New Zealand Treasury

The Best Practice Regulation Model: Principles and Assessments

July 2012

THE TREASURY
Kaitohutohu Kaupapa Rawa

New Zealand Government

ISBN: 978-0-478-39657-7 (Online)

The URL for this document on the Treasury's website at July 2012 is
http://www.treasury.govt.nz/economy/regulation/bestpractice

Persistent URL http://purl.oclc.org/nzt/g-bprmpa

Contents

Overview

This document describes how the Best Practice Regulation (BPR) principles have developed, their intended use, the process of assessing (currently 56) regimes against them, and how both principles and assessments fit within New Zealand's regulatory management system. It then works through the principles summarised below and detailed in the table on the final page.

- Growth Supporting
- Proportional
- Flexible
- Durable
- Certain and Predictable
- Transparent and Accountable
- Capable Regulators

How we got here and what comes next

The BPR principles were originally developed in response to a request from the Minister of Finance and then Minister for Regulatory Reform in late 2010. The Minister of Finance challenged Treasury to answer three questions: **(1) What is a best practice regulation? (2) How close are we to the frontier? (3) What can we do to get closer?**

The principles are distilled from a range of sources, including APEC and OECD documents, and guidelines and directives from many governments around the world. They are intended to help with overall assessments of the regulatory state of play, and with targeted reviews. The principles will not be formally mandated at this stage (although this will be reviewed in future) but will be reflected in Treasury's regulatory guidance to agencies.

For the purpose of undertaking assessments, we categorised regulatory instruments into 'regimes' focused on a common outcome, activity or sector. The categorisation was later revised through consultation. This reduced the assessments to a manageable number and made more sense than assessing thousands of statutes and regulations individually.

An initial process to assess regimes against the principles was then conducted, and reported to the two Ministers in July 2011, who confirmed that the assessment as presented was something they could engage with in thinking about priorities. Some further clarification and updating of assessments has occurred since then. All assessments have been discussed with agencies but ultimately represent the views of Treasury.

A comprehensive reassessment is expected in late 2013 and two-yearly after that. However, Treasury will consider updating individual regime assessments if warranted between full reassessment cycles.

Cabinet has noted [EGI Min (11) 18/3 of 17 August 2011 confirmed by CAB Min (11) 31/9] that:

- the Treasury's Best Practice Regulation project can inform discussions between agencies and the Treasury about where to focus regulatory efforts
- the Treasury's Best Practice Regulation assessments will be tested with external stakeholders shortly; regulatory agencies, rather than the Treasury are best placed to select stakeholders to test the assessments with and to lead any engagement

Agencies are **encouraged** to use the principles in internal and stakeholder discussions on regulatory design and implementation; **expected** to have systems in place to enable them to engage with Treasury on future assessment rounds; and **invited** to bring to our attention any changes in regime circumstances that might affect current assessments.

Context and Evolution

Why have we developed this model beyond the direct Ministerial request?

- to enable better debate about our regulatory systems, in particular connecting theory to practice and enabling discussions across disparate regulatory frameworks, and
- to support informed discussion of what constitutes good regulation and how close we are to achieving it. Without reasonably robust measurement, sustained performance improvement is hard to achieve.

This model allows us to ask key questions in expectation of meaningful answers, such as:

- How good is our regulation?
- Are there opportunities for improvement through either materially rethinking how we regulate or a process of continuous improvement?
- Are there latent weaknesses in our regimes that may result in, for example, another 'leaky building' situation?

One of the problems in answering these questions is the lack of a shared understanding of the attributes of good quality regulation. Growing such an understanding through the evolution of these principles, the cycle of assessments, and resulting cross-agency and public discussion means we can:

- begin to mobilise and coordinate dispersed knowledge of how the law is working in practice
- give a better appreciation at any point in time of the health of regulatory regimes, and
- help achieve coherence in how regulation is assessed, developed and delivered.

The principles and associated performance indicators are what we describe as "middle level design principles", which are intended to be generally applicable across most if not all regulatory regimes, but also measurable. They indicate the 'health' of regulatory regimes.

The principles and performance indicators should function as an initial diagnosis of potential for improvement within regimes - to shift closer to the best practice frontier - and to detect latent weaknesses that may result in regulatory failure. If an assessment against these principles indicated that there was an issue, then a further diagnostic would need to be undertaken which would be specific to the regime in question.

While there are overlaps, the BPR principles can be differentiated from:

- principles which underpin judgement on whether to regulate in the first place
- good policy development process principles such as those contained within the Regulatory Impact Analysis (RIA) regime, and
- detailed design principles relating to the unique characteristics of specific regimes.

The principles have been drawn from our experience and cross checked against OECD, APEC and World Bank principles, comparable jurisdictions such as the UK, Australia and the US, and earlier NZ principles (in particular the Code of Good Regulatory Practice endorsed by Cabinet in 1997). The mutual reinforcement between the principles and assessments

offers a robustness previously lacking in regulatory assessments and a connection to concrete discussions with stakeholders on regulatory choices.

We will continue to:

a. assess the appropriateness of the principles and performance indicators to provide a high level indication of the extent to which our regimes are best practice, and

b. verify, and if required, propose amendments to the regimes in the current table.

