainability through community building and urban design. The purpose of CPTED is to focus on reducing crime by removing opportunity.

CPTED is now moving into a second generation strategy – beyond image/maintenance/access control and into development of community culture, social cohesion, and understanding of community-wide capacity to deal with wide-ranging problems (see Figure 1).

Continued

Figure 1 – Community policing model

Figure 1 – Community policing model
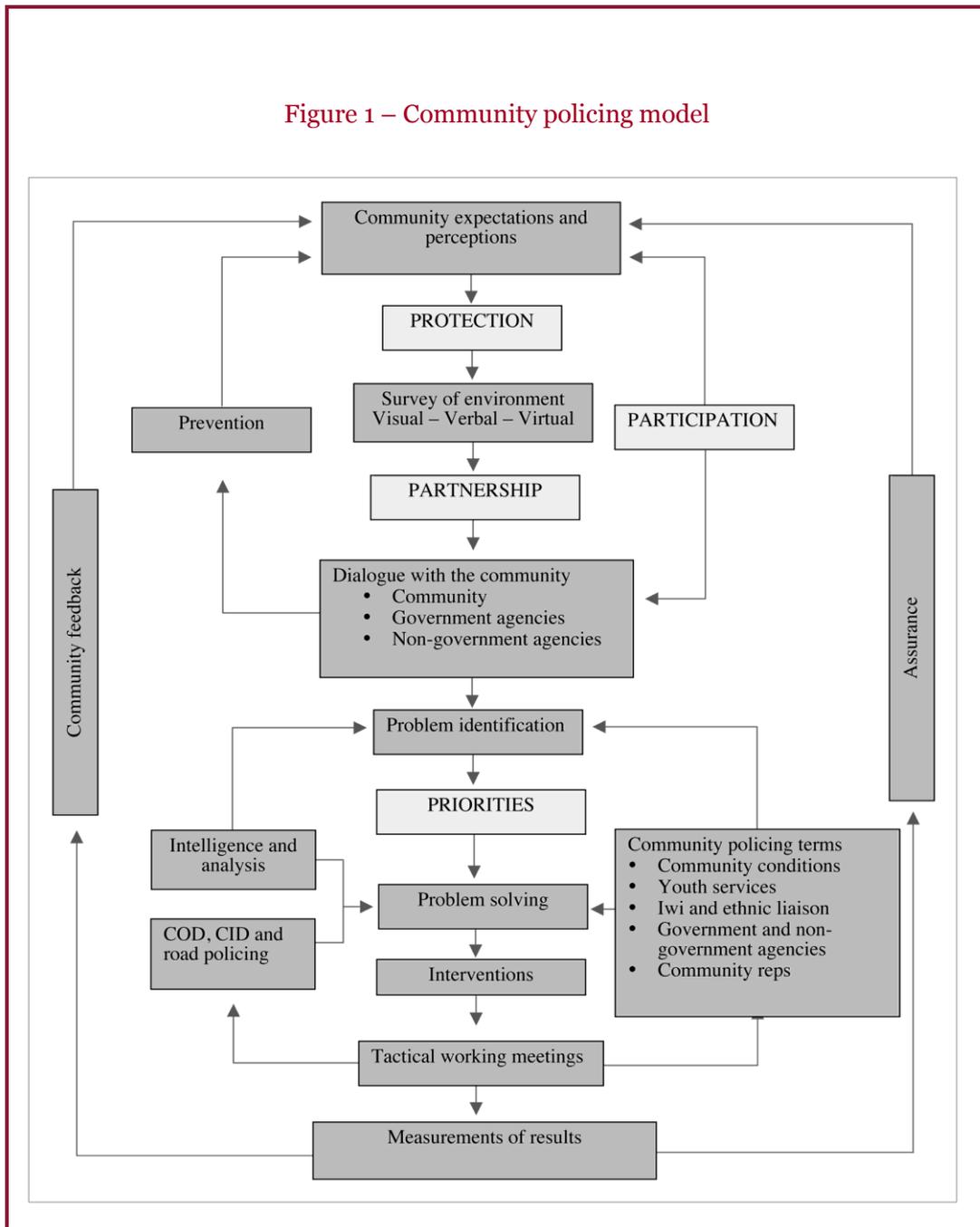
3.1.F   A PROJECT-BASED APPROACH TO SOLVING PROBLEMS

Intervening effectively to achieve compliance may often require a compliance agency to address patterns of non-compliance through specific project teams, rather than responding only to individual incidents through the agency's routine compliance activities and processes.

This can occur within a specific jurisdiction, or across jurisdictions and agencies, where the focus is on targeting the problem using the most appropriate means. For example, where a person or organisation might be offending against a variety of laws, a cross-agency problem-solving approach would see the agency that is best placed to deal with the problem taking action.

Effective project-based work requires a management framework that provides flexibility for creative problem-solving, but also accountability and clear criteria for success. See 14.5.

A project-based approach also has implications for a compliance agency's approach to managing information and intelligence. See 9.4.

3.2   Designing a graduated, risk-based compliance strategy

The traditional enforcement model for achieving compliance focuses on **deterring** non-compliance through enforcement action, such as bringing criminal prosecutions and suspending or revoking operating licences.

However, most individuals and organisations who owe regulatory duties don't need to be deterred from non-compliance – they generally accept the social obligations that are embodied in the regulations and are willing and ready to comply voluntarily. For the majority of the regulated sector, therefore, the barriers to full and timely compliance are likely to be lack of awareness or confusion about their obligations, or lack of awareness of the easiest and most convenient ways to comply.

> *The first condition is that the target group has to be* aware of the rule *and* understand *it. For example, lack of clarity in a rule may bring about unintentional non-compliance. Second the target group has to be* willing to comply*. Economic incentives can motivate compliance. A strong enforcement programme can discourage non-compliant behaviour. The third condition is that the target group is* able to comply*. For some regulations, implementation of the policy should include activities such as the provision of necessary information and other technical support. If any one of these conditions is not met, non-compliance occurs.* [2]

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[2] *Reducing the risks of policy failure: Challenges for regulatory compliance* (OECD, 2000)

In most cases, therefore, the task of a compliance agency will be to **facilitate and encourage compliance**.

The proportion of individuals and organisations that is willing and ready to comply will, of course, vary from one regulated sector to another. A compliance agency will need to obtain a picture of this at the outset by carrying out a robust risk analysis of its particular sector, based on an understanding of the different drivers of compliance behaviour in that sector.

3.2.A   THE COMPLIANCE PYRAMID MODEL

The idea that lower-level compliance tools will be sufficient in most cases is reflected in the often-used model, the 'Compliance Pyramid' (based on the work of John Braithwaite, *Restorative justice & responsive regulation,* Oxford University Press, 2002). This can be a valuable conceptual tool for regulatory agencies in achieving or improving compliance – see for example Inland Revenue's use of the pyramid in its compliance model shown in Figure 2 below. Inland Revenue's compliance model reflects the premise that most customers are compliant.

At the bottom of the pyramid are those who are willing to comply – at the top are those who are deliberately non-compliant in order to achieve some kind of economic or social advantage. Barriers to full, voluntary compliance will be different at different levels of the pyramid.

The Compliance Pyramid is designed to create downward pressure – that is, to move non-compliant individuals or organisations down the pyramid to full compliance and to where lower-level and less costly interventions will be sufficient to keep them compliant.

Figure 2 – Inland Revenue's compliance model
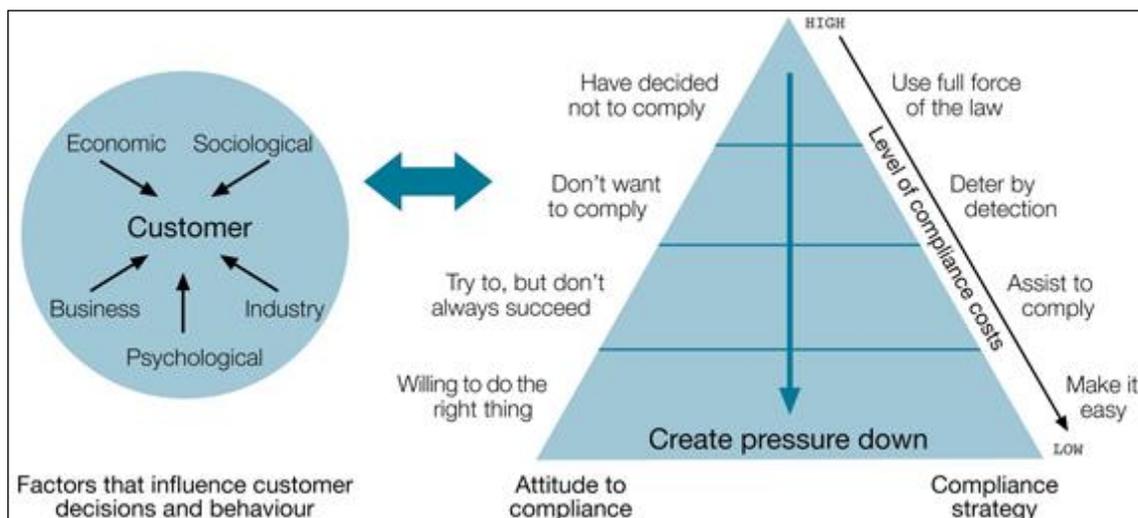
A useful framework for considering the way people respond to regulation is set out in an article by Ayres and Braithwaite (1992)[3]. This is done in the context of discussing the need for responsive regulatory institutions and promoting the use of the enforcement pyramid. Although the article focuses on the overall strategies that should be used by regulatory institutions, the way in which it discusses the types of responses that might be expected from regulated parties is useful in thinking about information strategies in particular.

The article suggests that regulators need to be able to deal with 'actors' (regulated parties) who may be:

- **Virtuous** – willing to comply with the law, and more, based on an existing strong desire to do the right thing

- **Economically rational** – willing to comply if, based on a kind of cost benefit analysis, it is better for the financial bottom line to do so

- **Irrational** – unwilling to comply because of contempt for regulation

- **Incompetent** – unable to comply because of lack of ability to understand or execute actions necessary to comply.

3.2.B   COMMUNICATING YOUR COMPLIANCE STRATEGY EFFECTIVELY

A proportionate, risk-based compliance strategy is most effective when it has been **communicated fully and effectively** to those the compliance agency regulates. Agencies should consider developing and publishing a 'compliance policy', which sets out a principles-based, graduated, and proportionate approach to compliance and enforcement. This may include principles such as:

- voluntary compliance and self-regulation through education

- transparency and consistency of decision-making

- accountability for decision-making

- proportionality of response to breach

- deterrence of future offending

- targeting of specific offences/offenders in response to public interest

- adequacy of evidence

- impartiality of compliance response.

By explaining to the regulated sector how the agency is likely to respond in different categories of cases, and the factors it will take into account in deciding on

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[3] Ayres I and Braithwaite J. 1992. Designing responsive regulatory institutions, The responsive community. *Rights and Responsibilities* 2 (3) Summer.

a response, the agency can build a more open and communicative relationship with the sector.

This area is explored further in 11.2.B.

3.3 Facilitating and encouraging voluntary compliance

A risk-based, proportionate compliance strategy recognises that most people and businesses are willing to comply with their regulatory obligations voluntarily, or can be encouraged or induced to do so. To maximise voluntary compliance, a compliance agency needs a sound understanding of the drivers of compliance and non-compliance in its particular environment, and of the ways in which the agency can harness those drivers to achieve its regulatory objectives.

By focusing on using the more severe enforcement tools only when they are warranted by the given risk, a compliance agency can achieve the broadest possible compliance at the least cost both to the agency and to the non-compliant person or business.

3.3.A   BENEFITS OF MAXIMISING VOLUNTARY COMPLIANCE

A focus in most cases on providing information, education, encouragement, and assistance will mean:

- clarity and certainty for the regulated sector about their obligations and the outcomes the agency is seeking

- convenience and lower compliance costs for the regulated sector in meeting their obligations

- a more open and responsive relationship between the agency and its regulated sector, with members of the sector being more likely to communicate with the agency about compliance issues – to the benefit of both sides

- greater public confidence in the agency, and greater appreciation of its objectives and public responsibilities.

3.3.B   KEY METHODS OF FACILITATING VOLUNTARY COMPLIANCE

Key methods will include:

- providing **clear, accessible information**

- **educating** the regulated sector about the full extent of its obligations and how it can comply most conveniently

- making **processes for complying** (for example, online registrations) as simple and convenient as possible.

These methods should not be seen as separate to, or only able to be used instead of, enforcement action. To maintain credibility, compliance organisations need to demonstrate a willingness to take enforcement action where non-compliance occurs.

3.3.C   UNDERSTANDING THE DRIVERS OF COMPLIANCE BEHAVIOUR

It is essential for an agency to understand the drivers of compliance behaviour in its particular regulatory sector. This will enable the agency to design the right set of responses to address compliance risks appropriately, and to distribute its resources most effectively.

3.3.C.i   Key drivers

Key influences on compliance behaviour include the following:

- **Deterrence** – This is the perceived risk of non-compliance being detected (through audits, for example) and of being subjected to sanctions. For detection to be a deterrent, the costs of non-compliance after the agency detects it must be greater than the cost of the compliance target setting up its own voluntary compliance programme and quality-control systems (see 13.7).

- **Norms** – This includes both personal and wider social norms. A compliance agency should consider how it might build and harness community support for its objectives and activities and make the best use of community pressure against non-compliance. This might be through drawing on social stigma that may apply to non-compliant behaviour ('naming and shaming', see 3.4.C).

- **Opportunity** – This includes both the opportunity to be compliant (enhanced by, for example, low compliance costs and simple rules) and the opportunity to be non-compliant (for example, opportunities for evasion).

- **Fairness and trust** – Members of the regulated sector will be more likely to comply if they perceive that the compliance agency and the regulatory regime it administers is fair and that the agency, and other members of the regulated sector, are trustworthy.

- **Economic factors** – This includes not only general economic conditions but also factors specific to the particular industry or sector, such as any market pressures on compliance or non-compliance. The agency may be able to make use of various economic instruments to encourage compliance (such as taxes, levies, charges, subsidies, and credits). A cost recovery or fees regime that is viewed as unfair or unaffordable may adversely affect compliance behaviour.

3.3.C.ii   Compliance 'triangle'

What is commonly known as the 'Fraud Triangle' – motive, rationalisation, opportunity – may also be usefully adapted to the compliance context to inform an understanding of the causes of non-compliance.

- **Motive (or pressure)** – the drivers of or incentives for non-compliance (cost, for example).

- **Rationalisation** – the mindset of the person that justifies them not complying.

- **Opportunity** – the situation that enables non-compliance to occur (often when controls are weak or nonexistent).

See 14.2 for more information on encouraging compliance.

Case study

Inland Revenue's compliance model: Tailoring compliance tools to different segments of the regulated sector

Inland Revenue's (IRD's) compliance model (see Figure 2 in section 3.2.A), which includes a version of the compliance pyramid, recognises that most people and businesses want to comply with their obligations. The model helps IRD identify and understand the drivers and causes of compliance behaviour and to design an appropriate set of responses.

The IRD model identifies four different types of compliance behaviour, and sets out compliance responses that are appropriate to them.

Willing to comply

The largest segment of the regulated sector will comply voluntarily. Inland Revenue's compliance approach here is **make it easy**, through for example:

- providing information and self-assessment tools *(see next case study)*
- offering online services (such as filing returns) that enable taxpayers to do more for themselves and thereby save time and reduce compliance costs.

Try to, but don't always succeed

Some people will try in good faith to meet their obligations, but sometimes need help to do so. IRD's approach here is **assist to comply**, which includes:

- offering advisory services
- encouraging taxpayers who may have made a mistake in their returns to contact IRD early on
- developing proposals for any law changes that may be necessary.

Don't want to comply

A minority of people and businesses are reluctant to comply with their tax obligations. IRD's corresponding compliance tool is to **deter by detection**, to ensure that these people are aware they won't go undetected for long, through:

- regularly analysing individuals' and businesses' tax affairs
- carrying out investigations
- educating people and businesses as part of the investigation process.

Have decided not to comply

For those people at the top of the pyramid who have consciously decided to evade their obligations, swift and firm enforcement is necessary. IRD uses the **full force of the law** in these cases. Specifically:

Continued

- it continually improves its capacity to identify and investigate fraud and tax evasion (for example, through exchanging information with international agencies)
- it has a range of methods for collecting and recovering tax in cases of deliberate non-compliance
- it brings prosecutions for fraud and tax evasion.

Case study

Self-assessment tools for gambling compliance

The Department of Internal Affairs (DIA) has developed self-assessment review tools, based on the Department's own audit checklist, to enable societies and clubs to:

- assess the extent to which their gaming-machine operations comply with the Gambling Act 2003, related regulations, licence conditions, and game rules
- identify areas where their own internal policies, systems, and procedures should be improved or strengthened
- put measures in place immediately to rectify any identified areas of non-compliance.

The two self-assessment tools – **Clubs Self-Assessment Review** and **Non-Club Societies Self-Assessment Review** – are available on the DIA website, www.dia.govt.nz, under Gambling/Compliance Investigations and Audit.

DIA has made it very clear that the fact that a club or society has used one of the self-assessment tools does not limit the Department in exercising its functions and powers under the Gambling Act 2003.

3.3.C.iii The 'VADE' model

Another way of depicting a proportional, risk-based approach is the 'VADE' model (Voluntary, Assisted, Directed, Enforced), which was developed by the Ministry of Fisheries (see Table 2 below). The VADE model is also used by the Department of Internal Affairs' Regulation and Compliance Branch.

Case study

The 'VADE' (Voluntary, Assisted, Directed, Enforced) model

This model segments the regulated sector in similar ways to the IRD compliance model, according to different compliance behaviours.

- **Voluntary** – Voluntarily comply and informed
- **Assisted** – Attempting to comply and uninformed
- **Directed** – Propensity to offend (opportunistic)
- **Enforced** – Criminal intent and illegal activity

Table 2 – Ministry of Fisheries' service delivery model

Service delivery categories	Voluntary	Assisted	Directed	Enforced
Behaviours	Voluntarily comply and informed	Attempting to comply and uninformed	Propensity to offend (opportunistic)	Criminal intent and illegal activity
Intervention Information	• Enabling legislation • Area and ethnicity-specific communication plans • Brochures, publications, and signage that accurately convey legal and technical requirements • Organisational information that directly supports decision making	• Area-specific communication plans • Brochures, publications, and signage that highlight areas of specific concern • Compliance collection planning • Organisational information that directly supports decision making	• Brochures, publications, and signage that highlight consequences of non-compliance • Compliance collection planning • Compliance tactical intelligence reporting • Organisational information that directly supports decision making	• Compliance collection planning • Compliance tactical intelligence reporting • Internal information that directly supports decision making • Compliance operational and strategic intelligence reporting
Intervention Stakeholder agreements	• Compliance rate discussion and agreement of comprehensive measures • Inspection focus	• Compliance rate with focus on improvement advice • Formal agreement with general standards	• Compliance rate with focus on direction of required activity • Formal agreement with performance standards defined	• Enforcement activity with clear understanding that voluntary, assisted, and directed states have been breached
Intervention Action	*Plan and respond* • Engage with stakeholders in all sectors – commercial, non-commercial (customary and recreational), and international • Support iwi, regional, and recreational forums • Deliver education services to non-commercial • Inform services to commercial • 'Trusted Fisher' status designed	*Intelligence and risk entities* • Compliance tactical intelligence reporting • Identification of risk *Plan and respond* • Engage through education and intervention with 'no' and 'low' risk *Enforcement* • Identified breaches of law will be 'warning' focused	*Intelligence and risk entities* • Identification of risk • Target 'medium' risk *Plan and respond* • Compliance tactical intelligence report responses • Develop enforcement plans that are principally patrol and inspection focused • Inter-agency collaboration *Enforcement* • Identified breaches of law will be 'infringement' and 'summary proceedings' focused	*Intelligence and risk entities* • Identification of risk • Target 'high' risk *Plan and respond* • Compliance tactical, operational and strategic intelligence report responses • Develop enforcement plans that are principally inspection and investigation focused • Inter-agency collaboration *Enforcement* • Identified breaches of law will be 'prosecution' focused

Service delivery categories	Voluntary	Assisted	Directed	Enforced
Intervention Assessment and measurement	• Define clearly relevant compliance measures and rates across sector dimensions • Compliance rate monitoring and reporting (agreed voluntary measures) • Effectiveness of education programmes *Review and design compliance best practice*	• Compliance rate monitoring and reporting (agreed assisted measures) • Effectiveness of education programmes *Review and design compliance best practice*	• Compliance rate monitoring and reporting (agreed directed measures) • Effectiveness as deterrent *Review and design compliance best practice*	• Compliance rate monitoring and reporting (agreed enforced measures) • Effectiveness as deterrent *Review and design compliance best practice*

3.3.D   THE ROLE OF ENFORCEMENT IN A GRADUATED, RISK-BASED APPROACH

Compliance agencies will usually have a range of tools available to them for achieving compliance. The most punitive enforcement tools should be used selectively: the agency should reserve them for the most serious types of risk, and where intermediate sanctions – such as conditions or restrictions on a business's operations – would be inadequate to manage the risks effectively.

However, prosecution and other punitive measures will continue to be a vital part of a compliance agency's toolkit of responses to non-compliance. Failure to use these enforcement teeth will undermine the agency's efforts to achieve compliance, and damage the agency's credibility and morale.

Decisions by the courts can also be useful to regulatory agencies to clarify aspects of the law, providing greater certainty for both the regulator and those being regulated on what the 'rules' are. In certain cases the regulator may judge that taking action and achieving certainty on a particular issue through the courts is in the best interests of ensuring compliance in the long term, even though the chances of winning may not be high.

Compliance agencies should continually evaluate whether they have an appropriate suite of tools for achieving compliance, and provide feedback to policymakers if their existing tools and powers are inadequate. This is best achieved by the provision of evidence-based information and analysis that is structured and supplied at times and in a way that is agreed as useful by the policymaker.

3.4   Dealing with non-compliance

The 'Compliance Pyramid' model can also be adapted to the more specific situation of addressing individual cases of non-compliance – see chapter 14. There the model presents a set of graduated interventions from which the compliance agency can select in designing a response that is proportionate to the risk presented by the non-compliance. Identifying the right response or responses will require the agency to understand the causes and drivers of the risk in that case.

The pyramid model does not require that a compliance agency's first response must invariably be a low-impact intervention from the base of the pyramid. The appropriate level of response will always depend on a robust assessment of the level of compliance risk in the particular case, based on intelligence, research, and an evaluation of the drivers and causes of the risk. The right response will also depend on the outcome the agency is trying to achieve.

Addressing non-compliance is covered in more detail in chapter 14.

3.4.A ADJUSTING THE RESPONSE IN A PARTICULAR CASE

The pyramid provides not only flexibility in choosing a proportionate response, but also allows for **adjusting the response** if necessary in a particular case.

A compliance agency may need to move to a more severe, more interventionist response if a previous tool has not been effective in achieving compliance. In other cases, however, the agency may be able to move its response down the pyramid rather than up – for example, removing restrictions on a business's operating licence as a reward for clear and committed progress towards compliance.

See 14.1.A.iii for more information about escalating and de-escalating responses.

3.4.B IMPOSING DISPROPORTIONATE RESPONSES FOR STRATEGIC PURPOSES

The level of the response will usually match the level of risk. But at times an agency may decide, for strategic purposes, to apply a higher-level response than usual.

For example, it might carry out a 'blitz' on a particular activity or area in order to give out a sharp message to deter non-compliance. This will usually be most effective when combined with other, more supportive forms of compliance activity.

An agency might also choose to take enforcement action on offending by, for example, a significant, well known, market participant where similar offending from a smaller market participant might not attract such an intervention. This action may be designed to maximise the publicity associated with a successful case, thus contributing to broader compliance outcomes. Such action may be regarded as 'unfair' by the party subject to the enforcement action/publicity. However, it may be justified on the basis that more significant, well known, market participants engaging in non-compliant behaviour will have a bigger impact on consumers than smaller market participants – and thus be proportionate.

3.4.C 'NAMING AND SHAMING'

The concept of shaming, and the use of the media by regulators to do so, has been addressed in a number of studies[4,5]. Among other things, the studies recommend that public authorities should act in a manner which is:

- authorised by law

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[4] Yeung K. 2002. *Is the use of informal adverse publicity a legitimate regulatory compliance technique?* Paper presented to the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002.

[5] Fisse, B and Braithwaite, J. 1983. *The impact of publicity on corporate offenders*. New York: State University of New York Press.

- reasonably certain and stable

- accountable and transparent

- procedurally fair, and

- proportional, consistent, and rational.

Regulator-initiated informal publicity may have a punitive impact on firms and individuals, by 'shaming' its targets and thereby lowering their reputation and prestige in the community. However, questions of fairness and proportionality may arise when a regulator consistently uses the name of a party that has previously been punished for non-compliance and thereby extends any reputation damage.

With regard to more general deterrence of non-compliant behaviour, it is not clear whether adverse publicity necessarily improves compliance. There is some evidence that shaming techniques and sanctions can be counterproductive and actually exacerbate non-compliance. On the other hand, adverse publicity may lead to improved regulatory compliance by raising public awareness of regulatory laws and encouraging the timely settlement of enforcement actions.

3.5 Relevant private-sector operational and service delivery models

The risk-based, outcomes-focused approach to achieving compliance set out in this guide provides a coherent framework for the work of public compliance agencies, by centring on their regulatory objectives and the obligation to serve the public interest.

Aspects of other operational or service delivery models derived from the private sector may also be useful to compliance agencies in achieving their regulatory priorities. Those other models emphasise values and goals that are also significant for compliance agencies, such as timeliness, efficiency, technical competence, courtesy, and respect in dealing with the regulated sector and other stakeholders.

However, in drawing on private-sector models, agencies should be aware of the limitations of those models for any organisation with significant public responsibilities. Effectiveness for a compliance agency will need to centre on qualitative outcomes, and effectiveness cannot be judged primarily by reference to, for example, customer satisfaction or quantitative efficiency.

Some specific alternative models and their strengths and limitations are discussed in 3.5.C to 3.5.C. The appropriateness of a given model will vary from one compliance agency to another, depending on the nature of the agency and its particular environment and regulatory objectives.

3.5.A CUSTOMER-SERVICE MODEL

A number of aspects of customer-service models may be valuable for compliance agencies. For example, a focus on responsiveness and timeliness will assist an

agency to meet targets for efficiency and other quantitative outputs. Further, an emphasis on the customer and their behaviours and needs is likely to enhance the agency's understanding of the regulated sector and therefore its capacity to achieve compliance.

However, there are important limits to the applicability of a customer-service model for public compliance agencies. Unlike the customers of a private-sector business, the sector regulated by a compliance agency is usually not the true customer of the compliance agency (the true customers are those that the regulation is intended to benefit, rather than those it applies to), and does not usually get to decide whether the agency is performing well; in fact, effective performance by the agency may frequently mean low levels of satisfaction with the agency among particular members or segments of the regulated sector. This is discussed further in the context of managing relationships with the regulated sector – see chapter 11.

There may therefore be tensions between the core values of a customer-service model and the regulatory objectives of a compliance agency. For example, an agency may at times need to make a considered decision to sacrifice a degree of timeliness in order to achieve qualitative outcomes and protect the public interest (see for example the gambling sector case study at the end of 11.2.A). In that context, a risk-based, outcomes-focused compliance model will provide the agency with the necessary framework for making an appropriate and balanced decision.

The customer-service model and its limitations for compliance agencies are discussed at length in chapter 4 of Malcolm Sparrow's *The regulatory craft* (2000).

3.5.B   TOTAL QUALITY MANAGEMENT (TQM)

The TQM model also includes a focus on customer service. Again, some aspects of this model can be valuable for achieving higher levels of compliance – for example, providing the regulated sector with clear, accurate information and with easier, more convenient access to the agency's services and processes (registration for instance).

The TQM approach also focuses on continuous refinement of processes, and therefore primarily on quantitative measures of efficiency rather than qualitative measures of effectiveness in achieving desired outcomes. The model also strives to achieve a uniformity of reaction by the organisation's staff.

While the TQM approach sees quality as being determined by the customer or client, compliance agencies serving the public and the beneficiaries of the particular regulatory regime will need to establish other performance measures.

To achieve its regulatory objectives, a compliance agency will also need to look beyond refinement of its core, routine processes. In addition to that routine work, agencies also need to find flexible organisational forms – such as finite-life, cross-functional project teams – for addressing serious risks and significant compliance problems (see 14.8). Agencies also need to place value on creative thinking and the intelligent exercise of discretion (see 7.2.A).

3.5.C THE CONTINUOUS PROCESS IMPROVEMENT AND RE-ENGINEERING MODELS

Both these models focus on improving the organisation's core, routine processes. In particular, the 're-engineering' approach centres on breaking down functional and vertical segregation to make processes work more efficiently. Rather than the process consisting of the work of a disjointed series of specialist teams, the agency's processing staff are reorganised horizontally, with process teams established to cover the whole process.

These models can be valuable in achieving greater efficiency and timeliness. However, in order to reduce their routine, reactive workloads, compliance agencies also need to look to more proactive, creative, and organisationally flexible approaches to addressing significant problems and serious risks.

ADDITIONAL GUIDANCE MATERIAL

Compliance strategy generally

- European Commission, *Better regulation – simply explained*, 2006. It's available at:
    - http://ec.europa.eu/governance/better_regulation/documents/brochure/br_brochure_en.pdf

- Inland Revenue, *Helping you get it right: Inland Revenue's compliance focus 2010 – 11*, available at:
    - http://www.ird.govt.nz/resources/3/c/3cffb480433082bf90f6f75d5f60e4be/our-compliance-focus-2010-11.pdf

Key drivers

- Workplace health and safety segmentation and key drivers available at:
    - www.dol.govt.nz/whss/resources/market-segmentation-24-02-04.asp

Encouraging compliance

- The Parliamentary Commissioner for the Environment has published a report on the use of economic instruments to reduce waste: *Changing behaviour: Economic instruments in the management of waste* (2006). It's available at:
    - www.pce.parliament.nz/publications/all-publications/changing-behaviour-economic-instruments-in-the-management-of-waste-3/

Private-sector models

- For a discussion of the limitations of the customer-service model, see Sparrow, M. 2000. *The regulatory craft: Controlling risks, solving*

problems, and managing compliance, Brookings Institution Press, Washington DC (see chapter 4, 'Customer service: Merits and limits').

PART B.

GOVERNANCE AND ORGANISATIONAL DESIGN

CH 4 INTRODUCING THE DIMENSIONS OF ORGANISATIONAL DESIGN

This chapter:

- discusses the key elements of organisational design and the need to ensure these elements are aligned and complementary (4.1)

- suggests some specific questions for compliance agencies to consider in addressing those key elements (4.2)

- discusses the need to ensure there are effective linkages between policy and operational-delivery functions (4.3).

4.1   Key elements of organisational design

For a compliance agency to be able to function effectively, key elements of its organisational design need to be in harmony with each other. The following provides a useful checklist to consider when designing or redesigning an agency (or particular units, projects, or teams within an agency).

