

Good Regulatory Practice: New Thinking, New Developments and New Tools

Course Outline

August 2017

From the deregulation period of the mid-1980s the emphasis has shifted from 'less regulation' to 'better regulation' and 'better implementation'. This has increased the complexity of the regulatory challenge as (a) policy advisors seek to develop regulatory regimes that achieve multiple and sometimes conflicting objectives, incorporate the lessons from past failures while not overreacting, and assimilate international best practice while maintaining local relevance, and (b) regulators seek to allocate their resources in a way that manages risks and achieves acceptable levels of compliance in regulatory systems where risk elimination and full compliance is usually not feasible.

The objective of this course is to identify how these challenges are being met by drawing on practical law and policy reform in New Zealand over the past 10 years in particular. Topics that will be covered include: regulatory systems and stewardship, regulatory best practice, regulatory success and failure, the role of regulators, aspects of regulatory design and the interface between domestic and international regulatory systems.

The teaching will be related to real-world policy issues so that participants can see what they are learning can help them in their work. It will be a very interactive teaching style, with a lot of discussion - much more like MBA than undergraduate teaching, as the participants will bring their real-world policy experiences to the discussions.

Names and contact details

Course Presenters:

Dr. Peter Mumford

Policy Director, MBIE

Email: peter.mumford@mbie.govt.nz

Jonathan Ayto

Principal Advisor, Treasury

Email: jonathan.ayto@treasury.govt.nz

Susan Hall

Senior Solicitor, MBIE

Email: susan.hall@mbie.govt.nz

Cassie Nicholson

Deputy Chief Parliamentary Counsel (Director Drafting Legislation)

Email: Cassie.Nicholson@pco.govt.nz

Karl Simpson

Policy Director, MBIE

Email: karl.simpson@mbie.govt.nz

Mark Steel

Director, Regulatory Systems, MBIE

Email: mark.steel@mbie.govt.nz

Biography

The course will be led by Peter Mumford, Jonathan Ayto, Susan Hall, Cassie Nicholson, Karl Simpson and Mark Steel.

Peter Mumford has a long history of involvement in regulatory systems development, regulatory reform and international regulatory cooperation. Systems development has included the implementation of the Regulatory Impact Analysis (RIA) regime in the mid-1990s, Treasury's Regulatory Best Practice Principles and Performance Indicators and the policy and design work that led to the establishment of the NZ Productivity Commission. Regulatory reform has spanned financial markets, building controls, workplace health & safety and occupational regulation.

On the international front Peter has negotiated a number of international agreements, including the Trans-Tasman Mutual Recognition Arrangement, and recently was the NZ negotiator of the TPP 'Horizontal Issues' chapters, which include Regulatory Coherence, SME's and Competitiveness and Business Facilitation.

Peter has an MA for a thesis on *Factors affecting international regulatory cooperation between States*, and a PhD for a thesis on *Enhancing performance-based regulation: lessons from New Zealand's building control system*. He has published, given seminars and lectured on the topics of regulatory failure, best practice regulation, regulatory cooperation and regulatory governance.

Following a four year secondment to the Treasury, attached to the Regulatory Quality Team, Peter returned to MBIE in 2013 and is a Policy Director in the Science, Innovation and International Branch focusing on a range of regulatory issues, including the establishment of the new Outer Space and High Altitude Activities regulatory regime. Peter also has responsibility for progressing the Government Regulatory Practice (G-REG) Initiative. This Initiative is mandated by the government to promote professionalism in the regulatory workforce.

Jonathan Ayto is a Principal Advisor at the NZ Treasury. Since the Treasury took on responsibility for strategic oversight and coordination of the government's regulatory quality management system in late 2008, much of his work has been as a member of Treasury's Regulatory Quality Team. This work has included changes to Cabinet's requirements for Regulatory Impact Analysis, the design and implementation of departmental disclosure statements for government-initiated legislation (originally proposed as an alternative to the Regulatory Standards Bill), and the introduction of government expectations for departmental regulatory stewardship. Johnathan is a member of the Legislation Design and Advisory Committee (LDAC), the

Government-appointed committee responsible for the *LAC Guidelines on Process and Content of Legislation* and for advising departments on design of legislation.

