

# What Does Good Regulatory Decision Making Look Like?

## Introduction

This article addresses a key theme of regulatory activity – decision making – in the context of the Government Regulatory Practice Initiative (G-Reg).<sup>1</sup> This initiative has a broad focus on the improvement of regulatory practice and the development of the regulatory profession in New Zealand. In doing so, the article addresses decision making across regulatory systems. The term regulatory systems refers to:

- the end-to-end approach of government intending to influence or compel specific behaviour, including policy development;
  - the design of instruments intended to achieve the intention;
  - the implementation of those instruments;
  - identifying and understanding the outcomes achieved; and
  - assessing and reviewing the success of each of these components, as a whole.
- This can be thought of as involving three main interrelated system phases: design, implementation and review.
- The article discusses the mechanics, influences and principles involved in good regulatory decision making. First it deals with design and review, as those phases essentially set the context of implementa-

tion. Then it deals with implementation and how the advent of G-Reg creates the conditions for improved regulatory decision making in this phase. It concludes with a brief description of what we will see if regulatory decision making at an individual case, industry and system level is, in fact, ‘good’.

## The mechanics, influences and principles involved in good regulatory decision making – design and review

Decision making in respect to regulatory design and review happens first and foremost in the policy and political domain. While the shape and decision-making rights of different regulatory systems differ (sometimes significantly between regimes), broadly speaking regulatory regimes generally consist of:

- primary legislation (e.g. laws) – decided by Parliament;
- secondary legislation (e.g. rules, regulations, by-laws) – decided by Cabinet, ministers and/or local

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authorities, within the bounds of primary legislation;

- tertiary legislation (e.g. standards and codes) – which may be in the decision-making domain of ministers, Cabinet or (unelected) regulatory bodies (ministries, departments, Crown entities), but any decision making must in any event occur within the bounds of the enabling primary and secondary legislation.

Of course, the courts also play a role in design, review and implementation through the development of common law (case law), and through precedent-setting decisions. Court decisions inform the way regulation is implemented, and may also trigger the review and re-design of regulation.

#### *Design and review decision-making frameworks*

Much work has been done to support good regulatory decision making in respect to (initial) design and (subsequent) review of regulatory systems. For the purposes of this article, the most relevant products of that work are the Treasury's *Regulatory Impact Analysis Handbook* (Treasury, 2013) (the *Handbook*) and *Best Practice Regulation Principles and Assessments guide* (Treasury, 2012) (the *Guide*).

The *Handbook* is effectively the regulatory policy adviser's bible, with its stated purpose being to serve two benefits:

- enhancing the evidence-base to inform decisions about regulatory proposals – to ensure that all practical options for addressing the problem have been considered and that the benefits of the preferred option not only exceed the costs but will deliver the highest level of net benefit, and
- transparency – the presentation of agencies' free and frank advice to decision makers at the relevant decision points provides reassurance that the interests of all sectors of the New Zealand public have been considered. RIA [regulatory impact analysis] also aims to encourage the public to provide information to enhance the quality of regulatory decisions, to further inform the evidence-base. (Treasury, 2013, p.1.4)

Those familiar with the *Handbook* will know that it also includes a section on

**Table 1: Best practice regulation principles and assessments guide**

Attribute	Principle	Indicators
Growth Supporting	Economic objectives are given an appropriate weighting relative to other specified objectives	<ol style="list-style-type: none"> <li>1. Identifying and justifying trade-offs between economic and other objectives is an explicit part of decision-making</li> <li>2. The need for firms to make long-term investment decisions is taken into account in regulatory regimes where appropriate</li> <li>3. Open and competitive domestic and international markets including minimising barriers to, and maximising net benefit from, cross-border flows are explicit objectives</li> </ol>
Proportional	The burden of rules and their enforcement should be proportionate to the benefits that are expected to result	<ol style="list-style-type: none"> <li>1. A risk-based, cost-benefit framework is in place for both rule-making and enforcement</li> <li>2. There is an empirical foundation to regulatory judgements</li> </ol>
Flexible	Regulated entities should have scope to adopt least cost and innovative approaches to meeting legal obligations	<ol style="list-style-type: none"> <li>1. The underlying regulatory approach is principles or performance-based, and policies and procedures are in place to ensure that it is administered flexibly</li> <li>2. Non-regulatory measures, including self-regulation, are used wherever possible</li> <li>3. Decisions are reassessed at regular intervals and when new information comes to hand</li> </ol>
Durable	The regulatory system has the capacity to evolve to respond to changing circumstances	<ol style="list-style-type: none"> <li>1. Feedback systems are in place to assess how the law is working in practice including well-developed performance measurement and clear reporting</li> <li>2. The regulatory regime is up-to-date with technological and market change, and evolving societal expectations</li> </ol>
Certain and Predictable	Regulated entities have certainty as to their legal obligations, and the regulatory regime provides predictability over time	<ol style="list-style-type: none"> <li>1. Safe harbours are available and/or regulated entities have access to authoritative advice</li> <li>2. Decision-making criteria are clear and provide certainty of process</li> <li>3. The need for firms to make long term investment decisions is taken into account in regulatory regimes where appropriate</li> <li>4. There is consistency between multiple regulatory regimes that impact on single regulated entities where appropriate</li> </ol>
Transparent and accountable	Rules development, implementation and enforcement should be transparent	<ol style="list-style-type: none"> <li>1. Regulators must be able to justify decisions and be subject to public scrutiny</li> </ol>
Capable Regulators	The regulator has the people and systems necessary to operate an efficient and effective regulatory regime	<ol style="list-style-type: none"> <li>1. Capacity assessments are undertaken at regular intervals and subject to independent input and/or review</li> </ol>