- **Strategy** – the agency's plan and direction, including how it intends to implement and communicate that plan and direction.

- **Structure** – the way the agency is structured, including its reporting relationships.

- **Systems and processes** – the systems and processes for carrying out the work of the agency.

- **Skills and culture** – the employees and their roles, skills, and competencies, and the agency's core values and beliefs.

4.1.A   ALIGNING THE ELEMENTS

Aligning key elements will be vital not only when a new agency or regulatory regime is being established, but also whenever an agency is going through a period of transition or development – for example:

- implementing a particular organisational strategy

- managing the organisation and its performance through a merger or other period of major change

- driving an improvement in performance

- identifying and remedying the sources of a particular problem of dysfunction in the organisation.

The key elements of organisational design are interdependent and reinforce one another, with changes in one element tending to produce changes in others. In particular, the agency's culture and values will be central to the development of all the other elements.

Aligning these elements in an agency is likely to be an iterative process involving several phases, making adjustments to elements, analysing the effect of those adjustments on other elements, then readjusting, reanalysing, and so on.

Some of the elements – strategy, structure, systems and processes – will usually be easier to define and identify, and easier to change in the short term through management decisions. The others – skills and culture – are harder to define and more difficult to change in the short term. The organisation's culture and values, in particular, may need to be shaped over time.

4.2 Aligning key organisational elements in a compliance agency

This section sets out some questions to pose in the context of organisational design in a compliance agency, and particular factors or issues to consider when addressing those questions.

In working through the questions below, it will often be helpful to start by identifying the functions the organisation will need to carry out. Some of these will follow from the governing legislation or regulations, while others will be standard corporate functions.

Guidance on a number of the questions posed in this section is provided in subsequent chapters of the guide.

4.2.A QUESTIONS AND ISSUES FOR COMPLIANCE AGENCIES TO CONSIDER

4.2.A.i Strategy

What is the agency's strategy for achieving compliance?

- It is important to be clear on the scope of the agency's role. What is within the regulator's scope to control and take action? What is the agency's role relative to that of related agencies?

- From there the agency can start to identify its key priorities and where its focus should lie. It may be useful to model different scenarios for alternative developments within the regulated sector, such as a move towards greater consolidation or fragmentation of businesses in a particular industry.

How will the agency reflect central or local government priorities appropriately?

- In the case of central government, there will normally be a process of development and articulation between the Minister and the agency of what the specific compliance priorities should be, which should be consistent with the overall government directions reflected in the agency's statement of intent.

- In the case of local government, councils' compliance priorities will be based on their responsibilities under various Acts and bylaws, as well as their communities' expectations expressed in councils' policies and plans, and their resources (see also 6.2).

How does the agency set and review priorities?

- This is commonly achieved through a risk assessment and planning process to establish or renew a risk-based approach. Priority setting and review could be part of an annual strategic planning exercise.

What will the balance be between reactive and proactive compliance work?

- Determine the appropriate mix of reactive and proactive strategies to achieve compliance objectives. Consider how the agency might prevent the 'busy' work (typically reactive) from crowding out proactive, high-impact work.

- Of the different kinds of proactive compliance activity, should the bulk of the resources be allocated to problem-solving work or to the more traditional compliance approaches of regular audits and other checks?

How does the agency engage with the regulated sector?

- Determined by the agency's overall compliance approach and underpinned by a stakeholder engagement or communications strategy.

Which other stakeholders need to be involved?

- Links to other agencies are critical here. The levels of interaction could include the ability to refer matters to other agencies and know they will be dealt with; ability to discuss matters or areas that might need attention or might 'fall between the cracks'; and the ability to work in joint teams to solve problems and take action.

4.2.A.ii   Structure

How is the organisation divided?

- One particular issue is whether a separate problem-solving group with core analytical and management skills should be created to cluster expertise and ensure a dedicated resource is available. Alternatively, teams can formed on an ad-hoc basis.

- Another consideration is whether to design the structure to separate the education and influencing function from the enforcement activities.

To what extent is decision making delegated, and how is this done?

- Most regulatory agencies will have a formal and established set of delegations governing regulatory decision making.

How will the agency ensure there are effective linkages between policy functions (whether or not they are within the agency) and the agency's operational functions?

- See 4.3 for information on designing effective links between policy and operational functions.

4.2.A.iii Systems and processes

What systems will the agency need?

- Consider both those specific to the compliance strategy (such as licensing systems) and those required for generic corporate functions (such as finance, human resources, and document management)

- Key supporting systems include intelligence data and knowledge bases and internal information-sharing systems and processes that also form links to other agencies.

4.2.A.iv Skills and staffing

What specific skills are needed?

- Skills are normally required across the broad spectrum of compliance approaches from education and influencing skills, through to specialist enforcement and investigative capabilities. The right balance will depend on the sector being regulated, the nature of the risks, and the compliance approach taken.

Are the required skills likely to shift in the future, in line with a projected shift in compliance strategy?

- For example, there may be a shift to greater emphasis on facilitating voluntary compliance, after a period of focus on providing information and improving the accessibility of the agency's services and processes.

What values are appropriate for the organisation?

- Traditional regulatory values focus on process, for example fairness and consistency. Consider the need to be seen to be firm, but also as imposing fair and proportionate responses.

- With an increasing emphasis on results and outcomes other key values, such as effectiveness and efficiency, are also important.

- The two sets of values will often be in conflict, particularly if an agency is to move to a greater emphasis on problem-solving approaches; this will create organisational tension and require decision making to be more complex.

Case study

New Zealand Police job analysis of the probationary constable role

The New Zealand Police completed an analysis of a police constable's activities, and the skills, abilities, and attributes that are required to perform the role of a police officer across a wide range of operational policing. The analysis found that the most frequently occurring skills, abilities, and attributes of a probationary constable, ranked in order, are:

1. abstract reasoning
2. active listening
3. sensory acuity
4. common sense
5. motor skills coordination
6. verbal comprehension
7. integrity
8. safety consciousness
9. patience
10. self-confidence
11. perception
12. conscientiousness
13. empathy

The analysis supported earlier research that found that recruits who were conscientious, emotionally stable, and had strong interpersonal skills tended to be the highest performers during training, and the most successful in operational policing after graduation.

For more information see: OPRA Consulting Group. *Job analysis of the probationary constable role*. New Zealand Police, 2009.

4.2.B   COMPLIANCE FUNCTIONS AS A UNIT IN A LARGER AGENCY

In many cases, the compliance function will be a unit within a wider agency and the questions above will need to be considered in that context.

Specific questions to be considered in this situation are:

- Will the compliance unit need specific enhancements to the centrally provided corporate services, such as legal and IT support?

- How will the unit's activities be coordinated with those of the wider agency?

- Does the compliance unit require its own particular set of values? If so, how will these be identified?

4.3   Policy and operations: Designing effective links between them

A key issue in designing a compliance agency is careful consideration of the linkages between the policy function and operational delivery – that is, the agency's compliance activity.

Strong links between those two areas will be a key strength in both policy development and in operational delivery, whether the policy function is within the compliance agency or a different agency. For policy to be effective it must be workable, and its development must be informed by operational reality (while at the same time avoiding capture by operational interests). For a compliance function to be effective the agency must continually remind itself of the policy objectives and constraints under which it is operating.

For an agency to be at its most effective there will be a self-reinforcing cycle of information and feedback between these two parts of the regulatory cycle.

Case study

Regulation of gambling: Functions and information flows in a regulatory/compliance agency

Figure 3 below provides an example – drawn from the regulation of gambling by the Department of Internal Affairs (DIA) – of the type of functions you might typically expect in a regulatory/compliance organisation. They range from policy, through to operational policy, licensing, and compliance. Gambling regulation also includes the Gambling Commission, an independent statutory decision-making body, which hears casino-licensing applications, and appeals on licensing and enforcement decisions made by the Secretary of Internal Affairs in relation to gaming machines and other non-casino gambling activities.

In the case of gambling, DIA has a complete 'set' of regulatory/compliance functions contained within the one agency. This may not always be the case and will depend on the sector being regulated, the purpose and scope of regulation, and the balance of powers and functions conferred on or between agencies. For example, DIA has responsibilities for the enforcement of censorship compliance, but the policy responsibility is with the Ministry of Justice.

Figure 3 – Gambling regulation – functions and information flows
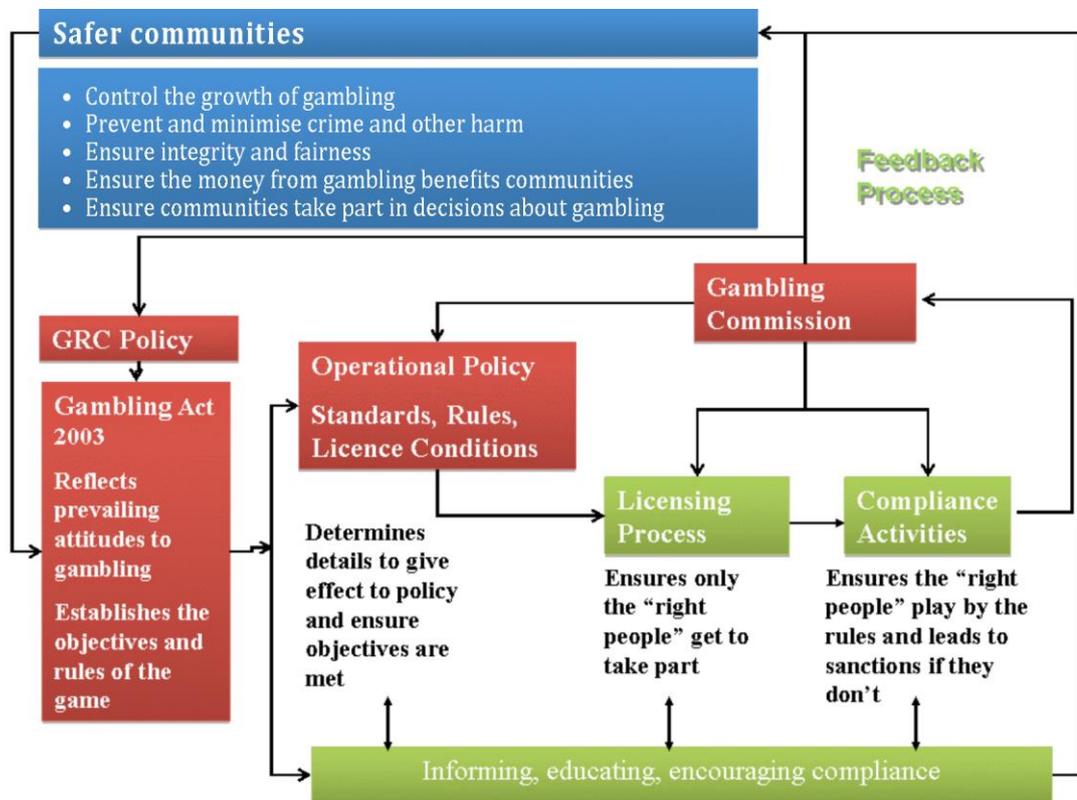
ADDITIONAL GUIDANCE MATERIAL

- The McKinsey 7S model for organisational design is one that has continued to be influential, and emphasises themes similar to those discussed in the first section of this chapter. The 7S model was described by Thomas Peters and Robert Waterman, two consultants working at McKinsey & Company, in their book: *In search of excellence: Lessons from America's best-run companies* (1982).

CH 5   RISK MANAGEMENT

This chapter discusses:

- why risk management is central to achieving compliance (5.1)

- principles of effective risk management (5.2)

- key elements of designing and implementing an effective risk management framework (5.3)

- specific risk-management issues for compliance agencies (5.4).

5.1   Introduction

Managing risk is central to a compliance agency's functions. Risk management needs to be embedded in the agency's management, culture and practices, and tailored to the agency's specific context and processes.

Relevant compliance risks may include:

- the risks of non-compliance occurring

- the possible harm that the relevant regulations are intended to address

- the risks to the regulated sector imposed by the regulations – increased compliance costs, for example.

A risk-based approach is written into the statute for some regulatory regimes, such as the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. This Act makes risk assessment a function of law enforcement and compliance agencies, and requires regulated entities to assess risks within their own business as part of their compliance programme.

5.1.A   THE BENEFITS OF EFFECTIVE RISK MANAGEMENT

A systematic risk-management framework helps decision makers make informed choices and respond to compliance risks in appropriate and proportionate ways. It therefore helps the agency develop a cost-effective compliance strategy, where limited resources are allocated appropriately to ensure the best possible compliance outcomes.

A focus on risk is vital to developing a defensible compliance strategy that can withstand external scrutiny and that will build public confidence in the agency's objectives and methods.

The agency's assessment of the level of risk will help it to decide, for example, which compliance tool will be appropriate for a particular case of non-compliance – such as information, encouragement or enforcement, or a combination of them – and how and when to monitor and assess a regulated entity's compliance.

5.1.B   MANAGING COMPLIANCE RISKS IN THE CONTEXT OF AGENCY-WIDE RISK MANAGEMENT

Most government agencies will have an agency-wide risk-management policy and process, and the agency's compliance work will take place in that context.

The agency-wide policy will take into account internal risks, such as systems failure or the effects of employee turnover on staff knowledge and capabilities, and external risks such as the economic climate.

Within that broader context, the agency may also have special policies and frameworks for specific areas of compliance risk presented by the regulated sector (see, for example, the swimming pool risk case study in 5.4.C).

5.2   Some principles of effective risk management

Compliance risk management is a structured process for systematically identifying, assessing, ranking, and treating compliance risks. The effectiveness of this process will be enhanced when a compliance agency's risk-management framework includes the following features.

- **Integrated into the agency** – Risk management is integrated into the core responsibilities of management and into all the agency's processes.

- **Commitment from senior management** – Risk-management policies and procedures are endorsed by the agency's head and are fully documented.

- **Risk-management culture** – A culture of risk-based management and decision-making is encouraged throughout the agency.

- **Intelligence-led** – Effective risk management in a compliance agency involves harnessing regulatory intelligence to provide the agency with a clear picture of risks within the regulated sector, including drivers of particular types of compliance behaviour. For regulatory intelligence, see 9.3.

- **Well-trained, well-supported staff** – Staff are knowledgeable about the agency's risk-based policies and procedures, and are trained and supported by management in applying them.

- **Clear responsibilities, appropriate delegation** – Responsibility for identifying, assessing, reporting, and managing risks is clearly understood by staff, and delegations of responsibilities are reviewed regularly to ensure they remain appropriate.

- **Dynamic and responsive to change** – The agency's risk-management framework continually senses and responds to change.

Larger agencies may have a dedicated risk-management function that is intended to support risk management carried out by individual branches and units (and that may also serve to aggregate strategic risks). The existence of a dedicated function does not absolve individual managers of responsibility for risk management.

Case study

Producing risk profiles of the gambling sector

In 2008 the Gambling Compliance Group (GCG) of the Department of Internal Affairs (DIA) took a new, more structured approach to compliance that integrated a new way of looking at the operating environment. The plan identified priorities for work that built on increasing the group's knowledge about a maturing sector and that reinforced the goals of the Gambling Act 2003.

A key step in evaluating the importance and potential effect of the group's activities was the development of an approach based on understanding risk.

The main reason for analysing and developing a risk-based plan was to ensure that the group's units made the most efficient and most effective use of resources and tackled the most important risks in the operating environment. This approach, it was believed, would provide a cohesive strategy for achieving the outcomes of the Act.

The GCG used a risk-evaluation template to assess the specific risks in each area of operation. The template was taken from DIA's standard risk-analysis templates, which adhered to international and Australian/New Zealand standards. Those standard templates were then adapted to the specific requirements of risk profiling the gambling sector.

The evaluation identified and assessed the consequences of allowing non-compliance in specific areas by considering the impact of the non-compliance and the likelihood of it occurring. The resulting information was used to identify priority areas of work and to develop 'risk profiles' of the gambling sector. The profiles look at different parts of the gambling sector – such as clubs and non-clubs – with reference to specific risk factors.

'Risk' in this context is understood as 'the risk of not achieving compliance with the Act', and so the analysis is based on the following four risk factors:

- minimising cost
- maximising return to the community
- gambling-related harm
- the entity's compliance history.

Continued

For each of these risk factors, metrics were developed based on DIA information sources. Local knowledge provided additional insight. Finally, relative weightings were determined that helped rank regulated entities by risk. The risk areas, factors, and profiles are reviewed annually, and inform the ongoing business-planning process.

This more robust, risk-based approach means that the GCG is better able to target its resources where they are needed most. The approach has enabled the group to identify specific areas of non-compliance and to increase its activities to target those areas.

5.3   Designing a risk-management framework

The material in this section summarises and adapts text from the Joint Australian/New Zealand Standard on risk management – AS/NZS ISO 31000: 2009, *Risk management – Principle and guidelines.*

The task of designing a risk-management framework can be divided into the following elements.

- **Evaluating the context** – Designing the framework begins with an evaluation of the agency's context, both internal (for example, the agency's objectives, and its resources and capabilities) and external (for example, trends that affect the agency's objectives). This identifies the boundaries within which the mitigation of compliance risks can take place, and makes clear what the agency can and cannot affect.

- **Establishing a risk-management policy** – The agency's policy on managing risk should clearly state:
  - the agency's commitment to risk management, including making the necessary resources available
  - the links between the objectives of the risk-management policy and the agency's wider compliance objectives
  - responsibilities and accountabilities for managing risk
  - how risk-management performance will be measured and reported
  - a commitment to reviewing and improving the risk-management framework, both periodically and in response to specific changes in the agency's environment.

- **Ensuring accountability** – To ensure that there is accountability, authority, and appropriate competence for managing risk, an effective policy will:

- identify who in the organisation has authority and accountability for managing risk
- identify other risk-management responsibilities at all levels of the organisation
- establish processes for measuring performance and for reporting.

- **Integrating the framework into organisational processes** – Risk management should be embedded into all the agency's practices and processes, including policy development and business and strategic-planning. For example, an agency-wide risk-management plan for implementing the policy can be integrated into the strategic plan.

- **Allocating resources** – In ensuring that appropriate resources are allocated for managing risk, the agency should consider, for example:
  - what resources are needed for each step of the risk-management process
  - what information-management systems are needed
  - what training programmes and other staff support are needed.

- **Communication and reporting mechanisms** – Clear mechanisms for internal communication and reporting will support and encourage understanding, accountability, and the ownership of risk – for example, through:
  - ensuring adequate reporting on the framework's effectiveness and outcomes
  - ensuring that relevant information derived from the risk-management process is available in the agency at appropriate levels and times.

  The agency will also need to establish external communication and reporting mechanisms to:
  - ensure effective exchanges of information with external stakeholders
  - ensure that the agency complies with legal and governance requirements
  - build external confidence in the agency and its performance.

- **Monitoring and review** – An effective framework will provide for:
  - periodically reviewing progress against the plan for designing and implementing the risk-management framework
  - measuring risk-management performance against indicators (and also periodically reviewing the indicators themselves)
  - periodically reviewing the effectiveness of the risk-management framework, including whether it is still appropriate for the agency's internal and external context.

5.4   Risk management for the compliance organisation

Risk-management processes typically comprise:

- **identifying** specific risks

- **assessing** the likelihood of the risks being realised and of the impact if they are in fact realised

- **managing (or 'treating')** the most significant risks.

5.4.A   IDENTIFYING RISKS

It is important that risk identification be as comprehensive as possible. For a large compliance agency, this can be a major exercise. It is best done by identifying broad categories of risk, and then subcategories within each of them, and so on.

For compliance agencies, there are some specific issues that need to be considered.

- It is important to distinguish between **compliance risk** (mainly relating to the individuals and businesses the agency regulates) and **risks affecting the agency** (mainly relating to the agency's ability to discharge its functions, and to customer perception and factors such as consistency, fairness and accountability). An example of the latter is systems failure that prevents the agency carrying out its licensing functions.

- In considering compliance risk, it is often helpful to divide the regulated sector into categories. There should be a sufficient number of categories to allow for useful analysis and treatment, but without there being so many categories that the analysis is unmanageable.

- When identifying risks, it can be useful to identify patterns of non-compliance, which will help to identify the cause of the compliance risk rather than the symptom. Understanding the cause allows agencies to apply resources more effectively (see 10.1 and 14.5.A).

5.4.B   ASSESSING RISKS

Risk assessment considers:

- the likelihood of risks being realised, and

- the impact if they are realised.

The overall seriousness of a risk is the product of those two elements. Managers should give priority to the most serious risks.

The proportions in which likelihood and impact drive the overall seriousness of a risk will vary according to circumstances. The swimming pool risk case study in 5.4.C is at one extreme: the impact is the same in all cases – the drowning of a child – but the likelihood is considered to vary.

It is often useful to develop indicators and tools to assess the likelihood and impact of risks, linked to any system used to categorise regulated entities.

Case study

The LINZ risk-assessment matrix

Land Information New Zealand (LINZ) uses the matrix in Figure 4 for assessing risk, which assists it to decide on the level of intervention that will achieve outcomes. The framework is as follows:

1. identify the risk

2. assess the risk

3. decide the level of intervention

The risk score is based on the calculation of:

> **severity** x **occurrence** x **detection** = **risk score**

where:

- **severity** is an assessment of the seriousness of the effect of the risks on the achievement of the objectives, the effects being on: the agency, the revenue/cost to the agency, people, performance, environment, political status, and society

- **occurrence** is how frequently the risk is projected to occur given existing regulatory tools

- **detection** is an assessment of the probability that other regulatory tools or controls will detect and eliminate the risk.

Figure 4 – The LINZ risk-assessment matrix

Decide the level of intervention

Toitu te
Land whenua
Information
New Zealand

Establish Context		Identify risks	Assess Risk					Alternative Interventions		Assess Risk				Determine intervention required
End outcomes and intermediate outcomes	Objectives and sub-objectives	Potential risk, its trigger and effect	Controls in place	Severity score	Occurrence score	Detection score	Risk Score	Alternative intervention tools	Cost/Benefit	Severity score	Occurrence score	Detection score	Risk Score	Overall Conclusion

5.4.C   MANAGING RISKS

The range of risks that compliance agencies have to manage may include risks that affect the agency's performance and ability to effectively carry out its role, as well as risks that can affect the overall level of compliance among regulated sectors (compliance risks). There are four general approaches to managing such a range of risks.

- **Avoidance** – Don't get involved in the activity that leads to the risk. Compliance agencies rarely have any choice about their involvement, but there may be some choice of, for example, which service-delivery channels to use, some of which may involve greater risk of failure than others.

- **Reduction** – Reduce the likelihood of the risk being realised or the impact if it is realised, or both. For compliance risk, this is likely to be the dominant approach.

- **Sharing** – Share the risk with another body, possibly through insurance. It is rarely, if ever, possible to share compliance risk.

- **Retention** – Accept the risk, and budget to cover the consequences. This is a common approach for risks that have a low level of seriousness. With

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low-level compliance risks the retention approach may be appropriate, but only up to a point – if the agency carries out no compliance activity at all in the relevant areas, this may lead to increases in general levels of non-compliance and may also send inappropriate signals to the regulated sector.

Case study

Thames-Coromandel District Council:
Guidelines for managing pool risk

The district council adopted a risk-management framework for private swimming pools. In particular, it was aimed at prioritising very limited enforcement resources to address high-risk non-compliance, and at developing consistency in treating risk.

The framework consists of general guidelines, rather than detailed prescriptive rules. In particular, the framework assumes that staff will exercise a degree of discretion in managing lower-level risks.

Cases of non-compliance are given one of four risk ratings, with the appropriate action being stated in the guidelines.

- **Extreme** – the pool is drained immediately, with precautions.
- **High** – the owner is given 7 days to fix the problem, provided precautionary measures are taken (otherwise the pool is drained).
- **Medium** – the owner is given 14 days to fix the problem (and temporary measures are to be taken in some cases).
- **Low** – the owner is given 28 days to fix the problem.

The risk rating depends on the type of defect – such as unfenced pools, climbable fences, unlatched doors or windows – but also depends on other key factors, such as whether children live on the property and whether it is urban or rural.

Further, the framework also explicitly incorporates the attitude of the pool owner in determining a risk rating. For example, if the owner has been repeatedly notified but has taken no action and clearly does not intend to comply at any time, then any non-compliance will be rated as either 'Extreme' (if the property is urban and there are children) or 'High' (in other cases).

5.5   Harm that breaks no rules: Problem solving outside the compliance context

A compliance agency may become aware of risks that can be addressed, or addressed more effectively and cheaply, without being dealt with as issues of compliance.

For example, it may be that no regulations have been breached. Or it may be that the case inhabits a grey area, so that it's unclear whether a particular entity is non-compliant, or it may be extremely difficult to prove non-compliance.

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Case study

Risk management and safety in the adventure and outdoor commercial sectors

In June 2010, the Department of Labour published its *Review of risk management and safety in the adventure and outdoor commercial sectors*. The review was sparked by concerns about a number of serious incidents, including some that resulted in loss of life.

New Zealand is similar to many other countries that operate adventure and outdoor commercial activities in that it primarily uses non-statutory accreditation programmes to ensure safety in the sector.

The Department of Labour review found that there is insufficient assurance that all activities involving heightened inherent risk are being managed safely, and that preventable accidents will occur.

A key recommendation of the review was to introduce a registration scheme with a requirement for upfront and ongoing external safety audits of operators' safety management provisions.

For more information see:

http://www.dol.govt.nz/consultation/adventure-tourism/final-report/01.asp

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5.5.A   THINKING OUTSIDE THE COMPLIANCE SQUARE

In situations where no regulations have been breached, a compliance agency might look for other ways to solve the problem and eliminate the risk, ones that are lawful and appropriate but that don't involve any of the agency's usual compliance tools.

The agency may be able to draw on its status and credibility as a government agency with important public functions; its relationship with the regulated sector, industry groups, beneficiaries of the regulation, and other stakeholders; its knowledge and experience of the workings of the regulated environment; and its links with other agencies.

Where the agency identifies risks without any regulatory requirements being breached, it should give feedback on this to the relevant policy-makers.

> *Example*
>
> **Dog Control Act 1996**
>
> The Dog Control Act requires dog owners to keep their dogs under control at all times. A dog can be under effective control behind a large fence, but still causing concern to members of the public by barking, snarling, and so on. While this is not a breach of the Dog Control Act, there is still a perceived risk to members of the public. In such situations council officers take the opportunity to educate dog owners of their responsibilities and make suggestions to improve the dog's behaviour.

BETTER PRACTICE CHECKLIST: RISK MANAGEMENT

☐ A structured and systematic risk-management approach is integrated into management's core responsibilities and into all aspects of the agency's compliance work.

☐ The agency's risk-management policies and processes are fully documented and endorsed by senior management.

☐ Staff understand the agency's risk-management policy and processes, including the scope of their authority in this area, and are trained and supported in applying them.

☐ The risk-management framework provides for regular reviews and adjustments.

ADDITIONAL GUIDANCE MATERIAL: RISK MANAGEMENT

- International risk-management standards:
    - AS/NZS IS0 31000: 2009, *Risk management – Principle and guidelines* (Joint Australian/New Zealand International Standard)
    - ISO/IEC 31010:2009, *Risk management – Risk assessment techniques*
- OECD Guidance Note, *Compliance risk management: Managing and improving tax compliance* (2004)

CH 6   MANAGING AND MEASURING PERFORMANCE

This chapter discusses:

- key elements of an effective performance-management framework (6.1)

- legislative requirements for performance-measurement and reporting, and best practice for meeting those requirements (6.2)

- methods and processes for evaluating effectiveness (6.3)

- guidance on quality-management procedures (6.4).

> This chapter includes material adapted from chapter 2 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

6.1   Key elements of an effective performance-management framework

A sound performance-management framework should be central to a compliance agency's governance arrangements. As well as providing for more effective internal management, the framework will enable the agency to show its stakeholders that its operations are consistent with the applicable legislation, are cost-effective, and achieve the agency's regulatory objectives.

An effective performance-management framework will include mechanisms that enable the agency to:

- define its desired outcomes and organisational priorities

- integrate its strategic and operational planning

- measure and manage its performance at all levels of the organisation

- document its operating procedures

- subject its key compliance activities to systematic quality management.

6.1.A   DEFINING OUTCOMES AND PRIORITIES

By clearly defining and publishing its priorities and the outcomes it seeks, a compliance agency will make its strategies and its expectations of the regulated sector more transparent.

If there is an applicable statement of intent or letter of Ministerial or Council expectations, this may help the agency clarify its desired outcomes and priorities.

Clarity in this area will enable those in the regulated sector to assess whether and to what extent they are complying with the agency's expectations and to assess the implications and consequences of not complying. See the workplace health and safety case study in 11.2.B.

Clearly stated outcomes and priorities will also assist the agency's staff to assess and respond to non-compliance, particularly where there is discretion (see 7.2).

Identifying outcomes in the local government context

Local government compliance units are integrated within a business group (such as Transport or Environment), whose outcomes are set and specified under the Long-Term Council Community Plan (LTCCP) process, as required by the Local Government Act 2002.

Compliance areas are usually linked to many of these outcome areas through key performance indicators (KPIs), and progress is reported to council along with any trends, patterns, and significant issues. Outcome areas and KPI results are regularly reviewed by Audit New Zealand.

6.1.B   INTEGRATING STRATEGIC AND OPERATIONAL PLANNING/OUTCOMES

When strategic and operational planning processes are properly aligned and mutually supportive, this provides assurance that the agency's operational priorities and activities are consistent with the key compliance outcomes and strategic risks.

For larger agencies, updating and publishing annually a forward-looking strategic plan (or ensuring that strategic planning is incorporated into any statement of intent) in conjunction with an annual business plan will give stakeholders a better understanding of the agency's long and short-term priorities.

6.1.C   MEASURING PERFORMANCE THROUGH WELL-DEFINED INDICATORS AND TARGETS

Having well-defined indicators and targets for outcomes, outputs, and quality standards enables the agency to measure, monitor, and report on its performance.

Quantitative output measures – such as efficiency, productivity, and timeliness – are comparatively straightforward to measure. By contrast, identifying measures of effectiveness is likely to be challenging for a compliance agency. However, it is vital that effectiveness indicators are defined, measured, and reported for the purposes of both internal management and external accountability. (Evaluating effectiveness and selecting indicators is discussed further in 6.3.)

The agency's performance-management system will need to be supported by appropriate procedures for capturing and analysing data, and for reporting. (See chapter 9 for a discussion of information management.)

6.1.D   DOCUMENTING AND PUBLISHING OPERATING PROCEDURES

Compliance agencies should document and publish the standard operating procedures for its key compliance activities, including decision making, and should train staff in using them.

This improves the efficiency of the agency's compliance operations and creates greater consistency. It also improves stakeholders' confidence that the agency is following legislative requirements and best practice.

The agency may wish to obtain legal advice on whether the procedures as documented are consistent with the agency's legislated powers.

Regularly updating the published procedures to incorporate lessons that have been learned will ensure that the procedures continue to reflect better compliance practice.

