

Chapter 5

Regulatory Coherence: The Case of New Zealand

Derek Gill

*New Zealand Institute of Economic Research and
Victoria University of Wellington*

August 2016

This chapter should be cited as

Gill, D. (2016), 'Regulatory Coherence: The Case of New Zealand, in Gill, D. and P. Intal, Jr. (eds.), *The Development of Regulatory Management Systems in East Asia: Country Studies*. ERIA Research Project Report 2015-4, Jakarta: ERIA, pp.175-227.

Chapter V

Regulatory Coherence: The Case of New Zealand

Derek Gill^{#§}

New Zealand Institute of Economic Research and Victoria University of Wellington

Part 1: The Evolution of Regulatory Management in New Zealand

1. Introduction and Country Context

New Zealand is a small developed country which ranks 27th in the world in terms of gross domestic product (GDP) per capita and 9th on the broader United Nations Development Programme (UNDP) Human Development Index and ranked top in the social progress index. It is one of only a handful of countries that can trace an uninterrupted history of parliamentary democracy back to the mid-19th century. New Zealand has unique constitutional arrangements resulting in a significant concentration of power in the Cabinet. Dominant features of these constitutional arrangements include the lack of a formal written constitution, the absence of a second chamber, a political system dominated by two major well-established parties, and a highly cohesive system of Cabinet government.¹ The Westminster system was modified in 1996, instigating the legislature to be elected using mixed-member proportional representation. Since this change, no

[#]Lead author: Derek Gill derek.gill@NZIER.org.nz L13 215 Lambton Quay, PO Box 3479, Wellington, 6140 New Zealand. Hayden Fenwick from the New Zealand Treasury contributed to Part 1 of this paper.

[§] This research was conducted as part of the collaborative project of the Economic Research Institute for ASEAN and East Asia (ERIA) and the New Zealand Institute of Economic Research (NZIER), 'Towards Responsive Regulations and Regulatory Coherence in ASEAN and East Asia: Deconstructing Effective and Efficient Regulatory Management Systems'. The author wishes to express his appreciation to the New Zealand Ministry for Foreign Affairs and Trade for sponsoring this project. The author is deeply indebted to the reviewers of this paper for their invaluable suggestions and particularly acknowledges the comments received from Peter Mumford, Julie Nind, and Ben Temple. The opinions expressed in this paper are the sole responsibility of the author and do not reflect the views of the ERIA or the Government of New Zealand.

¹ See Gill (2013, p.569) for a longer discussion of the constitutional features of New Zealand and how these affect law and regulation making.

government party has had an absolute majority in Parliament, but instead have governed with coalition or support parties.

Furthermore, New Zealand is one of the most centralised jurisdictions in the Organisation for Economic Co-operation and Development (OECD); over 90 percent of government workers are employed by central government organisations, and almost all citizen-facing public services – including policing, fire services, education, and health – are central government activities. A recent review of local government regulation (New Zealand Productivity Commission, 2013a) concluded that almost all local regulation was undertaken as an agent of central government, with little locally initiated regulation. As such, this chapter will focus almost exclusively on central government regulation.

New Zealand has been ranked consistently highly for both the quality of government and on regulatory quality since the World Bank Governance Indicators series began in 1996. As examples of this, the 2012 survey ranked New Zealand very highly on a range of quality of government measures: control of corruption (2nd out of 215 countries), rule of law (4th out of 215), voice and accountability (5th out of 215 countries), political stability (7th out of 215), and government effectiveness (9th out of 215). New Zealand ranks 4th on regulatory quality (World Bank, 2015). Other indices also show high scores: the Transparency International Survey (2014) ranked New Zealand second least corrupt country, New Zealand was second in the world (after Singapore) for the ease of doing business (World Bank, 2015), and the World Justice project ranked New Zealand 6th overall ranking between 4th and 10th (out of 120 countries) on open government measures, and between 2nd and 13th on different measures of limits to government.

Interestingly, this front-runner position on regulatory quality predates the attempts to formalise the regulatory management regime. The next section discusses the evolution of New Zealand regulatory policy over the last 30 years.