Source Treasury, 2012

implementation, on the basis that it is important to consider practical implementation issues when key policy and design choices are made. The specific implementation considerations referred to include:

- administration issues, such as which agency will implement and

administer the option and how it will function;

- timing and transitional arrangements: e.g. delayed or gradual introduction of new requirements, provision of interim assistance;
- compliance cost minimisation strategies: what implementation

- strategies will be required, such as an education campaign, the use of electronic technology, form design, advisory services and testing with stakeholders? Is there existing regulation that can be reduced or removed to prevent overlap?;
- implementation risks and their potential impact on the effectiveness of an option: strategies for mitigating these risks should be explained;
  - information that regulated parties will require in order to comply with the regulation, and how this will be provided (e.g. whether there is opportunity to rationalise or 'piggyback' on existing information sources or methods of communication);
  - enforcement strategy: how compliance will be enforced, who will

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.

The *Handbook* and the *Guide* can be thought of as 'closing the loop' in terms of support for good regulatory decision making across the three phases of regulatory systems.

### *Key influences on design and review decision making*

While the *Handbook* and the *Guide* provide advice which will support good regulatory design and review decision

(political) decision makers, and often with significant discretion.

The political influences on design decision making are related to:

- the world view and policy preferences of the governing political parties;
- the mandate they have achieved through democratic elections;
- the political capital they have: that is, the trust, goodwill and influence the (governing) political parties and politicians have with the public and other political figures; and
- the ideas that arise through things such as engagement with business and academia, and emerging international practice.

### **G-Reg and the role of professional development in good regulatory decision making**

Bearing in mind that regulatory design and review are primarily policy and political constructs, G-Reg has been careful to carve out its specific contribution to the improvement of regulatory systems as being related to the implementation phase.

Good regulatory decision making is a key part of implementation and a necessary part of exercising discretion as a regulator. The topic of exercising discretion was identified as one of five thematic issues of particular importance by the G-Reg Steering Group in its 2016 work programme.<sup>3</sup> It provided the theme for G-Reg's 2016 (Wellington and Auckland) conferences. An earlier version of this article underpinned the opening address at both.

Good regulatory decision making as part of the implementation of regulation requires:

- processes that support the effective collection, collation and analysis of information and facts (for example, intelligence, certification, audit and investigation processes);
- effective decision-making frameworks that provide for good regulatory decision making (for example, frameworks that enable risks to be considered, discretion to be applied and appropriate interventions to be imposed);
- people who have the capability to 'process' the information and facts in

## Good regulatory decision making is a key part of implementation and a necessary part of exercising discretion as a regulator.

undertake this, whether there will be sanctions for non-compliance (e.g. warnings, fines, licence suspension, prosecution, and whether there will be gradations of sanction depending on the phase/severity of breach), the suitability of risk-based enforcement strategies.

The *Guide* (see Table 1) responded to a challenge posed in 2010 by the minister of finance to Treasury to answer three questions: (1) what is a best practice regulation? (2) how close are we to the frontier? and (3) what can we do to get closer?

Its principles<sup>2</sup> are used as part of the ongoing process of identifying potential improvements in regulatory regimes. As Treasury notes in the *Guide* (p.4):

The principles and performance indicators should function as an initial diagnosis of potential for

making, the actual decision making is influenced by constitutional and political issues. It is not the purpose of this article to address these issues in any depth, but, for the sake of context, a brief comment on each is helpful.

Constitutional conventions (which would be reflected in policy advice) guide the decision-making rights that apply as between the primary, secondary and tertiary regulatory instruments. In plain language, those who are elected to office get to make the high-level decisions. At this level the decisions are typically about whether, and broadly how, to intervene in our lives to address risks and opportunities and provide (net) public benefits. By contrast, unelected state servants and local authority officials implement what is intended. This is usually with specific or delegated powers and functions that explicitly seek to ensure that operational decisions are independent of the elected

accordance with the decision-making frameworks; and

- organisations that are well led, with a culture<sup>4</sup> (norms, values and beliefs) that is appropriate to regulatory activity.