6.2   Meeting legislative requirements for measuring and reporting on performance

Central government agencies are subject to performance measurement and reporting requirements in the **Public Finance Act 1989**. Local authorities are subject to similar requirements in the **Local Government Act 2002**.

The key requirements for central government agencies are for an annual statement of intent that sets out the outcomes the agency is seeking to achieve, and an annual report covering financial and non-financial performance.

Local government agencies are required to identify 'community outcomes' at least once every six years, and to monitor and report on progress in achieving those outcomes. They are also required to include performance measures in their Long-Term Council Community Plan (LTCCP), which allow councils to show whether community outcomes are being achieved.

Changes made to the Public Finance Act in 2004, and the passing of the Crown Entities Act 2004 and the Local Government Act 2002, placed more emphasis on agencies providing contextual and strategic information – both medium-term and long-term – in their performance reporting.

Appendix 2 of *The Auditor-General's observations on the quality of performance reporting* (2008) sets out the performance reports that different types of public entities are required to prepare under the applicable legislation.

6.2.A BEST PRACTICE FOR MEETING LEGISLATIVE REQUIREMENTS FOR PERFORMANCE REPORTING

The Auditor-General's observations on the quality of performance reporting, a 2008 discussion paper on non-financial performance reporting, outlines the OAG's conception of best practice for meeting the legislative requirements in this area.

The Auditor-General noted that a core purpose of performance reporting is to make government agencies accountable for the responsible use of public resources and regulatory powers. This includes demonstrating that public services are being delivered effectively and efficiently.

Performance reports should also reflect good management practice, which will involve clearly articulating strategy, linking strategy to operational and other business plans, monitoring the delivery of those plans, and evaluating the effects and results of the agency's strategy.

This will provide the necessary **contextual information** for judging the quality and appropriateness of performance information and also for verifying it. Well-considered and well-prepared reports about planned and actual progress should provide useful insights into the relevant agency – its purposes, outcomes, and intentions, and the services it provides to achieve them.

Specifically, performance reports should set out:

- coherent performance frameworks that show logical links between medium-term outcomes information and organisational strategies (for central government, medium-term is three years) and the annual output information

- performance measures and targets that are well specified, relevant, understandable, reliable, and comparable, combined with historical or benchmark information that provides proper context for targets.

6.3 Evaluating effectiveness

'Whether a strategy is economical or efficient means little if it is ineffective – that is, if it is not meeting desired outcomes. ... Efficiency is about **doing things right**, while effectiveness is about **doing the right things**.'

– Measuring compliance effectiveness: Our methodology,
Australian Taxation Office, 2008

Measuring effectiveness is about measuring whether actual outcomes align with desired outcomes. A well thought-out framework for evaluating effectiveness over time will enable a compliance agency to be satisfied that it is meeting its objectives and will also enable the agency to demonstrate this to its stakeholders.

Further, by integrating an evaluation process into the planning of its compliance activities, the agency is able to learn from its interventions and is encouraged to reflect on what worked and what didn't. Evaluation is therefore a key element in fostering an 'improvement culture' in the agency, which in turn leads to greater productivity, higher quality, and more cost-effective interventions.

The ideas presented in the following sections – adapted from the Australian Taxation Office's *Measuring compliance effectiveness: Our methodology* (2008) – provide the basis for an evaluation framework.

6.3.A   PLANNING FOR EVALUATION STARTS EARLY

A plan for evaluating the effectiveness of an intervention is best integrated into the planning process for the intervention itself.

Early on in planning the intervention, the agency will need to clearly articulate:

- the desired outcomes
- what success will look like.

It is often also useful to consider the current level of compliance, and what the situation would be if there were no intervention.

6.3.B   DEFENSIBLE EVIDENCE OF EFFECTIVENESS

It can be difficult to reach clear conclusions about the causal relationship between an agency's compliance activities and the results produced. For that reason, the agency should focus on producing evidence of effectiveness that is **defensible**, rather than definitive.

It may be preferable to base evaluation on a set of **indicators** – that is, signs, clues, and markers – rather than on direct measures, as the latter may be either too expensive or too difficult to obtain.

First, all indicators that could potentially be used to measure the success of the intervention should be identified and articulated. From that list, a set of indicators should be selected to paint a picture of effectiveness. A single indicator will not be adequate; however, including too many in the set may mean that the necessary monitoring and assessment does not in fact happen.

Each indicator should be realistic. The Government's Performance Improvement Framework (see 2.5 of this guide) endorses the SMART test: that is, is the indicator specific, measurable, achievable, relevant, and timely?

If indicators are to provide useful insight into effectiveness, they need to cover the overall level of compliance (possibly disaggregated by different segments of the regulated sector). However, intermediate measures may also be useful in measuring the agency's performance and progress.

Examples
Effectiveness indicators

1   Dog control services

In local authority dog control services an effectiveness indicator is the proportion or number of known dogs that are voluntarily registered every year without any enforcement action being undertaken.

2   Minimisation of exposure to chemical hazards in food

The New Zealand Food Safety Authority's Statement of Intent for 2009-2012 includes the performance indicator of 'minimisation of exposure to chemical hazards in food' and specifies the following targets as measures.

- Agricultural compounds measured in the five-yearly New Zealand Total Diet Study do not exceed 10% of the acceptable daily intake (ADI).

- Exposure to the dithocarbamate group of fungicides, as measured by the five-yearly Total Diet Study, will not exceed 20% of the ADI.

Continued

- The dietary intake of mercury for women 25 years and older remains below 20% of the provisional Tolerable Weekly Intake, as measured by the five-yearly Total Diet Study.

- Non-compliance rates for agricultural compound residues in selected plant products reduced by 50% over five years from 2006/07, as measured by the Food Residues Surveillance Programme (FRSP).

- Compliance rates for agricultural compound residues in animal products maintained at more than 99% over five years from 2006/07, as measured by the animal residues status report.

For more information see:

www.foodsafety.govt.nz/elibrary/industry/Statement_Intent_2009-Describes_Nzfsa.pdf

3   OECD indicators of compliance

The OECD guidance note on compliance risk management in relation to tax compliance (OECD, 2004) recommends a 'compliance measurement framework' that enables decision-makers to:

- understand compliance trends and how they relate to current programmes and initiatives

- help identify areas where compliance treatment strategies need to be modified or adjusted

- be aware of emerging trends in non-compliance that will need close attention in the future.

The OECD guidance note groups compliance indicators into four broad categories:

- **macro indicators** that illustrate a relationship between an aspect of compliance and an external statistic, benchmark or similar point of reference that can be used for tracking macro trends. These indicators provide a general assurance of the effectiveness of the compliance approach

- **non-compliance indicators** derived from administrative data and from statistical calculations or estimates based on random samples that provide statistically valid generalisations

- **public opinion indicators** that draw information from client surveys and other public opinion research. These indicators help in understanding the contributing influences to compliance, and provide an insight into the behavioural aspects of compliance and the public viewpoints concerning compliance strategies

Continued

> - **programme impact indicators** assess the impact of specific programmes or initiatives. These indicators explore cause and effect relationships, and identify factors for improving programme effectiveness.
>
> For more information see:
>
> www.oecd.org/dataoecd/21/55/37212610.pdf

6.4   Quality assurance

By applying systematic quality-management procedures to its compliance activities, particularly its decision making, a compliance agency is better able to assure its stakeholders that its activities are lawful, of the highest quality, and consistent with the agency's defined procedures.

The following may assist a compliance agency to enhance its quality management:

- appointing a quality manager

- using quality-control techniques in its key processes

- publishing a quality manual

- subjecting its key processes to peer review

- carrying out quality-assurance reviews of its compliance activities (this can extend to registration under AS/NZS ISO 9001:2008 *Quality management systems – Requirements*, for the compliance services provided by the agency)

- measuring, analysing, and reporting on quality outcomes, including setting targets and using benchmarking techniques.

Case study

Porirua City Council: Quality assurance for building control functions

Porirua City Council has produced work instruction documents to ensure that, as a building consent authority, it has effectively implemented the policies, processes and procedures required by the Building (Accreditation of Building Consent Authorities) Regulations 2006.

A quality manager is responsible for establishing and documenting an annual timetable for internal audits and reviews. Building control technical functions are reviewed through internal audits, while other building control functions are subject to 'implementation reviews'. Audits and reviews must be carried out according to the set procedures and using the required forms and documents. Audits and reviews ensure that the relevant written policies and procedures are consistent with the regulations and with the unit's operations. They also ensure that the records produced reflect those policies and procedures and meet the requirements of the regulations.

Recommendations resulting from audits and reviews can include changes to processes or procedures, training, or other corrective action.

Recommendations are entered directly into the unit's continuous improvement register.

In addition the unit carries out monthly operational management reviews and annual strategic management reviews.

Case study

Accreditation for building control in the Auckland Council

The new Auckland Council's building control unit is made up from the seven legacy councils' building consent authorities that, before 1 November 2010, had seven different interpretations of their statutory obligations.

More than 600 staff from Franklin in the south to Rodney in the north were working with around 240 different forms and checklists.

The challenges were to consolidate all of these different factors, to provide for one consistent set of rules and practices, and to establish one team to service the entire Auckland region before 1 November 2011.

A significant factor contributing to the success of such an undertaking was the fact that all the previous councils' building control units were accredited as building consent authorities.

Accreditation is a procedure by which an authoritative body, such as International Accreditation New Zealand, audits and certifies that an organisation is competent to carry out specific tasks.

Accreditation requires the organisation to verify that:

- its procedures and practices are technically valid
- it has sufficient and technically competent personnel
- it has effective quality management systems
- it produces consistent and technically reliable results.

Accreditation for the Auckland building control unit meant that the unit could quickly identify and implement best practice from across the region, consolidate systems and processes where appropriate, and implement a region-wide monitoring and continuous improvement system.

This has resulted in the building control unit developing improved and consistent customer services, while ensuring that practices and processes are transparent and cost effective.

Links:

www.ianz.govt.nz/services2/building.htm

www.dbh.govt.nz/bofficials-bca

http://www.aucklandcouncil.govt.nz/EN/BuildingPropertyConsents/Pages/Home.aspx

Case study

Compliance processes now included in the Ministry of Economic Development Radio Spectrum Management's ISO 9001 registration

Over the last decade or so, the benefits of effective quality control systems to both industry and clients have been increasingly recognised. Radio Spectrum Management (RSM) was one of the first government organisations to adopt an internationally recognised quality control process for the purpose of ensuring consistent and reliable services to clients. In 1994, marine radio surveys were the first element of RSM work to be registered as meeting the requirements of ISO 9002. In 1999, technical measurements by RSM field staff were added to the registration, confirming that measurements done to check transmitter parameters were carried out in an appropriate and consistent manner, with results to a known level of certainty.

Recognising the benefits to both RSM and its clients accruing from well-controlled processes with designed-in mechanisms for achieving improvement, RSM pursued extension of registration to cover the Operational Policy unit. Registration was granted for the provision of operational policies for the management of the radio spectrum under ISO 9001 (which includes design processes) in 2000. The scope of registration was further extended in 2001 to cover fixed-service licensing activities, and in 2002 to cover all other licensing activities. In 2003, the discontinued activity of marine radio surveys was removed from the registration.

The development and application of policies for spectrum management, engineering and issue of licences, and measurement of transmitter parameters are backed by, and give effect to, the legislative provisions of the Radiocommunications Act 1989. Where interfering equipment, including radio transmitters, is found not to comply with legal requirements, it is necessary for RSM to take action to ensure compliance is achieved.

Recognising client (and RSM) needs to ensure that compliance processes are robust, consistent, and effective, and that the processes continue to be reviewed and improved, RSM has recently taken action to have its compliance processes considered for inclusion in the scope of its ISO 9001 registration.

RSM had its processes for the monitoring and enforcement of those legislative provisions of the Radiocommunications Act 1989, for which the Ministry has responsibility, assessed by Telarc in February 2005. The result was approval for the compliance processes to be included in RSM's registration under ISO 9001:2000. This is believed to be a world first for a spectrum management agency.

TeLARC
REGISTERED
SUPPLIER

Certificate of

REGISTRATION

This is to certify that

Ministry of Economic Development
Radio Spectrum Management

having been assessed by Telarc Limited, the quality system certification
authority of New Zealand, and having been found to operate a
quality management system conforming to

AS/NZS ISO 9001 : 2000

is hereby designated a

TELARC REGISTERED SUPPLIER

of the goods or services specified in the
schedule to this certificate.

Registration Number: 574

BETTER PRACTICE CHECKLIST: MANAGING AND MEASURING PERFORMANCE

☐   The agency's performance-management framework is structured and documented, and provides the means to effectively manage the planning, implementation, and quality of the agency's compliance activities.

☐   Compliance outcomes and priorities are clearly defined and well understood by staff and by the regulated sector.

☐   The agency's processes and procedures are well documented.

☐   The agency meets legislative requirements for measuring and reporting performance under the Public Finance Act 1989 or the Local Government Act 2002.

☐   The agency subjects its processes and activities to quality-assurance processes.

ADDITIONAL GUIDANCE MATERIAL

- Office of the Auditor-General:
    - *The Auditor-General's observations on the quality of performance reporting* (discussion paper, 2008)
    www.oag.govt.nz/2008/performance-reporting
    - *Reporting public sector performance* (2002)
    www.oag.govt.nz/2002/reporting
    - *Matters arising from the 2009 – 19 long-term council community plans* (2010)
    www.oag.govt.nz/local-govt/ltccps-2009-19

- Australian Taxation Office, *Measuring compliance effectiveness: Our methodology* (2008), available at:
    - www.ato.gov.au/corporate/content.asp?doc=/content/00157833.htm

- Standards Australia and Standards New Zealand (www.standards.co.nz) publish the following standards for quality-management systems, and these may assist in evaluating current quality processes:
    - AS/NZS ISO 9000:2006, *Quality management systems – Fundamentals and vocabulary*
    - AS/NZS ISO 9001:2008, *Quality management systems – Requirements*

- AS/NZS ISO 9004:2000, *Quality management systems – Guidelines for performance improvements.*

- International Standards on conformity assessment:

  ISO/IEC 17011: 2004, *Conformity assessment – General requirements for accreditation bodies accrediting conformity assessment bodies*

  ISO/IEC 17021: 2011, *Conformity assessment – Requirements for bodies providing audit and certification of management systems.*

- The Treasury has published a *Guide to the Public Finance Act* (2005), available at:

  - www.treasury.govt.nz/publications/guidance/publicfinance/pfaguide/

CH 7 ACCOUNTABLE DECISION MAKING

This chapter discusses:

- good practices for managing delegated decision making (7.1)

- good practices for managing discretionary decision making (7.2).

7.1 Managing delegation

This section includes material adapted from chapter 2 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

Decision making within a compliance agency may need to be delegated to other staff by the person nominated by the legislation. These delegations need to be properly managed to ensure that all decisions to exercise regulatory powers are lawful and are exercised consistently with requirements specified by the delegator.

The following practices will enhance the management and exercise of delegated powers.

- **Defining roles and responsibilities** – The roles and responsibilities of the agency's organisational units and key staff are clearly defined and documented.

- **Reviewing and updating delegations** – The agency periodically reviews and updates delegations to ensure that they are:
  - lawful and consistent with legislation *(see the statutory reference below)*
  - consistent with relevant public-service directives
  - accurate (for example, changes to the agency's structures or staff responsibilities may require delegations to be reviewed to reflect any new arrangements).

  A delegation may need to be adjusted if there is a potential conflict of interest for the decision maker.

- **Documentation and training** – Policies and procedures are fully documented, and staff are trained in the exercise of delegated power so

that they are able to make lawful decisions according to management directives.

- **Monitoring** – The agency monitors delegated decision making and uses quality-assurance processes to confirm that delegated powers are being exercised consistently with legislative and organisational requirements.

Statutory authority for delegations

- Central government delegations are authorised under section 41 of the State Sector Act 1988.

- Local authorities' powers to delegate are set out in the Local Government Act 2002, Schedule 7, Part 1, clauses 32AA – 32B.

7.2 Managing the exercise of discretion

7.2.A DISCRETION AS A VITAL TOOL FOR COMPLIANCE AGENCIES

Where a compliance agency has provided documented guidance for a given situation, decision making in that case will be essentially reactive and formulaic. However, agency staff will regularly face situations not covered by a manual, flowchart, policy, procedure, or piece of legislation. In that case, a fair and effective response from the agency will depend on the rational and structured exercise of discretion.

When guided by fair and well-understood principles, discretion enables a compliance agency to **actively manage** the regulated sector in the pursuit of the agency's objectives, giving it greater control over the regulated environment. It enables the agency to focus on **outcomes**, rather than particular contraventions.

Discretion works well when it is exercised within **boundaries** that provide a structured framework. These will include:

- the agency's principles and values

- documented decision-making frameworks or guidelines

- legal requirements for decision-making processes, specified in the relevant legislation or in case law (judicial review).

These three areas are discussed below.

7.2.B PRINCIPLES AND VALUES: KEY BOUNDARIES FOR DISCRETIONARY DECISION MAKING

Discretionary decision making should be guided by principles and values that have been clearly stated by the agency. If they are not clearly stated, the line between the agency's values and the decision maker's personal values can become blurred.

These principles and values might be drawn from legislation, strategic plans, statements of intent, policy documents, best-practice guidelines, and other strategically important documents.

By working within a set of principles and values that the agency owns and that supports its intent, decision making can be framed and directed towards desired outcomes. Clear principles and values also provide for the agency and individual decision makers to be held accountable.

7.2.C DECISION-MAKING FRAMEWORKS AND GUIDELINES

An agency may specify a detailed framework that covers:

- what decisions have to be made

- by which people and at which level of the agency

- at what time.

Case study

Gambling Compliance Group's Decision-Making Framework

The Gambling Compliance Group (GCG) of the Department of Internal Affairs adopted a detailed decision-making framework in 2010 to provide greater clarity and certainty about accountability for decision making.

Based on the requirements of the Gambling Act 2003 and of departmental policy, the decision-making framework specifies:

- what decisions have to be made
- by which people
- at which level of the agency
- at what time
- who must be consulted
- who must be informed of progress.

Continued

The introduction to the framework commented:

> 'Accountability is key to decision making, and the framework is designed to help GCG formulate an accountability model which clearly shows which people should be involved in making a particular decision. The framework is intended to empower staff to make decisions rather than take

responsibility away, and it is hoped that generally decision making will be driven down the organisational structure, lines of accountability made clearer, and staff consulted when they need to be rather than as a matter of course.'

The RACI matrix

The framework uses a RACI matrix, which splits tasks into four participatory responsibility types to describe the roles and responsibilities of various teams or people in delivering a project or operating a process:

- Responsible (who's responsible for the relevant task or process)
- Accountable (who bears final responsibility for making the decisions)
- Consult (who should be consulted)
- Inform (who should be kept informed of progress).

The RACI model – shown in Figure 5 below – is especially useful in clarifying roles and responsibilities in cross-functional/departmental projects and processes.

The RACI matrix was used to construct a table for each area of decision making, which specifies, for each type of decision, the different staff designations for each of the RACI categories.

For example, 'Escalate to Investigations Unit' is one of the types of decision included in the 'Compliance Investigations' table. The table row for that decision specifies the following:

- **Reason** – Increased scope/complexity of investigation
- **Responsible** – Gambling Inspector (Compliance), Senior Gambling Inspector (Compliance), Team Leader (Compliance)
- **Accountable** – Regional Manager (Compliance)
- **Consult (must)** – National Manager (Investigations)
- **Consult (may)** – Legal, Operational Policy
- **Inform** – Director (Gambling Compliance Group), National Manager (Compliance)

Figure 5 – RACI model used by the Gambling Compliance Group

| R | = | Responsible | Responsible person or those who do work to achieve the task. The role of Responsible includes Support, which is to provide resources to complete the task. There can be multiple R's. |

| A | = | Accountable | The person who is responsible for making the final decision or those who are ultimately accountable to the correct and thorough completion of the task. Accountable is the one to whom R's are accountable. In other words, A must sign off on work that R provides. There must be only one A specified for each task. The role of Accountable may include Responsible. In other words, it is not unusual that the one who is Accountable for a task is also Responsible to do the work to achieve the task. |

| C | = | Consult | Those whose opinions are sought or those who will contribute to the decision by providing advice. Two-way communication (typically between R and C). |

| I | = | Inform | The person to be informed of progress and results or those people who must be informed of the process as it progresses and of the final decisions in order for the decision to be implemented most effectively. One-way communication (typically between R and I). |

Case study

Manukau City Council's[6] 'Enforcement Assessment and Decision-Making Guide'

Manukau City Council (MCC) provides its enforcement officers with a combined assessment form and decision-making guide. The enforcement officer first completes this document for a given incident and then discusses it with their team leader or manager, whose approval is required.

This form and guide requires the enforcement officer, among other things:

- to confirm that a checklist dealing with sufficiency of evidence has been complied with – for example, 'Is there clear identification of all potential parties?'

- to identify key factors, such as: potential adverse environmental effects; whether the action was deliberate; whether the compliance target had earlier failed to comply with an instruction or notice; and the attitude and level of cooperation shown by the compliance target.

The form/guide requires the enforcement officer to consider all the applicable key factors before making a recommendation.

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[6] This case study was prepared before the Auckland Council was established in 2010.

Hamilton City Council's compliance methodology

To give effect to the purpose, outcome and principles of its Compliance Strategy, Hamilton City Council has developed a methodology based on a three-tiered approach to compliance, as outlined in Table 3.

Table 3 – Compliance methodology

ROUTINE matter requiring compliance	Non-compliances of a minor nature and low risk where officer discretion and judgment is often exercised to educate.
IMPORTANT matter requiring compliance	Non-compliances of a moderate nature and low-moderate risk where officer discretion and judgment is often exercised to warn.
CRITICAL matter requiring compliance	Non-compliances of a major nature and moderate-high risk where officer discretion and judgment is often exercised to enforce.

Staff have allocated a status of routine, important, or critical to non-compliances with Acts, by-laws and policies enforced by Council. This status establishes a presumption of how an officer should approach a decision about compliance action.

The non-compliance status ranking will be reviewed from time to time and adjusted by management as necessary. All new policies, Acts, and by-laws will be added to the compliance framework schedules and an appropriate status allocated.

Deployment framework

A deployment framework has been developed to assist staff implementing the compliance framework.

Continued

Table 4 – Deployment framework

Activity status for non-compliance	Approach taken by staff for non-compliance		
	Education & awareness	Warning	Enforcement
Routine	often	seldom	seldom
Important	sometimes	often	sometimes
Critical	seldom	sometimes	often

The framework is based on a differential model of compliance. The principle of proportionality is strongly reflected in this framework along with customer service drivers to achieve the Council's mission and purpose.

7.2.D   JUDICIAL REVIEW: ENSURING DECISIONS CAN WITHSTAND LEGAL CHALLENGE

Any exercise of discretion will need to meet the requirements of administrative law to ensure that the decision cannot be overturned through judicial review in the High Court or through any review or appeal process specific to the agency.

The key grounds of review can be grouped as follows:

- **Illegality** – A decision could be overturned if, for example:
  - it was *ultra vires* (outside the decision-maker's powers)
  - it was based on a mistake of fact or law
  - the decision maker took into account irrelevant considerations, or failed to take into account all relevant considerations
  - the decision was made for an improper purpose
  - the decision maker applied a predetermined policy instead of genuinely exercising discretion

- **Unfairness** – A decision could be overturned if, for example:
  - the decision maker was biased
  - the person affected was not afforded natural justice, such as the right to a hearing

- **Unreasonableness** – A decision could be overturned if, for example:
  - it meets the test of unreasonableness
  - it was substantively unfair.

The grounds of judicial review are discussed in detail in *The Judge over your shoulder – A guide to judicial review of administrative decisions*, Crown Law Office, 2005, available at:
http://wiki.participation.e.govt.nz/images/5/5c/Judge_over_Your_Shoulder.pdf

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BETTER PRACTICE CHECKLIST: ACCOUNTABLE DECISION MAKING

Delegated decision-making

☐ The delegation of decision-making authority is consistent with legislative requirements and any public-service or organisational directives.

☐ Procedures for exercising delegated authority are documented and staff are trained in applying them.

☐ The exercise of delegated authority is monitored and subjected to quality-assurance processes.

Exercising discretion

☐ The agency has clearly stated principles and values that guide the exercise of discretion.

☐ A decision-making framework document specifies what decisions need to be made, by whom, and when.

☐ Decision makers understand relevant legal requirements so that their decisions can withstand legal challenge.

ADDITIONAL GUIDANCE MATERIAL

- Office of the Auditor-General. 2007. *Turning principles into action: A guide for local authorities on decision-making and consultation*, available at: www.oag.govt.nz/2007/decision-making

- Crown Law Office, 2005. *The Judge over your shoulder – A guide to judicial review of administrative decisions*, http://wiki.participation.e.govt.nz/images/5/5c/Judge_over_Your_Shoulder.pdf

- Baker et al. 2001, *Guidebook to decision-making methods*, US Department of Energy.

CH 8   MINIMISING CORRUPTION, MISCONDUCT, AND REGULATORY CAPTURE

This chapter discusses:

- the kinds of corrupt or inappropriate behaviour that may occur in a compliance agency (8.1)

- general guidelines for minimising corruption and misconduct (8.2)

- how to manage conflicts of interest (8.3)

- ways to minimise 'regulatory capture' (8.4)

- examples of codes of conduct (8.5).

> This chapter includes some material adapted from chapter 2 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

8.1   Risks of corrupt or inappropriate behaviour in a compliance agency

An agency's credibility is a major factor in its ability to carry out its compliance functions effectively. Its credibility rests on the degree of public trust and confidence in the agency's probity, accountability, and openness, and the public's perception that the agency is exercising its powers fairly and lawfully.

Risks of corruption exist in all compliance agencies. A failure by the agency's management to minimise these risks undermines public confidence in the agency.

These are some examples of corrupt or inappropriate behaviour that may occur in a compliance agency:

- **Conflicts of interest** – when an official's personal affairs and interests conflict with their public responsibilities

- **Accepting bribes** – acceptance of bribes or 'kickbacks' in return for ignoring non-compliance, granting a licence, or some other favourable decision or response.

- **Regulatory capture** – when an official inappropriately identifies with the interests of a person or organisation from the regulated sector, rather than the public interest

- **Misuse of official information** – when an official releases confidential or sensitive information obtained in the course of their compliance activities

- **Abuse of power** – when an official uses inappropriate practices to achieve compliance.

8.2 General guidance for minimising risks of corruption and misconduct

The following are good governance practices for minimising the risks of corruption and misconduct.

- **Documenting systems and processes** – The agency should ensure that, for activities where risks of corruption and misconduct are high, operational systems, procedures, and responsibilities are documented comprehensively and unambiguously, and published so that all parties are aware of them.

- **Privacy and security requirements** – Staff should be provided with guidelines for, and training in, applying privacy and security requirements.

- **Work practices that minimise the risks** – The agency should implement work practices that require consistent and comprehensive recording of work activities, and that include unannounced checks by supervisors. Independent feedback from the regulated sector on the performance of agency staff will also be helpful.

- **Publishing relevant policies** – An organisation's policies and expectations concerning corruption and misconduct should be published, including fraud control policies and procedures.

- **Staff training** – Staff should be trained in policies to deal with corruption and misconduct, including explanations of what is unacceptable behaviour, and rules for accepting gifts and benefits, disclosing personal assets, and reporting misconduct.

- **Audits and investigations** – The agency should perform regular internal audits of operations and carry out detailed, independent investigations when misconduct is suspected. Monitoring of IT systems and 'data-mining' (the extraction of patterns from data) can also assist in detecting fraud or other misconduct.

- **Specific procedures for high-risk cases** – There should be specific monitoring and work-management procedures (such as staff rotation) for high-risk operational circumstances – for example, where a small number of agency staff work in a remote area.

- **Procedures for protected disclosures (whistle-blowing)** – The agency should adopt and make known a clear internal procedure for employees to make disclosures under the Protected Disclosures Act 2000.

8.3   Managing conflicts of interest

An agency should have clear, effective, and robust processes in place for identifying and addressing potential conflicts of interest.

8.3.A   GUIDING PRINCIPLES FOR MANAGING CONFLICTS OF INTEREST

The following principles will help guide managers and staff likely to be faced with situations that could lead to conflicts of interest:

- **Well-informed staff** – Management should ensure that staff know what a conflict of interest is.

- **Declaring conflicts** – Staff should declare to their manager any conflict of interest that they may face. How formal this declaration needs to be will depend on the context – for example, the commercial significance of the matter in question and the nature and extent of the public interest.

- **Avoidance and appropriate management** – Staff should avoid conflicts of interest where possible, and manage them appropriately if they cannot be avoided.

- **Mutual staff support** – Staff should encourage and support their colleagues to do the same.

- **Training** – Management should provide regular training in this area to reinforce the staff's awareness and understanding.

8.3.B   CONFLICTS RELATING TO FORMER STAFF OR STAFF RECRUITED FROM INDUSTRY

Potential conflicts of interest may arise where a former staff member now works for a business or other body that is part of the regulated sector. Management should ensure that the current agency staff and the former employee are all aware that the former employee will not have any greater access to officials or information than other members of the regulated sector.

Similarly, where a staff member has been recruited from the regulated sector, the agency's decision makers and the former employer need to be aware of that potential conflict and of how the agency is managing it.

8.4   Minimising regulatory capture

'Regulatory capture' is where an agency or particular staff members come to identify inappropriately with the interests of those being regulated rather than with the public interest.

The risk of capture is likely to be greater where compliance teams are small and work in relative isolation – for example, in the local government context.

The agency's plans for managing the regulated sector can explicitly acknowledge the risk of regulatory capture, and can incorporate the following techniques to minimise it:

- identifying clearly the purpose or outcomes expected of the relationship

- rotating staff responsible for relationships, or a specific set of relationships

- requiring file-notes to be made of all contacts with the regulated entity at the time of key decision-making events, with the file-notes being available to all officials involved in the process

- assigning staff as relationship-managers not just for large, commercially significant regulated entities, but also for less significant ones or for associations that represent smaller entities

- operating a buddy system, so that there are always two people involved in any interactions of substance

- operating an effective gifts and gratuities policy

- explicitly focusing staff-competency descriptors on what is required to manage stakeholder relationships effectively, and not just, for example, focusing on customer-service competencies.

Example

Competency descriptors for staff working with the regulated sector

The Department of Internal Affairs (DIA) developed a proposed set of competency descriptors for 'working with regulated parties'. Its usual client-service descriptors were not considered specific enough for a more complex relationship in the compliance field.

Examples of the department's competency levels, and the minimum standards proposed for each level include:

Continued

Level 1 – minimum standards:

- knows who regulated persons are
- distinguishes the difference between providing customer service and delivering regulatory obligations
- acts in a timely, courteous and professional manner
- acts in accordance with fairness and natural justice
- demonstrates discretion and good judgement in applying powers
- interacts effectively with diverse cultures
- recognises potential risks arising from actions, and informs others
- maintains positive public image of DIA.