2. Evolution of the New Zealand Regulatory Management System

Regulatory policy in New Zealand has gone through four overlapping phases (**Box 1**):

1. Sector-based reform – with extensive regulatory reform in 1984 and the early 1990s and ongoing changes thereafter
2. Compliance cost reduction – an episodic series of initiatives introduced from the early 1990s until the mid-2000s
3. Regulatory flow management – the flow of new regulations has been focused through regulatory impact analysis (RIA) and a Code of Good Regulatory Practice commencing in 1998
4. Regulatory stock management – increased emphasis on stock management, starting in 2009, in addition to flow management

The election of a reformist Labour Government in 1984 was a watershed in economic and government management in New Zealand – but this ‘quiet revolution’ has been extensively documented elsewhere (James, 1986). In brief, the demand for these reforms arose from sustained poor economic and broader social performance culminating in an economic crisis in 1984. The drive also came from a new political administration committed to change and bureaucratic elite groups that supported and were capable of executing the changes.

Box 1. Significant Events in the Evolution of the Regulatory System

Period	Significant Milestones
1984–mid-1990s (sector based)	<ul style="list-style-type: none"> ○ Labour government launches the ‘quiet revolution’ – a wide-ranging reform programme ○ Removal of much economic regulation and widespread use of performance regulation
Early 1990s–mid-2000s (compliance cost focus)	<ul style="list-style-type: none"> ○ Period of consolidation and refinement under National and Labour administrations ○ Compliance cost reduction programmes
1997–2008 (flow management)	<ul style="list-style-type: none"> ○ Regulatory Impact Analysis (RIA) regime introduced ○ Ministry of Economic Development lead role on regulatory management and reform
2008–2015 (stock management)	<ul style="list-style-type: none"> ○ Treasury assumes lead role on regulatory management ○ New national administration–led with a new portfolio Minister for Regulatory Reform ○ Regulatory stewardship expectations established along with public disclosure of departments’ strategies and systems to meet this requirement ○ Greater regulatory disclosure to Parliament

Source: Compiled by the author.

Once underway, the reform programme created its own dynamic as sectors exposed to increased international competition pushed for the sheltered sectors also to be reformed. What is important to note for this study is that regulatory reform was part of a wide programme of macroeconomic stabilisation, trade liberalisation, and structural reforms that affected private capital, product, and labour markets, as well as the government sector. In a short time, New Zealand moved from being one of the most heavily regulated economies in the OECD to being on the 'regulatory frontier'.

Phase 1 – Sector-Based Reform

The initial regulatory policy focus was on sector-based reforms. A rolling programme of changes was introduced, starting with financial markets, moving to selected product markets including government trading enterprises, then non-trading government and labour markets. While there was reduced use of sector-specific economic regulation, it would be misleading to describe New Zealand's approach as deregulation. Instead the widespread regulatory reform since the mid-1980s includes changes regarding:

- the focus of economic regulation moving away from sector-specific economic regulation in favour of more reliance on general regulatory regimes (such as the Commerce Act);
- the mix of regulation, with reduced use of sector-specific economic regulation, but increased social and environmental regulation; and
- the style of the regulation, with reduced use of command and control in favour of more use of performance-based regulation and economic instruments, such as using auctions to allocate licences and property rights

Once the initial period of widespread reform was over, New Zealand embarked on a period of consolidation, refinement, and more incremental changes to the economic regulatory regime. When surveying the regulatory reforms as a whole, what is striking is how much economic change has been sustained, and how few substantive amendments have been enacted to the broad thrust of the economic policies introduced in the decade after 1984.

As would be expected, there have been some modifications and adaptations to the economic policy settings since the mid-1980s. For example, in network industries, the attempt to rely on light-handed regulation based on general anti-competition provisions of the Commerce Act has not proved sustainable, and New Zealand has moved to more sector-specific regulation (Scott, 2013). Financial market regulation was tightened after 1999 following the rapid liberalisation of the mid-1980s. Labour market regulation has ebbed and flowed with changes in administration, while attempts to introduce widespread reform of occupational regulation, announced by successive governments, have never been successfully enacted. Overall, however, what stands out is the continuity rather than the changes.

Part 2 of this chapter explores two case studies of regulatory change: building controls and vehicle licensing. In the case of the transport sector, while there have been changes to the organisational arrangements, the regulatory changes introduced in the early 1990s involving an increased focus on safety have been sustained. There has been no return to the economic regulation of the past. In the case of building controls, while the regime has been extensively modified as a result of the problems with leaky buildings, the performance-based approach to building controls has been retained, but with more emphasis placed on guidance and 'how-to' documents (Mumford, 2011). There has been no move back to the prescriptive input-based regulation of the past.