Professional development, in the G-Reg context, supports each of these elements directly or indirectly. It does this through its five themes of work which sit alongside the development of the regulatory compliance qualifications framework. This framework was developed to improve capability amongst those undertaking regulatory activities and to recognise expertise where it currently exists. The five themes are: the use of information; risk and communication of risk; the exercise of discretion; regulatory stewardship; and the future of the qualifications.

Ultimately, G-Reg's focus on regulatory practice and capability initiatives is intended to improve leadership, culture and workforce capability. This is intended to create the conditions in which good regulatory decision making can occur: essentially, 'professionalising' the regulatory workforce.

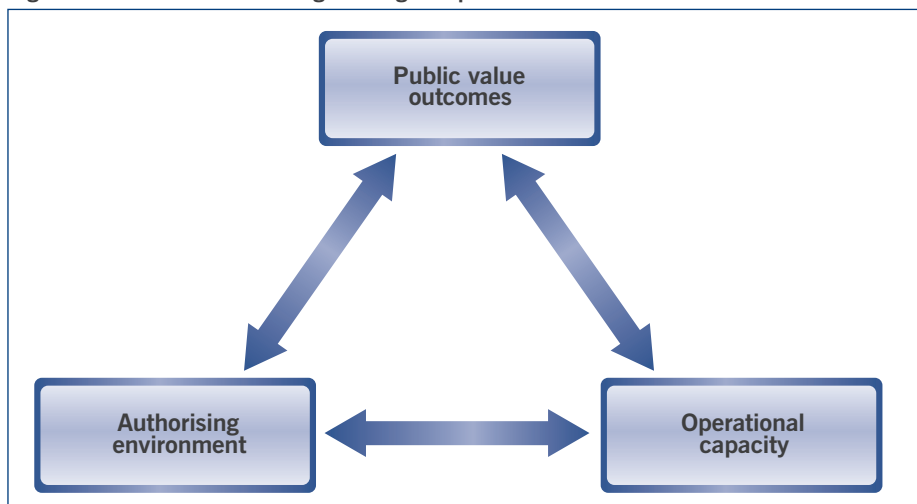
#### The mechanics, influences and principles involved in good regulatory decision making – implementation

Good regulatory decision making in the implementation phase occurs within organisations that are either:

- selected as part of machinery of government<sup>5</sup> decisions as being the appropriate existing organisations to implement the system; or
- put in place as part of the system design or review phases, to implement the system.

The machinery of government decisions are typically informed by advice provided in accordance with the requirements of the implementation section of the *Handbook*, discussed above. So, effectively the shaping of the boundaries of the regulatory decision making that is within the domain of the organisation (or statutory office holders within it) occurs as the policy intent is expressed through the development of the relevant legislative instruments. And legislative instruments are now much more likely than previously to provide

Figure 1: Mark Moore's strategic triangle of public value



Source: Moore 1995

guidance on matters of good regulatory decision making to those involved in regulatory implementation.

As noted by Searancke et al.:

Modern statutes convey much more information to regulators than in the past about their role and how they should perform it. In effect, regulators have always been able to exercise discretion. Modern statutes still provide for discretion, but are more informative in terms of how that discretion should be exercised.

Discretion continues to be important, as the modern regulator needs to choose the most appropriate type of intervention (e.g. informing versus sanctioning) given the particular circumstances and based on evidence. This is not necessarily clear at the time a new regulatory regime is put in place or a new regulator is established. This is not just an issue of flexibility for the regulator. If implemented well, it should lead to the most effective and lowest (social) cost solution for the regulated. (Searancke et al., 2014)

Within these boundaries it is generally the case that regulatory decision making in the implementation phase is statutorily independent<sup>6</sup> of political influence,<sup>7</sup> but this does not mean that those engaged in that decision making should be politically naïve.

Considered in terms of Mark Moore's strategic triangle of public value (Figure 1), discussed by Bromell (2012), it seems

apparent that even independent regulators should seek to ensure that their decisions and actions deliver the public value intended by the regulatory system. This should maintain the confidence of those in their authorising environment (democratically elected representatives, the private sector, the voluntary sector and the broader community).

This is a challenging issue to deal with operationally, which is discussed further below.

#### Decision-making frameworks

Unlike the examples discussed above relating to design and review – the *Handbook* and *Guide* produced by Treasury – the development of decision-making guidance and frameworks in the implementation phase has occurred with limited central direction and support.<sup>8</sup> The exception to this is the *Solicitor General's Prosecution Guidelines* (Crown Law, 2013), which are required to be followed but relate clearly only to one type of decision making in a regulatory decision-making context.