Level 2 – level 1 minimum standards plus:

- educates the sector about the department's role
- ensures complaints are actioned in line with departmental standards
- deals effectively with conflict situations
- gathers and shares intelligence within the regulatory environment

Level 3 – previous levels plus:

- encourages and inspires others to be professional, fair, and consistent
- responds to and monitors complaints to the sector
- reviews regulatory processes and procedures, and seeks to improve them
- maintains integrity and professionalism under duress
- makes sound and balanced decisions.

Level 4 – previous levels plus:

- develops standards and processes for delivering regulatory obligations with fairness and impartiality
- assesses the impacts of regulatory obligations on those being regulated, and seeks opportunities to improve relevant standards and processes in line with regulatory objectives

Level 5 – previous levels plus:

- builds and sustains a positive working relationship at Ministerial, community, or sector leader level, appreciating their objectives and working to find effective solutions that further regulatory objectives
- establishes clearly defined vision, values, and standards for managing regulatory relationships and communicates these to all levels.

8.5   Complying with applicable codes of conduct

8.5.A   NEW ZEALAND PUBLIC SERVICE CODE OF CONDUCT: STANDARDS OF INTEGRITY AND CONDUCT

The State Services Commissioner issued the following Code of Conduct for the New Zealand public service (under section 57 of the State Sector Act 1988).

Standards of integrity and conduct

We must be fair, impartial, responsible, and trustworthy

The State Services is made up of many organisations with powers to carry out the work of New Zealand's democratically elected governments.

Whether we work in a department or in a Crown entity, we must act with a spirit of service to the community and meet the same high standards of integrity and conduct in everything we do.

We must comply with the standards of integrity and conduct set out in this code. As part of complying with this code, our organisations must maintain policies and procedures that are consistent with it.

Fair

We must:

- treat everyone fairly and with respect
- be professional and responsive
- work to make government services accessible and effective
- strive to make a difference to the well-being of New Zealand and all its people.

Impartial

We must:

- maintain the political neutrality required to enable us to work with current and future governments
- carry out the functions of our organisation, unaffected by our personal beliefs
- support our organisation to provide robust and unbiased advice
- respect the authority of the government of the day.

Continued

Responsible

We must:

- act lawfully and objectively
- use our organisation's resources carefully and only for intended purposes
- treat information with care and use it only for proper purposes
- work to improve the performance and efficiency of our organisation.

Trustworthy

We must:

- be honest
- work to the best of our abilities
- ensure our actions are not affected by our personal interests or relationships
- never misuse our position for personal gain
- decline gifts or benefits that place us under any obligation or perceived influence
- avoid any activities, work or non-work, that may harm the reputation of our organisation or of the State Services.

8.5.B   LOCAL GOVERNMENT CODES OF CONDUCT

Some local authorities have their own codes of conduct or policies dealing with integrity and conduct. Core expectations of staff, volunteers, contractors, and consultants may include details such as:

- employee responsibilities
- personal behaviour
- conflicts of interest
- gifts, inducements, and favours
- intellectual property, confidentiality, and information security
- use of agency property and technology.

BETTER PRACTICE CHECKLIST: MINIMISING CORRUPTION, MISCONDUCT, AND 'REGULATORY CAPTURE'

☐ Mechanisms are in place that minimise the risk of corruption and misconduct, such as regular internal audits of operations and work practices that incorporate unannounced checks by supervisors.

☐ Staff are aware of what constitutes a conflict of interest. There is training for staff on how to avoid them if possible and, if they cannot be avoided, staff are required to declare conflicts to their manager and to manage them appropriately.

☐ The agency explicitly acknowledges the risk of regulatory capture, and incorporates mechanisms to minimise it, such as rotating responsibility for relationships and the keeping of file notes for all contacts.

ADDITIONAL GUIDANCE MATERIAL

Conflicts of interest

- *Walking the line: Managing conflicts of interest*, a resource kit produced by the State Services Commission (2005); available at:
    - www.ssc.govt.nz/display/document.asp?docid=4896

- *Best practice guidelines for departments responsible for regulatory processes with significant commercial implications,* State Services Commission, 2004 (prepared by a chief executive reference group convened by the Ministry of Economic Development); available at:
    - www.ssc.govt.nz/display/document.asp?docid=4264

- Good-practice guides published by the Office of the Auditor-General:
    - *Managing conflicts of interest: Guidance for public entities* (2007), available at:
      www.oag.govt.nz/2007/conflicts-public-entities
    - *Guidance for members of local authorities about the law on conflicts of interest* (2007), available at:
      www.oag.govt.nz/2007/conflicts-members
    - *Local authority codes of conduct* (2006), available at:
      www.oag.govt.nz/2006/conduct

Regulatory capture

- *Best practice guidelines for departments responsible for regulatory processes with significant commercial implications*, State Services Commission, 2004 (see above)

Gifts and gratuities

- *Guidance on acceptance of gifts, benefits and gratuities*, State Services Commissioner, 2002, available at:
    - www.ssc.govt.nz/display/document.asp?DocID=4885

CH 9   INFORMATION MANAGEMENT

This chapter discusses:

- the importance of high-quality information (9.1)

- features of effective information management (9.2)

- the role of regulatory intelligence in identifying compliance risks (9.3)

- the information support needed for a project-based approach to problem solving (9.4)

- the proper documenting of agency decisions (9.5).

This chapter includes some material adapted from chapter 3 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

9.1   The importance of high-quality information

The quality of the information available to managers and decision makers in a compliance agency is crucial to the agency's ability to:

- identify, analyse, and prioritise risk

- design and implement strategic and operational plans

- make well-informed, reliable, and consistent compliance decisions

- assure stakeholders that the agency is meeting its regulatory objectives

- contribute effectively to the ongoing development of the policy and regulatory frameworks that define the agency's work.

Further, the agency's accountability will be increased by a sound information-management system that fully documents and makes accessible key aspects of compliance decisions, including reasons for the decision and the evidence supporting it.

High-quality information is:

- **timely** – that is, it's readily available to management when decisions are being made, or is supplied to management when deviations from plans or assumptions need management's attention

- **reliable** – that is, it's recorded accurately over time and across the regulated sector

- **consistent** – that is, it's recorded consistently over time and across the sector to allow meaningful comparisons so that risks and trends can be accurately identified and assessed

- **comprehensive** – that is, all relevant information required to make a balanced, informed, and defensible decision is collected and made available to decision makers

- **accessible** – that is, it is able to be accessed by those people that have a legitimate reason to see the information (such as policy makers) and is capable of being analysed in a variety of ways

- **managed with integrity** – that is, it is held, protected, and disclosed in a manner that is consistent with relevant information security, privacy, and information sharing and matching frameworks.

9.2 Key elements of effective information management

To ensure that its information-management system is effective, a compliance agency should address the following questions:

- Are the agency's information-management systems designed to support ongoing policy improvement?

- Are the agency's information-management systems aligned with its compliance strategy?

- Are the needs of all the agency's decision-makers being met?

- Is the right information being collected?

- Is the data reliable?

- Is the information made available across the agency as necessary?

- Are there effective systems for capturing, filtering, and distributing regulatory intelligence?

9.2.A   ALIGNING INFORMATION MANAGEMENT WITH COMPLIANCE STRATEGY

A public compliance agency will typically be an information-intensive organisation. How the agency goes about collecting and managing information will therefore be a key factor in the agency's ability to achieve its objectives effectively.

An agency needs to tailor its information systems to its strategy for achieving compliance. Although technology will obviously impose boundaries on an information-management system, it's important that the system's shape and capabilities be determined by the agency's compliance objectives and activities, rather than being driven primarily by technical concerns in isolation.

As an agency adjusts its compliance strategy, it needs also to adjust its information systems, and to integrate its strategic and operational planning with the planning of its information systems.

Case studies

New passport issuing system

The Department of Internal Affairs' new passport issuing system, to be introduced in 2011, has been designed from the outset with the effective collection, use, and management of information as a key outcome.

Compliance objectives have been fully considered so that information collected and held within the system can be accessed and used to full effect, with technology as an enabler. This will result in enhanced integrity for New Zealand travel documents.

Radio Spectrum Management's case-management system

The case-management system used by RSM to capture information relating to audits, warnings, infringement notices, and infringements is part of the Register of Radio Frequencies. It's modified as needed to stay aligned with current compliance strategies and information needs. The elements used by staff are hidden from external users.

The LINZ Landonline system

LINZ runs the Landonline system for land-title and survey transactions. With the use of automated business rules and user rights granted to lawyers under a certification regime, many simple transactions are fully automated. For example, the lawyers for a vendor and purchaser of a residential property can complete online the discharge of an existing mortgage, the transfer of the property, and the registration of a new mortgage. The compliance strategy behind these transactions is made up of the digital audit trail of certifications by the lawyers, the generation and collection of automated reports on transactions, and a regular audit programme of law firms to assess their process and controls to manage risks.

9.2.B MEETING THE NEEDS OF THE AGENCY'S DECISION-MAKERS

The requirements for different sets of decision makers across the agency will vary, and will depend on:

- the type of information they need

- how quickly the information needs to be made available to them

- the kinds of decisions they make and how often they have to make them.

For example, senior managers making decisions that affect the whole agency will have different needs from decision makers making operational decisions in regional or local offices.

9.2.C COLLECTING THE RIGHT INFORMATION

The agency should periodically compare the data its information systems are capturing with the needs of its decision-makers. New risks or new compliance requirements may require it to collect new sets of data, or to differentiate into subcategories the data that's already being collected.

However, moving to new sets of data or changing subcategories brings the risk of not being able to compare new with previously captured information. If long-term trends are to be captured and analysed, data must remain consistent and comparable.

9.2.D ENSURING THAT DATA IS RELIABLE

Data should be validated as it's entered into the agency's information system, and there should be regular checks of the integrity of the agency's databases. If the agency is to use data supplied by other agencies, it will first need to confirm that this data meets agreed quality standards as well as privacy and security requirements.

9.2.E MAKING INFORMATION AVAILABLE ACROSS THE AGENCY AS NECESSARY

The agency should have protocols for information access that allow its decision makers timely access to the data they need, regardless of their physical location or their location within the agency's structure, while at the same time imposing appropriate restrictions for reasons of privacy, security, or commercial sensitivity.

9.2.F   CAPTURING, FILTERING, AND DISTRIBUTING REGULATORY INTELLIGENCE

A sound information system facilitates the reporting of non-compliance to the agency by a range of sources, defines procedures for filtering reports and capturing the information that is considered reliable, and distributes the information only to those who have a legitimate interest in it.

Regulatory intelligence is dealt with in the following section.

9.3   Regulatory intelligence

9.3.A   REGULATORY INTELLIGENCE AND RISK MANAGEMENT

Regulatory intelligence is information supplied to or obtained by a compliance agency that may be inconclusive in isolation, but that when combined with other pieces of intelligence, or added to other information held by the agency, may indicate heightened compliance risks or the emergence of new risks.

An effective compliance agency will generate regulatory intelligence by routinely scanning its environment for significant changes in the environment and in the activities of the regulated sector. This will inform its management of compliance risks in the sector.

For example, an agency might scan its environment for:

- changes in business practices in the regulated sector, such as increasing use of subcontractors

- the adoption of new technologies

- greater consolidation or fragmentation in the particular industry

- trends in levels of activity, or in the geographical focus of activities.

9.3.B   POTENTIAL SOURCES OF REGULATORY INTELLIGENCE

Sources of regulatory intelligence may include:

- key informants, including members of the relevant industry or sector

- the agency's own staff

- relevant trade or industry associations

- publicly available sources of information, such as trade journals, public registers, classified advertising, and social-networking websites

- available statistical sources

- contracted information providers (for example, of credit information)

- relevant correspondence, such as complaints submitted to the agency

- special studies commissioned by the agency (likely to be available only to larger agencies)

- stakeholder organisations, such as environmental or other watchdog organisations

- other government agencies, such as law enforcement agencies

- sister regulators from overseas.

The Intelligence Unit in the Regulation & Compliance Branch of the Department of Internal Affairs

The main focus of the Intelligence Unit (Intel) is supporting the regulatory, compliance, and law-enforcement functions of the Regulation & Compliance Branch by providing information collection, management, and analysis of operational and strategic issues that affect Branch outcomes. Intel also plays an important role in working with other regulatory and law enforcement agencies across government and internationally. This work involves joint initiatives in information collection, sharing, and analysis, as well as supporting operational activities.

Intelligence operates as an enabler in three ways:

- by acting as a force multiplier to better focus the branch's resources on efforts that are directed towards achieving its outcomes
- by supporting the branch's regulatory activities by identifying and understanding the risks and trends in the regulatory environment, and guiding decision making on how best to address any potential impact
- by helping to integrate the branch's policy and operational functions through information-sharing and contributions to strategic thinking.

Figure 6 gives an overview of the intelligence function within the Branch.

The aims of the intelligence cycle (shown on the right of Figure 6) are:

- to produce intelligence to support the fullest range of regulatory activities across the Branch using the set resources
- to ensure decision makers have as comprehensive a picture as possible of the environment they operate within
- to identify the emerging risks and trends that might impact on the Branch's operational or policy approach to regulation
- to enable decisions makers to review and assess the impact of their decisions.

The aims of the '3i model' (shown on the left of Figure 6) are to ensure that:

- management takes ownership of intelligence recommendations
- intelligence is operationalised and is actionable
- the intelligence function is integrated at all levels of business.

This process provides a structured and continuous approach to intelligence development that has the potential to impact on the full range of the Branch's functions, as shown in Figure 7.

Figure 6 – Intelligence function within the Regulation and Compliance Branch of the Department of Internal Affairs
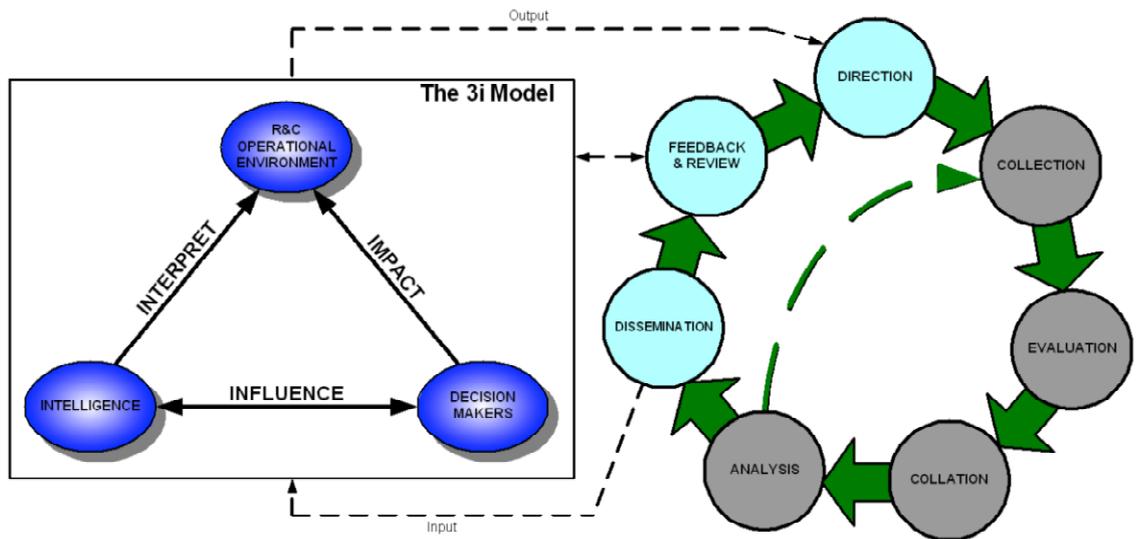
Figure 7 – Intelligence development potential impacts
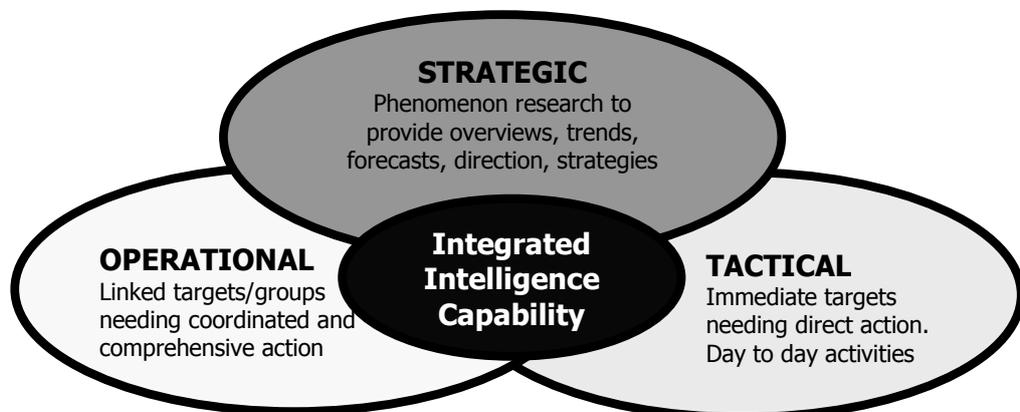
9.4   Information support for compliance problem solving

This section is adapted from Malcolm Sparrow's *Imposing duties* (1994), chapter 4, 'Redefining analysis'.

Project-based work addressing significant compliance problems requires particular forms of information support. The effectiveness of this area of work will be increased by a particular kind of information-management culture.

9.4.A   IDENTIFYING PROBLEMS

In many cases it will be appropriate for agencies' information systems to have a data-mining capacity, to allow the agency to cluster incidents of non-compliance in different ways – for example, by location, by time (of day, week, or year), by type of compliance issues, or by category of compliance subject (size of business, for instance).

This does not mean that databases must be indexed and searchable by all possible factors and dimensions; however, the agency's information analysts do need to have the capability to manipulate the information in the databases to produce information about clusters.

An information system's capacity to identify non-compliance patterns is not a technological issue. The capacity will depend less on automated processes than on the skills of the agency's information analysts.

Identifying problems and priority areas for work may require the agency to generate risk profiles for the regulated sector or particular parts of it. See for example the gambling risk profile case study in 5.2.

'Identification of problems, risks, or significant non-compliance constitutes a break with routine, demanding a great deal of ingenuity, experience, instinct, and curiosity, backed up by highly flexible data-analysis capabilities.'

– Sparrow (1994), p 109.

9.4.B   FLEXIBLE DEPLOYMENT OF INFORMATION SYSTEMS AND STAFF

To be able to support the agency's project work effectively, the agency's information systems and staff must be able to be deployed flexibly, on a project basis, in teams of different sizes. Problem-solving project work can range from a single employee on a one-day project, to a major agency programme over several months; the agency's information systems must be able to be adapted to provide the information support necessary in each case.

9.4.C   INFORMATION NECESSARY TO MEASURE EFFECTIVENESS

Systems for measuring the effectiveness of the agency's projects and other activities are crucial to determining whether the agency is achieving its compliance objectives (see 6.3). Problem-solving projects will therefore frequently need the statistical-analysis and quantitative-analysis skills of the agency's information specialists, who in turn will also need a good understanding of the requirements for evaluating a project's impact and effectiveness.

9.4.D   USING MULTIPLE DATA SOURCES

Because a compliance agency will not routinely collect all the data it needs, it will need the capacity to design its own specialist data-collection activities. It will also need a good knowledge of external data sources, and an appreciation of their value. The agency also needs the capacity to integrate external data with its own.

9.4.E   INFORMATION SUPPORT FOR A BROAD RANGE OF COMPLIANCE TOOLS

A proportionate, risk-based compliance strategy involves the use of a range of tools for achieving compliance. The agency's information systems will need to be geared not just to traditional enforcement but to other, lower-level interventions such as providing information, education, and encouragement to the regulated sector.

It's important that staff involved in the agency's information systems be won to an organisational culture that recognises the value of all those compliance tools, rather than seeing low-level interventions such as education as being also low-status, and not part of the agency's real work.

9.4.F SHARING INFORMATION WITH THE PUBLIC AND OTHER AGENCIES

Recognition of the value of educating the regulated sector and the wider public also requires a more open, less-secretive attitude to the uses to which the agency's information holdings should be put. Making information available to the public should be seen as an opportunity to influence attitudes and behaviours in the pursuit of the agency's compliance objectives. Information should therefore be presented to the public in a form that's accessible and easily understandable.

In achieving compliance the agency will be assisted by cooperation with other public agencies, and therefore it will also need an appreciation of the value of information-sharing with other agencies.

See the case study in 10.1.

9.5 Documenting the agency's decisions

9.5.A ENHANCING ACCOUNTABILITY AND CONSISTENCY

By fully documenting its key strategic, operational, and compliance decisions, a compliance agency will ensure that it maintains a record of evidence, analysis, and judgment that can be used to:

- meet legislative record-keeping requirements

- improve the consistency of decisions over time and across the agency

- increase the transparency of the decision-making process and of the reasons for decisions

- carry out a review, either internally or by a third party, of the merits of a decision

- enable the agency to make an informed response to a formal challenge to one of its decisions.

9.5.B GUIDANCE TO STAFF ON DOCUMENTING DECISIONS

By providing specific guidance on what aspects of its decisions should be documented and how to do so, the agency will help ensure it captures and retains all the material that it needs for accountability and quality assurance.

Guidance on documenting decisions may specify the following:

- **Information that must be retained** – Decision makers will be assisted by a list of documents and other material that must be compiled and retained with the relevant decision, including, for example:
  - the reasons for the decision
  - endorsement that the decision was made in accordance with the agency's legislative powers and established decision-making procedures
  - correspondence with the particular regulated entity
  - records of relevant discussions and meetings
  - any technical or other advice that was used in making the decision.

- **Documentation checklists for specific compliance actions** – A checklist of the documents that must be recorded for different types of compliance action ensures that evidence is documented in accordance with legislative and organisational requirements. As the level of response increases, the documentation requirements are also likely to increase. Examples of evidence that may need to be recorded include:
  - inspection reports and photographs
  - technical assessments
  - correspondence with the particular regulated entity
  - the entity's compliance history.

- **Legislative and due-process requirements** – By documenting the steps and timelines in its processes for making, notifying, and implementing its decisions, a compliance agency will ensure that it provides evidence that the relevant compliance action was lawful and that the agency provided the regulated entity with due process in accordance with the agency's established procedures.

- **Procedures for writing and compiling documentation** – Requests to examine compliance agencies' decisions can be made by a range of parties, and the type and amount of documentation that an agency will need to provide will vary, depending on legislative and the agency's own requirements. For example, the agency may need to release documentation when there is:
  - a merits review
  - a formal challenge by a party affected by the decision
  - a request under the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987.

By providing guidance to decision makers on meeting the requirements for each type of information request, the agency will minimise its costs in retrieving and presenting the information, particularly when the request is made a long time after the decision.

BETTER PRACTICE CHECKLIST: INFORMATION MANAGEMENT

☐ The agency integrates the planning of its information-management systems with its strategic and operational planning.

☐ The agency meets legislative requirements for information management.

☐ Its information-management system provides timely, reliable, and comprehensive information to its decision makers.

☐ The agency has effective systems for capturing, filtering, and distributing regulatory intelligence.

☐ The agency provides flexible information and analytical support to project teams addressing patterns of non-compliance.

☐ The agency meets legislative record-keeping requirements.

☐ Decision makers are given comprehensive guidance on documenting decisions, including the information that must be compiled, retained, and stored with each decision.

ADDITIONAL GUIDANCE MATERIAL

- Books by Malcolm Sparrow:
    - *Imposing duties: Government's changing approach to compliance* (1994, Praeger, Westport): see chapter 4, 'Redefining analysis'.
    - *The regulatory craft: Controlling risks, solving problems, and managing compliance* (2000). See chapter 18, 'Intelligence and analysis'.

- Good-practice guides published by the Office of the Auditor-General:
    - *Governance and oversight of large information technology projects* (2000), available at: www.oag.govt.nz/2000/it-oversight

- For information on handling official information requests under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, see: www.justice.govt.nz/publications/global-publications/o/official-information-your-right-to-know

- For information on recordkeeping requirements and good practice, see the standards and guidance published by Archives New Zealand, available at: http://archives.govt.nz/advice/continuum-resource-kit

CH 10   RESOURCING ISSUES

This chapter discusses:

- how a risk-based, outcomes-focused approach will help a compliance agency make the best use of limited resources (10.1)

- the staff skills and experience that a compliance agency needs to carry out its activities (10.2)

- arrangements for recovering the costs of the agency's compliance activities (10.3).

This chapter includes material adapted from:

- Malcolm Sparrow's *The regulatory craft: Controlling risks, solving problems, and managing compliance*, Brookings Institution Press, Washington DC, 2000, chapter 16, 'Finding Resources, Making Space'

- chapter 5 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

10.1   Improving resource efficiency through focusing on risks and outcomes

Compliance agencies will almost invariably be seeking to achieve compliance with limited resources. A risk-based approach to achieving compliance will assist an agency to define its strategic and operational priorities and to develop operational plans that take into account the available resources. Further, focusing on the agency's effectiveness – that is, its success in achieving desired outcomes – will help it ensure that resources are expended in pursuit of its compliance objectives.

The following risk-based, outcomes-focused management practices will assist a compliance agency to allocate its resources efficiently:

- **Targeting resources and attention** – A risk-based approach to compliance activities enables the agency to target time and attention on the most important issues.

- **Analysing problems in detail** – By fully analysing a risk the agency will gain a proper understanding of its components, causes, and

consequences, and therefore be able to design an intervention that makes efficient and effective use of the agency's resources.

- **Choosing responses that are resource-efficient** – When choosing between alternative responses to non-compliance, the agency should choose those that are resource-efficient. The decision should include, as applicable, the planned withdrawal of resources over time, in the expectation that the problem will not soon reappear. The agency should reject options that would consume disproportionately significant resources or threaten to tie up resources indefinitely.

- **Abandoning what doesn't work** – By focusing on outcomes and evaluating the effectiveness of its compliance activities, the agency will be able to more quickly recognise when an intervention is not working. If it is not working, the agency will need to identify the reasons for this and decide whether to continue with the activity, or abandon it and re-allocate resources to a more effective solution.

- **Reducing workloads by addressing patterns of non-compliance** – By intervening proactively to address patterns of non-compliance and serious risks, an agency should be able to decrease workloads stemming from reactive responses to individual cases of non-compliance. Compliance should increase, reducing the demand on the agency's resources. However, the principle of diminishing returns suggests that proactive intervention will have a turn-over point, beyond which compliance costs to both the agency and the regulated entity outweigh the benefits of increased compliance.

- **Learning from previous compliance responses** – Reviewing lessons learned from previous interventions will help the agency design and implement interventions that are likely to work. An organisational focus on measuring the effectiveness of its interventions will reduce the level of resources required to plan future interventions and also reduce the number of iterations needed to perfect an intervention.

- **Learning from other compliance organisations** – Discussing with other compliance agencies, both in New Zealand and overseas, strategies and activities they have found effective will assist the agency in developing effective interventions.

- **Specialist compliance function** – Where the compliance function of an agency relates to a primary service-delivery function, the compliance function may be carried out as part of the service-delivery operation. However, there will be a tipping point where work volumes or risk levels make a separate compliance function viable or preferable.

Crime in casinos: A systemic, intelligence-led effort to identify causes

Crime in casinos was becoming an increasing problem. The Department of Internal Affairs (DIA) received regular reports, mainly from the Police and the casinos themselves, of suspected money-laundering, prostitution, theft, loan-sharking, and intimidation. While each reported incident was dealt with, it was done in isolation from the problem as a whole. The department recognised the need to step back from 'fighting fires' and to instead discover, understand, and analyse the underlying causes so that it could tackle the problem most effectively.

'Project Metos' was initiated as an intelligence-led study to better understand the nature and extent of crime and criminality in the Auckland and Christchurch casinos. The project was originally designed to address the department's growing concern that its understanding of crime and criminality was largely based on anecdotal evidence and subjective opinion. It was decided that the project would take a strategic and proactive approach to tackling this problem: this meant focusing on the 'why', not the 'who'.

The project involved wide collection of information using intelligence-gathering methods to source data from law enforcement agencies, problem gambling organisations, casino operators, and sources within DIA. This ensured that the department understood the problem from a systemic viewpoint, not simply as a result of the collection of individual opinions held in the department.

The analysis found that three key factors – Asian Organised Crime, Asian culture, and the business culture at the casinos – act in concert to create an environment that facilitates casino-related crime. The department was able to successfully refocus its compliance approach to address those three interrelated factors.

Project Metos introduced to the department several new ways of thinking about complex problems in the compliance environment. 'Systems thinking' was the methodology applied to thinking about casino-related crime. Systems thinking means understanding the problem, its causes, and enablers, and identifying areas of leverage where a compliance agency can intervene to effectively tackle the underlying causes of problems, rather than tackling the visible symptoms. Since Project Metos other compliance initiatives have used aspects of systems thinking to understand and address complex issues.

10.1.A USE OF SCARCE RESOURCES IN A COMPLIANCE CONTEXT

Compliance agencies inevitably have scarce resources, and therefore allocating resources to achieve maximum effectiveness – 'bang for bucks' – is a key strategic and design issue. Compliance agencies are typically set up to manage both reactive and proactive work: a key question is what is the appropriate balance between proactive and the necessary reactive work, and how do you prevent the 'busy' work (typically reactive) from crowding out the important, high-impact work?

Proactive work involves tensions on a number of levels – for example, between a problem-solving approach and the more traditional compliance model of regular checks through, for example, regular audits. Most compliance agencies typically invest most of their resources in traditional audit-focused activity. An agency will need to consider whether that is in fact the optimum resource split in its particular context. It will also need to consider how to design its supporting activities (for example, its risk model) and its functional areas (for example, compliance teams or project teams) for maximum effectiveness.

It is worth noting that 'proactive' work, such as understanding patterns of non-compliant behaviour and the reasons behind them (see the compliance 'triangle' in 3.3.C.ii) will allow agencies to plan and manage their resources more effectively for both reactive and future proactive work.

10.2 Acquiring skills and experience

A compliance agency may source the skills and experience needed to carry out compliance activities either from the agency's own staff or from another public or private-sector organisation.

A cost-benefit comparison will enable the agency to determine the extent to which skills and experience should be developed in-house or sourced from the outside.

10.2.A STAFFING THE AGENCY'S COMPLIANCE FUNCTIONS

Creating and maintaining a staff that is capable of executing the agency's compliance strategies and operational plans requires strategic planning in the human resources area. The agency's recruitment, retention, and training programmes should be targeted at developing and maintaining the individual competencies that are essential for assessing, monitoring, and enforcing compliance.

10.2.A.i Key individual skills

The following are important individual skills for compliance staff:

- **Technical skills** – Formal technical qualifications and recent industry experience build confidence that staff have the theoretical and practical skills to assess compliance fairly and to identify cost-effective improvements to the operations of those who are regulated.

- **Audit and inspection skills** – The quality of a compliance assessment is enhanced when it is conducted by staff who have training or experience in auditing techniques. Important skills include: scoping an audit; planning; information management; quantitative and qualitative analysis; gathering evidence; and preparing documents.

- **Team-management skills** – Skills and experience in leading multi-discipline audit/inspection teams help to maximise the contributions of each discipline and the collective output of the team.