Overall, what is striking is how much change has been sustained, as New Zealand moved to a period of consolidation, refinement, and more incremental changes. What is also clear is that New Zealand has not sustained its path-breaking role. The 2011 OECD economic report states that 'OECD indicators suggest that New Zealand's long-standing front-runner status in product market regulation has been eroded away over the past decade or so. Regulatory quality has deteriorated somewhat' (OECD, 2011, p.101). This deterioration according to the OECD product market regulation survey data is not due to any significant absolute decline in regulatory quality. Rather, it is relative erosion, which reflects more on New Zealand's early path-breaking regulatory reform and the subsequent catch up by other OECD countries.²

² Conway (2011) used OECD product market regulation data to suggest New Zealand is now inside the regulatory frontier in part because of increased regulatory uncertainty.

Phase 2 – Compliance Cost Reduction

The second phase, which began in the early 1990s and spread over a decade, saw a number of compliance cost reduction initiatives led by the Ministry of Economic Development. These initiatives included departments producing detailed compliance cost reduction plans, a ministerial inquiry in 2001 undertaken by an independent task force, omnibus bills to remove red tape, but no sustained requirement on departments to undertake ongoing reviews of their regulatory stock. A key change was in 1995 when the Cabinet agreed to institute a compliance cost assessment to accompany all Cabinet papers (a requirement that was subsequently removed, then reinstated, and finally abolished in 2007).

Phase 3 – Flow Management

The third phase, which commenced in 1997, focused on the flow of new regulations through RIA, and supported by a Code of Good Regulatory Practice.³ While episodic efforts to reduce compliance costs continued, with the introduction of RIA, focus shifted to building policy capability of the public service. The Regulatory Impact Statement (RIS) framework was designed to ensure that costs to business along with costs of wider distortions were factored into the analysis of new policy proposals being considered by the Cabinet.

The RIA system has been refined as it developed over time. The approach adopted in New Zealand has a strong emphasis on RISs being embedded as part of a good policy development process rather than being a compliance requirement to be hurdled at the end of the policy development process. RISs now have broad coverage of all substantive government bills and are widely accepted by departments, although systematic evidence on their use by ministers and parliamentarians is lacking.

However, the quality of RISs, although they have been improving, remains of concern. The Treasury's RIS on the proposed Regulatory Responsibility Act

³ The third element of the package was the requirement for a generic policy development process, which was agreed by the Cabinet but never effectively rolled out across departments. The fourth element, the department's proposal for regulatory responsibility legislation, was not accepted by the government.

commented: 'We all know that the analysis we see in Regulatory Impact Statements (RISs) is often not of the highest standard, and as a consequence is little used or valued' (Ayto, 2011). The Treasury estimates that in 2012 only 62 percent of RIAs fully met Cabinet requirements and subsequent reviews 'suggest that the quality of RISs has not improved' (Sapere Research Group, 2015, p.9).

Phase 4 – Stock Management

The fourth phase commenced simultaneously with the Treasury assuming the regulatory management oversight function in 2008, and the emphasis shifted to augmenting the management of the flow of new regulations with the RIS process, to also build a stock management system. This system now includes:

- statutory expectations for departmental chief executives on regulatory stewardship,
- public disclosure of departments' strategies and systems for meeting their regulatory stewardship expectations (including how they will manage their stock of existing regulations),
- information on a department's regulatory priorities are included in the Four Year Plans (replacing annual regulatory plans), and
- departmental disclosure statements to accompany legislative changes as they are introduced in Parliament.