Other guidance material has been developed; for example:

- the *Achieving Compliance* guide (Compliance Common Capability Programme,<sup>9</sup> 2011), which is a broad-based guide which contains material relating to decision-making guidance, but is not focused primarily on that and has no 'formal' standing as a guidance document;
- the New Zealand Productivity Commission's *Regulatory Institutions*

**Table 2: Guiding principles for decision making on compliance interventions**

<p>Decisions regarding Maritime NZ compliance interventions will take into account the attitude towards compliance and be:</p> <ul style="list-style-type: none"> <li>logical, timely and considered evidence-based</li> <li>made impartially and without fear, favour, bias, prejudice or improper motive</li> <li>sufficiently robust and well-documented to withstand judicial review</li> <li>proportionate to the risk posed by the non-complaint behaviour, and the attitude towards compliance</li> </ul>	<ul style="list-style-type: none"> <li>consistent with the law, the public interest, Maritime NZ's policies and values, and any applicable international treaties.</li> </ul> <p><b>Factors for consideration</b></p> <p>The factors for consideration are set out in the table below. Application of these factors requires expertise and experience to be applied in the process of weighing up which compliance tools might be most applicable.</p>
<p>Extent of harm or risk of harm: This includes harm or potential harm to health and safety, security, and the environment. Actions that create risks but do not actually lead to harm occurring can still be serious and require a firm response.</p>	
<p>From</p> <ul style="list-style-type: none"> <li>There's minimal or no harm or risk of harm.</li> <li>Harm is, or would likely be, easily remedied.</li> <li>Harm is, or would likely be, restricted in scale or effect.</li> <li>There's significant or widespread harm or potential for such harm.</li> </ul> <p>To</p> <ul style="list-style-type: none"> <li>Harm is actually or potentially caused to a vulnerable section of the community/environment.</li> </ul>	
<p>Conduct: Conduct in this context means the behaviours, intent and capability of the person whose actions are being considered.</p>	
<p>From</p> <ul style="list-style-type: none"> <li>It is first-time or one-off behaviour that is unlikely to be repeated.</li> <li>The conduct is accidental or resulted from momentary carelessness or the result of a limited understanding of the law (where that is not inconsistent with the expectations of someone holding a maritime document).</li> <li>Mitigating factors exist.</li> <li>The behaviour is deliberate, reckless or involving consistent carelessness.</li> <li>The conduct is repeated, ongoing or sector-wide.</li> <li>There is a serious departure from expected lawful behavior by a maritime transport operator.</li> </ul> <p>To</p> <ul style="list-style-type: none"> <li>Aggravating factors exist.</li> </ul>	
<p><b>Public interest:</b> Public interest can be described as something being in the interest of the wider public or of public importance. It is more than simply interest from the public or expectation from the public of action. Considerations include responsibility to victims, the need to clarify the law, and whether the matter at hand reflects a widespread problem that can be usefully addressed by highlighting the need for compliance.</p>	
<p>From</p> <ul style="list-style-type: none"> <li>The conduct occurred some time ago and has ceased.</li> <li>The legal principles involved are well-established and do not require clarification in court.</li> <li>A decision not to act would undermine public confidence in the maritime transport system or a significant sector within the system.</li> <li>The conduct involves a new or significant service to a large travelling public.</li> <li>Action is necessary to clarify a grey area in the law.</li> </ul> <p>To</p> <ul style="list-style-type: none"> <li>Action is necessary to deter others from similar conduct.</li> </ul>	
<p><b>Attitude to compliance:</b> Typically, the nature of the responses will be informed by, and tailored to, the attitude of individuals or groups involved towards compliance. This helps ensure that the intervention(s) chosen will have the desired effect. This does not prevent significant action being taken for other reasons, even when attitude is good.</p>	
<p>From</p> <ul style="list-style-type: none"> <li>Willing and able to comply.</li> <li>Willing but not able to comply.</li> <li>Reluctant to comply.</li> <li>Unwilling to comply</li> </ul> <p>To</p> <ul style="list-style-type: none"> <li>Actively and intentionally non-compliant.</li> </ul>	
<p><b>Available compliance interventions</b></p> <p>Assessment against the factors above, and attitude to compliance, will support a decision about the best course of action. There is a continuum of possible interventions:</p> <ul style="list-style-type: none"> <li>from: an approach based on information, education and engagement to support and encourage compliance</li> <li>to: an approach (usually through investigation)</li> </ul>	<p>that may lead to enforcement interventions such as infringement notices, improvement notices, warnings, imposition of detention or conditions and/or other civil or criminal action under applicable law.</p> <p>More than one intervention may be appropriate and applied as a 'package' of interventions. For example, it may be appropriate to prosecute and also publish educational material for the general public in response to an incident raising serious safety concerns.</p>

Source: Maritime New Zealand, n.d.

and Practices report (New Zealand Productivity Commission, 2014), which, again, has a broader focus than regulatory decision making but contains material very relevant to that, and, while it has been

instrumental in driving the development of G-Reg, does not have any 'formal' standing as a guide to regulatory decision making;

- more broadly, the administrative law decision-making guide *A Judge Over*

*Your Shoulder* (UK Government Legal Department, 2016), which is an important foundation.<sup>10</sup>

Overall, the development of G-Reg and its antecedents, as described by Manch et al. (2015), is a response to this gap in the level of central, coordinated and consistent direction and support in relation to many regulatory implementation issues.