The principles will evolve over time, such as the extended definition of what is meant by open and competitive markets, reflecting experience from their application.

Agencies are also likely to supplement the principles with additional ones relevant to their own regimes. We would appreciate being advised of such additions. This will help us address the challenge noted above of whether the principles should be widened to ensure coverage of all types of regimes (e.g., those that underpin the regulatory system itself such as courts, machinery of government, or particular circumstances and institutions relevant to a regime), or if a range of tailored extensions might be more appropriate.

The longer term goals, supported by these principles and assessments are a shared agreement on the attributes of good quality regulation, timely feedback on regime performance, and the ability to evaluate that feedback and take action based on it. Scans, Plans, the RIA regime, and post-implementation reviews all form part of Treasury's supporting framework for achieving these goals.

The following benefits have resulted from the project working as an additional element in the overall regulatory quality management system – helping achieve regulatory coherence:

- the BPR **principles** have been shown to be relevant for assessing regimes; which should also apply for future reviews of specific regimes. They are being integrated into RIA guidance
- the **assessments** are a step to:
  - credible benchmarking of regulatory performance between regimes and over time, feeding into longer term regulatory plans and Treasury's advice on strategic regulatory priorities
  - greater awareness of best practice for agencies to learn from each other, as with the Performance Improvement Framework (PIF) process, as well as a bridge for stakeholder engagement, now and ongoing.

The best practice work has positioned New Zealand better to shape regulatory expectations in trade negotiations and OECD and APEC discussions, influence overseas regulatory outcomes, and meet potential international obligations; such as publication of regulatory plans.

The Assessment Process

The best practice principles and performance indicators allow us to gauge the health of a broad spectrum of regulatory regimes and provide an alert to where there are or may be material issues that require further analysis. The assessments relate only to regulatory regimes, not the overall "health" of each area; e.g., in terms of whether intended outcomes are being achieved, the state of governance, efficiency and effectiveness etc. Those wider issues are beyond the scope of this approach.

The ratings are a negative assessment in the sense that green does not mean a regime is optimal, but rather that there are "no significant concerns" with it. It would be possible for a regime to be prioritised for reform for policy reasons that fall outside the regulatory best practice principles. The Best Practice principles generally avoid judgement about the appropriate outcome of any regulatory decision.

The ratings system is:

	No significant concerns
	Possible areas of material concern
	Strong Indications of material concern
	Not known

Assessment worksheets were initially sent separately to agencies and responses tested and calibrated within the Regulatory Quality Team before being sent back to individual agencies for review. Subsequently the complete set of draft assessments were circulated, allowing agencies to calibrate against each others' assessments. Initial regimes were defined by the Regulatory Quality Team and revised following agency discussions, balancing between coherence of each regime, and managing the scale of the assessment task. It is likely that the set of regimes will evolve over time, but this should be consistent with the approach taken in regulatory Scans and Plans.

In future, all agencies will be working from a common starting point of a base set of assessments, allowing for a more streamlined assessment process. In years between full assessments, it is likely that the Regulatory Quality Team will initiate only targeted regime reassessments. We welcome agencies to bring new information to our attention at any time if they consider it would justify our revising any existing assessment.

The following points are relevant in interpreting the assessment table.

- Assessments cover regulation only, for example, administration of the tax regime but not the tax take. Thus, government spending is beyond the scope of assessments (except where regulation is a major determinant of the effectiveness of that spending).
- A high materiality threshold has been applied in identifying areas of concern.
- While most regulatory regimes have been assessed, some have not been deemed significant enough to include.
- The assessments are "owned" by Treasury Vote Teams, informed by discussions with agencies (there was a high level of convergence between vote teams and agencies).

- Limitations include:
  - The assessments reflect a snapshot of information available on regimes at a point in time, so may change quite quickly as new information comes to hand.
  - Assessments are necessarily subjective (albeit informed by agencies' judgements), making it difficult to achieve standardisation in assessments.
  - The assessments have not been tested with stakeholders who, in some cases, may have different views.
  - We have learnt a lot since commencing the exercise, e.g., we should have sought information on the ability of all regimes to accommodate changing information technology. Future iterations will be much improved.

Taken together the 'areas for improvement' assessments ('strong indications of concerns' and 'possible areas of concern') indicate a significant gap between where regulatory regimes are now and a best practice frontier. Across the board improvements could, in aggregate, have a material impact on overall national welfare.

The core of the assessments table consists of ratings against principles (and the "other" column), but there are two additional elements:

- identification of whether a review is underway, internal or external, and
- additional context required to understand how an assessment has been reached, is addressed under the "scope of issue" column; e.g., research underway, unresolved questions, or reform underway or being implemented.

How this model as a whole fits with regulatory plans, scans and impact analysis is specified in the October 2012/13 Guidance for Departments: Regulatory Planning and forthcoming guidance on Regulatory Scanning.