This system is augmented by the Treasury undertaking and publishing an assessment of the quality of regulatory regimes against the Best Practice Regulatory Principles (New Zealand Treasury, 2012a; 2015). Simultaneously, legislative amendments have been developed to enhance the disclosure to Parliament about any proposed new legislation. Part 2 of the Legislation Amendment Bill (before the House, but yet to be debated) proposes strengthening Parliament's role in reviewing new legislation (New Zealand Treasury, 2012b).⁴

The major development over this period was the introduction of statutory expectations for departmental chief executives on regulatory stewardship. The Treasury has been proactive in developing guidance around the new regulatory

⁴ The bill was introduced into Parliament in May 2014 but in early 2016 when this paper was prepared, the bill had yet to have its first reading. For details of the legislation see the Treasury discussion document on the indicative legislation (13 August 2012).

stewardship provisions applying to departmental chief executives. Moreover, as part of the government's response in 2015 to the Productivity Commission Inquiry (2014), departments are now required to publicly disclose their strategies and systems for meeting their regulatory stewardship expectations (including how they manage their stock of regulations). These requirements are still 'a work in progress' and the impact is untested, but represents a potential significant shift in the focus of the New Zealand regulatory management system (RMS).

Examining the four phases of regulatory reform in New Zealand over the last 30 years, a number of themes have emerged about the focus, locus, coverage, purpose, and style of regulatory policy.

Focus

Regulatory reform has consistently focused on reducing the potential for total distortion from regulation. Apart from the decade of episodic attempts starting in the early 1990s and the recent initiative under the public service targets system, there has been little systematic focus on attempts to reduce administrative and compliance costs.

New Zealand has deliberately chosen not to adopt some system-wide stock management techniques, such as standard cost reduction developed by the Netherlands, as part of its formal RMS.⁵ This resistance to a focus on administrative costs is because:

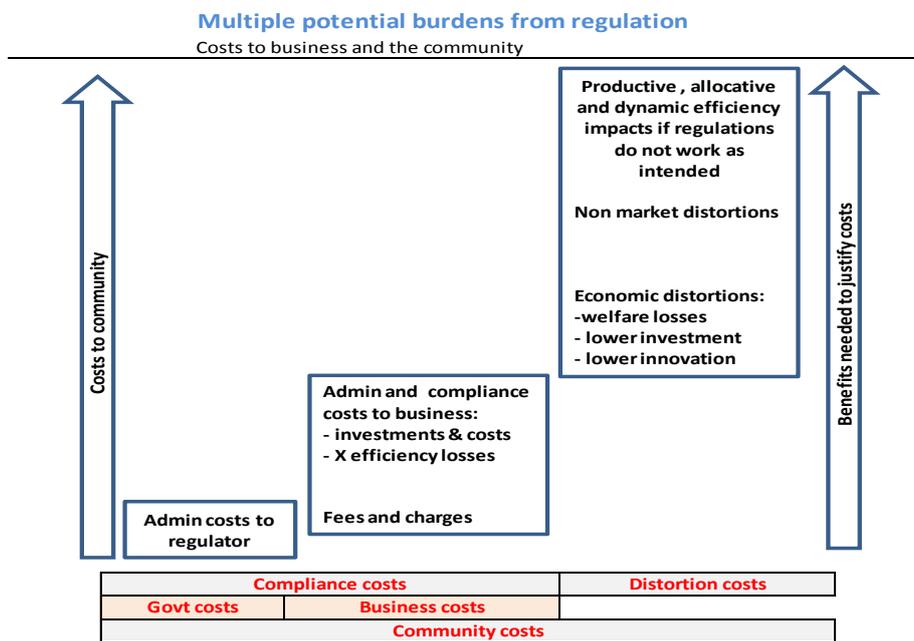
- the narrow focus on costs rather than wider net benefits;
- the major costs of regulation are generated by distortions to behaviour rather than administrative costs;
- the experience of other countries, in that applying these tools they can impose considerable administrative costs and the benefits are disputed;
- scarce resources are focused on arbitrary targets for gains that are small with the risk of hitting the target and missing the mark;

⁵ Where red tape or compliance cost reduction measures are undertaken, they are generally within separate programmes or within specific portfolios, such as the government's Better Public Services target to reduce business costs from dealing with government by 25 percent by 2017, through a year-on-year reduction in effort required to work with agencies (which is a target within Result 9). New Zealand businesses have a one-stop online shop for all government advice and support they need to run and grow their business (<http://www.ssc.govt.nz/bps-interaction-with-govt>) and the review of local government red tape (<http://www.beehive.govt.nz/release/taskforce-tackle-loopy-rules-and-regulations>).

- the tools are blunt and make little use of existing information about relative performance in different regulatory areas as they impose arbitrary rules concerning target levels, scope, timing, or trade-offs; and
- finally, these tools tend to have a limited life – because the rules are arbitrary and centrally imposed, they are viewed as a compliance exercise from the start, and any opportunities for shortcuts or gaming are quickly exploited.