Having said this, approaches to good regulatory decision making are coalescing. The advent of G-Reg is contributing to this. The relatively small size of New Zealand's state sector, and close relationships and common histories among people in the regulatory implementation field have been a factor. The engagement in New Zealand of a small number of well-known and highly regarded academic leaders in the field (such as professors Malcolm Sparrow, Arie Frieberg and Julia Black) has also played a part.

Thus we are seeing an emerging consistency of regulatory implementation decision-making frameworks. They are mainly underpinned by the key concepts of 'risk-based' and 'responsive' approaches discussed by the Productivity Commission (2014, pp.68-76), which support the implementation of regulation. Which example is used for illustration purposes is not critical in considering good regulatory decision making. They all tend to reflect similar factors and criteria, and they all form the basis for the exercise of discretion relating to decisions made.

The example that I am currently most familiar with is the approach taken by my own organisation, Maritime New Zealand, through our 'Policy on decision making' (Maritime New Zealand, 2016) and Compliance Operating Model and supporting documents.<sup>11</sup> In this context, there are three main things that support regulatory decision making. First, the 'Policy on decision making' begins by establishing its purpose, as follows:

As a regulatory, compliance and response organisation our 'business' involves receiving information, considering that information, making decisions and taking action. Decisions are made and actions taken by people

according to their job responsibilities and accountabilities (general decisions), and in many cases delegations (statutory decisions), under the laws that provide authority to Maritime NZ and its staff.

This policy is intended to support good decision making, in support of better outcomes in respect to our focus on safe, secure and clean seas and waterways.

The policy then touches on the importance of taking good advice (legal, technical, policy) and acting in good faith according to Maritime New Zealand's statutory mandate. It outlines key factors in good decision making (context, facts, advice, costs and benefits and risks), as well as foundation issues such as having the appropriate authority (delegation) and competency, and applying professional judgement and discretion.

The policy is clear that advice received by the decision maker must be considered carefully, but the advisers do not make the decisions. The intention of this is to ensure that our decision makers understand that good regulatory decisions require discretion and a focus on overall outcomes rather than being framed by specific or narrowly defined perspectives. This can be a source of tension should the advice provided not all be followed.

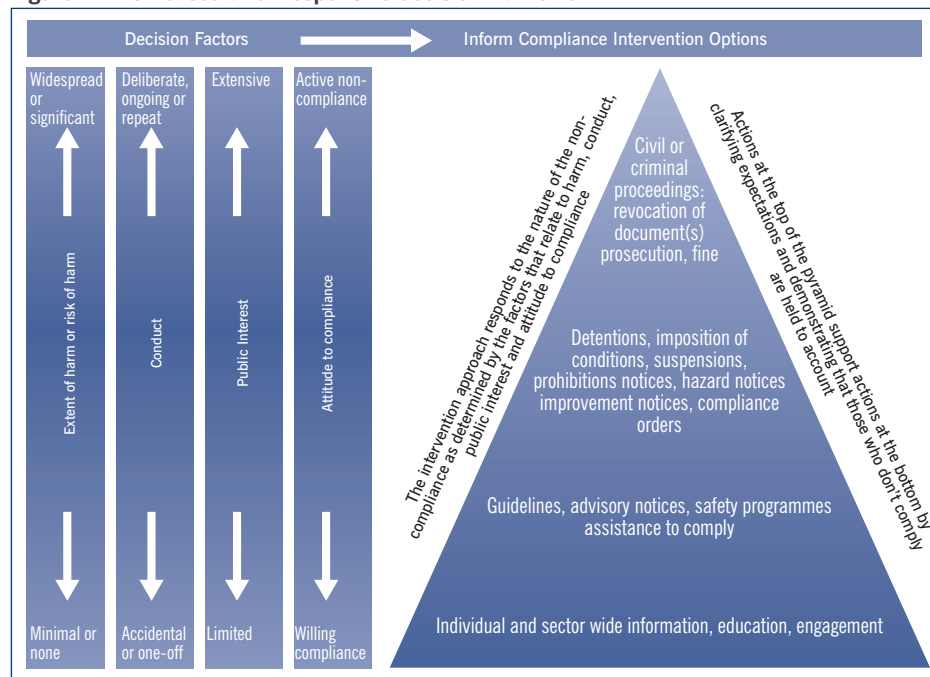
The policy on decision making has broad application across all regulatory decisions, including

- licensing, certification and approvals ('entry' control);
- audits and inspections ('monitoring' activity); and
- investigation, prosecution and administrative actions ('accountability and exit' activities).

The extent to which discretion can be applied can vary across these different types of regulatory and compliance activities depending on the prescriptive (or not) nature of the underpinning legal requirements.