It is envisaged that the principles will be embedded through reassessments reported to Cabinet, and linked to:

- regulatory scans and plans, major review processes and government policy statements on regulation
- RIA expectations and training, and use by the Regulatory Quality Team and Vote Teams in Treasury's external engagement
- international processes that guide regulatory best practice
- informing Performance Improvement Framework (PIF) reviews of regulatory agencies.

Agencies are responsible for validating assessments with stakeholders and can provide feedback to the Regulatory Quality Team at any stage. It is expected that there will be a comprehensive reassessment exercise in late 2013. Agencies may wish to consider this timeline in stakeholder engagement plans.

The BPR principles will also be the new standard where previous guidance or practice in policy development drew on the 'code of good regulatory practice' or similar past approaches.

If agencies find it useful to extend the principles and indicators for their own regimes, they are invited to discuss that process and its outcomes with Treasury and share their experience with other agencies.

There is no single strategy for moving closer to best practice. In some cases it will be a case of maintaining the momentum of existing reforms, in others a new impetus may be required. Major reviews with a focus on the legal framework remain an option in some cases, but in many areas the focus should be on improving regulatory agency performance within the existing legal framework (albeit with adjustments to the legal framework and rules as required to facilitate effective operations).

The Principles

1. **Proportionality**: the burden of rules and their enforcement should be proportionate to the benefits that are expected to result. Another way to describe this principle is to place the emphasis on a risk-based, cost-benefit regulatory framework and risk-based decision-making by regulators. This would include that a regime is effective and that any change has benefits that outweighs the costs of disruption.

2. **Certainty**: the regulatory system should be **predictable** to provide certainty to regulated entities, and be consistent with other policies.

   There can be a tension between certainty and flexibility. A principles or performance-based regime that provides for safe harbours such as deemed-to-comply standards tries to resolve this tension, but ensuring both attributes are optimally reflected is a challenge.

3. **Flexibility**: regulated entities should have scope to adopt least cost and innovative approaches to meeting legal obligations. A regulatory regime is flexible if the underlying regulatory approach is principles or performance-based, and policies and procedures are in place to ensure that it is administered flexibly, and non-regulatory measures, including self-regulation, are used wherever possible.

   Flexibility and durability can be two sides of the same coin; a regime that is flexible is more likely to be durable, so long as the conditions are in place for the regime to 'learn'. Indicators of durability are that feedback systems are in place to assess how the law is working in practice; decisions are reassessed at regular intervals and when new information comes to hand; and the regulatory regime is up-to-date with technological change. These two principles have been grouped for carrying out assessments.

4. **Durability:** closely associated with flexibility; the regulatory system has the capacity to evolve to respond to new information and changing circumstances.

5. **Transparency** and **Accountability**: reflected in the principle that rules development and enforcement should be transparent. In essence, regulators must be able to justify decisions and be subject to public scrutiny. This principle also includes non-discrimination, provision for appeals and sound legal basis for decisions.

6. **Capable Regulators:** means that the regulator has the people and systems necessary to operate an efficient and effective regulatory regime. A key indicator is that capability assessments occur at regular intervals, and subject to independent input or review.

7. **Growth Supporting:** economic objectives are given an appropriate weighting relative to other specified objectives. These other objectives could be related to health, safety or environmental protection, or consumer and investor protection. Economic objectives include impacts on competition, innovation, exports, compliance costs and trade and investment openness. A regime embodies this attribute if the identification and justification of trade-offs between economic and other objectives are explicit parts of decision-making.

   The growth-supporting principle is associated with a particular outcome, and hence to some extent differs from the previous six, in-so-far as they can be seen as intermediate objectives. It does not assume that growth should be given prominence over other

outcomes, but reflects that growth as an objective is not always identified or given due weight. It seeks to ensure that tradeoffs between economic and other objectives are explicitly considered along with any other objectives emphasised in a regime.

Treasury's assessment chart also includes a box for 'other' issues such as IT. Agencies are welcome to add principles or indicators where relevant to their circumstances.

Frequently Asked Questions

What is the role of the Ministers?

Ministers have seen draft assessments and can consider them in setting regulatory priorities.

What is the role of the Treasury?

Treasury will:

- facilitate the sharing of best practice and learning by agencies
- carry out the formal best practice assessments and report annually
- build the principles into its guidance and training and revise them as needed.

What is the role of Agencies?

Agencies are responsible for validating assessments with stakeholders, and can provide feedback to the Regulatory Quality Team at any stage.

How do these principles relate to the code of good regulatory practice and any similar past approaches?

It is intended that these principles will be the standard approach from now on. Previous principles were not linked to any assessments or other follow-up processes.

Are these principles binding?

No, but they will be referred to in guidance on policy development, including RIA, as a good starting point for assessing new or revised regulatory regimes.

How do the best practice principles relate to broader constitutional frameworks?

The principles assume the existence of, and are nested within, frameworks such as Parliamentary Standing Orders (eg, provisions regarding Explanatory Notes for Bills and the role of the Regulation Review Committee) and Legislation Advisory Committee Guidelines.

What does the Treasury do with assessments?

Assessments provide Treasury with information it needs to assess, and advise on, the progress of the government's regulatory objectives, priorities for reform, overall system health and cross-cutting issues.