New Zealand has instead tried to build a stock management system that is consistent with a focus on encouraging departments to exercise responsible regulatory stewardship over their regulatory regimes and institutions, using tools that are better tailored to individual departmental circumstances. The tools selected for stock management have tried to focus on mainstreaming regulatory management as part of the public management duties of departments (linked to Chief Executive Performance Reviews) rather than requiring compliance with the requirements of an entirely separate RMS.

Figure 5.1. Administrative Compliance and Distortion Costs Compared



Source: New Zealand Institute of Economic Research (NZIER) adapted from the Victorian Productivity Commission.

Locus

The locus of regulatory reform however has shifted over time. As discussed, after the initial emphasis on sector-based reform and a brief period of administrative streamlining focused on ease of doing business initiatives, attention shifted to improving the quality of policy advice on proposed new rule-making through RIA and most recently to management of the regulatory stock.

Coverage

The coverage of the regulatory management regime has expanded so that the range is arguably the most comprehensive of all the OECD countries with only two significant exclusions: local government whose rule-making is negligible in New Zealand and the application of RIA (and associated disclosures) to tertiary rule-making. The new regulatory stock management provisions apply to all central government primary law, secondary regulations, and tertiary rules. Unlike other jurisdictions, there are no significant exemptions from RIA requirements for primary legislation other than private members' bills. All substantive government bills (that is, all other than those with no regulatory or policy impact) are expected to have a RIS. A review of just under 100 recent bills suggests that all but a handful had a RIS where one was required.

RISs also apply to secondary legislation, that is, regulations that take effect following Cabinet agreement by Order in the Council. RISs are not required for tertiary legislation. Tertiary legislation is detailed rule-making delegated to public bodies such as the development of detailed codes and standards where no Order in the Council is required.

Purpose

The purpose and rationale of the RMS has changed over time. The initial focus with compliance cost reduction was to enable Cabinet Ministers collectively to make better decisions by providing the Cabinet with additional *information* on the compliance costs of the regulatory proposal. With RISs, the purpose has changed to place greater emphasis on improving the *policy capability* of departments underpinning the advice going to ministers. With the recent development of regulatory stewardship expectations for departmental chief

executives, the purpose shifted to increasing the scrutiny of existing interventions.⁶

Style

The style of political change also has altered. The extensive programme of regulatory and other reforms from 1984 until the mid-1990s was based on a 'crash through' style of political change management. This was enabled by the concentration of political power in the Cabinet, which was relatively unconstrained by constitutional requirement or formal consultation requirements. The New Zealand political system of the time was variously described as 'an elected dictatorship' and the 'fastest law maker in the west' (Palmer 1979). The role of Parliamentary Select Committees has been strengthened. The change in the electoral system, however, tempered the power of the Executive even though the Cabinet remains strong (according to Palmer and Palmer, 1997), so New Zealand is no longer the 'fastest law maker in the west'.

Successive recent administrations have moved away from the 'crash through' approach to policy change based to building a broader consensus for reforms. This in turn puts a premium on more inclusive consultative processes that engage key stakeholders in co-design of policy regimes. Consultation now tends to be more focused on big policy design issues than in the past, when consultation was limited to 'little' policy improvements in how the reforms should be applied.

3. Current State of the Regulatory System (as of 31 July 2015)

Section 2 discusses how the regulatory system evolved from sector-based approaches, to attempts to improve the flow of new regulatory proposals, through to more recent attempts that systematically examine whether the stock of existing regulations are fit for purpose.

Flow Management

The main 'flow' policy tools have been through the use of RIA, supported by good regulatory practice principles. Unlike comparable jurisdictions, quantitative

⁶ Gill (2011) explored the rationale for regulatory management in more detail.

techniques like cost–benefit analysis (CBA) or formal risk assessment do not form the centrepiece of the New Zealand system.