Susan Hall is a senior solicitor in MBIE's legal branch. Susan has been at MBIE since 2014, where her focus has been on labour market regulation, health and safety law and identifying best legislative practice for occupational regulatory regimes. Previously, she spent 12 years at the Law Commission as lead legal and policy adviser on law reform projects relating to regulatory enforcement, criminal and family law, and a range of public law matters. Her Law Commission work included coordinating the Commission's review of draft legislation against the Legislation Advisory Committee Guidelines, and the 2014 rewrite of the LAC Guidelines.

Cassie Nicholson, is the Deputy Chief Parliamentary Counsel (Director Drafting Legislation) at PCO. Cassie has a strong interest in legislative design and how it affects regulatory systems. She has worked (largely as a legislative drafter but also in policy on secondment at MBIE) on many significant and complex reforms over the past 17 years, including financial markets reforms, Crown entities legislation, patents legislation, and a wide variety of other commercial legislation. In her current role leading the drafting unit at PCO, she also has primary responsibility for PCO's support for the Legislation Design Advisory Committee. More broadly, PCO's strategic focus includes initiatives to support departmental regulatory stewardship. Cassie is a member of LDAC.

Karl Simpson is a Policy Director in the Labour and Immigration Policy Branch of MBIE. Karl's career in government has largely been spent working across the policy and legal boundary. He has worked in communications and information technology policy, as a lawyer on a range of legislation, including reforms of energy markets, and consumer and commercial law, and as a policy leader in the design and implementation of both financial markets and health and safety at work system-wide reforms. He then managed MBIE's Legislation Team, before returning to a policy director role in labour and immigration policy, where he currently works on matters such as pay equity, employment standards and immigration policy. Karl is also a member of LDAC.

Mark Steel is currently Director Regulatory Systems in the Office of the Chief Executive, MBIE. A key part of Mark's current role is to ensure that MBIE's approach to regulatory policy and practices across its wide range of microeconomic responsibilities are consistent and complementary. This includes taking a regulatory stewardship approach and the adoption of international best practice in MBIE's regulatory systems.

Mark has had an extensive public service career leading work on economic development and regulatory policy. Mark has previously held the positions of Deputy Secretary, Regulatory and Competition Policy, and Deputy Secretary, Industry and Regional Development in the former Ministry of Economic Development, and General Manager, Trade and International, in MBIE. Mark has at various times led policy advice teams working on competition law & policy, intellectual property policy, company and securities law, trade remedies & international regulatory cooperation.

Day 1- The Big Picture (lead: Peter and Mark)

Session 1: What is regulation?

What do we mean by regulation? This has been the subject of much debate over the years, and has ranged from a narrow focus on what the State does by way of creating and enforcing rules, to a broader focus on the many ways in which societies regulate themselves and the role of the State in creating an alignment between non-State regulation and overall national welfare as defined by the State. Drawing on Black (2002) this session will discuss the questions of 'what is regulation' and 'what is the role of the State'. The session will then focus more directly on the role of the regulatory policy advisor. Taking the regulatory lifecycle as the reference point, we will discuss what stages in the lifecycle policy advisors can expect to be involved, and what they are expected to know in the role.

Session 2: Key concepts and critical issues in regulation

The 1970's provides a useful starting point for describing current approaches to regulation, but over the past 40 or so years both ideas and practices have evolved (although not in quite the same ways and currently not at the same rate across regulatory regimes within countries, or between countries). The 1970's has been chosen as this was when the most restrictive forms of economic regulation began to be dismantled, and the shift from prescriptive to goal-based regulation and economically efficient regulation commenced.

However, there were many other significant developments over the period, including the consolidation and codification of law, a significant increase in the quantum of social regulation, increased alignment of regulatory approaches and regulation across borders and, more recently, an increased focus on 'risk-based' and 'responsive' regulation and implementation, precipitated in many cases by regulatory failures. This session will outline and discuss these trends.

Exercises will be introduced aimed at putting course participants in 'real world' situations to illustrate the challenges of designing and implementing regulatory regimes that meet societal, political and stakeholder expectations. These sessions will set the scene for the subsequent sessions on regulatory stewardship, legislative design and regulatory practice.

Day 2 - Regulatory Stewardship (lead: Mark and Jonathan)

Session 1: Regulatory stewardship and its implications for agencies

Historically the management of regulatory systems has received limited attention from public administration scholars or from the central agencies of government. Parliament and the Executive created law based on advice from departments or expert bodies, and regulators administered the law. Oversight was the province of the Courts and took place through the development of administrative law.