Questions and feedback

General enquiries about the information contained in this guidance, not addressed in this guidance or the FAQs, can be directed to regulation@treasury.govt.nz. Other useful information can be found at the Treasury's regulation website http://www.treasury.govt.nz/economy/regulation

Attribute	*Principle*	*Indicators*
Growth Supporting	**Economic objectives are given an appropriate weighting relative to other specified objectives**	1. Identifying and justifying trade-offs between economic and other objectives is an explicit part of decision-making 2. The need for firms to make long-term investment decisions is taken into account in regulatory regimes where appropriate 3. Open and competitive domestic and international markets including minimising barriers to, and maximising net benefit from, cross-border flows are explicit objectives
Proportional	**The burden of rules and their enforcement should be proportionate to the benefits that are expected to result**	1. A risk-based, cost-benefit framework is in place for both rule-making and enforcement 2. There is an empirical foundation to regulatory judgements
Flexible	**Regulated entities should have scope to adopt least cost and innovative approaches to meeting legal obligations**	1. The underlying regulatory approach is principles or performance-based, and policies and procedures are in place to ensure that it is administered flexibly 2. Non-regulatory measures, including self-regulation, are used wherever possible 3. Decisions are reassessed at regular intervals and when new information comes to hand
Durable	**The regulatory system has the capacity to evolve to respond to changing circumstances**	1. Feedback systems are in place to assess how the law is working in practice including well-developed performance measurement and clear reporting 2. The regulatory regime is up-to-date with technological and market change, and evolving societal expectations
Certain and Predictable	**Regulated entities have certainty as to their legal obligations, and the regulatory regime provides predictability over time**	1. Safe harbours are available and/or regulated entities have access to authoritative advice 2. Decision-making criteria are clear and provide certainty of process 3. The need for firms to make long term investment decisions is taken into account in regulatory regimes where appropriate 4. There is consistency between multiple regulatory regimes that impact on single regulated entities where appropriate
Transparent and accountable	**Rules development, implementation and enforcement should be transparent**	1. Regulators must be able to justify decisions and be subject to public scrutiny
Capable Regulators	**The regulator has the people and systems necessary to operate an efficient and effective regulatory regime**	1. Capacity assessments are undertaken at regular intervals and subject to independent input and/or review

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other

Legend			
	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue

State of Play

(identifying agency responsible for regime)

Biennial assessments 2011-12 **Released July 2012**

Treasury's biennial assessment of regimes against the Best Practice Regulation principles

This chart represents a high-level assessment of New Zealand's regulatory regimes against a set of best practice principles and performance indicators, derived from relevant international and domestic sources. It should be regarded as a preliminary assessment, identifying areas where further analysis may be warranted, and highlighting analysis and reforms that are underway. Certain underpinning or cross-cutting issues (which may affect individual assessments) have not been included in the table, such as the courts and machinery of government (other than financial), except to the extent that they are picked up in specific regimes. In some cases, regimes have very recently been reviewed and the resulting changes have addressed identified issues. In these cases, we have ranked regimes "green", assuming that the recent changes will achieve the desired effect (e.g., Air Quality and Electricity Infrastructure) with close monitoring of these changes required to test this assumption.

It should also be noted that these assessments:

- have been undertaken by Treasury, in consultation with responsible policy agencies, based on current knowledge but without external consultation;
- reflect a snapshot in time (primarily in mid-2011, but with updates on the state of play since) rather than expected results of actions, which in many cases are already underway and could achieve a 'move to green'; and
- cover the combined impact of regulatory design and implementation, but exclude tax policy, and the level and allocation of government spending.

Assessments are organised by regime, and state of play comments by responsible agency; but all ratings and text represent the views of the Treasury, unless explicitly identified as an agency comment.