- **Inter-personal, cultural, and communication skills** – Well-developed oral communication and interpersonal skills enable staff to establish and maintain productive and professional relationships with the regulated sector. Good writing skills ensure that the agency's documented decisions and formal communications with the regulated sector are clear.

10.2.A.ii Specialist competencies

As well as individual skills and competencies, a compliance agency needs a range of specialist competencies. These include:

- **Risk and quality-management** – The design and application of the agency's risk- and quality-management systems and procedures are enhanced when staff have practical experience in applying the relevant national and international standards.

- **Contract management** – Staff with experience in handling contracts contribute to the effective management of outsourced compliance activities (discussed in the next section).

- **Legal and criminal investigation** – A compliance agency needs staff with appropriate legal and investigative skills to ensure that its compliance powers are exercised lawfully and that it uses sound practices for collecting evidence to support criminal prosecutions.

- **Data management** – Quality information is a key component of effective compliance activities (discussed in chapter 9). Staff with skills in designing and implementing data-management systems will be key members of a compliance agency.

- **Public relations and media –** The confidence of the agency's stakeholders in its performance is enhanced when the agency

communicates effectively with the public. Staff who are skilled in website design, public relations, and dealing with the media are central to this.

- **Intelligence analysis** – Regulatory intelligence will be central to a sound understanding of risk in the regulated sector and of problems and patterns to be prioritised (see 9.3).

- **Forensic specialists** – for example, computer forensics and forensic accounting.

Case study

LINZ: Developing specialist expertise

Land Information New Zealand (LINZ) has decided to develop specialist expertise alongside generic skill sets. This includes separating operations compliance staff from regulatory teams, and establishing a dedicated regulatory assurance team.

For the regulatory assurance team LINZ recruits auditors, to work alongside subject-matter experts (for example, surveyors to ensure there is a complementary set of skills to carry out survey firm audits).

The operations compliance team has developed an in-house structured learning programme where new recruits are inducted into the theory and practice of the operation over a period of months before graduating and working fully in the business.

For the regulatory teams, senior staff attend the Australia and New Zealand School of Government (ANZSOG) 'Managing regulation, enforcement and compliance' course by Malcolm Sparrow, to ensure they're skilled in international best practice and can benchmark themselves with an Australasian peer group.

10.2.A.iii Matching skills and capabilities to the agency's compliance strategy

The kinds of skills and capabilities needed will depend on what part of the spectrum of compliance approaches the agency is operating in (that is, from 'hard' to 'soft').

For example, does the agency want education and influencing skills to be primary, or is the agency looking for more hard-edge enforcement capabilities? Should the agency be looking for a complete skill-set in one person, or should the agency be differentiating by establishing separate staff skill sets based on the approach and skills required?

The agency will need to consider not only its current compliance approaches, but also what those approaches are likely to be in the future. The agency's current

strategy may include a projected shift towards the 'softer' end of the compliance spectrum after a period.

Case study

Ministry of Fisheries' Honorary Fisheries Officers

The Ministry of Fisheries deploys approximately 132 full-time and warranted Fisheries Officers delivering daily compliance services across New Zealand. In addition, the Ministry uses the services of a voluntary network of approximately 210 'Honorary Fisheries Officers' (HFOs). HFOs receive comprehensive (but abbreviated) training, are provided with full uniform and safety equipment, and hold a limited form of fisheries warrant. They work alongside full-time Fisheries Officers and are responsible for approximately 40% of the public 'contacts' in the recreational fishing sector.

The HFO network provides compliance services in remote areas across the country in all conditions, and under all potential risk situations. HFOs receive no remuneration for their services but are well known and renowned for the professionalism and commitment they bring to the fishing sector. The HFO network is central to the ongoing success of the Ministry of Fisheries in its efforts to protect and sustainably use the natural resources of the marine environment.

10.2.B   OUTSOURCING COMPLIANCE ACTIVITIES

Whatever its reasons for outsourcing a particular compliance activity, a compliance agency remains responsible for the quality of the regulatory decisions that are made under the outsourcing arrangement.

The principles and practices of contract management provide a framework for managing an outsourced activity. They include defining the outputs being purchased, stipulating quality and performance standards, and establishing a regime for monitoring and enforcing the contract.

Details covered in the outsourcing contract may include:

- a clear description of the goods or services to be delivered, including quality standards

- timelines for delivering the product or service

- requirements for progress reports, to assist the agency in monitoring the service provider's activities

- procedures for approving payments, including arrangements for quality-assurance testing before the agency approves payment

- who owns the information and intellectual property generated by the service provider

- specific instructions and undertakings that ensure the service provider meets legislative obligations (for example, in relation to privacy and security of information) and procedural requirements

- boundaries of acceptable behaviour.

Case study

Manukau City Council[7]: Animal management field contract

Manukau City Council decided in 2000 to outsource its animal management **field** services, which primarily related to dogs and stock.

The contract is set out in two parts. The first part relates to a range of generic contractual matters, while the second part relates to matters specific to animal management services as follows:

First Part

Definitions and interpretation	Appointment and renewal
Performance of services	Payment
Access to sites	Council's responsibilities
Termination and suspension	Confidentiality and intellectual property
Indemnity and insurance	Variations
Completion of services	Unforeseen circumstances
Subcontractors	Contractor's bond
Disputes	Health and safety
General	

Second Part

Description of services	Price and payment
Insurances required by council	Addresses for notices
Performance specifications	Reporting requirements
Cost fluctuation adjustment	Contractor's performance scorecard
Network access agreement	

The contractor is required to report monthly on the nature and volume of services performed and their performance against a scorecard which contains weighted key performance indicators. The key performance indicators are intended to focus the contractor on the most important outcomes sought by the council which are dog registration compliance, complaint response, and education.

Continued

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[7] This case study was prepared before the Auckland Council was established in 2010

A contract manager has primary responsibility to manage and monitor the contractor's performance. This is achieved through a variety of means, such as:

- auditing monthly reports and scorecard. This includes active enquiry of information and data provided by the contractor and internal systems

- responding to complaints about the contractor by members of the public

- partnering and operational meetings that bring together the contractor and contract manager with other internal service delivery units involved in providing animal management services such as the call centre, finance, parks, and legal services.

10.3 Recovering regulatory costs

The two main sources of funding for compliance activities are:

- general government revenue from the annual budget process

- cost-recovery charges collected by the compliance agency.

Cost-recovery charges can take the form of:

- a fee collected from an individual or business for a particular activity (for example, an inspection/audit fee or an application fee)

- a levy imposed across a group of entities (for example, an annual registration or licence fee); specific legislation is required to establish a levy, as it is equivalent to a tax.

It would be inappropriate to charge a fee for discretionary activities.

10.3.A COST-RECOVERY ARRANGEMENTS

A compliance agency will need to take the following considerations into account when developing and implementing cost-recovery arrangements.

- **Authority for recovering costs** – A compliance agency should not put a charging regime in place without legislative authority or formal approval from government.

- **Consultation** – The agency should consult with stakeholders before implementing cost-recovery arrangements.

- **Directly related costs only** – The agency should recover only those costs directly associated with its delivery of the particular compliance regime. This will minimise cross-subsidisation between compliance subjects and across activities within the agency. Costs of activities such as policy development and advice should not be included in the agency's costs calculations. However, costs of imposing compliance on one group

may be recovered from another party being protected – for example, the control of electrical products (which may cause radio interference) into the New Zealand market is recovered through licence fees imposed on users of the radio spectrum, not the product suppliers.

- **Transparency and accountability** – The agency should document the method it uses to calculate a charge, and make this accessible to the regulated sector. The relationship between the charge and the costs incurred should be clearly described.

- **Stable arrangements** – The agency should avoid making frequent or significant charges to the arrangements.

- **Reviews** – The agency should review the cost-recovery arrangement periodically.

- **Court-ordered costs** – The agency should include any costs that a court has ordered.

Examples

Radio licence fees

Radio licence fees collected by Radio Spectrum Management provide an example of a cost-recovery arrangement.

Documents explaining the scheme can be found at:

www.rsm.govt.nz/cms/licensees/fees/expired-items/fee-reviews-history

Funding the land titles and survey system

Land Information New Zealand (LINZ) runs a system whereby the Crown funds the policy function and part of the regulatory function for the land titles and survey system. The remainder, including operational compliance and transactions, is funded by a user-pays third-party fees and charges regime. This involves stakeholder consultation and regular review, and is set through regulations under statute.

BETTER PRACTICE CHECKLIST: RESOURCING ISSUES

Allocating resources

☐ Resources are targeted at the most important compliance risks.

☐ Compliance strategies are designed in the expectation that fewer resources will be required as the risk is eliminated or mitigated.

☐ The agency's performance is monitored to identify activities that are not working effectively and that need to be either modified or abandoned.

☐ Lessons learned from previous compliance activities and outcomes are incorporated into planning and procedures.

Acquiring skills and experience

☐ Cost-benefit analysis and workforce planning techniques are used to design and implement human-resource management plans that recruit, retain, and develop staff to conduct and support compliance operations.

Outsourcing compliance activities

☐ The principles and practices of contract management are used to manage outsourced compliance activities.

☐ Quality-management techniques are applied to outsourced activities to confirm that they meet the standards set in the contractual arrangements.

Cost-recovery arrangements

☐ The agency's arrangements for recovering costs:

- meet legal and government requirements
- recover only those costs that are directly related to the compliance regime
- avoid cross-subsidisation within the regulated sector and within the agency
- are transparent.

ADDITIONAL GUIDANCE MATERIAL

Improving resource efficiency through focusing on risks and outcomes

- Malcolm Sparrow. 2000. *The Regulatory craft: Controlling risks, solving problems, and managing compliance*, Brookings Institution Press, Washington DC. See chapter 16, 'Finding resources, making space'

Outsourcing

- Good-practice guide published by the Office of the Auditor-General:
    - *Procurement guidance for public entities* (2008). This covers good practice for public entities procuring goods and services. Available at:
    www.oag.govt.nz/2008/procurement-guide

Cost recovery

- Good-practice guide published by the Office of the Auditor-General:
    - *Charging fees for public sector goods and services* (2008). This covers only the charging of fees for goods or services that the agency is required by statute to provide. It does not cover levies. Available at:
    www.oag.govt.nz/2008/charging-fees
- Treasury guidelines for setting charges in the public sector (2002). Available at:
www.treasury.govt.nz/publications/guidance/planning/charges/charges-dec02.pdf

PART C.

KEY COMPLIANCE

FUNCTIONS AND ACTIVITIES:

INTERACTING WITH

THE REGULATED SECTOR

CH 11   MANAGING RELATIONSHIPS WITH STAKEHOLDERS AND THE REGULATED SECTOR

This chapter discusses:

- high-level stakeholder relationships that need to be considered in a regulatory environment (11.1)

- achieving clarity about the proper nature of relationships between a compliance agency and the regulated sector (11.2)

- defining roles and commitments through a service charter (11.3)

- mechanisms for communicating with the sector (11.4)

- handling complaints and challenges to agency decisions (11.5).

This chapter adapts some material from chapter 4 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

11.1   High-level relationships

The relationship between the compliance agency and the regulated sector is obviously important, but must be placed within a framework of the key stakeholder relationships that exist in a regulatory environment. When making decisions that affect, for example, the relationship between the regulator and regulated sector, the impact on the other stakeholders in the wider environment must also be considered.

Figure 8 illustrates the key stakeholders and relationships involved.

In this model Government/Ministers provide the mandate for the regulatory agency to perform its role. That role is usually performed for a wider purpose or public value and to provide a benefit to society or the community. The means by which this is achieved is by regulation of a particular sector or group.

Figure 8 – High-level relationships
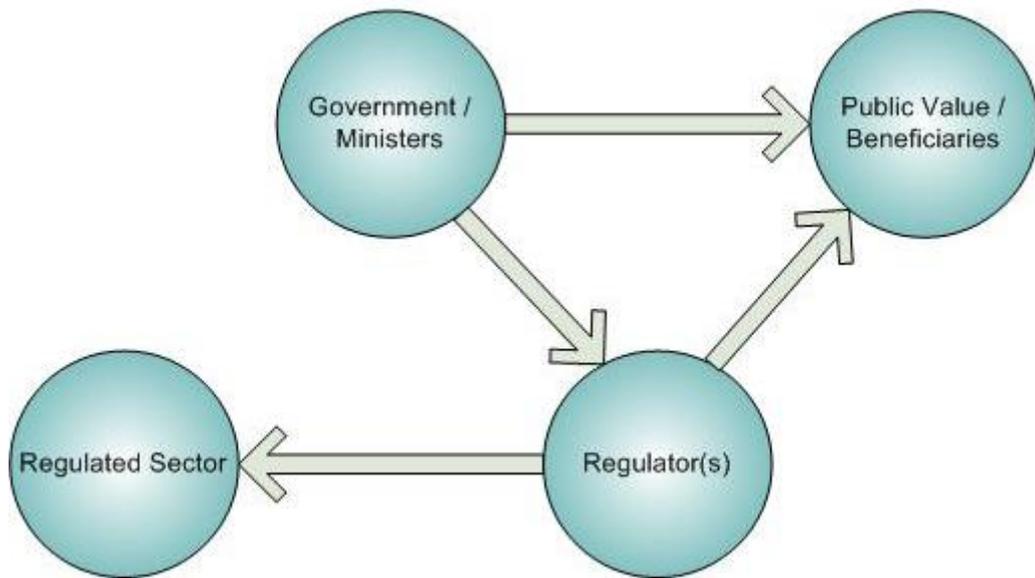
Two important points arise:

- A compliance agency may sometimes inappropriately come to see the regulated sector as the key stakeholder, when in fact it is not, and place undue focus on its relationship with the regulated sector.

- The relationship model is dynamic and it's important to focus on ensuring that compliance decisions take into account the interests of all stakeholders. For example, regulatory/compliance decisions must contribute towards public value, while being fair to the regulated sector and maintaining the confidence of Ministers in the ability of the compliance agency to perform its role.

With those considerations in mind, the remainder of this chapter focuses on the relationship between the compliance agency and the regulated sector.

11.2 Achieving clarity about relationships and desired outcomes

For a compliance agency to be able to effectively manage its relationships with the regulated sector, the agency must have a clear conception of the appropriate nature of those relationships, one that centres on the agency's role and responsibilities as a public compliance organisation (see 11.1). The agency must also communicate that conception effectively to the sector.

By clearly defining its relationships with those it regulates and also the compliance outcomes it's seeking from those relationships, a compliance agency is better able to develop the relationship mechanisms and the staff skills and attitudes that are needed to achieve those outcomes. A clear shared understanding of that role will help the agency maintain the capacity and preparedness to exercise its regulatory authority independently and objectively in the public interest.

Being open and transparent about relationships and desired outcomes also helps the regulated sector and other stakeholders develop their own processes for interacting with the compliance agency.

Achieving clarity about the nature of relationships can be particularly complex in an agency where the compliance function is secondary to a service function. There the compliance arm will have a different focus and a different relationship with the sector compared to the service-delivery arm.

11.2.A THE REGULATED SECTOR: CLIENTS, TARGETS, OR STAKEHOLDERS?

Without doubt, certain aspects of a customer-service model will enhance the agency's effectiveness in achieving its objectives – including the importance of timeliness, technical competence, courtesy, and respect. An effective compliance agency should have an appropriate concern for levels of satisfaction among the regulated sector with the agency's processes and services. Further, a focus on the regulated sector as 'customers' as one subset of the overall regulatory relationship, will enhance the agency's understanding of those it regulates and therefore the agency's capacity to achieve compliance.

A compliance agency will also find that there are some important limits to applying customer service and other private-sector models to its compliance functions. A framework centred on customer service cannot easily accommodate the notion of the 'service provider' carrying out unannounced spot inspections, issuing warning notices and, even less so, bringing criminal prosecutions against its 'client'.

Compliance agencies need to retain a focus on their regulatory objectives and their public responsibilities, and in general it will not be for the regulated sector to decide how effectively the agency is meeting those objectives and responsibilities. For a

compliance agency it will often be routine that some of those it regulates are deeply dissatisfied with the actions the agency takes in serving the people who are the beneficiaries of the regulation and in serving the wider public interest. A non-compliant business is unlikely to rate the agency's performance highly when the business becomes an enforcement target.

While building aspects of the agency's work on conceptions of 'customers' or 'clients' will have a number of important advantages, a compliance agency needs to draw on a wider set of concepts and on a vocabulary that appropriately characterises the regulated sector and the agency's relationships with it. The regulated sector must be placed within a framework of relationships that includes all the stakeholders involved in the particular regulatory environment – including the beneficiaries of the regulation, other government agencies, policymakers, and the wider community.

Case study

Compliance in the gambling sector:
Tension between customer service and compliance objectives

The context

The Gambling Act 2003 requires a provider of gambling activities outside casinos (that is, operators of 'pokie' machines in pubs or clubs) to hold operator and venue licences. The Act states that those licences must not be granted unless the Secretary for Internal Affairs – whose powers are delegated to Gambling Inspectors – is satisfied that certain criteria relating to suitability have been met.

Gambling Inspectors receive and process a variety of applications related to Class 4 gambling, which includes poker machines and other high-risk forms of gambling. Inspectors reach a decision based on many types and sources of information, including information provided by the applicant, other units in the Gambling Compliance Group (GCG), external stakeholders, and enforcement agencies.

Gathering information, making inquiries and reaching an informed and robust decision can take time, and is subject to factors beyond the inspector's control.

The issue

There is an inherent and ongoing tension between the need to process licence applications in a timely manner to meet the needs of gambling operators, and the need for an accurate and robust decision on whether an applicant is a fit and proper person to conduct gambling.

Continued

Before the Gambling Act was introduced, those two objectives became blurred. Timeliness as a measure ranked alongside ensuring compliance, and it was monitored, reported on, and used to assess individual and organisational performance.

In this case, a focus on timeliness – one of a range of possible measures – distracted from what was important: ensuring compliance.

Since the passing of the Gambling Act, the main role of the licensing function has been to ensure that only fit and proper persons are licensed to conduct gambling operations. Timeliness is still important, but has less influence on decision making. It remains a measure that is reported, but it is part of a more balanced set of indicators of efficiency and effectiveness within Internal Affairs' overall accountability framework.

The focus is now on ensuring that the process for applicants is as efficient and easy as possible, while effectively meeting the objectives of the Gambling Act. The time taken to assess and decide on applications is explained and defended by reference to the overriding requirement to be satisfied of the applicant's suitability on a range of criteria before a licence is issued.

11.2.B   COMMUNICATING THE AGENCY'S COMPLIANCE STRATEGY TO THE REGULATED SECTOR

A proportionate, risk-based compliance strategy works most effectively when it has been fully and clearly communicated to the regulated sector.

The regulated sector needs to know what to expect from the agency in different situations. For its part, the agency wants the individuals and businesses it regulates to seek assistance and information from the agency on compliance issues – for example, about how to become fully compliant.

By explaining to the regulated sector how it is likely to respond in different categories of cases, and the factors it will take into account in deciding on a response, a compliance agency can build a more open and communicative relationship with the sector. Most of the regulated sector will feel able to interact more freely and effectively with the agency if they are made aware that the agency's resources will frequently be focused on facilitating compliance, and that its enforcement teeth will be directed at the minority who seek to obtain an advantage through deliberately refusing to comply.

By contrast, uncertainty about when and how a compliance agency will apply its enforcement powers may be an obstacle to achieving compliance. In the next case study, the Department of Labour found that uncertainty among businesses about its enforcement approach may have been a barrier to some businesses achieving compliance.

In considering this broad principle, however, compliance agencies are often confronted with complexity and issues that require judgement.

- In providing assistance and information to the regulated sector about regulatory requirements, an agency should take care that it does not shift into playing the role of a compliance consultant, as this would compromise its role as an assessor and enforcer of the sector's compliance with those requirements.

- Relationships and communication can be more complex when multiple agencies are dealing with a single regulated entity or sector. In those cases, it's necessary to ensure, as far as possible, that strategies and messages are consistent.

- The regulated sector is often not homogenous and a 'one size fits all' approach will not suffice – regulators may need to segment their sector based on differing characteristics, and tailor their messages and communication accordingly. This may include acknowledging the effects of cultural diversity in compliance relationships and the challenges of interacting with different cultures and values.

The Department of Labour's compliance strategy for health and safety

The Health and Safety in Employment Act 1992 is results-oriented legislation that gives flexibility and freedom to businesses in working out how they will go about complying with the Act.

However, a drawback to this open-endedness was some uncertainty among businesses about the Department of Labour's approach to non-compliance – this was revealed through consultation with businesses through the Government's 2006-07 Quality Regulation Review. Because of this uncertainty, it seems that some businesses were reluctant to approach DOL for information and guidance on how to comply.

To address that uncertainty, the Department published *Keeping work safe* (April 2009), a policy statement about its approach to enforcing the legislation. The intention was that by being more open and transparent about its approach, businesses that in good faith want to comply with the law would be more open to seeking the Department's help before someone is harmed. At the same time, those few businesses willing to risk health and safety for short-term advantage would be clear about what enforcement actions they would likely face.

Communicating the department's proportionate, risk-based approach

Keeping work safe explains that the Department of Labour will respond proportionately to the level of harm and potential for harm involved in any particular case of non-compliance, and will draw on a variety of enforcement tools.

In enforcing the Act it will always be fair, impartial and consistent – but consistency does not mean uniformity, it means taking a similar approach in similar circumstances to achieve similar ends. A key determinant of the Department's response in a particular case will be the judgement of its inspectors about how best to obtain compliance and improve performance; how the relevant business has responded will be an important factor in the inspector's decision.

The statement explained the Department of Labour's priorities, and the kinds of harm and the kinds of non-compliance it sees as posing the most significant risks – for example, serious harm or harm affecting more than one person, and non-compliance in systems for identifying and addressing hazards and in training and supervision.

Continued

Outlining the department's likely responses

The Department of Labour's policy statement outlined how it would be likely to respond in different types of cases –

'Our initial response to non-compliance might not involve the use of one of our statutory enforcement tools. For example, if non-compliance is of a minor nature and it does not immediately endanger any person, we might agree with the relevant duty-holder on ways for them to become compliant without having to use an enforcement tool.

'If non-compliance is of a serious nature, or it represents a likelihood of serious harm to any person, we are more likely to use an infringement notice or prosecution.

'Aside from the seriousness of the non-compliance, we will generally be supportive of duty-holders who demonstrate a genuine willingness to comply with the HSE Act. In some circumstances, for example, it may be appropriate for a duty-holder and inspector to negotiate an agreement on specific remedial actions and time frames required to bring about compliance with the HSE Act. However, where we believe a duty-holder is disingenuous, obstructive or has a previous record of similar non-compliance, we are likely to move quickly to stronger enforcement options.' (*Keeping work safe,* p 6)

For other published statements of compliance strategies, see:

- *Helping you get it right: Inland Revenue's compliance focus 2010-11*, available at –
http://www.ird.govt.nz/resources/3/c/3cffb480433082bf90f6f75d5f60e4be/our-compliance-focus-2010-11.pdf

- *Compliance guide: For users of the radio spectrum, for suppliers of electrical & radio products*, published by the Radio Spectrum Management division of the Ministry of Economic Development, available at –
www.rsm.govt.nz/cms/pdf-library/resource-library/publications/Compliance-guide

11.2.C   DOING BETTER THAN 'TICK BOX' COMPLIANCE

An open and transparent relationship with the regulated sector will enable a compliance agency to more effectively influence the attitudes and behaviour of those it regulates (see 3.3.C).

This will help the agency move beyond a simple 'tick box' compliance, where the regulated individuals and businesses are concerned only with doing the minimum necessary to achieve compliance.

The schematic below shows the continuum of responsiveness to regulation. Having a culture of compliance and trying to deal with the actual risks related to non-compliance is the place where regulators should be aiming to position the regulated sector.

Denial	to	Compliance	to	Engagement
(there is no problem here)		(with rules)		(where real risk gets addressed)

By getting the regulated sector to engage more fully and energetically in risk management, the agency will achieve full compliance more quickly and more cost effectively. Further, those who are regulated:

- will be more likely to achieve higher levels of protection against risks, beyond the minimum requirements

- will be better able to deal with new risks as they arise

- will be more likely to embrace an 'improvement culture'.

11.3   Defining roles and commitments

By articulating the roles, obligations, and commitments of the compliance agency and the regulated sector, the agency defines the **terms and conditions** of the relationship.

This makes the relationship more transparent and provides a framework for holding the two sides accountable for their contributions to it.

Entering into these sorts of agreements must be considered carefully. As with providing information and advice, the regulator must ensure that any charter or contract does not compromise decision-making scope and flexibility, and the ability to take action as required.

It is also important to consider the nature of the regulated sector and the extent to which it has moved along the continuum of responsiveness in the schematic above. Regulated entities that are at the denial or tick box compliance stages may not be mature enough to proactively engage with the regulator in this way. On the contrary, such agreements may become 'weapons' to be used against the regulator.

This section discusses two mechanisms for defining roles and commitments – a client service charter, and a contract or understanding with a specific regulated entity.

11.3.A   SERVICE CHARTER

A client service charter is a tool for defining roles and obligations.

Note that the service charter is useful to define the service aspects of the relationship, which are a subset of the overall regulatory relationship (see 11.1 and 11.2).

Case study
Inland Revenue's charter

The Department of Inland Revenue developed and published the following statement of its obligations to taxpayers. It is available at:
www.ird.govt.nz/aboutir/commitment/aboutir-charter.html

_____

Our commitment to the community: Inland Revenue charter

Inland Revenue collects money to pay for public services. We help people to meet their obligations and receive their entitlements. We work within the Inland Revenue Acts and other relevant laws, and our actions are consistent with the spirit of the Treaty of Waitangi.

How we will work with you

- We will be easy to deal with, prompt, courteous, and professional.
- We will follow through on what we say we will do.
- We will be responsive to individual, cultural, and special needs.
- The person you are dealing with will give you their name.
- We will value your feedback and use it to improve our services.

Continued

Reliable advice and information

- We will provide you with reliable and correct advice and information about your entitlements and obligations.

- We will assist you to get in touch with the right people for your needs.

- We will be well-trained and competent.

- We will keep looking for better ways to provide you with advice and information.

Confidentiality

- We will treat all information about you as private and confidential, and keep it secure. We will only use or disclose it in accordance with the law.

Consistency and equity

- We will apply the law consistently so everyone receives their entitlements and pays the right amount.

- We will take your particular circumstances into account as far as the law allows.

Your right to question us

- We will make it easy for you to question the information, advice, and service we give you.

- We will inform you about options available if you disagree with us, and we will work with you to reach an outcome quickly and simply.

For this Charter to work effectively, we rely on each customer to provide all relevant information when dealing with Inland Revenue.

11.3.B   ESTABLISHING A CONTRACT WITH THE AGENCY

It can be useful to manage the expectations of the regulated sector by promoting a 'balance' or 'contract' between a regulated entity and the compliance agency.

A 'contract' may specify that if you wish to have access to, for example, a licence, benefit, or exemption from an obligation, then you will need to meet specific obligations or be subject to compliance monitoring or other conditions.

11.4   Mechanisms for communicating with the regulated sector and other stakeholders

A compliance agency should draw on a range of mechanisms as appropriate – both traditional and non-traditional – for communicating with those it regulates, as well as with other stakeholders.

Seminars, presentations, workshops, and clinics are a means of providing information and education out in the communities, and of obtaining feedback or cooperation from the regulated sector and other stakeholders.

Other mechanisms include social-marketing campaigns, social-networking websites, and the internet in general.

11.4.A   THE ELECTRONIC INTERFACE: MAKING BEST USE OF THE WEB AND EMAIL

By maintaining a well-designed and up-to-date website, a compliance agency provides the regulated sector with convenient access to information, services, and mechanisms for complying (such as registration).

The website should include a clear and well-monitored 'contact us' feature, with the appropriate email addresses and phone numbers.

11.4.B   SINGLE POINT OF CONTACT

Many agencies have established a service centre, where a single phone number or email address acts as a contact point that provides internal redirection of complex enquiries to subject-matter experts. This can be particularly useful for compliance matters that are handled by multiple sections of an agency.

Assigning a particular staff member to manage the relationship with a particular regulated organisation (or group of organisations) may be useful if the relationship is complex and there will be frequent exchanges.

Case study

Reporting non-compliance

The Ministry of Fisheries operate two 0800 numbers. The first number is 0800 4 POACHER and is a publicly advertised number encouraging the public to report incidents to the Ministry that may involve non-compliance with fishing regulations. The number is answered directly by the Ministry's communications centre team, which dispatches Fisheries Officers immediately to deal with each incident. The 0800 number is publicised in all mainstream media, and is emblazoned on all Ministry signage, vehicles, websites, and publications. This 0800 line averages 500 calls per month.

The second line is 0800 4 RULES and is advertised in much the same way as the POACHER line. This line is specifically for fishers to call and seek advice on the fishing rules in the area in which they are fishing. All these calls from throughout the country are taken by a single community education manager, and this ensures that all advice provided to the callers is consistent.

11.4.C   CONSULTATION WITH THE REGULATED SECTOR

11.4.C.i   Consultation through formal standing bodies

A standing consultative body, with representatives from the compliance agency, the regulated sector, and other stakeholders, provides ongoing opportunities for the open exchange of information and opinions on issues relevant to the regulatory regime.

Ministry of Agriculture and Forestry (MAF)/Industry Cargo Consultative Committee

MAF's Industry Cargo Consultative Committee (MICCC) is the principal advisory forum for MAF and the cargo-handling and -importing industry to consult on all operational issues arising from the management of New Zealand's Cargo Clearance and Seaport Biosecurity Strategy. This forum meets four times a year.

The overall objectives of the MICCC are to assist MAF Biosecurity New Zealand (MAFBNZ – the MAF division that manages biosecurity) to improve the effectiveness and efficiency of the pre-border and border biosecurity controls, coordinate the functions of stakeholders, and facilitate the smooth flow of vessels and aircraft through ports and cargo/goods through New Zealand sea and airports.

The Consultative Committee acts as the peak industry consultative group between MAFBNZ and the cargo industry, providing an effective conduit for the exchange of information between them.

As well as MAFBNZ managers, the committee includes representation from the New Zealand Customs Service, the shipping industry, port management, and specific industry bodies such as the Customs Brokers & Freight Forwarders' Federation (NZ) Inc, the New Zealand Fresh Produce Importers' Association, and the Imported Motor Vehicle Association.

The committee promotes collaboration between MAFBNZ and the industry and provides both sides with learning opportunities. It also provides a means for MAFBNZ to effectively communicate cargo clearance initiatives and improvements in facilitating the movement of cargo, while maintaining and improving biosecurity entry measures.

11.4.C.ii Informal and ad hoc consultation

As specific compliance issues arise, ad hoc meetings, seminars and discussion groups will assist the agency to communicate with the regulated sector (or selected parts of it) and other stakeholders about those issues.

11.4.C.iii Legislative requirements to consult

Local government agencies are required under the Local Government Act 2002 to carry out a public consultation process as part of their long-term planning requirements (Long-Term Council Community Plans (LTCCPs).