This situation has changed markedly in recent years. Commencing with the introduction of Regulatory Impact Analysis requirements some 18 years ago, the regulatory management system has evolved to include the codification of good regulatory practice principles, reporting on regulatory performance, and Regulatory Stewardship. This overarching system creates expectations that agencies with

regulatory policy and operational responsibilities need to meet and to understand. This session will discuss this trend and explore the government's new regulatory stewardship expectations in detail.

Session 2: Regulatory systems and stewardship strategies

A number of agencies have developed and published regulatory stewardship strategies and others are in the process of doing so. MBIE's approach will be examined by way of a case study, and participants will be invited to discuss how regulatory stewardship is being applied in their agencies.

Day 3 - Legislative Design (lead: Karl, Cassie and Susan)

Statutes provide the basic framework for regulatory regimes. To ensure coherence, the statute should include a clear expression of the purpose of the regime. This basic building block enables the regime to be effectively monitored and evaluated as well as guiding the exercise of discretion by regulators, regulated parties and the courts. Built on that foundation, the regulatory regime will set out or provide for rules and standards of conduct, and provide for compliance activities, regulatory tools and enforcement.

However, regulated entities are heterogeneous and rules, standards, guidance and compliance strategies need to be tailored to the characteristics of different groups and situations (to avoid over or under regulation). The challenge for policy advisors is to create legislative frameworks that provide for fit-for-purpose rules, standards, guidance and compliance strategies, as well as checks and balances which ensure that the rules and strategies remain fit-for-purpose, and are an appropriate exercise of the coercive power of the State.

The theory and practice of legislative design will be discussed with specific reference to recent statutes.

Day 4 Regulatory Practice (Lead: Karl, Cassie, Susan and Peter)

Session1: The role of the regulator

One of the responses to recent regulatory failures has been a stronger focus on the implementation of regulatory regimes, and alongside this greater monitoring of regulatory regimes and regulators and greater 'regulation of the regulators'. The latter is reflected in recent Statute design which provides clearer direction to regulators, more duties, more powers and more checks and balances. Drawing on Searancke, Mumford, Simpson and Steel (2014) the evolution of statute design as it relates to the governance and performance of regulators will be discussed.

Session 2: Regulatory practice and the implications for policy

In 2014 the Productivity Commission reported on *Regulatory Institutions and Practices*. This provided a catalyst for the establishment of the Government Regulatory Practice Initiative (G-REG); a network of central and local government regulatory agencies established to lead and contribute to regulatory practice initiatives. It works on actions that improve leadership, culture, regulatory practice and workforce capability in regulatory organisations and systems. Insights from the G-REG community and activities will be drawn on to reveal how regulatory agencies

are addressing the challenges they face, and how to improve the policy-practice divide.

References

Ayto, Jonathan. "Why Departments Need to be Regulatory Stewards". Policy Quarterly 10. Issue 4. (2014)
<http://igps.victoria.ac.nz/publications/files/c9ef039ec6f.pdf>

Black, Julia. "Critical reflections on regulation." Austl. J. Leg. Phil. 27 (2002): 1.

Ministry of Business, Innovation and Employment (MBIE). Regulatory Cooperation Toolkit. 2014.

Ministry of Business, Innovation and Employment (MBIE). Regulatory Management Strategy 2016/2017
<http://www.mbie.govt.nz/publications-research/publications/regulatory-systems-programme/regulatory-management-strategy-15-august-2016.pdf>

New Zealand Productivity Commission. Regulatory Institutions and Practices. 2014
<http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf>

Searancke, Gaye, Peter Mumford, Karl Simpson and Mark Steel. "Governing the Regulators – applying experience." Policy Quarterly 10, Issue 1 (2014)
<http://igps.victoria.ac.nz/publications/files/ce1961e8517.pdf>

Class Details

Date	Times	Venue
23 August 2017	12.30pm – 4.30pm	G.03, MBIE, Ground Floor 15 Stout Street, Wellington
25 August 2017	9:00am – 1.00pm	G.03, MBIE, Ground Floor 15 Stout Street, Wellington
30 August 2017	12.30pm – 4.30pm	G.02, MBIE, Ground Floor 15 Stout Street, Wellington
31 August 2017	9:00am – 1.00pm	G.01, MBIE, Ground Floor 15 Stout Street, Wellington