		(Ministry of Business, Innovation and Employment)
Commerce Act	There is a very strong focus on economic efficiency, and within that, the economy. While the regime seems broadly right for a small, open economy, there is little hard data on competition levels, but work is underway. If competition is much lower than anticipated, a fundamental rethink may be required. Recent regulatory changes (Part IV) and changes in how the Commerce Commission exercises its powers may be causing uncertainty. The Commission places a lot of emphasis on education to improve certainty.	In terms of consumer protection and securities markets: • The Consumer Law Reform Bill will make regulation more up-to-date and principles based, and deal with areas lacking in clarity. • MBIE does not share Treasury's view regarding potential negative effects of the increased emphasis on consumer protection in securities market regulation. • The FMA has successfully developed its structure and capability over the first year of its operation. Its activities, including enforcement action and development of disclosure guidance, are increasing market confidence and certainty. On the legislative front: • The Reserve Bank Act requires the NBDT regime to undergo a post-implementation review. • It may now be appropriate to review the Commerce Act to ensure it is appropriate for business in the 21st Century. • The Patents Act will be updated by the Patent Bill, but administration will require more resources and more skills - reflected in the 'capable regulator' rating. The proposed joint system with Australia is intended to mitigate the capability risk. On capability and IT: • There may be a question regarding Commerce Commission resourcing. • A replacement Immigration IT System supported by a strong business case will be important in fully realising service delivery improvement.
Consumer protection	There is a very strong growth focus to the regulation (through making it more difficult for poor entities to operate). However, there are some gaps relating to internet and credit cards, for example, and the regime does not broadly align with good practice overseas (higher standards). While fundamentally sound, some prescription is causing problems and limiting the ability of the regulator to act, and there are possible areas of concern relating to fringe lenders.	
Securities markets	*This assessment includes regulation of financial service providers.* A new regulator is being established, and is still developing its systems and capability and because of its newness may contribute to greater uncertainty. The ratings reflect 'unfinished business' (Securities Act Review) intended to address many issues, and Treasury's view that the increased emphasis on consumer protection in the wider package of securities market reforms in recent years may inhibit innovation and increase moral hazard risks.	
Corporate governance	*This assessment includes insolvency law.* The Companies Act is geared towards the bigger end of the market.	
Prudential	This regime is regarded as very good practice. It was reviewed against OECD best practice guidance in 2010 and found to be in line with what they recommend. International comparisons also confirm this. The prudential regimes for non-bank deposit takers (NBDT) and insurers are new and are in the process of being implemented.	
Contract/Commercial law	There is a stable and well understood legal framework in this area.	
Intellectual property	The growth principle is highlighted to reflect the patentability threshold in the Patent Act 1953 (which discourages innovation and inhibits growth in productivity and exports) and reflects the risk of having to adopt stronger IP standards through free trade agreements than appropriate for New Zealand firms and consumers.	
Overseas Investment	Possibilities for further easing exist, but since a review was recently completed the opportunities are limited.	

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other
Minerals							
Petroleum							
Electricity infrastructure							
Gas infrastructure							
Telecoms infrastructure							
Radio Communications							
Building regulation							
Housing/tenancy							
Energy efficiency							

Legend			
	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue	State of Play (identifying agency responsible for regime)
Biennial assessments 2011-12	**Released July 2012**
Minerals	The Crown Minerals Act and associated regulations are under review as part of the petroleum action plan. The current regime has been assessed to be internationally competitive.
Petroleum	The petroleum regime was recently assessed to be internationally competitive, but there may be further scope for gains in its clarity and the way permits are allocated.
Electricity infrastructure	Initial response to new electricity regime was positive.
Gas infrastructure	There are questions about whether the regulatory regime supports optimal investment, the allocation of pipeline capacity and the regulatory model (in particular whether New Zealand has too many industry specific regulators).
Telecoms infrastructure	The on-going regulatory challenge in this area is to ensure legislation keeps pace with technology and market development, while ensuring there is sufficient stability to encourage investment.
Radio Communications	The legislation was not designed for regulating holders of radio spectrum, impacting the ability of the regulator to manage any adverse behaviours of spectrum holders. Also, there are questions around the behaviour of some spectrum holders, particularly in relation to allocative efficiency.
Building regulation	There is demand for greater certainty/prescription. A recent review addressed these issues and ongoing work seeks to address remaining concerns.
Housing/tenancy	Issues have been identified with specific pieces of legislation.
Energy efficiency	No significant issues identified.

(Ministry of Business, Innovation and Employment)

On communications, energy and minerals:

- There remain opportunities for improvement in the Crown Minerals Act, particularly in relation to improving its clarity. The new electricity regime will need to be monitored.
- Although the trade-off in telecoms regulation between growth and other objectives is clear, it is important to continue to monitor how well this is put into effect; and the transparency and consistency of the regulator's decisions.
- On radio spectrum, the arbitration mechanism is currently being reviewed.

Implementation of, and interaction between, regimes remain issues:

- Problems in the building area (costs, uncertainty, poor implementation etc) are attributed mainly to the Resource Management Act (RMA) and Local Government Act, rather than to the Building Act. Making these regimes work properly (interpretation, enforcement) is the role of local government - this is problematic. Implementation of changes to the Building Act is underway.
- Also for minerals, the impact of other regimes can be an issue (health and safety, RMA).
- For housing/tenancy law, however, MBIE have not yet prioritised reviews, and issues aren't regarded as substantial. In the health & safety area, there is also a need to ensure consistency between multiple regimes e.g. Adventure Tourism and the Machinery Act, and to strengthen enforcement capability and capacity.
- In immigration, MBIE has focussed on improving service delivery in the past several years and is making progress.
- MBIE are considering how best to realise synergies between ACC and health and safety in employment.