Noting that there are often group or collective processes involved in regulatory decision making (see below and the reference to Maritime New Zealand's compliance intervention panel), the policy also comments on the importance of the decision maker retaining responsibility for

**Figure 2: Risk-based and Responsive decision framework**



Source: Maritime New Zealand, Undated

the decision. Finally, it notes the importance of using established decision-making guidelines, where they exist.

This brings me to the second of the decision-making frameworks: the guiding principles for decision making on compliance interventions (part of the Compliance Operating Model). These enable assessment of risk-based decision factors to identify the appropriate responsive interventions (Table 2, and represented in a graphical form in Figure 2). As such, while the guiding principles apply across 'entry', 'monitoring' and 'accountability and exit' activities, the 'factors for consideration' are more attuned to 'monitoring', 'accountability and exit' activities specifically.

Operational decision-making frameworks such as these are similar to the *Handbook* and *Guide* discussed above in that they provide analytical frameworks that allow discretion to be applied, but in a consistent fashion across different matters. Essentially, they allow the same factors to be weighed up in relation to different factual situations so that the decision-making process takes account of risk, and considers what the most appropriate response is, to address the matter at hand.

This framework is supported by a compliance intervention panel (the standard operating procedures for which are also part of the Compliance Operating

Model). This panel provides guidance, direction and advice regarding courses of action to be followed in responding to compliance issues. While it is intended to support a robust, consistent and proper operational decision-making capability, it does not replace the need for statutory decisions that require formal delegations to be made by the holders of those delegations.

The third necessary element relates to delegations. Commonly, the law relating to the decisions that are being made will specify who has the decision-making rights (often the chief executive or some form of statutory office holder), and allow for decision making to be delegated. Decisions about delegation are usually made by considering matters such as:

- the ability to specify the scope of decision making;
- the significance of the impact of the decisions to be delegated (for example, in respect to people's rights and obligations);
- the capability and capacity of those who might receive delegations (do they have the required knowledge and experience); and
- the efficiency and effectiveness of decision making (to optimise this, does it rely on an ability to make decisions in a particular time frame or at a particular phase).

Table 3: Better practice checklist: accountable decision making

Better Practice Checklist: Accountable Decision Making	
<b>Delegated decision-making</b>	
<ul style="list-style-type: none"> <li>• The delegation of decision-making authority is consistent with legislative requirements and any public-service or organisational directives.</li> <li>• Procedures for exercising delegated authority are documented and staff are trained in applying them.</li> <li>• The exercise of delegated authority is monitored and subjected to quality-assurance processes.</li> </ul>	
<b>Exercising discretion</b>	
<ul style="list-style-type: none"> <li>• The agency has clearly stated principles and values that guide the exercise of discretion.</li> <li>• A decision-making framework document specifies what decisions need to be made, by whom, and when.</li> <li>• Decision makers understand relevant legal requirements so that their decisions can withstand legal challenge.</li> </ul>	

Source: Compliance Common Capability Programme, 2011

*Achieving Compliance* (Compliance Common Capability Programme, 2011) discusses delegation (and discretion) in a chapter relating to accountable decision making, and provides a simple better practice checklist (Table 3) that addresses both delegation and discretion.

**Key influences on ‘implementation’ decision making**

While decision-making and delegation frameworks are important, there are other factors at play that have a big influence. Just as constitutional conventions and political influences shape decision making at the design and review phases, there are significant influences at the implementation phase that must be considered. They are strongly interrelated and include the importance of:

- delivering public value;
- calibrating effectively the approach to risk;
- maintaining a clear focus on the purpose of the regulatory system; and
- ensuring that the incentives that exist in performance management systems are aligned with the desired regulatory outcomes.

**Delivering public value**

While decision making in the regulatory implementation phase is usually, for good reason, independent of political involvement, overall it must deliver public

value. As noted above, a crucial element of this is having an effective authorising environment (through maintaining the support of democratically elected representatives, the private sector, the voluntary sector and the broader community). There are two good reasons for this. The first is that, as every regulator knows, the ability to succeed in delivering desired regulatory outcomes is heavily affected by the overall attitude of the industry or sector being regulated and the confidence there is in the regulator. The second is that the continued existence of a regulatory agency depends on government and Parliament having confidence in it to deliver the outcomes desired by the regulatory systems in which it operates.

Taken superficially this could be read as suggesting that regulators are subject to political interference in the way they do their work and make their decisions. A better way to think about it is that regulators’ continued existence is subject to the views that democratically elected decision makers have about the body of the regulator’s work and decisions in terms of whether or not that is delivering public value.

The influence this has isn’t, in my experience, felt in day-to-day operational decision making. It does, however, encourage careful attention over time to the quality of decision making. This includes the careful use of discretion and

focusing on the outcomes that are intended by the law for which the regulator has responsibility. In this context, it remains critical that regulators continually have regard to what their statutes say about their role and how they should perform it, as discussed by Searancke et al. (2014).