Central government agencies may be subject to specific consultation requirements under legislation.

11.5 Handling complaints and challenges to agency decisions

It is important that a compliance agency has well-defined and transparent mechanisms for handling disputes with those it regulates.

Legislation will often require a formal external review or appeal process; however, for someone dissatisfied with an agency decision that will usually be an expensive and time-consuming means of challenging the agency. An agency should therefore consider implementing its own processes for:

- **internal review** of the merits of the decision

- **handling complaints** about the agency's decisions, processes, or staff behaviour.

These less formal methods can:

- provide cost-effective ways of resolving a range of compliance disputes, preventing them from escalating to costly litigation

- enhance the regulated sector's perception of the agency's processes as being fair and transparent

- identify deficiencies in the agency's processes and contribute to quality assurance.

11.5.A   INTERNAL REVIEWS OF AGENCY DECISIONS

In addition to any general right of appeal, compliance agencies should consider providing those it regulates with access to an internal review of the merits of a decision. The process should be transparent and the reviewer should be independent of the original decision maker.

This provides a quick and inexpensive means of challenging decisions if the person or business affected by the decision believes that a fundamental error was made or that the proper process wasn't followed.

11.5.B   COMPLAINTS HANDLING

Although a complaints process will not always be able to amend defective decisions, it may often be able to resolve matters to the complainant's satisfaction and also help the agency identify deficiencies in its processes or practices and take corrective action.

The appropriate complaints process will depend on the particular agency, including its size and resources. Larger agencies are more likely to be able to operate a separate complaints-handling unit – for example, Inland Revenue's Complaints Management Service (see: www.ird.govt.nz/contact-us/a-z/make-complaint) . Other agencies can consider channelling complaints through their existing operational managers.

An effective and credible complaints-handling process will include the following core features:

- **Accessibility** – The agency should publish details of its complaints-handling process, including how to make a complaint and to whom.

- **Confidentiality** – Complaints, and supporting evidence provided by the complainant, should be treated confidentially. This will make it more likely that the complaints process will in fact be used and be seen as credible.

- **Timeliness and commitment** – The agency should set service standards that define time frames for investigating and resolving complaints. This will indicate to the regulated sector the agency's commitment to processing complaints and to being held accountable for its performance.

- **Prioritisation** – Complaints should be prioritised as they are received, and sufficient resources should be allocated for investigating and resolving the highest priority complaints.

- **Notification** – The complainant should be formally notified of the agency's findings and any action it intends to take.

- **Improvement** – Lessons learned from investigating complaints should be incorporated into the agency's processes and practices.

BETTER PRACTICE CHECKLIST: RELATIONSHIP MANAGEMENT

☐ The agency's compliance strategy is based on clarity about the nature of its relationships with the regulated sector and with other stakeholders.

☐ If appropriate the expected outcomes of the relationship are defined and agreed between the agency and the other party.

☐ Where possible, relationships with the regulated sector are managed in an open, responsive manner that builds trust and understanding.

☐ The agency's compliance strategy has been fully and effectively communicated to the regulated sector.

☐ The agency has clearly stated its role, obligations, and commitments in its relationships with the regulated sector through a service charter or contract.

☐ Relationships are managed in a way that does not inhibit the agency's capacity and willingness – whether actual or perceived – to exercise its regulatory powers in the public interest.

☐ The agency monitors and reports on whether relationship outcomes are achieved.

☐ The methods the agency uses to communicate with the regulated sector are cost-effective, both for the agency and those whom it regulates.

☐ If available resources permit it, the agency provides mechanisms for handling disputes about the agency's activities and performance. Examples include internal review of the agency's compliance decisions and a complaints-handling service.

ADDITIONAL GUIDANCE MATERIAL

- Best practice information on resource management issues – Quality Planning website: www.qp.org.nz/

- Office of the Auditor-General. 2007. *Turning principles into action: A guide for local authorities on decision-making and consultation*,: www.oag.govt.nz/2007/decision-making

- International Association for Public Participation case studies of best practice in community engagement –: http://www.iap2.org.au/news/id/54

CH 12   CONTROLLING ENTRY: THE 'GATEKEEPER' ROLE

This chapter discusses:

- how the gatekeeper role can be used to achieve and monitor compliance (12.1)

- designing an application form and guidance material (12.2)

- assessing compliance with entry requirements (12.3)

- developing the decision-making process and the evaluative criteria to be used, and determining whether a person or organisation should be prohibited (12.4).

This chapter includes material adapted from:

- *Best practice guidelines for departments responsible for regulatory processes with significant commercial implications,* State Services Commission, 2004

- chapter 6 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007

12.1   Introduction

A core function of many compliance agencies will be to determine whether a given business or individual will have access to a particular market or field of commercial activity, or be given approval to carry out specific activities within a particular commercial field. Whether or not a compliance agency has such a role is determined as part of the design of the laws and regulation it is responsible for implementing.

Such functions can be either positive or negative. Positive regimes can include, for example:

- allocating licences and permits (such as mining, radio spectrum)

- allocating quotas (such as fishing)

- granting concessions to carry out commercial activities (such as in the conservation estate)

- granting clearance for particular cargo shipments to enter the country.

Negative regimes can include, for example:

- powers to prohibit activity by a person (such as insolvency practitioners and company directors).

More generally, other agencies may be engaged in granting permission to individuals or organisations to do certain things, commercial or otherwise – for example, issuing passports or driver licences.

12.1.A   HARNESSING THE GATEKEEPER ROLE TO ACHIEVE COMPLIANCE

This role – sometimes described as the gatekeeper role – can be a powerful tool for ensuring compliance in the agency's particular regulatory environment. The agency will be able to:

- ensure that all entrants to a market or activity are fully compliant

- use the entry process to communicate fully to the applicant its duties and the agency's expectations

- monitor ongoing compliance with any restrictions or conditions attached to a licence or other grant of approval, and with relevant statutory requirements and policy objectives

- use banning or prohibition as one of its compliance tools where necessary (this is a significant penalty).

The management framework most appropriate for controlling entry will depend first of all on the way the relevant laws and regulations specify the gatekeeping requirements; and then on the agency's overall compliance strategy and a range of specific factors, including:

- the commercial significance and monetary value of any property right that is involved

- the number of interested parties

- the nature and level of the public interest.

The agency should adopt minimum process standards, and apply them consistently.

The best-practice guidelines set out in this chapter can be adapted to the agency's particular context.

12.2 The application form and accompanying guidance material

12.2.A DESIGNING THE APPLICATION FORM

An effective application form should be designed so that it directs and assists the applicant to provide the information and documentation necessary for beginning the assessment process.

The form should:

- include all information required to make a decision on the application

- set out the applicant's obligations, including an acknowledgement that they understand these obligations.

The form may also include a release to use information provided in the application for other purposes or for sharing with other agencies.

12.2.B ELECTRONIC APPLICATIONS

An electronic application system can increase the efficiency of the process, in the interest of both the compliance agency and the applicants, by reducing:

- the volume of paper

- the time required for applicants to prepare and submit their application

- turn-around times for processing applications

- the frequency of errors.

Electronic application systems will need to comply with security and privacy requirements.

12.2.C   GUIDING AND ASSISTING APPLICANTS

12.2.C.i Providing guidance material

Providing applicants with effective guidance material will increase the transparency of the application process. The material should:

- explain the application process

- outline the responsibilities of both the applicant and the agency

- set out timelines for key steps in the application process.

Practical examples of the type of information required may also assist the applicant to complete the application correctly.

Guidance material should be:

- comprehensive

- written in plain English

- readily available to the regulated sector, including on the agency's website

- regularly reviewed and updated to make sure it incorporates any changes to the legislation or to the application process.

12.2.C.ii Other means of guidance and assistance

Maintaining convenient channels of communication between the applicant and the agency will also help the applicant complete their application – for example:

- through having a single point of contact at the agency who deals with any requests from the applicant for information and assistance

- through providing a helpline if there are large numbers of applications.

Case study

Online applications for radio spectrum licences

The Radio Spectrum Management group (RSM), which is part of the Ministry of Economic Development, administers the radio spectrum under the Radiocommunications Act 1989 and the Radiocommunications Regulations 2001. The group's responsibilities include radio spectrum licensing, registration of licences, investigating interference on the radio spectrum, and compliance with licence conditions.

RSM operates a full range of online services for licensing matters – called 'SMART', for Spectrum Management and Registration Technology – on its website at www.rsm.govt.nz. Here, users of the site can:

- apply for licences
- modify, renew, or cancel licences
- pay licence fees
- examine the register of radio frequencies.

The SMART website provides a full series of training guides for using the online services, including applying for radio spectrum licences. These give step-by-step instructions, and include screenshots and 'tips' in the margins.

12.3 Assessing compliance with entry requirements

12.3.A FEATURES OF PRE-ENTRY ASSESSMENTS

A compliance assessment carried out as part of the approval process for access to the relevant market or activity may be significantly different from compliance assessments carried out after entry (which are discussed in chapter 13).

For example, pre-entry assessments may:

- require **significant research** by the agency to verify claims made and evidence submitted by the applicant because the applicant lacks practical operational data to support its claims

- be completed **in phases**, with non-operational requirements assessed first, followed by operational requirements

- rely on **interviews**, rather than performance information, to assess the applicant's understanding of, and commitment to, compliance obligations

- be **iterative**, particularly if the initial assessment reveals that the applicant has a poor understanding of what is acceptable compliance

- be **resource-intensive**, requiring a multi-disciplinary team working over a long period to assess compliance with all regulatory requirements.

The agency should ensure that it has strategies for managing conflicts of interest, regulatory capture, and other risks in relation to agency staff carrying out assessments. Relevant strategies are discussed in chapter 8 of this guide.

12.3.B   SELF-ASSESSMENT OF ENTRY REQUIREMENTS

Under some regulatory regimes, the barrier to entry may consist of requirements or conditions that the regulated entity self-assesses or self-declares, with no assessment made by the compliance agency unless an audit is conducted further downstream – for example, Radio Spectrum Management's radio licences and supplier declarations work in this manner.

12.4   The decision to approve or deny entry, or prohibit activity

12.4.A   DESIGNING THE DECISION-MAKING PROCESS

The process for determining whether a regulated party is to be permitted access to a market or activity, or is to be prohibited from such access, should be **well-defined** and **transparent**. This is to ensure that all applicants are treated fairly and consistently. Failing to do so may:

- lay the decision open to a successful challenge

- create a perception that the agency's processes are unfair and thereby damage the agency's credibility

- lead to poor decisions and undesirable outcomes.

Elements of a sound decision-making process include the following:

- **Complying with the law and natural justice** – The process should comply with any authorising legislation and meet its purpose, and also

comply with the principles of natural justice. The process should be reviewed by the agency's lawyers before it is implemented.

- **Equal treatment** – Applicants should all be treated equally, particularly in relation to access to and disclosure of information. This is especially important when the process involves competition between several participants.

- **Tender/auction principles** – When the process is a competitive one, the agency should be guided by general tender/auction principles. (The Audit Office and the Treasury provide best-practice guidelines in this area: see additional guidance material at the end of this chapter.)

- **Statement of principles and policies** – To achieve consistency, the agency should clearly state the principles and policies to be applied by decision makers – particularly if decisions will be made in different regional or local offices, or if several decision-makers will be involved. However, the agency should also ensure that policies aren't applied as an unlawful fetter on the decision maker's discretion (unless the legislation permits this); fettering discretion is a potential ground for overturning the decision on judicial review.

- **Peer review** – A peer review of the decision and the process, carried out before the applicant is notified, will increase the confidence of both the applicant and the agency that the established procedures were followed and that the information on which the decision was based was complete and of the highest quality.

- **Challenging decisions through internal review** – Access to an internal review of the decision to approve or deny entry will give the applicant a relatively quick and inexpensive means of challenging the decision. It will also contribute to the agency's quality-assurance system.

- **Quality-assurance and consistency** – The agency should have quality-assurance systems for reviewing all decisions to monitor the ongoing quality and consistency of decision making.

> *Examples*
>
> **Monitoring consistency of decisions**
>
> • In order to monitor consistency, Inland Revenue has a number of **National Consistency Panels** for tax matters to review the consistency of practices across regional offices.
>
> • The Ministry of Fisheries has **centralised accountability** for processing all applications to gain authority to harvest fisheries resources. In addition, a national standards team has been established to set standards and guidelines for regulatory processes and monitor compliance with those guidelines.

12.4.B THE DECISION-MAKING CRITERIA

The agency's criteria for approving or denying entry should be **explicit, clear, and transparent**.

In developing the criteria, the agency should consider the following matters:

- **Consistency with law and policy** – The criteria should be consistent with relevant legislation, policy statements, and any international agreements.

- **Documented and accessible** – The criteria should be well-documented and made available to all interested parties.

- **Notifying changes** – Any changes in the criteria or the processes used should be notified to all interested parties, and, if appropriate, the agency should consult with all parties before deciding on changes.

- **Weightings of different factors** – To ensure that the criteria are transparent, the agency should indicate the weight to be given to particular factors. It should document this, including, if appropriate, the reasoning for its ranking of the different criteria.

12.4.C THE DECISION MAKERS AND THE DECISION

The conduct and capability of the people making the decisions is critical to the agency's effectiveness and credibility. Decision makers must act, and be seen to act, fairly and without fear or favour.

12.4.C.i The decision maker's capabilities

The decision-maker should have the appropriate experience, qualifications, and competence, and be trained in decision-making and problem-solving techniques.

Decision makers should have an understanding of administrative-law requirements, to ensure that the decision will withstand judicial review. The requirements include that the decision maker must:

- be free of bias, prejudice, or improper motive

- take into account all relevant considerations and ignore irrelevant ones.

The grounds of judicial review are dealt with more fully in 7.2.D.

The decision maker should also have an understanding of the principles in the Public Service Code of Conduct: see 8.5.A.

12.4.C.ii Documenting the decision

Decision-makers should ensure that their decision is fully documented. They should set out the reasons for the decision, and should link it to the evaluation criteria and to legal requirements.

Fully documenting the decision can provide a successful applicant with valuable guidance for improving the level of its compliance, and it can help an unsuccessful applicant decide whether to persist and make another application.

For the agency, fully documenting the decision will also be useful:

- for informing future decisions

- for defending the decision if there is a formal appeal

- for determining the timing of, and priorities for, future monitoring of a successful applicant's compliance.

12.4.C.iii Who is involved in the decision

The decision maker should be clearly identifiable.

It may be desirable to:

- have more than one decision maker

- keep the decision making separate from the evaluation process

- involve a party who is neutral to the process in the decision making.

12.4.C.iv Opportunity for debriefing the applicant

Applicants should be given the opportunity to request a debriefing of the decision.

BETTER PRACTICE CHECKLIST: CONTROLLING ENTRY

The application

☐ The agency has a well-designed application form that directs the applicant to supply the necessary information and evidence and that states the applicant's obligations.

☐ Applicants are provided with clear and comprehensive guidance on how to prepare their application, and informed of the time frames for the steps involved in processing the application.

☐ Electronically-based applications comply with security and privacy requirements.

☐ Where possible, the staff who assist and guide the applicant in preparing their application do not also assess the application.

Assessing compliance with entry requirements

☐ The assessment is risk based, and takes account of the applicant's level of experience in the regulated sector. For example, a multi-stage assessment approach may be appropriate for a compliance agency to confirm that the applicant meets all regulatory requirements.

☐ The agency has strategies for managing conflicts of interest, regulatory capture, and other risks.

The decision to approve or deny entry

☐ The decision-making process should:

- comply with the law and natural justice

- treat all applicants equally

- follow general tender/auction principles

- be fully documented and understood by the applicant, including a clear statement of the principles and policies to be applied.

☐ Where permitted, the decision-maker has the option of imposing restrictions on entry approval in order to manage risks identified by the compliance assessment, and applicants are made aware of these powers.

☐ The decision-making process is subjected to peer review to confirm that established procedures were followed and that the information provided to the decision maker was complete and of the highest quality.

☐ The applicant is provided with a fully documented decision that includes the reasons for the decision.

☐ The agency provides dissatisfied applicants with an internal review process or some other process for handling disagreements.

ADDITIONAL GUIDANCE MATERIAL

- State Services Commission, 2004. *Best practice guidelines for departments responsible for regulatory processes with significant commercial implications* (prepared by a chief executive reference group convened by the Ministry of Economic Development).

CH 13 MONITORING AND ASSESSING COMPLIANCE

This chapter discusses:

- examples of sources of information on compliance (13.1)

- the benefits of a risk-based monitoring strategy (13.2)

- developing the monitoring strategy (13.3)

- developing and implementing a monitoring schedule (13.4)

- planning a specific monitoring activity (13.5)

- making decisions about compliance status (13.6).

> This chapter includes material adapted from Chapter 7 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007.

13.1 Information on compliance

An agency will develop its understanding of levels of compliance in its sector through a variety of means, including:

- **Complaints** – complaint information can help to inform an agency about developing problems in the area it is responsible for

- **Media information** – by identifying and highlighting new or developing issues and problems, media articles can provide useful input into an agency's understanding of the general compliance situation

- **Competitor information** – information from market participants about their competitors can signal potential compliance problems; this can be in the form or complaints or information gathered through general 'engagement' activity.

Sources of information such as these should be actively 'mined' as part of monitoring and assessing compliance, while also taking appropriate care about the accuracy and integrity of information.

13.2 Benefits of a risk-based approach to monitoring and assessment

For a compliance agency, a systematic, risk-based programme of activities for assessing compliance is a means of:

- monitoring compliance in a cost-effective manner

- targeting its resources at the highest-priority risks

- responding proactively to changing and emerging risks

- promoting sound practices and positive attitudes towards compliance among the regulated sector

- strengthening its relationships with the regulated sector.

13.3 Developing an effective risk-based monitoring strategy

The appropriate monitoring strategy for a compliance agency will depend on:

- the compliance risks the agency has identified, and

- the resources available to the agency for its monitoring activities.

A risk-management framework will provide the agency with a means of determining the appropriate balance: see chapter 5.

The agency should seek, where possible, to minimise the cost burden its monitoring activities will impose on those being regulated, provided this does not limit the agency's ability to monitor compliance effectively.

It may be appropriate for two or more agencies to collaborate in monitoring activities where they have shared outcomes. For more on cross-agency work, see 14.8.

> *Case study*
>
> **Radio spectrum management: Encouraging monitoring by interested parties**
>
> A monitoring strategy may also be designed to encourage external monitoring and assessment by interested or affected parties.
>
> For example, RSM's auditing activities receive significant voluntary input from licensees or suppliers who have an interest in seeing a level playing field for all participants. In this way, a compliance strategy can encourage and obtain useful support from industry involvement in the monitoring processes (while at the same time taking due care against industry 'capture').

13.3.A WHAT THE MONITORING STRATEGY SHOULD COVER

A monitoring strategy will define:

- the types of activities the compliance agency will carry out to assess whether those it regulates are compliant

- how frequently these activities will be carried out

- who will carry them out

- how the activities will be reported.

13.3.B DOCUMENTING THE MONITORING STRATEGY

Documenting the monitoring strategy will increase its transparency and the agency's accountability, providing stakeholders with assurance that the agency is managing compliance risks effectively.

The documenting of the strategy should include:

- the reasons for choosing certain types of monitoring activities

- the reason for choosing a particular frequency of monitoring

- the compliance risk assessments that underlie these decisions.

13.3.C REVIEWING THE MONITORING STRATEGY

A compliance agency should systematically review and update its monitoring strategy to ensure that it reflects any changes in compliance risks and remains effective.

Risk-based monitoring of radio spectrum licences

The Radio Spectrum Management group (RSM – part of the Ministry of Economic Development) administers the radio spectrum under the Radiocommunications Act 1989. The group's responsibilities include radio spectrum licensing and administering the Register of Radio Frequencies, which is the electronic database of licensed frequencies used in New Zealand.

Radio licence audits are a core element of RSM's risk-based compliance assessment strategy, and a proactive way of maintaining the integrity of the Register of Radio Frequencies and promoting compliance. The auditing programme helps minimise the likelihood of interference on the radio spectrum and the costs associated with legal compliance actions.

Targeting high risk licences for audits

There is no initial assessment for entry under the radio-licensing system, and therefore only a small proportion of transmitters are able to be checked during their active life. RSM audits target 'high risk' licences or classes of licences – that is, those with an increased potential to cause interference with other radio services.

There are a number of factors that may result in a licence or licence class being considered high-risk – including, for example, high power, a large coverage area, previous non-compliance, and previous interference issues. RSM may also carry out an audit where a complaint has been made.

RSM also carries out random licence audits.

The audit process

Where practicable, RSM carries out audits using over-the-air (radiated) measurements. Access to the transmitter site may be necessary in some cases.

If a risk to radiocommunications is identified, the radio inspector may carry out an immediate 'spot' audit. These are designed to mitigate interference with the radio spectrum, while optimising the use of RSM's compliance resources and maintaining the integrity of the radio spectrum compliance framework.

RSM's audit checklist for radio spectrum licence holders

RSM's *Compliance guide* provides licence holders with the following checklist, which not only itemises the main aspects of compliance but also deals with practical matters to do with carrying out the audit, such as site access:

Continued

'If you are asked to provide access for an audit, your checklist should include:

- Do you have a current licence?

- Is the transmitter located at the stipulated licensed location?

- Are all licence conditions complied with, including frequency, power, bandwidth, emission type, antenna polarisation, radiation pattern, antenna directivity (if applicable), and number of sets?

- Is site access available?

- Are there any safety issues to be considered?

- Have any other affected parties (site owner, co-users) been notified?'

– From *Compliance guide: For users of the radio spectrum, for suppliers of electrical & radio products* (page 19), available at – www.rsm.govt.nz/cms/pdf-library/resource-library/publications/Compliance-guide

13.3.D TYPES OF MONITORING ACTIVITIES

Different types of monitoring activities may include:

- assessment of complaint 'trend' information

- general information gathering and analysis

- desktop audits

- site inspections

- use of samples, photographs, or surveys

- self-monitoring and reporting by the compliance target (see 13.3.G).

Different types of activities are appropriate for different aspects of compliance. For example, desktop audits would not be appropriate for monitoring manufacturing standards; in those cases an on-site inspection would be necessary.

> *Examples*
>
> **LINZ monitoring activities**
>
> Land Information New Zealand (LINZ) is responsible for cadastral survey work performed by licensed cadastral surveyors under the Cadastral Rules 2010. In addition to in-house checks undertaken when a new cadastral survey dataset is submitted, LINZ auditors undertake field survey work as part of the annual regulatory compliance assurance plan, to ensure that what is on the ground matches with the records and data submitted as part of a new cadastral survey dataset. A risk profile of surveyors based on quality records is used to target resources at those with higher risk profiles.
>
> A further example is the monitoring of Landonline land-title transactions registered by automated business rules. The system generates a number of reports and exception reports, and the checks and balances regime is also supported by audits of law firms that submit these types of transactions.

13.3.E   FREQUENCY OF MONITORING

The appropriate frequency for monitoring activities will depend on:

- what it is that's being regulated (for example, particular types of goods or services)

- the potential consequences of non-compliance

- the operating environment for the particular industry or sector, and related technological issues

- the compliance history of the particular individual or organisation being monitored.

13.3.F   OUTSOURCING THE MONITORING PROGRAMME

The compliance agency will need to decide whether it carries out its monitoring and assessment programme itself or engages others to do this, such as another compliance agency or a private-sector organisation.

Outsourcing the monitoring programme may be appropriate when:

- an assessment needs to be carried out in an area where the agency does not have staff or the necessary authority (for example, assessing manufacturing standards in another country)

- the agency does not have the capability to assess compliance effectively

- the agency does have that capability, but it would be more cost-effective to outsource the activities.

For more on outsourcing compliance activities, see 10.2.B.

13.3.G SELF-MONITORING

A compliance agency may have statutory authority to require a compliance target to carry out self-monitoring and to make regular reports to the agency.

Example

Self-monitoring as a condition of resource consents

The Resource Management Act 1991 (section 108) empowers local councils to impose, as a condition of a resource consent, that the consent-holder carries out its own self-monitoring programme at its own expense, including reporting back to the council.

This can include (see section 108(4)) taking measurements and samples, and carrying out surveys, inspections, and other tests. Allowing self-monitoring by consent holders will depend on a number of factors, including the compliance record of the consent holder, the availability of the necessary monitoring skills and resources, and having appropriate reporting and audit processes in place.

For example, Taranaki Regional Council uses sources apart from its own monitoring to gather specific information about the activities of resource consent holders, as well as general information about the state of the environment. Some companies may already be carrying out monitoring for their own purposes, linked to their environmental policies. Companies that are able and willing to provide their own monitoring information, contribute to the council's total monitoring programme, and may enable the council to reduce its overall monitoring costs. The council retains an auditing role to ensure that the quality of the information supplied is acceptable.

For more information see:

www.trc.govt.nz/Auditing-company-data/

www.qualityplanning.org.nz/monitoring/comply-complaint-monitor.php#whomonitoring

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13.4   Developing and implementing a schedule of monitoring activities

The agency's monitoring schedule will set out the monitoring activities to be carried out over a specific period, such as a month or year. The types of activities – such as on-site inspections and desk audits – will be determined under the criteria set out in the monitoring strategy.

13.4.A   WHO WILL BE MONITORED

In determining which individuals or businesses from the regulated sector to include in its monitoring schedule, the agency should consider including those:

- due for an assessment based on the frequency standard set out in the monitoring strategy

- for whom an assessment would be appropriate because changed circumstances since the last assessment mean that non-compliance is now more likely

- that are overdue for an assessment because of a decision to postpone made in the last schedule period

- selected for a random inspection or audit.

13.4.B   BUILDING FLEXIBILITY INTO THE MONITORING SCHEDULE

A monitoring schedule is an important risk-management tool, and to function effectively in a potentially shifting environment it needs to allow for some flexibility. The agency should monitor the implementation of the schedule to make sure it continues to fit the agency's compliance risk priorities.

To be able to respond to changing compliance risks during the schedule period, the scheduling process needs to be integrated with the agency's risk-monitoring process, so that the managers of the schedule receive timely warning of changing risks. The scheduling process needs to be designed so that activities can be added, removed, or modified accordingly.

The schedule also needs to be designed to allow for changes in compliance risks that have occurred since the agency developed its monitoring strategy.

13.4.C BETTER-PRACTICE GUIDELINES FOR MANAGING THE MONITORING SCHEDULE

Monitoring should cover the following.

- **Regular reporting** – The schedule managers should provide regular progress reports to the agency's senior managers on the implementation of the schedule.

- **Addressing slippage** – If the agency falls behind in its monitoring programme, the reasons for this should be identified, and management should be provided with options for addressing the slippage.

- **Authority for changes** – The staff with authority to change the schedule should be clearly identified.

- **Keeping resources in reserve** – If possible, a reserve of monitoring resources should be included in the funding plan for the schedule.

- **Identifying lower priorities** – The lower-priority activities in the schedule should be identified so that resources can be quickly shifted from them if new assessment priorities emerge.

- **Assessing changing risks** – Resources should be reallocated from scheduled to new activities only after a comprehensive assessment of the compliance risks at the time of the proposed change and of the consequences of changing the schedule.

- **Documenting changes** – Changes to the schedule should be fully documented, including an assessment of the risk of not carrying out the programme as scheduled.

13.4.D INTERIM MONITORING STRATEGIES TO ADDRESS SIGNIFICANT NEW RISKS

If compliance risks suddenly increase to the extent that the agency does not have the resources to carry out all the monitoring activities that are necessary, the agency may need to design and implement a special interim monitoring strategy. The interim strategy will apply until the environment returns to normal or, if the changed risks will persist indefinitely, the agency adopts a new monitoring strategy.

The interim strategy should fully document the compliance risks that cannot be monitored under the established monitoring strategy, and identify the level of monitoring that will provide some degree of assurance that compliance requirements are being met.

13.5　Planning a monitoring activity

13.5.A　KEY ELEMENTS TO BE IDENTIFIED IN THE PLANNING PROCESS

The planning of a particular monitoring activity should identify:

- the activity's objective

- the priority compliance requirements that are to be assessed

- the resources required to carry out the activity

- a detailed timetable, which includes the resources to be allotted to each assessment task.

13.5.B　INFORMATION RELEVANT TO THE PLANNING PROCESS

During the planning of the activity, the following information should be researched:

- the regulated entity's compliance history, including reports from previous monitoring

- the results of investigations into any complaints or any accidents or other adverse events

- the regulated entity's market-performance data since the last compliance assessment

- trends in non-compliance in the regulated sector and, in particular, among those in the sector with similar characteristics to the regulated entity.

13.5.C　DOCUMENTING PLANNING DECISIONS

Decisions made in planning the monitoring activity should be properly documented.

If it's decided that only some aspects of the regulated entity's operations will be assessed in detail, it will be particularly important to document the reasons for that decision, in order to provide assurance that the activity is targeting the priority compliance requirements. This will also assist in planning future monitoring of that particular entity.

Case study

Internal Affairs auditing of gambling societies:
Shifting to a systemic, team-based approach

The Department of Internal Affairs' Gambling Compliance Group has adopted a 'virtual team' concept for carrying out compliance audits of gambling societies. This applies a strategic approach to auditing, where for each audit a special team is convened from the group's different units.

The Gambling Compliance Group had concluded that compliance audits were not as effective and decisions were often not as well informed and timely as they could be, because they were being undertaken by the audit team without proper linkages and alignment with other compliance functions. There were gaps in information and delays in finalising audits.

Under the new strategic approach, resources for each audit are planned and scheduled in advance from across the business. The roles and responsibilities of team members at each stage in the audit process are made clear up front. The virtual team consists of people with relevant knowledge and experience of the different elements in the audit process, from scoping the audit, to publishing the final audit report. Besides the audit team, each virtual team includes members of the Operational Policy, Licensing, Intelligence, and Legal Services Units, plus other units as appropriate.

The audit itself is timed with the licence renewal process so that information from the audit can used as input in licensing decisions. Previously, audits and the processing of licences were not synchronised.

The formalised team approach has improved the quality and timeliness of audits. It has also led to greater collaboration and information sharing to assist other compliance activities, and greater understanding of compliance issues generally across the business.

The key thing the group learned was to consider the various activities undertaken to ensure compliance in a systemic, rather than a functional sense, and to plan and allocate resources accordingly to get the most effective and efficient result.

13.6 Deciding compliance status

13.6.A THE IMPORTANCE OF TIMELY DECISION MAKING

The decision whether or not the individual or business in question is compliant needs to be made in a timely manner so that the agency can take prompt action if it does find non-compliance. Timely decision-making will also increase the confidence of the regulated sector in the agency and the regulatory regime.

To assist the agency to make timely decisions, its procedures should include **timelines** for:

- writing up the findings of the monitoring activity

- documenting the compliance assessment

- finalising the decision on the regulated entity's compliance status and notifying it of the decision.

13.6.B ENHANCING CONFIDENCE IN THE AGENCY'S COMPLIANCE ASSESSMENTS

If the agency finds that the regulated entity is non-compliant, the extent to which the entity accepts the decision and moves promptly to full compliance will be influenced by whether it sees the agency's decision as being fair and reasonable.