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other

Legend			
	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue

State of Play

(identifying agency responsible for regime)

Biennial assessments 2011-12 **Released July 2012**

	Scope of Issue	State of Play
HSE	The performance-based regulatory framework contributes to uncertainty, particularly for SMEs, with respect to compliance obligations.	***(Ministry of Business, Innovation and Employment)*** In areas of labour law: • The Pike River Commission of Enquiry will question the current HSE regulatory regime. MBIE has started to review the current balance between principles and prescription, and the Minister has launched a Workplace Health and Safety Taskforce and Strategic Review which will look at whether the regime is fit-for-purpose and how well aligned HSE regulation is across the system. • The Government has announced intentions to introduce a 'Starting-Out Wage' and amend eligibility for the Training Minimum Wage. The Ministry is undertaking a review of the ACC funding policy, which includes consideration of stability of levies, assets and liabilities. The Ministry is also looking at ways to offer businesses more choice, reduce injury rates, improve incentives for rehabilitation and improve disputes resolution processes. The creation of MBIE offers opportunities to address longstanding issues around unclear leadership responsibility for occupational regulation. MED was responsible for the guidance on occupational regulation, while DoL was interested in the functioning of labour markets and had commissioned a piece of work scoping the extent of issues in this area. The establishment of MBIE provides a means for bringing these strands of work together.
Employment relations	Employment relations regulation is relatively fit-for-purpose having regard to growth objectives and the needs of employers and employees. However, recent amendments specifically for the film production industry have created some inconsistency.	
Minimum wage	The 'sleepovers' case has raised questions about the fitness-for-purpose of the legislation, reflected in the Flexible/Durable rating, but a wider review of the Minimum Wage Act 1983 is unlikely at this stage. The minimum wage has tended to increase faster than average wages, and at over 60% of the median wage is high by OECD standards. The Adult Minimum Wage is high relative to the average wage at 60%.The abolition of the Youth Minimum Wage may be also contributing to high youth unemployment.	
Immigration	The new Act supports significant discretion, but requiring effective operational processes to ensure that the objectives are achieved.	
ACC	There is little emphasis on financial stability and affordability compared to other objectives. Consideration should be given to changing the general settings of the ACC Scheme to put more emphasis on financial stability and affordability, as the current settings have allowed both deterioration in performance and the subsequent very significant turnaround.	
Occupational regulation	There is a restraint of trade, especially for migrants. Occupational regulation is a feature of many regimes. Comments include inconsistent regulatory approaches, questionable capability and motivation of some regulators (there is a mix of self government, and co-regulatory models), as well as poor accountability and inappropriate standards.	
Industry training	There are concerns around the extent to which regulatory settings focus industry training towards economic growth goals, and around the capability of the sector to deliver Government goals effectively. There is a review underway which should capture these issues (among others).	
Transport Safety	For New Zealand firms offering non-airline aviation services in overseas markets, there is potential disconnect between legitimate aims of economic growth and appropriate safety oversight in another country. There is no international guidance and it is an issue for other states. New Zealand is working to manage this tension by developing policies which may identify deficiencies in the NZ aviation regulatory system. Treasury notes that Growth issues may arise in other areas of transport safety and this will be a focus of the regulatory reform programme.	***(Ministry of Transport)*** The Regulatory Reform Programme was initiated to improve how the sector performs regulatory functions, including opportunities for substantial system improvements, and making the rule development system is more effective and efficient to ensure proposed rules are justified (i.e. are there other options?), looking at how the form/design of a Rule is fit-for–purpose, and if complementary tools available. Treasury supports this work and while it is early to judge effectiveness, has observed development and improvement; e.g. in the Ministry of Transport's regulatory management systems.
Transport infrastructure	Rating consistent with Transport Infrastructure Plan.	

Area of Law	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other	Scope of Issue	State of Play (identifying agency responsible for regime)
	Issues identified by Treasury (against best practice principles)								

Legend

	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Biennial assessments 2011-12 **Released July 2012**

Area of Law	Scope of Issue	State of Play (identifying agency responsible for regime)
Tax administration	The rating on 'other' reflects the technological challenge associated with Inland Revenue transferring from legacy IT systems.	**(Inland Revenue Department)** Inland Revenue is advancing its Business Transformation programme to build the capability it needs to achieve its objectives now and into the future.
IRD social programme	*(Covers child support, student loans, Working for Families and Kiwisaver.)* The rating on 'other' reflects the technology challenge associated with transferring from legacy IT systems.	
Crime	Treasury's view is that the seriousness of sanctions has increased in recent years compared to New Zealand's peers, but without evidence of public safety improvements. The uncertainty assessment is associated with the broad band of behaviour captured by each offence and the large level of discretion to determine charges and penalties within the band.	**(Ministry of Justice)** The Ministry of Justice agrees that that there are questions over the proportionality of sanctions, but would not agree that this has a material impact on growth.
Family Law	No significant issues. There is currently a Family Court review.	
Early childhood education	No significant issues.	**(Ministry of Education)** The Ministry of Education continues to keep education legislation under review to ensure it is appropriate. The Minister is developing an Education Plan for consideration by Cabinet and has recently established a cross-sector forum, which is able to review barriers to raising achievement, including any regulatory issues. For Tertiary Education the issues around the clarity of the legislation and its practical application – especially in relation to private training establishments – were addressed through the Education Amendment Act 2011. Concerns will continue to be addressed as part of business as usual, as and when opportunities arise.
Primary education *Secondary education*	There is a generally sound legal framework for schools but limited use is made of powers to intervene in struggling schools, or to rationalise the network. These issues are not considered to reach the materiality threshold.	
Tertiary education	Concerns exist around clarity in legislation, uncertainties around capability, and the extent to which regulation is growth focused. Frequent tweaks to the legislation have been reported by providers as causing problems. Oversight of private training providers is slightly different from public ones.	
Welfare	Growth issues have arisen mostly from long term beneficiaries not moving from welfare to employment. The growth principle is highlighted to reinforce the importance of maintaining momentum with the response to the Welfare Working Group, and the rating may become green once the reforms are in place. In relation to flexible/durable, the primary legislation is large and cumbersome, being both old, and subject to constant amendment and a large body of case law.	**(Ministry of Social Development)** A program of welfare reform is currently underway, explaining the amber rating.