Stock Management

New Zealand has eschewed the use of ‘stock’ management tools, such as the standard cost model, regulatory guillotine, red tape reduction targets, ‘one-in, two-out’ or ‘one-in one-out’, regulatory budget, and the regulatory agenda, and has no formal requirement for the use of review clauses or sunset provisions.⁷ In terms of stock management, amending legislation that clarified the statutory responsibility for departmental chief executives to undertake regulatory stewardship was introduced only recently. Prior to that, responsibility for management of the regulatory stock was left unassigned, beyond limited Cabinet requirements for regulatory scans and plans.⁸

Policy Coherence

There is a robust interdepartmental process within the Executive in the policy development phase focused on improving policy coherence both horizontally across policy regimes, and to ensure consistency with international trade obligations and to a lesser extent vertically to ensure consistency with local government policy regime and capability.⁹ The RIS process has added more rigour and robustness to the policy development process. For example, the RIS guidance requires that international trade obligations are explicitly considered in the development of regulatory regimes and the Ministry of Foreign Affairs and Trade is consulted if necessary. Each RIS is accompanied by a disclosure statement, signed by a named departmental official, that specified requirements have been met, and drawing attention to any issues such as the lack of data or time for adequate consultation, which might affect the reliability of the analysis. The RIS together with the Disclosure Statement that accompanies bills made publicly available at the time the legislation is introduced into the house.

⁷ Gill and Frankel (2014) found that only 1.7 percent of primary legislation had any statutory review provision and no secondary regulatory had review provisions. Interestingly s158–160A of the Local Government Act requires by-laws to be reviewed within 5 years of introduction and then every 10 years thereafter. However, local government passes relatively few by-laws, so the requirement is not onerous.

⁸ The NZ Productivity Commission (2014) report survey results suggested two-thirds of existing legislation was either obsolete or not up to date.

⁹ See the NZ Productivity Commission (2013a) Local Regulation Final Report for criticisms and comments on vertical coherence of the New Zealand system.

Consultation

There is less formality around the requirements for consultation. There are no general formal legal procedural requirements, such as notice and comment or consultation requirements, and there is no equivalent of the Administrative Procedures Act 1946 in the United States (US). In general, consultation can be undertaken for a number of purposes: as a means of attempting to control the bureaucracy (as in the US), to improve the overall legitimacy and consent to the proposed regime by those who are regulated, or to improve the detailed design and operation of the regime by highlighting pressure points in implementation.

Historically, consultation in New Zealand was focused on highlighting pressure points and improving detailed design rather than improving the legitimacy of what is proposed. Engagement with the business sector and civil society varies, depending on the nature of the issue and the style of the government of the day. Instead, the procedures followed tend to be case by case. Consultation on big policy is tailored to the particular situation and is not a one-size-fits-all approach. An example of this is the development by the Inland Revenue Department of a standardised procedure – the Generic Tax Policy Process – that has not been adopted by other agencies.

However, a key feature of the New Zealand system is the role of Parliamentary Select Committees in improving the detailed design through the scrutiny of legislation, including the public submission process. The routine involvement of the public in this way is unusual and is a part of the broader consultative framework in New Zealand.¹⁰ Commenting on the quality of Select Committee reviews in New Zealand, the late George Tanner, former Parliamentary Counsel, observed (in email correspondence) '[a]t its best, it works well and is probably a more effective scrutiny process than many upper Houses around the world' (Gill, 2011, p.567).

Consultation is also necessary as part of the process of developing secondary delegated regulation and other delegated legislation. In New Zealand, it is possible to seek judicial review of the decision to exercise the power to make

¹⁰ A good source of information is the relevant chapter of David McGee's *Parliamentary Practice in New Zealand* (2005).

delegated legislation. Consultation addresses the possibility of judicial review if all relevant (and no irrelevant) issues have been considered.

The New Zealand Productivity Commission (2014) reported that around one-half of the 50 statutes they reviewed had a statutory consultation requirement of some kind. It is important to note that statutory obligations to consult are only part of the picture. There are strong presumptions that support consultation, often and early, and expectations for consultation are included in the Cabinet Manual, the RIA Handbook, as a key criterion in RIA assessments and the Legislation Advisory Committee guidance.

In general, the development and review of regulation is dominated by public agencies within the Executive. Even in the parliamentary consideration phase, officials from the sponsoring department support the House Select Committee as they consider submissions on proposed primary legislation. However, Select Committees can appoint their own advisors and their considerations remain an important and valuable check and balance on the Executive. The dominant role of the Executive does not equate to control.