**Approach to risk**

A significant influence on regulatory decision making in the implementation phase is the approach to risk. Risk is an all-pervasive issue for regulators. Regulatory systems themselves are risk-management systems. Within those systems, decisions about which risks to focus on are always necessary, as no regulator has the resources to deal with everything that is possibly within their legal mandate. Making a decision to focus on one set or area of risks over another creates risks both to achieving the desired outcomes, and in terms of the regulator’s reputation for not dealing with something, or conversely focusing too much on something else.

As Quarmbly (n.d.) notes, ‘regulation permeates the world of vested interest, representative groups, and lobby groups; all of whom generate political and legal scrutiny over the decisions made by regulators’. He also touches on another matter that can undermine good regulatory decision making. That is how regulators may respond to reputational risks by either not applying discretion (we will look bad if we apply discretion and something goes wrong), or, where it is within their power to do so, by requiring more detailed controls (we can’t trust them to do anything right so we should prescribe everything). The result of this is that the risk to be avoided becomes regulated parties not adhering to the black-and-white letter of the law, or the increased controls, in the strictest possible way, instead of the risk of the desired outcomes not being achieved.

This would not be a problem if regulatory frameworks were able to specify detailed requirements that met every possible situation, in dynamic industries and sectors, in a way that only prevented harms, without interfering with reasonable behaviours. We all know that that will never happen. It is easy for

regulators to get lost in this milieu, so careful attention needs to be paid to it.

#### *Focus on the purpose of the regulatory system*

In addition to calibrating effectively the focus on risk, it is important to consider carefully the purpose of the regulatory system in respect to matters such as 'who is intended to benefit' and 'how to engage'. I was fortunate recently to see the products of some internal discussion within the New Zealand Transport Agency (2015, pp.4, 11) as part of its regulatory capability improvement activity. People in the agency were encouraged to engage in 'thought-provoking discussions' relating to regulatory issues.

Part of this material underpinned the challenges associated with what might be thought of as the quite simple idea of defining regulated parties as 'customers' in order to drive good-quality engagement. While customer service principles remain relevant to good regulatory practice, it is important to think about the actual nature and purpose of the relationship regulators have with regulated parties. It is primarily one of supporting, encouraging and requiring them to do things they might not otherwise do (as opposed to delighting them by providing what they want). The following extracts from this material capture well the importance of thinking carefully about the purpose of the regulatory system in the context of such issues.

One of our guiding principles as an Agency is putting the customer at the heart of everything we do – from the way we design and build roads, to how we handle calls to the contact centre, to the process we use to set and interpret rules.

This is a really neat idea. We give New Zealanders what they want, when they want it, and in a way that they want it, which makes them more likely to be compliant. Legislation that works for people, rather than restricts them. Easy, right? But what if what our customers want isn't actually the right thing? Where is the tipping point where doing something for the customer compromises our role as regulators?<sup>12</sup>

As part of a project last year, we went out and tested six or seven different text messages and three different layouts for email reminders that customers might receive to encourage them to pay their vehicle licensing (rego) 'on time and online'.

The message that we internally thought would be a winner, and which our customers loved, was the 'A friendly reminder from NZTA' message. It was positive, friendly and had all the relevant information for people to renew their 'rego' on time and online.

When we went out and asked our

increase people paying online from 32% to 62%. These are both regulatory objectives.<sup>13</sup>

#### *Performance-management systems*

Various people have been credited with the phrase 'what gets measured gets managed'. Regardless of its origins, it is a reality that applies to the implementation of regulatory systems as much as any other enterprise. This reality underpins the importance of getting the measures right, in respect to the purpose of the system, with an appropriately calibrated understanding of risk.

The tendency of measurement systems

'...regulation permeates the world of vested interest, representative groups, and lobby groups; all of whom generate political and legal scrutiny over the decisions made by regulators'.

customers what they thought would encourage them to pay on time and online, 60% of our customers chose this message over the others which made it a clear winner from a customer service point of view.

But when we trialled the messages in an online pilot to measure the behaviours of our customers once they received these reminders, the message that was most successful, was the message customers least 'approved' of. The 'Avoid a fine, pay on time' message. This message was the preferred option for only 6% of our customers, but had a huge impact in encouraging customers to comply both on time and online. This is because what we had tapped into was our customers' drivers and motivations and understood best how we could 'manipulate' them to comply.

'Avoid a fine, pay on time' isn't going to win any customer service awards but what it did do was help increase on time compliance within the trial from 50% to 75% and

is to default to things that are easy to measure and that demonstrate efficiency, often because it is simply too difficult to measure outcomes. A good example, also discussed by Quarmby, is in the area of licensing and certification. Focusing on processing times can be quite inconsistent with the purpose of such activity, which is to examine the capability or suitability of someone to exercise privileges granted by a regulatory system. Timeliness must be subordinate to quality in such decision making. This is not an argument against efficiency measures, but for inclusion of them in an appropriate way that does not derogate from the intended purpose of the activity.