The regulated sector and other stakeholders will have greater confidence that the agency's compliance assessments are fair and reasonable if:

- the agency can demonstrate that its decisions are consistent, through the agency's use of quality-assurance practices (such as peer review), assessment procedures that reduce the scope for subjectivity, and a final review by the manager who has decision-making authority

- the assessment and decision-making processes are well defined and understood by the regulated entity

- the decision is timely and well documented, with the reasons and supporting evidence being included in the documented decision

- the regulated entity is formally notified of the decision and given the reasons for it, so that it gets useful feedback on its performance.

13.7 Ensuring that detection is a deterrent

An effective compliance regime needs to provide the regulated sector with incentives to comply voluntarily. If the cost of remedying non-compliance after the agency detects it is the same or less than the cost of a voluntary compliance

programme, much of the regulated sector may be happy to await detection by the agency – in other words, to use the agency's monitoring programme as a convenient quality-control programme.

Incentives to comply voluntarily can include:

- additional financial penalties

- infringement fines

- restrictions on operating a licensed activity

- restrictions on access to a market

- social stigma (naming and shaming).

Case study

Infringement fines as an incentive for voluntary compliance by radio spectrum licence-holders

In 2001, an infringement offence penalty programme was introduced for transmitters not complying with licence requirements.

Until then, prosecution was the only tool available to Radio Spectrum Management to provide a disincentive to non-compliance, a measure that would have been disproportionate in most cases and that was therefore seldom used. As a result, many licence-holders chose to look on RSM as a quality-control service, as it cost them less to remedy the non-compliance found by RSM than it would to set up their own quality systems to ensure they complied.

The result was an industry that was happy to be audited and to comply as required, but that did not build the capability to evaluate its own compliance or to see a need to do so.

The infringement fine programme provided Radio Spectrum Management with an important compliance tool, enabling it to impose a proportionate response to non-compliance and an effective incentive for voluntary compliance across the regulated sector, by imposing an added cost for non-compliance.

BETTER PRACTICE CHECKLIST: MONITORING AND ASSESSING COMPLIANCE

Developing a monitoring strategy

☐ The agency's monitoring strategy is risk based.

☐ The monitoring strategy identifies the types of monitoring activities, their frequency, and who will conduct them, consistent with available resources and an acceptable level of residual risk.

☐ The agency takes into account the costs its monitoring strategy will impose on the regulated sector.

☐ The monitoring strategy is fully documented, including an assessment of the compliance risks in the regulated sector and the agency's reasons for choosing particular approaches to address them.

☐ The agency systematically reviews compliance risks, and reviews and adjusts its monitoring strategy as necessary.

☐ Compliance targets have incentives, whether financial or otherwise, to comply voluntarily, rather than waiting for detection under the compliance agency's monitoring programme.

Managing the monitoring schedule

☐ Monitoring activities are scheduled and implemented in accordance with the monitoring strategy.

☐ The schedule is implemented flexibly so that unscheduled activities can be carried out as necessary to address new or changed compliance risks that emerge during the period of the schedule.

☐ The agency monitors the implementing of the schedule, and reports on it to senior management. Where slippage occurs, an action plan to remedy the slippage is put forward to senior management for it to endorse.

☐ Any changes to the schedule are based on a comprehensive assessment of the compliance risks at the time of the proposed change and the consequences of not following the original schedule.

☐ Any changes made to the schedule are fully documented.

Planning a monitoring activity

☐ Individual monitoring activities are planned in detail to ensure that they are targeted at the high-priority risks and that they provide reliable evidence of levels of compliance.

Deciding compliance status

☐ The decision on the level of compliance is made in a timely manner so that the agency can take prompt action if it finds that the regulated entity isn't compliant.

☐ The assessment and the decisions resulting from it are documented and provided to the regulated entity.

☐ Appropriate documentation related to the decision is also made available to stakeholders if they request it.

☐ Compliance assessments and resulting decisions are subjected to quality-assurance processes in order to:

- ensure they are lawful

- confirm they have followed established procedures

- improve the consistency of assessments and decision making over time and across the agency.

ADDITIONAL GUIDANCE MATERIAL

- Sparrow, M. 2000. *The Regulatory craft: Controlling risks, solving problems, and managing compliance*, Brookings Institution Press, Washington DC.

CH 14   ADDRESSING NON-COMPLIANCE

This chapter discusses:

- the benefits of a proportionate, risk-based approach to responding to non-compliance (14.1)

- achieving compliance in most cases through using lower-level, less interventionist measures (14.2)

- addressing serious risks and deliberate non-compliance (14.3)

- returning a regulated entity to compliance while effectively managing the risks posed by the continuing non-compliance (14.4)

- addressing patterns or clusters of non-compliance incidents (14.5)

- the life cycle of project-based problem solving (14.6)

- organisational infrastructure to manage and support project-based work (14.7)

- the benefits and disadvantages of coordinating activities between agencies to achieve results (14.8)

- characteristics of successful joint work (14.9).

This chapter includes material adapted from chapter 8 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007.

14.1   A proportionate, risk-based compliance strategy

A successful and cost-effective compliance strategy will draw on a range of options for responding to non-compliance. Responses can range from encouraging and assisting an individual or business to comply where the risk presented is minor, to revoking an operating licence and bringing criminal or civil court action in cases of serious risk and deliberate non-compliance.

Having a toolkit of graduated responses enables the compliance agency to impose a response that is **proportionate to the risk** posed by the non-compliance.

This flexibility also enables the compliance agency:

- to target the most serious and highest-priority risks presented by the non-compliance

- to minimise the costs associated with the agency's response

- to take account of the willingness and capacity of the non-compliant entity to return to compliance

- to signal to the non-compliant entity concerned, and to the wider regulated sector, the level of seriousness with which the agency views the non-compliance and the risks it poses

- to adjust its response in an individual case by escalating or de-escalating the level of its approach, as necessary.

Case study

Inland Revenue's approach to managing risks

The Inland Revenue Department's approach to managing compliance risks involves several key principles:

- use evidence-based information to identify risks to compliance
- commit resources to address priority risks
- address risks using a range of coordinated responses (often cross-functional)
- address the causes of non-compliance
- measure and learn from actions and outcomes.

Figure 9 below is the Department's Compliance Management Cycle (CMC), which is based on the risk-management process adopted by the Organisation for Economic Co-operation and Development (OECD).[8]

Table 5 below sets out the OECD principles adopted for each stage of the CMC.

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[8] OECD. 2004. Guidance note: *Compliance risk management: Managing and improving tax compliance.* Available at: www.oecd.org/dataoecd/21/55/37212610.pdf

Figure 9 – Inland Revenue's Compliance Management Cycle (CMC)

1. Establish context

2. Identify and analyse risks

3. Assess and prioritise risks

4. Analyse behaviour and select intervention

5. Monitor and evaluate outcomes

Intelligence
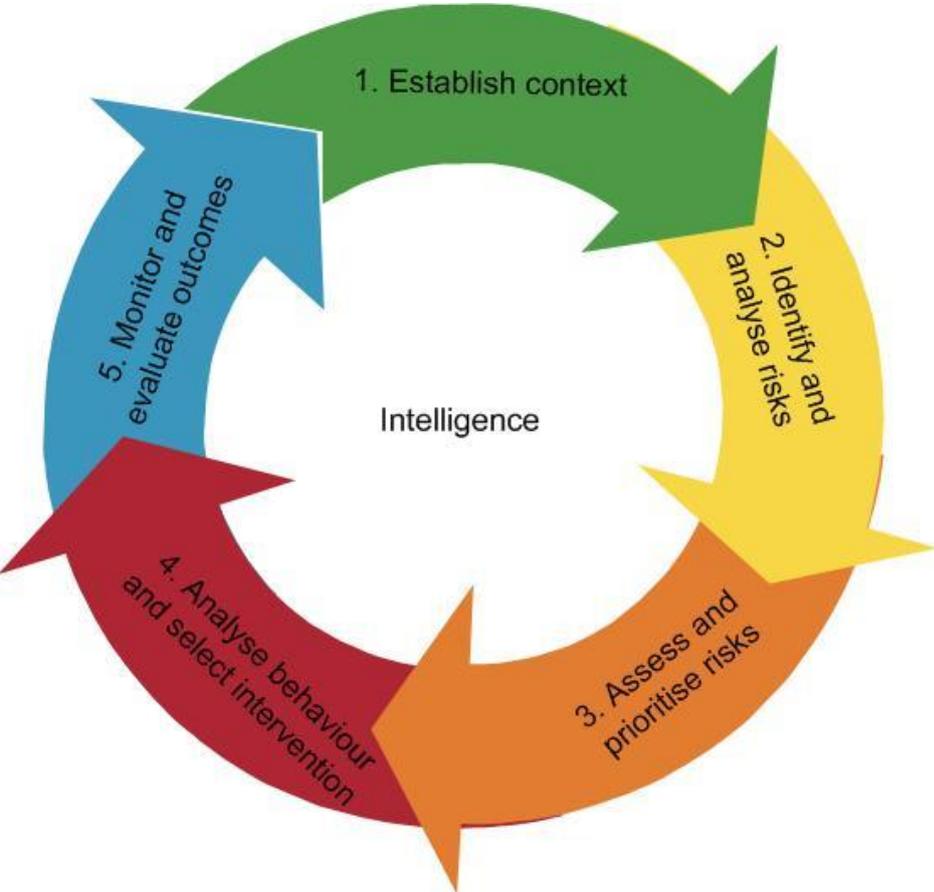
Table 5 – Inland Revenue's Compliance Management Cycle (CMC) stages, and principles adopted from the OECD

Stage of the CMC	Some of the adopted OECD principles
1. Establish the context	Continually monitor the content
2. Identify and analyse risks	Take a multi-level approach to risk identification and assessment – leads to a more complete understanding of risks Understand the drivers of compliance behaviour to identify the cause(s)
3. Assess and prioritise risks	Assess the relative impact of the risks in the context of our priorities. Base assessment and prioritisation on objective evidence Take a balanced approach to treatment and prioritisation (that is, not all risks can be addressed; some risks that are addressed might not reflect the highest revenue risk)
4. Analyse behaviour and select intervention	Behaviour can be shaped by many factors, such as economic drivers, normative values, tax administration system, and so on Treat the underlying cause of the compliance behaviour Provide a graduated response to behaviour (that is, make it easier for those who want to comply, and enforce against those who don't) Multi-faceted and systematic strategies are often the most effective Engage staff around the intent of the intervention strategy Apply strategies fairly and consistently, and in a way that is the most resource efficient
5. Monitor and evaluate outcomes	Determine outcome measures and treatment objectives when planning to facilitate evaluation Treatment objectives must look beyond immediate outputs to change behaviour over time Also evaluate the process

14.1.A.i Responding consistently in the pursuit of regulatory objectives

A flexible approach to non-compliance does not mean responding arbitrarily or inconsistently. On the contrary, a toolkit of graduated responses allows a compliance agency to achieve a real consistency of approach, responding to similar cases in similar ways to achieve similar ends.

The agency is able to take account of all factors that go into determining the real level of risk presented by an individual case of non-compliance – including the seriousness of the potential consequences of non-compliance, the likelihood of those consequences occurring, and the attitude and the degree of responsiveness shown by the non-compliant entity, including by its compliance history.

By contrast, a blanket uniformity that responds identically to cases of non-compliance that appear to be formally equivalent achieves a superficial

consistency, and fails to manage risks and meet regulatory objectives in a proportionate and cost-effective manner.

14.1.A.ii Proportionate responses are cost-effective

Selecting from a set of response options on the basis of risk enables a compliance agency to achieve its objectives at minimum cost. This ensures that both its own administrative costs and the compliance costs of the regulated entity are commensurate with the risks involved.

14.1.A.iii Escalating and de-escalating a response: Moving up and down the compliance pyramid

The toolkit of responses also allows the agency to **adjust its response** as necessary in individual cases.

For example, a compliance agency could impose restrictions on the operations of a business that has failed to move towards compliance after being given the opportunity and encouragement to do so.

By contrast, the agency could reward a non-compliant business that in good faith has implemented a remedial plan in line with, or in advance of, agreed targets and deadlines. The agency could, for example, remove or reduce the restrictions on the business's operations, or move to a less intrusive and less frequent monitoring system.

Figure 10 shows a set of graduated responses that could be used by a 'gatekeeper' agency that controls access to a market or activity.

The pyramid suggests a pattern of responding to most cases of non-compliance with lower-level responses, such as encouragement and guidance, and reserving more punitive measures for serious non-compliance or if lower-level responses fail to achieve the necessary outcomes (see also the IRD compliance model case study in 3.3.C.ii).

Figure 10 – Graduated responses used by 'gatekeeper' agencies
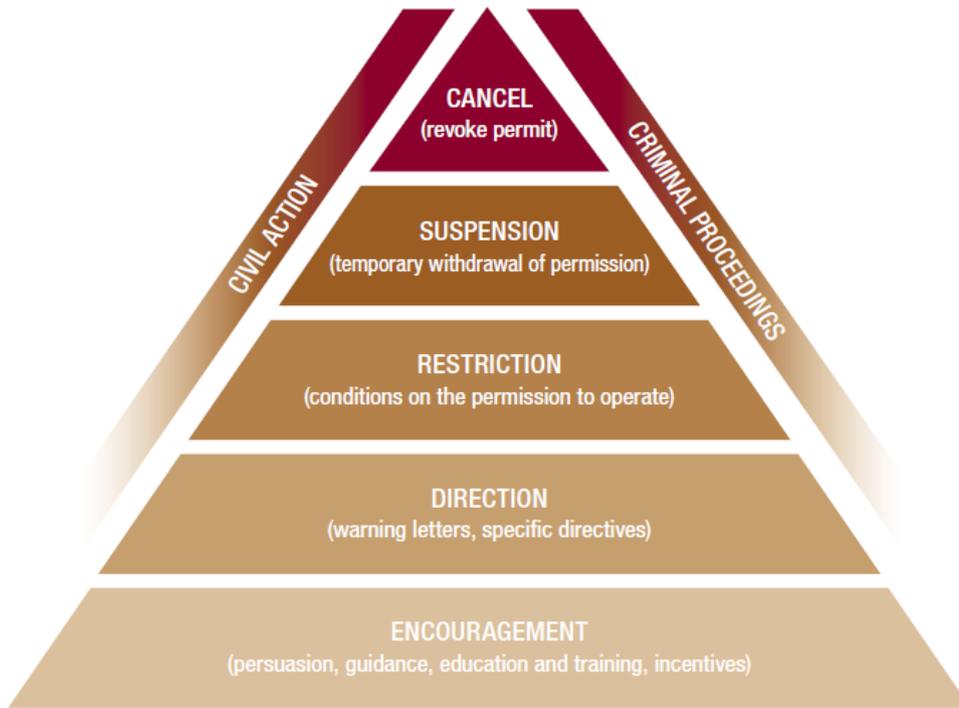
From *Administering Regulation: Better Practice Guide*,
Australian National Audit Office, 2007

14.2 Encouraging compliance

Most cases of non-compliance can be effectively addressed through using the lower-level responses from the compliance pyramid.

If a lower-level response proves to be ineffective, the compliance agency retains the flexibility to respond with more punitive enforcement tools.

The art of encouraging compliance is complex and there are a number of considerations and ways of going about it that can be considered. Some of the more common issues that regulators need to weigh up are as follows:

- Is the regulatory objective to punish or to elicit compliance? Both are legitimate, depending on the objective of the regulatory agency at the time, but they are often not mutually reinforcing. High-profile punishment or a disproportionate response can legitimately be used by regulators for capturing attention, signalling the standards expected, and influencing community attitudes. However, the effectiveness of punishment in effecting long-term changes in behaviour is disputed. What is not disputed is that the threat of punishment can increase receptiveness to actions taken to improve compliance at the lower end of the pyramid.

- Eliciting future compliance means addressing a number of issues simultaneously, including what action to take, showing how compliance can be achieved, and uncovering the incentives for compliance. It is often necessary to take a long-term view and think about what influences short and long-term compliance behaviour. For example, is there a risk that strong enforcement may drive risks and problems underground, making them more difficult to control and detect?

- Should an agency use a mix of rewards and punishments to encourage compliance? There is a body of literature that suggests that, in general, punishments are more useful to regulators and less problematic than rewards, but that informal rewards (praise, letters of recognition) are consistently useful tools to secure compliance when operating at the lower end of the pyramid.[9]

- A careful consideration of how to encourage compliance may conclude that the agency does not have enough of the right tools at its disposal. It is legitimate to consider referring the issue back through the policy process to Ministers for consideration.

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[9] Braithwaite, J. 2002. Rewards and regulation. *Journal of Law and Society* Vol 29, No 1

Case study

Workplace health and safety: Developing an action plan for returning to compliance

Hot Paints Ltd is a new panel-beating and body-spraying business in a regional centre, owned by Fergus and Janet. Fergus has employed Angus to look after the spray-painting side of the business, as Fergus has little experience with that area.

Fergus and Janet are contacted by Dave, a health and safety inspector from the nearby city, who tells them a team of inspectors will be visiting local businesses the following week. Dave arranges with them a suitable time to visit their operation. Dave asks them to have any relevant information available for the visit.

Dave arrives with Marie, another inspector who specialises in occupational health and hazardous substance issues. They first have a general discussion with Fergus and Janet about the health and safety issues in the business and the systems in place to manage them.

The inspection of the workplace space reveals two main problems with the quality of the air. First, there is excessive dust in the panel-beating space. The inspector Marie is able to advise Fergus on dealing with this through a combination of improved cleaning, fitting vacuum dust collection on finishing tools, and some changes to personal protective equipment. Fergus is enthusiastic about addressing the dust problem: quite apart from the health and safety risks, the dust has been causing problems with work quality throughout the workshop. To show his willingness to deal with the problem, Fergus phones his equipment supplier from his office while the inspectors are present.

The second air-quality problem, to do with the spray-painting area, is going to be more expensive to resolve. The business has yet to invest in a purpose-built spray booth, and has instead improvised with a curtain arrangement that has inadequate ventilation. The employees' personal protection equipment is also inadequate, particularly for the use of isocyanate-based paints, which are used continuously.

The inspectors agree with Fergus and Janet on a plan that would see the worst practices end immediately and improved equipment introduced progressively over 6 months. The plan is documented in detail, and Fergus and Janet are made aware that there will be follow up inspections and that more serious enforcement action could follow if the plan isn't implemented.

Hot Paints Ltd installs a new spray booth and invites the inspectors along to see it in operation within the 6-month compliance deadline. Fergus tells them the new arrangement has added to both the quality and quantity of their work and has therefore added value to the business.

– Adapted from *Keeping work safe: The Department of Labour's policy on enforcing the Health and Safety in Employment Act 1992* (2009)

In the case study above, the Department of Labour's response:

- used encouragement, advice, and guidance as its main compliance tools, having assessed that they were likely to be sufficient

- minimised its own administrative costs and the business's compliance costs

- used a flexible set of responses, differentiating between those most serious risks that needed to be eliminated immediately, and lesser risks that could be managed effectively until they were eliminated within an agreed time

- gauged the business's attitude to achieving compliance – here through face-to-face contact with its front-line inspection staff – as part of an overall assessment of the risk posed

- signalled clearly to the business that more punitive forms of intervention might follow if it failed to move towards compliance in good faith and as agreed

- laid the basis for an effective future relationship with the business on workplace health and safety issues, one that would be characterised by clarity on roles and obligations, effective communication, and a collaborative approach to achieving compliance.

Working with offending occupiers to achieve compliance with District Plan

Manukau City Council received a complaint about a large amount of inorganic material (old appliances, cupboards, garage doors, wheelbarrows, and so on) being stored on the back lawn of a property. The complainant was concerned that these materials would harbour rodents and mosquitoes.

An officer from the Council's District Plan Enforcement Team visited the property and assessed this outdoor storage activity as having adverse visual effects on the area. The officer explained to the occupier that the council discourages the use of private open space for storing inorganic materials as it conflicts with the use of open space, as well as making the property look unsightly. The officer also explained that these materials could become infested with rodents and mosquitoes. The officer told the occupier that, for those reasons, the council treats storage of inorganic materials on any residential property as a non-complying activity and that it was unlikely that the council would grant a resource consent for this if the occupier applied for one.

The occupier agreed to remove the inorganic materials within the next 3 days. After 3 days, the officer went back to the property to find that the materials had in fact been removed as agreed, and thanked the occupier for cooperating.

The complainant was also satisfied with the result of the council's action.

As a precaution, the council sent the occupier a letter reiterating the council's requirements in relation to outdoor storage and informing the occupier that enforcement action could be taken if it were to happen again. The letter also encouraged the occupier to seek free advice from the council's customer advice unit before undertaking any land use related activities on the property, to avoid enforcement action from the council.

14.3 Serious risks and deliberate non-compliance: Using the sharp end of the pyramid

The compliance pyramid of graduated responses is based on the recognition that most people are willing and ready to comply with their obligations. In those cases the compliance agency's chief strategy will be making it simple and convenient to comply.

But where a regulated entity deliberately or persistently fails to comply, it is vital that the agency take **swift and firm enforcement action**. Failing to do this will:

- unfairly advantage those who are non-compliant, as against those who comply voluntarily

- undermine incentives for voluntary compliance

- damage the agency's credibility with the regulatory sector and the wider public, who will perceive that the agency allows deliberate offenders to 'get away with it'

- undermine the agency's own internal morale.

The nature and extent of a compliance agency's response to an incident of serious non-compliance will depend on its assessment of the **risks** and **costs** that it poses. In a gatekeeper case, the agency's assessment could result in it revoking the regulated entity's licence to operate in the market. In other cases it could mean criminal or civil court proceedings, as in the next case study, which shows how the New Zealand Department of Labour is likely to respond to serious risks in enforcing the Health and Safety in Employment Act 1992.

Case study

Department of Labour response to a serious workplace accident

Alistair, a forestry health and safety inspector, was called by the Police to the scene of an accident at a logging operation in a plantation in the ranges nearby. He arrived to find the body of a middle-aged logger, Lester, covered by a sheet in the cab of an excavator he had been operating.

It was clear from the scene, and from a co-worker's account, that Lester had been killed after a tree branch smashed through the excavator's side-window and impaled him. The excavator had a roll-over protective structure and cabin intrusion bars fitted to the front of the machine, but no side-intrusion bars.

Alistair's investigation concluded that side-bars were a practicable and reasonable safety precaution, and a widely accepted practice among forestry companies. The logging contractor, EZ Logging, should have known this. The Department of Labour prosecuted EZ Logging and also Rawiri as its director, who it found was specifically aware of the risk and of the widely recognised solution.

Continued

The investigation also found that Radiata Corporation, the forestry company that contracted EZ Logging to work the site, had learned of the absence of side protection and the risks this posed when it had audited EZ Logging's health and safety performance. Radiata had, however, let the matter go, as it regarded EZ Logging as a preferred and reliable contractor. The department therefore also prosecuted Radiata.

The department also issued a Prohibition Notice against the use of the excavator, and distributed an alert to the industry about the need for side-intrusion protection.

– Adapted from *Keeping work safe: The Department of Labour's policy on enforcing the Health and Safety in Employment Act 1992* (2009)

Case study

Deliberate non-compliance with District Plan: Seeking compliance through Abatement and Infringement Notices

A property owner requested an additional recycling bin from Manukau City Council. As a standard practice, the request was referred to the council's district plan enforcement team to check whether there was an additional household unit on the property, as Council records showed only one unit on the property.

A site inspection revealed that the free-standing garage on the property had been converted into a minor household unit and was being rented out separately from the main house. The property owner had carried out additional works on the garage, including installing a kitchen and food-preparation area, constructing a partition to create a bedroom, and installing plumbing.

The owner had been aware that converting the garage into a minor household unit required both resource and building consents from the council. The council therefore decided to issue both an abatement and an infringement notice for breaches under the council's district plan. The abatement notice required that the garage be reverted back to its approved use, while infringement notices (carrying a fine of $300 each) were issued for the owner's breaches of section 9 of the Resource Management Act 1991.

After receiving the notices, the property owner vacated the illegal unit and admitted the offence by paying the infringement notice fines. The owner applied for a resource consent to legally convert the garage into a minor household unit and a certificate of acceptance under the Building Act 2004. The council accepted the building works that had been carried out and granted a resource consent to convert the garage into a minor household unit.

14.3.A   FACTORS RELEVANT TO AN ASSESSMENT OF SERIOUS RISKS

The compliance agency will base its assessment of the risk on:

- the seriousness of the potential consequences of the non-compliance, and

- the likelihood that the consequences will occur.

Based on its assessment of those factors, the agency may decide to:

- take immediate enforcement action (for example, a gatekeeper agency could restrict the operations of a non-compliant business by immediately suspending its licence), or

- not take immediate action because the risks are not significant and can be managed in other ways.

14.3.B   KEY FEATURES OF THE DECISION-MAKING PROCESS

The compliance agency's decision-making process should be timely, proportionate, lawful, and fully documented:

- **Timely** – Once the agency has identified a case of non-compliance, it must decide on its response quickly, and then implement it immediately. This will be particularly important if the non-compliance could result in serious social or economic harm, such as death or serious injury, if it is not addressed.

- **Proportionate** – A proportionate response will benefit both the compliance agency and the non-compliant person or business, because it will minimise:

    - the amount of regulatory intervention needed to eliminate or mitigate the risk

    - the costs of the response to the agency (enforcement costs) and to the particular regulated entity (business costs).

- **Lawful** – An unlawful response is likely to result in a legal challenge and will undermine public confidence in the compliance agency. A challenge will compromise the agency's capacity to eliminate or mitigate the immediate risks. The costs of the agency's response will also be increased, both for the agency and the regulated entity.

- **Fully documented response** – Ensuring that regulatory decisions are properly documented helps to ensure that the regulatory regime is transparent and that the agency is accountable (this is discussed further in 9.5).

14.3.C TARGETING THE RISK

To align the extent of a response with the risk posed, the response should be targeted at the specific risk, as in the following example.

Example
Targeting the risk, minimising the costs

A 'gatekeeper' agency responsible for administering regulation that protects public health and safety can suspend a regulated manufacturer's licence if the manufacturer's non-compliance increases the risk of unsafe products entering the marketplace. Doing this will certainly achieve the regulator's objectives and eliminate the risk, but it will also impose significant business costs on the manufacturer. If the manufacturer appeals, there will also be substantial legal and other costs for both sides.

It may be, however, that the non-compliance and the risk can be isolated in a particular part of the manufacturer's operations. The compliance agency can then target its response by, for example, placing restrictions on the manufacturer's licence to operate, rather than fully suspending the licence.

14.4 Managing a return to compliance through a remedial action plan

Once a compliance agency has addressed the most serious risks posed by a case of non-compliance, the next step is for the non-compliant person or business to prepare and implement a **remedial action plan** that meets the agency's requirements.

By participating in developing the plan, and then endorsing it, the agency can make the planning process more efficient and can also increase confidence – on both sides – that the plan will return the entity to compliance. The agency should, however, take care that in endorsing the plan it does not compromise its potential to take any subsequent enforcement action that is necessary.

Once the plan is in place, the agency needs to monitor its implementation – this enables it to be sure that the risks are being appropriately managed while the regulated entity is moving towards compliance. Further, keeping the regulated entity informed of the outcomes of the agency's progress assessments will provide it with feedback that will help it complete the plan effectively.

14.4.A DEVELOPING THE REMEDIAL ACTION PLAN

The compliance agency should provide the regulated entity with a compliance assessment report that clearly defines the compliance gap – that is, the nature and

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extent of the non-compliance. This will help the regulated entity prepare a plan that addresses the non-compliance effectively.

The key elements of an effective remedial action plan are:

- a list of **remedial actions** that need to be taken, as well as the regulatory outcomes they are to achieve

- the **order** in which those actions should be undertaken, reflecting any priorities the agency has set

- a **timetable** for carrying out each action

- a description of arrangements made by the non-compliant entity for **managing, monitoring, and reporting** on the implementation of the plan

- a list of the **evidence** that the agency requires to confirm that key milestones have been met.

14.4.B   ENDORSING THE PLAN

The compliance agency's involvement in developing and endorsing the plan has the following benefits:

- it assures the agency that the plan will, if implemented appropriately, meet its requirements and return the regulated entity to compliance

- it makes it more likely that the plan will be prepared and implemented in a timely way

- it allows the agency to assess whether the plan will effectively manage ongoing risks (if the non-compliant entity is being allowed to continue operating).

However, as noted previously in this guide, it is important that the agency does not shift into playing the role of a compliance consultant, as this would compromise its role as an assessor and enforcer of the sector's compliance with those requirements.

14.4.C   MONITORING THE IMPLEMENTATION OF THE PLAN

By monitoring the implementation of the remedial action plan, the compliance agency will be able to:

- confirm that the ongoing risks posed by the non-compliance are being managed effectively, until compliance is achieved

- take any further compliance action that might be necessary to reinforce the importance of implementing the plan appropriately

- decide the timing and extent of the agency's future monitoring of that particular regulated entity.

14.4.C.i Cost-effective monitoring

Monitoring methods may include:

- carrying out desk audits of progress reports that the non-compliant entity has submitted

- reviewing evidence that the entity has submitted of completed remedial actions, such as photographs or invoices for work completed

- carrying out on-site inspections

- reviewing assessments carried out by any other compliance agencies.

The most cost-effective means of monitoring the plan will depend on the particular action. For example, photographs and invoices from a maintenance company could be sufficient for the compliance agency to confirm that machinery has been repaired satisfactorily. However, an on-site inspection may be needed to confirm that a manufacturer has changed its operating procedures in line with the agency's requirements, plus a desk audit of a revised procedures manual.

14.4.D   GIVING FEEDBACK ON PROGRESS ASSESSMENTS

By formally reporting back to the non-compliant entity on the outcomes of the agency's progress assessments, the agency provides it with feedback that it can use to implement the rest of the plan effectively and efficiently.

Giving this feedback also allows the agency to:

- reinforce the importance it places on the remedial action plan and thereby strengthen the commitment of the non-compliant entity to implementing it and becoming compliant

- highlight the remedial actions the agency has assessed as being completed satisfactorily

- draw attention to any actions that the agency has assessed as being unsatisfactory

- create an audit trail of its regulatory supervision – this could be used if there is any legal challenge to the agency's management of the risks posed in the particular case.

14.4.E   EXAMPLE OF A REMEDIAL ACTION PLAN

In the first case study in 14.2, the Department of Labour focused on providing encouragement and guidance to manage the non-compliance risks presented by Hot Paints Ltd, a panel-beating and body-spraying operation.

However, the Department also ensured that there was a detailed remedial action plan that clearly stated the requirements the business had to meet in order to avoid more serious forms of enforcement action – as explained below in Part 2 of this case study.

Case study

Hot Paints Ltd, Part 2 – An action plan for returning to compliance

The two areas of non-compliance in Fergus and Janet's panel-beating and spray-painting business both involved problems with air quality – namely, dust in the panel-beating space, and inadequate ventilation in the spray-painting area.