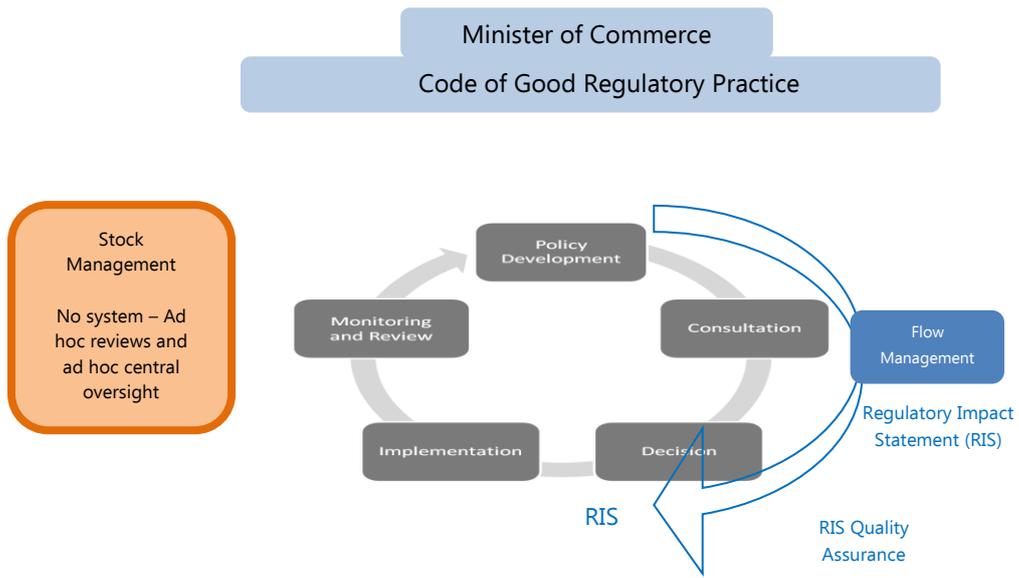
Moreover, there is increasing use of more innovative co-design and co-production initiatives such as the Land and Water Forum.¹¹ These reflect a change in political style from the 'crash through' approach to a consensus building through more inclusive consultation so the changes are more likely to stick.

System Evolution

The evolution of the RMS between 2008 and today can be seen by comparing **Figure 5.2** (the system in 2008) and **Figure 5.3** (the system in 2015). The development of a new regulatory regime often goes through a number of phases—the strategic or the 'big what' phase where a regulatory response is selected from a range of possible policy interventions, the tactical or 'how' phase where the regulatory policy is developed, the operationalisation or 'the 'little what' where the detailed 'little policy' legal analysis is undertaken and drafting prepared. Consultation with stakeholders can occur in any of these phases.

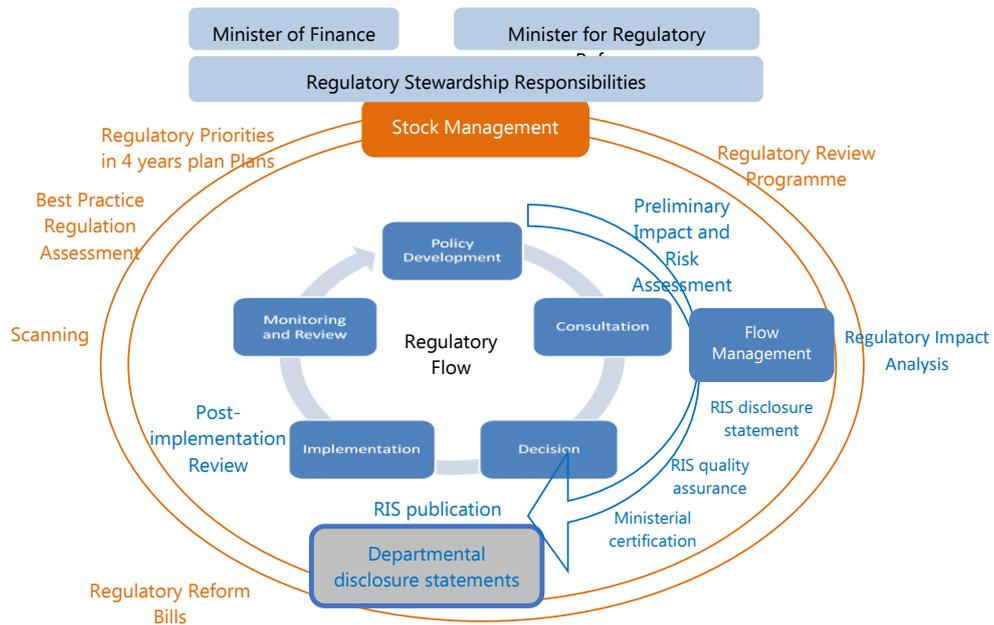
¹¹ The Forum led the co-design of water management standards by agricultural environmental and policy interests that helped shape the national policy statement which took effect from August 2014, <http://www.mfe.govt.nz/publications/fresh-water/national-policy-statement-freshwater-management-2014>