#### **So, what does good regulatory decision making look like?**

As shown in Table 4, good regulatory decision making can be thought of at four levels: in respect to victims, individual cases, sectors or industries, and regulatory systems.

In respect to victims, good regulatory decisions will:



**Table 4: What good regulatory decision making looks like**

Victim	Individual	Sector/Industry	System
Treated fairly, respectfully with courtesy and compassion	'Risky' behaviour stopped	General deterrence supported	Regulatory system development informed
Well informed of progress of complaint	Compliant behaviour supported	Standards supported	Respect in system/regulator engendered
Victims views, effects and impact of offending understood and acknowledged	Held to account	Standards Improved	Trust in government supported

- meet the requirements of the Victims' Charter, ensuring that victims are treated fairly and with respect, courtesy and compassion;
- ensure that victims are well informed of the progress of their complaint; and
- ensure that their views, including on the effects and impacts of the offending, will be understood and acknowledged.

At the individual case level a good decision is one that identifies the most appropriate intervention to do one or all of the following:

- stop risky behaviour;
- encourage compliant behaviour (both in respect to the individual person or organisation concerned, and in respect to the 'messages' that action sends to others);
- where appropriate hold someone to account for their actions.

At the industry or sector level a good decision is one that:

- sets or supports standards;
- engenders respect in the regulator; and
- encourages high levels of voluntary compliance.

In respect to the regulatory system, a good decision is one that:

- highlights strengths and weaknesses in the system; and
- provides information that is used to improve and evolve the system.

Overall, good regulatory decisions will deliver public value.

**Conclusion**

The intent of this article was to explore matters relating to good regulatory decision making. It doesn't break new ground, except perhaps by seeking to articulate a clear framework to judge what good regulatory decision making might look like in an overall sense (Table 4), but brings together a number of aspects that will be known individually or collectively to readers who work in the regulatory field.

The scope of things that affect good regulatory decision making is broad and different in various phases of regulatory systems, but with common threads, such as dealing with risk and ensuring that the benefits of regulatory activity outweigh the costs. Other common features are the need for clarity of decision-making rights, effective policies and workable frameworks to guide and support advisers and deciders. The article seeks to 'put it all together' as part of the continuing process of developing a shared view of key aspects of regulatory practice that is important to developing this as a professional enterprise.

1 The Government Regulatory Practice Initiative (G-Reg) primarily has an operational, not policy, focus and seeks to lead and contribute to regulatory practice and capability initiatives where collective action can be shown to be helpful. It works on actions that improve leadership, culture, regulatory practice and workforce capability at the operational level in regulatory organisations and systems. While not the primary purpose, improvement in these

areas will enable operational regulators to contribute more effectively to improving regulatory policy development.

- 2 The government has just released a refreshed set of 'Government Expectations for Good Regulatory Practice'. These expectations overtake, but with some selectivity and refinement draw significantly on, earlier principles in documents such as the *Guide*. They address the design of regulation and regulatory stewardship, including providing specific expectations in respect to good regulator practice. As part of its 2017 and beyond work programme, G-Reg is undertaking work to support regulatory practice agencies to engage with and operate in accordance with the refreshed expectations. They are available at: <http://www.treasury.govt.nz/regulation/system/strategy>.
- 3 The G-Reg work programme was signed off by the G-Reg chief executive oversight group at its meeting on 4 May 2016.
- 4 The New Zealand Productivity Commission discussed the importance of regulator culture and leadership in chapter 4 of its report into regulatory institutions and practices (New Zealand Productivity Commission, 2014).
- 5 The State Services Commission describes 'machinery of government' as referring to the structures of government and how they work. It includes the changing set of organisations within government, their functions and governance arrangements, and how they work together to deliver results for ministers and the public (State Services Commission, 2016).
- 6 Decision making is generally either expressly statutorily independent and undertaken by statutory office holders, or, where vested by statute in ministers, is required to be performed independently of political considerations.
- 7 The nature and degree of independence is a function of statutory provisions and organisational form: for example, compared to ministries and departments in which state servants may have independence conferred by specific provisions in law, Crown entities have varying degrees of independence (as Crown agents, autonomous or independent entities) alongside similar legal provisions.
- 8 As noted in endnote 2, new expectations for good regulatory practice published by the New Zealand Government do provide greater central direction and support to implementation activities than has been the case in the past, some of which focuses on decision making.
- 9 The Compliance Common Capability Programme is the predecessor to G-Reg.
- 10 *Judge Over Your Shoulder: a guide to good decision making* was first published in 1987. The fifth edition was released by the Treasury solicitor and permanent secretary of the government legal department in the UK in 2016.
- 11 The Compliance Operating Model is made up of a compliance strategy, compliance intervention guidelines and the compliance intervention panel standard operating procedures, available at <http://www.maritimenz.govt.nz/about/what-we-do/compliance/compliance-model.asp#overview>.
- 12 Contribution from Luke Bailey.
- 13 Contribution from Damien Le Breton.

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