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other

Legend

	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue	State of Play (identifying agency responsible for regime)

Biennial assessments 2011-12 **Released July 2012**

Scope of Issue	State of Play (identifying agency responsible for regime)
Health products & markets	There is concern that regulation of health products and markets do not take adequate account of compliance cost reduction and ease of export objectives. A lack of proportionality, having regard to full sets of costs and benefits of regulatory activity, is evident in District Health Boards.
Quality of health services	This regime covers workforce occupational regulation, mental health commissions etc. There is perhaps a disproportionate focus on risk mitigation relative to other objectives.
Public health	This regime covers water, sewerage, epidemics, compulsion under Mental Health Act, tobacco, and alcohol. It is possible that some activities (e.g., commercial) are not being undertaken in some regions because of the strength of local enforcement. Uncertainty of future regulation, and variability in enforcement, may be deterring long term investment for tobacco and alcohol retailing in particular. Overall there is a lack of certainty and there are inconsistent rules in some areas, but it is difficult to tell the size of the problem.
Machinery of Government	*(Financial machinery only.)* Concerns have been raised about the effects of some aspects of the Public Finance Act; in particular a lack of financial flexibility acting as a barrier to collaboration and innovation, prescriptive and inflexible reporting requirements; and lack of role-clarity and emphasis in relation to sustainable, longer-term financial management.
Civil Defence	
Gambling	The Gambling Act currently does not facilitate economic growth, as two of the key purpose provisions of the Act under Section 3 are to "limit the growth of gambling" and "prevent and minimise the harm caused". The Act does, however, allow casinos to operate. Casinos were introduced into New Zealand to promote employment, tourism and economic development.
Local Government	There is often tension in regulatory design between allowing local authorities to tailor regulatory solutions to respond to local preferences and conditions while maintaining a nationally efficient regulatory environment. Some central government agencies have expressed concern about the performance of local government, particularly in the delivery of regulatory functions for which national consistency is considered to be important (eg, building and public health regulation). It is also unclear whether some local authorities have the capacity and capability to respond to the diverse range of regulatory functions delegated to them. It is the nature of local government that considerable variability exists in local preferences and how councils choose to pursue locally-driven objectives, although there are some restrictions, e.g., around ownership, cost recovery. Some prescription has been removed, but there may be room for removing more.

(Ministry of Health)

DHB concerns could be an issue for contract management rather than regulation.

Occupational regulation has some conflicts of interest that need to be managed.

There is some risk of 'impulsive' public health decisions by local agents, but mechanisms are in place (e.g., appeal and review) to ensure responses to health threats are not disproportionate. There is considerable focus on building capability, but high staff turnover in some areas is a problem.

(The Treasury)

Amendments to the Public Finance Act are proposed for introduction to the House in 2012 with a view to selective implementation in 2013/14 and general implementation in 2014/15.

(Department of Internal Affairs)

Following a number of reviews into the Canterbury earthquakes, there may be a review of the Civil Defence Emergency Management Act with a focus on recovery; noting the significant damage and ongoing recovery issues associated with the earthquakes.

Government is in negotiations with SkyCity to build an international convention centre in Auckland in return for some expansion of its gambling operation.

A key to improving the quality of regulatory intervention will be to increase collaboration between central and local government in regulatory design.

The Better Local Government review will consider, among other things, how regulatory functions are allocated between central government and local government, in light of the findings of the Productivity Commission inquiry into local government regulatory performance (due in April 2013).

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other

Legend			
	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue

State of Play

(identifying agency responsible for regime)