The inspectors discussed the most appropriate controls with Fergus and Janet, and they agreed on a plan that would see the worst practices end immediately and improved equipment introduced progressively over 6 months. Isocyanate-based paints were not to be used until a purpose-built spray booth was installed. While on site, Dave issued the business with an improvement notice to that effect.

Dave recorded the result of their discussions during the visit. Back at his office he sent them a letter setting out the Department of Labour's understanding of what was to happen in the workplace. This letter was also a written warning about the dust hazard in the panel-beating space. The letter told Fergus and Janet that if the dust and spray-painting hazards were not both controlled, the department could take further enforcement action.

While on site, Dave also told Fergus and Janet that there would be a follow-up inspection, but that they might not be given advance warning.

– Adapted from *Keeping work safe: The Department of Labour's policy on enforcing the Health and Safety in Employment Act 1992* (2009)

In this example, the Department of Labour managed the risks posed by non-compliance through:

- working cooperatively with the business to develop and agree on a remedial action plan that clearly set out the department's requirements

- including in the action plan a clear timetable for when each action was to be completed, with the different steps in the plan reflecting the priorities set by the Department as a result of its assessment of the most serious risks

- documenting the plan in detail, so that the requirements for returning to compliance were clear

- monitoring the business's implementation of the plan, after choosing a monitoring process on the basis of its assessment of the risks posed, including the extent of the business's willingness to comply

- making the business aware that the inspectors would monitor the implementation of the plan and that the Department would take more severe enforcement action if the business did not move to full compliance according to the plan.

14.5 Addressing patterns of non-compliance through project-based problem-solving

14.5.A INTRODUCTION

An effective compliance agency will look for opportunities to make significant advances towards its regulatory objectives through addressing patterns or clusters of non-compliance incidents.

In this context the 'unit' of the agency's work becomes a grouping of past (and potential future) incidents of non-compliance, rather than an individual case of non-compliance by a single person or business.

14.5.A.i Benefits of project-based problem solving

A compliance agency's core work will always include responding reactively to individual cases of non-compliance that come to its attention. However, intervening proactively through project-based work to solve deep seated or complex compliance issues will enable the agency to:

- address serious risks in a cost-effective way

- shape future compliance, rather than respond reactively to non-compliance after the fact

- achieve significant advances in levels of compliance by addressing patterns of non-compliance, not single cases

- reduce reactive workloads over time.

14.5.A.ii Organising the agency's project-based work

An effective compliance agency will also have an organisational framework in place to manage this type of proactive compliance work, and will foster an organisational culture that recognises the value of this work and facilitates its successful functioning.

Project-based work must be organised at two different levels:

- the stages of the individual project, and

- the agency's standing arrangements for managing all its project work.

These two levels are separate. Responsibility for each level rests with different levels of staff within the agency. However, the two levels do interact at various points in the life of a project.

Some best-practice guidelines for the two different levels are discussed below in 14.5.B and 14.5.C. Some of the specific types of information support required for project-based work are discussed in 9.2.

Inland Revenue and the 'hidden economy' in the hospitality industry

As part of its compliance focus for 2009-10, Inland Revenue had decided to prioritise a number of specific patterns of non-compliance. One area was the hidden economy among small and medium-sized businesses in the hospitality industry. As they deal mainly in cash, hospitality businesses are more likely to have incentives and opportunities for understating their income or overstating their expenses.

Inland Revenue established an investigations project to address the problem, drawing on previous lessons IRD had learned about how to assess the profitability of cash businesses.

Its research had shown that businesses that don't comply with their tax obligations are probably failing to comply with other obligations, and Inland Revenue therefore looked at information received from local authorities about non-compliance with local government regulations. This enabled IRD to target and tailor its investigations. The result was that substantial tax evasion was revealed.

In designing a successful intervention to address the problem, Inland Revenue:

- took advantage of lessons learned from previous cases and projects
- applied some creative, lateral thinking
- collaborated with other compliance agencies (here, local government).

14.5.B   LIFE CYCLE OF A PROBLEM-SOLVING PROJECT

A project addressing a particular pattern of non-compliance will usually need to include the following phases:

1. Nominating the problem for attention

   (then, if the agency decides the problem is a priority to be addressed)

2. Defining the problem

3. Developing measures of success

4. Analysis and planning the action

5. Implementing the plan

6. Closing the project, with ongoing monitoring

Each of these phases is discussed below.

14.5.B.i Nominating the problem for attention

The problem is first nominated for attention. This may be done by a variety of people, including front-line staff and people or organisations external to the agency. (Agency systems for nominating problems are discussed in 14.5.C.i.)

For a nominated problem to progress to being the subject of a project team, there must now be intervening management decisions to select the problem, assign responsibility for it, and allocate the appropriate resources. This is discussed further in 14.7.

14.5.B.ii Defining the problem

The problem is examined more rigorously and its scope and definition are refined. Defining the problem carefully at this point, rather than when the action plan is being implemented, will minimise the need for backtracking later on.

The agency should also confirm that there is in fact a problem, through data analysis and collecting evidence. Although the agency must retain the authority to decide what is and isn't a problem, input from the regulated sector may assist it here.

The problem needs to be defined at the appropriate level of generality. Reaching this definition is a process that may require disaggregating the incidents that were grouped together when the problem was first nominated. Thus a broadly stated problem may need to be narrowed down to, for example, a particular geographic area or a particular part of the regulated sector.

> 'While problems must be defined at sufficiently low level to be feasible and actionable, they must also be at sufficiently high level to be worth doing.'
>
> Sparrow, M. *The regulatory craft* (2000)

14.5.B.iii Developing measures of success

Choosing the relevant measures of success for the project should come **before** the project team designs an action plan to address the problem. This helps to focus the project on the desired outcomes, rather than on whether the team has merely implemented its plan.

Usually a set of indicators, rather than a single indicator, will be appropriate.

The measures chosen may require the agency to collective additional data.

For more discussion of success measures and evaluating effectiveness, see 6.3.

14.5.B.iv Analysis and planning the action

In designing the agency's intervention, the project team should focus on the desired end state. They should always bear in mind that any actions taken by the agency to address the problem so far have not worked.

Planning discussions should cover:

- enumerating the methods used previously to address the problem

- honestly appraising what works, what does not, and how one knows

- an open-minded search for new responses, to generate a lengthy list of ideas (these discussions may usefully include input from people affected by the problem, potential partners, and other stakeholders)

- consideration of the pros and cons of each option, including issues of legality, feasibility, cost, side-effects, and so on

- selection of the best available option or combination of options, including taking into account how resources might eventually be withdrawn from the solution without the problem reappearing.

14.5.B.v Implementing the plan (with monitoring and reviews)

Implementing the plan should include periodic monitoring and reviews by management, with adjustments as necessary, as part of the supporting infrastructure for the project work (see 14.7).

14.5.B.vi Closing the project (with long-term monitoring)

A compliance project has a finite life. While it exists, it should be actively and energetically pursued. If it is not, it should be terminated. Management should not permit projects to linger on in an intermediate, low-energy state.

A project will be terminated if:

- it succeeds in eliminating the given risk, or adequately mitigating it

- the problem proves to be intractable

- the agency determines that the problem is no longer a priority.

This ensures that resources are being allocated appropriately.

The agency should have an effective long-term plan for monitoring and maintaining the solution.

14.5.C ORGANISATIONAL INFRASTRUCTURE FOR PROJECT-BASED WORK

Addressing serious risks through project-based problem solving is part of an effective compliance agency's continuing practice. While each project will have a

finite life, this style of work requires an **ongoing organisational infrastructure** to manage and support it.

The successive stages of the project life cycle are the responsibility of the particular project team, but the responsibility for the organisational infrastructure for **all** the agency's project work belongs with management.

In general, a compliance agency will need to address the following areas (discussed in more detail in 14.5.C.i to 14.5.C.vii):

- a system for nominating problems for attention

- a system for selecting problems for action

- assigning responsibility and resources

- project records and files

- monitoring and reviewing progress

- reporting of outcomes and achievements

- a support system (including specialists and consultants).

14.5.C.i System for nominating problems for attention

An effective nomination system will include a clear, simple, and quick mechanism that enables anyone to propose a problem for the agency's attention. A problem might be nominated by the agency's routine data analysis, by staff from various levels and units within the agency, by other government agencies, by members of the regulated sector, or by the general public.

Having a simple and easily accessible form for nominating a problem will help ensure that the agency has the appropriate windows into the regulated environment.

The nomination system will also need to include a process for funnelling nominated problems towards a selection process.

14.5.C.ii System for selecting problems for action

Selecting from a group of nominated problems to determine which problem or problems the agency will address will be task of the agency's middle or senior management.

This will involve an assessment of the risks presented. The agency may not always be able to undertake comprehensive risk and cost-benefit analyses and to have all the information it would like. In practice, risk assessment by operational managers may sometimes have to be more subjective and impressionistic. The agency will need to balance the need for sound decision making with the need to take timely action in pursuit of its compliance objectives.

In other instances, agencies may have dedicated intelligence groups to assess and prioritise compliance risks.

The practical business of choosing which problems to address will also depend on what other problems have been nominated to be addressed and on the agency's level of experience with project work. The agency will need to consider how many projects it can handle effectively at one time, and what kinds of problems – including what size of problems – it should be trying to address.

14.5.C.iii Assigning responsibility and resources

Attacking a problem will require the agency to commit staffing and other resources to it.

Management will need to assign staff, collecting the appropriate skills and experience from the agency's various units as necessary. This will include relieving the project team from their other duties, partly or entirely. The agency will not be able to undertake sustained activity in addressing problems if it relies on the enthusiasm and stamina of a few volunteers, with no relief from their other work.

The project team will need to be given access to the necessary resources. The issue of what level of resources is appropriate to the task will be for management to determine.

It may be difficult to accurately forecast the cost and duration of a project. Management will therefore need to review levels of staffing and resources periodically throughout the life of the project.

14.5.C.iv Project records and files

Management should ensure that there is a framework and clear expectations for the project team to record its meetings, decisions, and so on. Without clear records, it will be difficult for management to adequately review the project team's progress and for the agency to be able to draw useful lessons from the project.

14.5.C.v Monitoring and reviewing progress

Management will need to maintain oversight of the project and periodically engage with it. Management will need to ensure that, for example:

- the project team has not embarked on its intervention before it has adequately defined the problem and identified measures of success

- the level of resources assigned is still appropriate

- the team has the necessary skills and capabilities to address the problem

- the project is still being actively pursued and has not, for whatever reason, become stalled.

Finally, management will need to determine when the project should be ended, either because it has succeeded, or because it is clear that it will not succeed, or because the agency's priorities have changed as a consequence of new and more important problems now demanding its resources.

Management should take care not to move too quickly to terminate a project that is having difficulty achieving success, and should not expect that the first action plan will necessarily be successful. Project teams need a degree of freedom to experiment with solutions and to persevere when a problem proves resistant.

14.5.C.vi Reporting of outcomes and achievements

A completed project report should include:

- a statement of the problem as it was defined

- the initial evidence that it was a problem

- a description of the indicators that were selected for measuring success and tracking progress (including the starting benchmark values)

- an account of the interventions that occurred, including the resources that were expended

- a summary of the results achieved, mainly by reference to the indicators that were selected

- a proposed longer-term plan for continuing to suppress the problem.

14.5.C.vii Support system (including specialists and consultants)

Both the project teams and the management exercising oversight may need assistance from specialists with expertise in problem solving.

14.6 Benefits and disadvantages of coordination

Policy issues addressed by government will frequently transcend boundaries between government agencies. Achieving policy objectives in those cases will therefore be assisted by coordination between agencies – that is, the sharing of information, resources, and responsibilities to achieve a particular outcome.

Before a decision to engage in joint work is made, the agencies should consider the full range of pros and cons involved with coordinating activity.

14.6.A BENEFITS OF JOINT WORK

The benefits of joint work can include:

- the capacity to address strategic issues not captured by any one agency's objectives

- better-quality analysis, through bringing a more diverse range of thinking, skills and information to bear

- a better understanding of the full scope and context of an issue, leading to more effective interventions

- a broader resource base with which to attack problems

- economies of scale, such as sharing of IT facilities and property

- less duplication and therefore greater cost-effectiveness.

14.6.B   DISADVANTAGES OF JOINT WORK

However, the agency must also have a realistic awareness of the potential disadvantages, including:

- less clear lines of accountability

- longer times for decision making

- greater difficulty in measuring performance

- additional costs involved in establishing and maintaining the cross-agency relationship

- differences in organisational culture, priorities, resourcing, or governance.

14.6.C   WHEN TO COORDINATE

A decision to engage in joint work should be based on an assessment of whether:

- the outcomes for New Zealanders will be improved by better-coordinated government action

- the benefits to New Zealanders will outweigh the costs

- all the agencies involved in the joint work will be accountable for their actions

- there is a clear rationale for including all participants

- there is sufficient time to achieve a superior outcome through a coordinated initiative.

14.7   What makes for successful joint work?

The State Services Commission's *Factors for successful coordination framework* identifies a number of **success factors**, grouping them under three main dimensions: mandate, systems, and behaviours.

The framework notes that, for any given joint project, not all of these success factors will be in place at the outset: some may be in place first, with others being developed later as the joint work evolves.

Success factors include:

- **Mandate**
  - For successful coordination, leaders must emphasise the importance of effective coordination, and commit to making it work by prioritising the coordinated activity within an all-of-government context.
  - Ministers and other stakeholders need to buy into the coordinated approach.
  - State servants must agree on clearly defined joint outcomes to focus effort.

- **Systems**
  - For successful coordination, appropriate governance and accountability frameworks must be in place; and the roles, responsibilities, and contributions of each agency must be documented – for instance through a memorandum of understanding.
  - Sufficient and appropriate resources must be available to deliver the required tasks.
  - An effective process to measure performance from established baselines must be in place, with remedial action being taken when necessary.

- **Behaviours**
  - For successful coordination, the right agencies must be represented by state servants with the appropriate authority, and the right skills and competencies to work collaboratively. There must be clear leadership among the group.
  - Each agency's organisational culture must support coordination so that over time those state servants involved in the coordinated activity come to share a common culture, language, and values.

A formal memorandum of understanding or service level agreement between the agencies may be useful.

Case study

The Border Sector Governance Group: Collaboration on border protection

The Government's border agencies have created the Border Sector Governance Group (BSGG) to increase the overall effectiveness and efficiency of the border sector.

Continued

There are six core government agencies with a border sector management role, and about 20 agencies in total that contribute to border-related activities. The core agencies are:

- the Department of Internal Affairs
- the Department of Labour
- the Ministry of Agriculture and Forestry
- the Ministry of Transport
- the New Zealand Customs Service
- the New Zealand Food Safety Authority.

The Border Sector Governance Group has set out key areas and key types of joint work in Border Sector Strategy 2008 – 2013: *A framework for collaboration for border sector agencies*, which is available at:

http://www.customs.govt.nz/news/resources/corporate/Documents/Border%20Sector%20Strategy%202008-2013.pdf

The strategy document discusses a spectrum of joint agency activity, from communication to collaboration. The development of appropriate information systems is a key aspect of collaboration under the strategy.

The strategy sets out the key areas of focus for the next 5 years in developing a more integrated and responsive border management system for New Zealand. It identifies facilitation, protection, and partnership as the desired outcomes for the border sector and establishes four work programmes to realise those outcomes by 2013:

- Trade Single Window (TSW) – a single point of submission for compliance-related information to do with the import, export, and transit of cargo, and the arrival and departure of commercial ships and aircraft
- streamlined passenger processing, with improved risk management at airports
- robust identity assurance for all of government on the entry and exit of people at the border
- improved risk management at the border by enhancing the information and intelligence made available to decision makers and partners.

BETTER PRACTICE CHECKLIST: ADDRESSING NON-COMPLIANCE

Designing a proportionate response to non-compliance

☐ The compliance agency has a range of responses it can select from when it identifies non-compliance.

☐ The agency has documented the criteria for particular types of responses, to assist its decision makers to design a response that is proportionate to the risks posed.

☐ The agency's operational procedures include clear guidance on the steps that must be taken to assess the risks posed by the non-compliance and to determine whether the agency needs to take immediate enforcement action to control the most serious threats.

☐ The agency fully documents all decisions taken when addressing non-compliance.

Adjusting the response: Escalation and de-escalation

☐ Performance benchmarks and other relevant criteria are documented so that, when they are observed by the agency, they trigger an escalation (or de-escalation) of the agency's response.

Returning to compliance: Remedial action plans

☐ A remedial action plan is developed cooperatively by the agency and the non-compliant entity, and endorsed by both sides before it's implemented.

☐ The remedial action plan contains detailed management information, including milestones, performance targets, and requirements for reporting progress.

☐ The implementation of the plan is systematically monitored – and modified by the compliance agency if necessary – to ensure that the risks posed by the non-compliance are managed satisfactorily until the plan is full implemented.

☐ The compliance agency gives feedback to the non-compliant entity on the agency's assessment of progress in implementing the plan.

ADDITIONAL GUIDANCE MATERIAL

- *Keeping work safe: The Department of Labour's policy on enforcing the Health and Safety in Employment Act 1992* (2009), available at

    – www.dol.govt.nz/publications/research/keeping-work-safe/index.asp

Books by Malcolm Sparrow:

- *Imposing duties: Government's changing approach to compliance* (1994)

- *The regulatory craft: Controlling risks, solving problems, and managing compliance* (2000)

- *The character of harms: Operational challenges in control* (2008)

Guidance on project management generally:

- State Services Commission, 2008. *Factors for successful coordination: A framework to help state agencies coordinate effectively.* Available at:

    – www.ssc.govt.nz/display/document.asp?docid=6453

Good-practice guides published by the Office of the Auditor-General:

    – *Local authorities working together* (2004)
    www.oag.govt.nz/2004/working-together

    – Key success factors for effective coordination and collaboration between public sector agencies (2004)
    www.oag.govt.nz/2003/key-success-factors

    – Achieving public sector outcomes with private sector partners (2006)
    www.oag.govt.nz/2006/public-private

Cross-agency work in the context of complying with international agreements

- *Guidelines on compliance with and enforcement of multilateral environmental agreements,* produced by the United Nations Environment Programme (UNEP); see for example para 25. Available at:

    – www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf

  Examples of multilateral environmental agreements to which New Zealand is a signatory include, in relation to hazardous waste, the Basel, Waigani, Rotterdam, and Stockholm Conventions.

CH 15   RESPONDING TO ADVERSE EVENTS

This chapter discusses:

- when a compliance agency may need to respond to an event that causes or will potentially cause harm (an adverse event) (15.2)

- procedures for ensuring the agency is notified of adverse events as necessary (15.3)

- planning and managing the agency's response to an adverse event (15.4)

- the importance of a formal, structured evaluation after the response to an event (15.5).

This chapter includes material adapted from chapter 9 of *Administering regulation: Best practice guide,* Australian National Audit Office, 2007.

15.1   Introduction

A compliance agency may sometimes need to address specific events that cause harm or could potentially cause harm – referred to as 'adverse events' in this chapter.

Regardless of whether an adverse event involves non-compliance with regulatory requirements, the agency will need to respond if the event threatens its regulatory objectives.

Examples of adverse events can include:

- an industrial accident

- a biosecurity emergency, such as an animal disease outbreak

- foreign objects, such as metal filings, being found in processed food

- a spate of motor vehicle accidents caused by faulty or unsafe mechanical components

- unexpected medical reactions to an approved drug

- a building being erected without a building consent.

The **main causes of adverse events** are:

- non-compliance by members of the regulated sector

- a highly unlikely regulatory risk being realised

- events or acts by people who are outside the control of a compliance agency

- deficient regulation

- poor administration of regulation by a compliance agency.

Whatever the causes of the event, a compliance agency will need to decide the best course of action to limit the harm that may have been caused, and remove the threats it poses to the agency's regulatory objectives.

If an event is minor, the compliance agency's normal administrative processes may be adequate to manage the threats. If, however, the event has caused, or could cause, significant harm, the agency may need to design a specific response to the event.

15.2 Key steps in responding to an adverse event

The main steps in an agency's response to an adverse event are as follows:

- **Timely notification to the agency** – In deciding the most appropriate response, a compliance agency needs timely and relevant information about the event. Effective notification procedures will help the agency gather all information that will be relevant to its decision making.

- **Managing the response to the event** – The agency then uses that information to assess regulatory risks and identify the priority issues that its response action plan will need to address.

- **Post-event evaluation** – After it has implemented its response plan, the agency will need to formally evaluate the causes of the event and the effectiveness of its response. This helps reduce the likelihood of similar events occurring, by identifying improvements to:
  – the legislative and administrative frameworks under which the agency operates
  – the agency's systems and procedures for managing its responses to adverse events.

Those three steps are discussed in more detail in the following sections.

15.3 Notification of adverse events

A compliance agency will increase the likelihood of adverse events being reported to it and therefore of being able to make a timely response if it educates the regulated sector and other stakeholders about the need to notify the agency. It should develop specific protocols for notification.

An effective notification process will include the following features.

- **Well-defined responsibilities and procedures** – Responsibilities and procedures for reporting adverse events are documented and published, and the types of events that must be reported and the required reporting time frames are defined.

- **Keeping reporting procedures simple** – By providing easy access to a report template that lists the necessary information, the agency will ensure that all relevant information is collected about an event.

- **Simple, well-defined contact points** – All relevant agencies and regulated entities have a single point of contact in their own organisation, so that they can be given timely notification of any adverse event.

- **Requiring the regulated sector to maintain key information** – By requiring regulated entities to maintain relevant operations data (for example, production batch numbers and sales and distribution records), the compliance agency is able to quickly collect important information about the scale of the emergency and about any initial response from a regulated entity.

- **Effective notification within the agency** – The agency has well-defined and well-tested internal notification procedures for activating its internal response processes. This ensures that the right people in the agency are supplied with the right information as soon as possible after the agency receives it.

15.4   The agency's response

An effective response to an adverse event:

- is timely

- is targeted at addressing whatever harm has already been caused

- eliminates or minimises the threat of further harm.

Depending on the particular event, the agency's response to the event may consist of two elements:

- **immediate compliance action** that targets the source of the threat

- **developing and implementing an emergency response action plan** aimed at mitigating the harm that may already have been caused, or at removing the threat and preventing harm.

15.4.A   IMMEDIATE COMPLIANCE ACTION

Immediate compliance action might include, for example, restricting the right of a business to continue to operate in the manner that caused an adverse event.

In general, the procedures an agency will follow in deciding whether to take immediate compliance action after an adverse event will be the same as when the agency's monitoring activities reveal non-compliance. However, there will often be less time available for decision making when the agency is responding to an emergency. In those cases decision makers will need to ensure that they follow the agency's established procedures as far as practicable, to be assured that the action taken is lawful and reasonable in the circumstances.

If the agency's standard, non-emergency procedures or timelines are inappropriate for decision making in emergencies, it may need to develop and publish special decision-making procedures for these cases. These procedures must meet legislative requirements and the agency's staff must be trained in applying them.

In particular, the agency will need to ensure that:

- it strikes a proper balance between responding with timely action and providing appropriate due process to the regulated entity or entities involved

- the compliance action it takes is proportionate to and consistent with its assessment of the threat

- the decision and the reasons for it are properly documented, lawful, and made in accordance with established procedures.

15.4.B   PLANNING AND MANAGING THE AGENCY'S RESPONSE

The agency's response action plan defines how the threats are to be controlled, minimised and, if possible, eliminated. The plan will specify the tasks and accountabilities of:

- the compliance agency

- the regulated entity or entities that caused or contributed to the adverse event

- other government and private-sector entities involved in the response, such as law enforcement agencies, industry associations, and relevant compliance agencies in New Zealand and overseas.

Having clear contingency plans and well-documented emergency response procedures will help a compliance agency activate its response management system quickly and efficiently.

The following are some better-practice guidelines for emergency-response planning and management.

- Contingency plans and emergency response procedures are documented, validated, and maintained – including through trial exercises.

- Roles, responsibilities, and coordination arrangements are documented.

- Relevant agencies participate early on in response planning.

- The response plan includes performance targets, and defines who is responsible for delivering them.

- If the compliance agency is not playing a central role in managing the response, it endorses the response plan in order to provide assurance to stakeholders that the plan will be effective.

Case study

Response system for biosecurity risks

Biosecurity risks have escalated in recent years, due to growth in trade and travel and to climate change producing new organisms that could potentially pose threats. To manage these increasing risks, MAF Biosecurity New Zealand adopted a response-management system, focused on effective and efficient decision-making processes and on ensuring that sufficient capacity and skills are available.

The response system is aligned to the response policy, 'Preparing for and responding to risk organisms', and sets out what the Government will do and what people can expect in relation to responses to pests and diseases (called 'risk organisms'). It reaffirms the leadership role played by MAF Biosecurity New Zealand, but also anticipates that other stakeholders will participate in a response.

The system is based on a single, generic management approach covering all sectors and replacing animal, plant, forestry, and marine-focused policies. The response system can be scaled up or down as appropriate for almost any situation.

The response system has a number of underpinning principles.

- **Risk-based decision-making** – Decisions are based on the risks to the values of New Zealand (economic, environmental, socio-cultural, human health) at each stage of the response.

- **Whole-of-government approach** – The response system works with the Coordinated Incident Management System (CIMS) approach to emergency management, which allows various organisations to work closely together using common management structures, functions, and language.

- **Scalable and consistent** – Response phases and the core management approach are the same for a large response as for a small response.

- **Project management** – The system focuses on planning the work and working to the plan.

- **A response organisation structure dictated by the work** – Organisational charts are based on response activities, not on role holders, and this allows responses to be easily scaled up or down.

- **Activities** – These are defined by the work that is required to be completed, not by the responsibilities of role holders.

On the night of 18 July 2010, a liquor store in Manurewa was ram raided by an offender in a vehicle who was attempting to get goods from the store. The impact caused significant structural damage to the building and also started a fire, causing further structural damage. The Police and Fire Service were in attendance on the night of the incident.

On 21 July the Council received a complaint from a member of the public. A building enforcement file was subsequently created by a building enforcement administrator and logged into the council building enforcement complaint file database.

A dangerous building notice under section 124 of the Building Act 2004 was issued to the property owner.

A site visit on 21 July revealed that the property was a shop on the end of a block of single-level shops, and was extensively damaged by the fire which had occurred at the road frontage and spread throughout most of the interior. The cantilevered awning extending from the shop front over the footpath by approximately three metres had suffered damage and the shop front roller-doors had also been destroyed by the vehicle impact.

The council officer at the site was concerned about the awning falling on passers-by and the need to keep members of the public away from the damaged shop front and to also deter entry.

The council's lead officer obtained advice from an engineer on the soundness and stability of the cantilevered awning. On 22 July, the lead officer arranged for council fencing contractors to erect temporary security fencing and signage.

The council decided to monitor the building on a weekly basis until it received advice from the Crown, the former directors, or the mortgagees on the future of the building – that is, whether it was to be repaired and refurbished or demolished and then rebuilt.

15.5 Evaluation after the event

After responding to an adverse event, it is vital that the compliance agency evaluate the causes of the event and the effectiveness of the agency's response to it.

This will be a central component of the agency's quality-assurance system in this area, enabling it to identify any necessary improvements to the legislative framework and to its own processes.

15.5.A   IDENTIFYING AND ADDRESSING THE CAUSES OF THE EVENT

Identifying the causes of the event is a critical first step in minimising the likelihood of any repetition.

The causes of an adverse event in a given case may involve non-compliance by a regulated entity. Alternatively there may have been no breaches of compliance requirements, with the event being caused either by an inadequate legislative framework or by the realisation of residual risk. The appropriate steps to be taken will be different in each case.

If the event was caused by **non-compliance**, the agency's response may include:

- increasing the level of its supervision of the particular non-compliant entity – for example, by placing restrictions on the entity's operations or by intensifying its monitoring of the entity

- bringing legal proceedings against the entity

- reviewing the agency's monitoring strategy, particularly the frequency of its compliance assessments (see chapter 13)

- educating the regulated sector, through its website and other through other relationship-management arrangements, about the lessons the agency learned as a result of its evaluation.

If the non-compliance resulted from poor administrative practices, the agency should immediately implement changes to its practices to address the deficiencies.

Where the event was caused by the **realisation of residual risk**, it would be appropriate for the agency to review the risk assessments on which its existing strategic and operational plans are based. The adverse event may have resulted from a significant change to the compliance environment, in which case the agency would need to change its monitoring strategy accordingly.

If the adverse event happened because **legislative arrangements were inadequate**, it will probably be appropriate for the agency to recommend changes to the policy framework to reduce the likelihood of similar events occurring again.

15.5.B   IMPROVING THE AGENCY'S RESPONSE MANAGEMENT

An agency's post-event evaluation of the effectiveness of its emergency response management is a key element of its quality-assurance system. The evaluation should cover:

- the agency's procedures for contingency planning and emergency operations

- its decision-making procedures

- communication and information flow within the agency and between all organisations participating in the response

- the quality of the agency's published guidance material (for example, its notification procedures).

15.5.C ACCEPTANCE OF EVALUATION FINDINGS

The agency will enhance the effectiveness and the credibility of the evaluation by involving stakeholders and all organisations that participated in the response to the event. It should document the terms of reference for the evaluation and seek the endorsement of the terms of reference from relevant stakeholders. The evaluation team should produce a detailed report, which the agency should make available to stakeholders.

These measures will make it more likely that the sector will accept and act on the conclusions of the evaluation.

BETTER PRACTICE CHECKLIST: RESPONDING TO ADVERSE EVENTS

Event notification

☐ Responsibilities for reporting adverse events are clearly defined, and regulated entities, in particular, understand their responsibilities.

☐ Procedures for reporting adverse events are simple and cover all the information the compliance agency needs to be collected efficiently. The procedures are published.

☐ The agency's procedures for alerting relevant organisations and entities about an adverse event are simple and documented.

☐ Regulated entities are required to maintain operations data that will provide useful information for the compliance agency about an event.

☐ Procedures to activate the agency's internal response-management processes are documented, and its staff are trained in applying them.

Planning and managing the response

☐ If immediate compliance action is needed to control a threat, decision makers should follow the agency's established decision-making procedures to ensure that the action taken is lawful and that it provides due process for the targeted regulated entity.

☐ The decision to take the compliance action is fully documented.

☐ Contingency plans and emergency response procedures are documented, tested, and kept up-to-date, and staff are trained in implementing them.

☐   The response action plan defines a performance-management framework, including specific activities, key results, and milestones, and identifies which organisations and entities are responsible for achieving them.

☐   If the compliance agency is not directly responsible for planning and implementing the response, the agency endorses the response plan, and monitors the implementation of the plan to be assured that it is achieving the agreed outcomes.

Evaluation after an adverse event

☐   As part of the agency's quality-assurance system, it formally evaluates the causes of the adverse event and the effectiveness of the emergency response arrangements.

☐   The lessons learned from the evaluation are incorporated into the agency's systems for managing emergency responses, and also into those of regulated entities and other relevant organisations.

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