Biennial assessments 2011-12 **Released July 2012**

	Scope of Issue	State of Play
Forestry	It is possible some of the minor indigenous forestry provisions should be more permissive, for example harvesting some regenerating forests (e.g., manuka / kanuka), indigenous trees on pastoral land and the export of sustainably produced timber. This is a minor issue, as indigenous forestry only accounts for 0.2% of harvest by volume.	**(Ministry for Primary Industries)** MPI is considering ways of addressing the issues identified in relation to forestry regulation. MPI has initiated reviews of key QMS issues, which will lead to an improved regulatory framework in these areas. Fisheries Plans will improve how resources and interventions are prioritised, and enable the performance of each fishery to be comprehensively monitored and reported, including the impacts of regulatory and non-regulatory interventions. MPI is currently reviewing the Biosecurity Bill. The intention of the Biosecurity Bill is to streamline regulatory processes and information sharing, provide for a greater partnership approach with the sector, allow for outcome based regulation and ensure that those best placed to manage risk are encouraged to do so. MPI is reviewing export food regulation in the context of its regulatory reform programme and the regulatory barriers to export growth project. The improvements in the Food Bill will ensure the regulatory platform for exports is modernised and robust. Concerns regarding the food regimes that are reflected in the assessment relate primarily to legislative constraints and managing joint delivery with local government. The Food Bill is expected to improve business certainty, reduce compliance costs and ensure that legal requirements are commensurate with the food safety risk of the activity, while maintaining our food safety standards. A review of the Bill has confirmed it is consistent with the policy intent and has suggested a number of changes to improve the clarity and workability of the Bill. Ensuring effective implementation of the Bill (once enacted) will be important, particularly with local government as co-regulators. The Bill is intended to clearly outline roles and responsibilities of the Ministry and territorial authorities who have regulatory responsibilities in this area. This should simplify and providing a national approach to regulatory capability.
Commodity levies & boards	Based on Treasury's information, it is unclear whether levy orders for very small industries confer a net benefit.	
Fisheries	The Quota Management System (QMS) provides a sound overall regulatory approach to managing fisheries stocks. The Ministry for Primary Industries (MPI) is continuing to improve on ways to integrate the QMS into an ecosystem-based management approach, in order to meet world best practice. There remains much legislation promulgated prior to the introduction of the QMS in 1986, which may be creating rigidities and costs, with unclear benefits.	
Biosecurity	The focus of the changes promoted through the Biosecurity Law Reform Bill is to strike a balance between protecting NZ from biosecurity risk and enabling safe trade.	
Food regulation (export)	While regulators are capable from a technical perspective, it is unclear to Treasury whether the wider economic impacts of regulations are consistently taken into consideration. The Australian Productivity Commission report noted the current regulatory regime was best practice, but there were overlaps between food and health regulation which the export review is looking at.	
Food regulation (domestic)	Regulation under the Food Act 1981 is regarded as highly prescriptive and costly to food business operators, relative to best-practice. However, the actual adverse food safety impact of the legislation is not regarded as substantial. This is in part due to other strategies that have been put in place i.e., the Campylobacter strategy with industry and MPI.	
Conservation	No significant issues identified. This would not have been the case 2-3 years ago.	**(Department of Conservation)** Conservation have embarked on a comprehensive improvement programme across all of the principles.

Area of Law	Issues identified by Treasury (against best practice principles)						
	Growth supporting	Proportional	Flexible - Durable	Certain - Predictable	Transparent	Capable regulator	Other

Legend

	No significant concerns		Possible areas of material concern
	Strong indications of material concern		Not known

Scope of Issue

State of Play

(identifying agency responsible for regime)

Biennial assessments 2011-12 **Released July 2012**

Area of Law	Scope of Issue	State of Play (identifying agency responsible for regime)
Resource Management	It is unclear whether the current balance of economic and non-economic objectives in the RMA principles (sections 6 & 7) is appropriate or encourages proactive planning for activities with economic benefits. There are concerns that some aspects of the Resource Management System are not as efficient as they could be, and that implementation (via local government) is problematic and causing uncertainty.	**(Ministry for the Environment)** RMA Phase II reforms are underway. The review of RMA ss. 6 and 7 will include consideration of 'matters of national importance' including infrastructure and urban design. The Government has announced its intention to impose a six month time limit on medium sized resource consent applications, and require a single resource management plan per district. Issues relating to resource allocation and governance are being considered as part of the Fresh Start for Fresh Water policy programme. A National Policy Statement on Freshwater Management (NPS-FM) was issued in 2011. The Land and Water Forum collaborative stakeholder process is currently working in parallel with officials to develop recommendations for improved water management building on the NPS-FM and addressing other matters which are likely to have a non-regulatory response. MfE has recently received a number of consultancy reports on HSNO and officials are currently considering their implications. This will put us in a better position to confirm and substantiate the ratings provided for Hazardous Substances and New Organisms.
Hazardous Substances	A number of concerns/claims have been raised about the regime, including: prescriptive, high cost for applicants (direct and indirect), low levels of compliance, overlaps of regulation and enforcement (multiple parties). Also concerns over the opportunity costs associated with the regime.	
New organisms	A number of concerns/claims have been raised about the regime, including: that it is prescriptive and high cost for applicants (direct and indirect), opportunity costs (i.e., what New Zealand may be missing out on), and potential impact on New Zealand's competitiveness and innovation, especially in the primary sector. Concerns also exist over costs researchers face and whether these are proportionate to the benefits received.	
Water	There is an acknowledged need for greater central government direction in freshwater management, the setting of limits to manage both water quality and quantity, and improved involvement of Māori in freshwater management processes.	
Air	The burden for improving air quality has been disproportionately borne by business. This was creating significant uncertainty for business in particular, but also other stakeholders, as it became apparent that others would have to accept a greater share of the burden for reducing emissions. This was a major driver for changes to the Resource Management (National Environmental Standards for Air Quality) Regulations in 2011.	
Climate change	The Government's response to the Emissions Trading Scheme review will require changes to the Climate Response Act and regulations during 2012, in the context of international uncertainty.	
Land registration		**(Land Information New Zealand)** LINZ is undertaking an independent external review of the effectiveness of its regulation in maintaining confidence in property rights.