Figure 5.2. The Formal System, 2008



Source: New Zealand Treasury.

Figure 5.3. The Current Formal System, 2015



RIS = regulatory impact statement.
Source: NZIER based on New Zealand Treasury.

Big Policy Focus

The main phase when regulatory management tools are applied is policy development in particular in the initial 'big what' and the 'how' policy design phases through the RIS process. The left-hand side of **Figure 5.3** shows how the preliminary RIS informs the 'big what' phase while the RIS is developed alongside the 'how' phase. There are few extra resources or special measures applied to detailed 'little policy', legal design, parliamentary deliberation and decision, or the implementation and conduct of regulators. No general formal requirements for monitoring and review would enable learning about effectiveness. However, in cases where the RIS was inadequate, a post implementation review can be required.

Governance and Coordination

The governance of the RMS has received increasing attention in OECD countries. In New Zealand's case, two main agencies provide coordinating capacity:

- The Treasury is the national coordinating body on regulatory management, tasked with oversight of regulatory systems, including RISs and regulatory policy, which reports to the Minister of Finance and the Minister for Regulatory Reform.
- The Parliamentary Counsel Office has the statutory function to develop all drafting instructions (other than for tax law).

Five other institutions play important roles:

- The Legislation Design and Advisory Committee provides detailed guidance on public law issues and legal review of draft legislation.
- The Law Commission undertakes independent review of legal issues and makes recommendations for reform.
- The Productivity Commission undertakes a similar role to the Law Commission completing inquiries on topics referred by the government, including recent reviews of local government regulation and the overall regulatory system (**Box 2**).
- The Parliamentary Select Committees whose scrutiny of all legalisation (other than bills considered under urgency) allows for a public submission process.
- The Parliamentary Regulations Review Committee, which examines all secondary regulations and proposed regulation-making powers, and investigates complaints about regulations.

Box 2. New Zealand Productivity Commission – Regulatory Institutions and Practices

The New Zealand Productivity Commission completed a major detailed review of the central government regulatory system in 2014. It concluded with recommendations on:

- creating a default presumption that engagement and consultation will have been undertaken before new legislation is introduced,
- developing a strategy to review the stock of existing regulation,
- improving the focus on the review of the effectiveness of regulation,
- increasing the scope for 'repairs and maintenance' to bring legislation up to date,
- improving the capability of regulatory agencies through the development of communities of practice and professional cadre leadership,
- professionalising staff by strengthening the skills of those undertaking regulatory functions, and
- improving system leadership by augmenting the Treasury's regulatory capability and introducing a head of profession.

There are no equivalent roles for the administration and enforcement of regulation by regulatory agencies or regulatory monitoring review or evaluation (Gill and Frankel, 2014).

The main locus of attention is executive procedures, rather than those of parliamentary or judicial branches of the central government, or how the government engages with business and civil society. As discussed in the Introduction, Part 2 of the Legislation Amendment Bill currently before the House involves strengthening Parliament's role in reviewing new regulation. The Treasury has been proactive in developing guidance around the new stewardship provisions applying to departmental chief executives, but this is still a work in progress and the impact is untested.

4. Assessment of the New Zealand Regulatory Management System

Every country's programme of regulatory reform and its RMS needs to be understood in the context of the constitutional arrangements, government capability, the overall level of economic and social development, and the critical constraints on improving economic and social performance.

New Zealand started the mid-1980s with high levels of government capability and economic and social development but with a sustained period of relative

decline in economic performance that created a political platform for change. The unique constitutional arrangements, in particular the concentration of power in the Cabinet, allowed for rapid change to be driven through. The Cabinet and Cabinet Committee system is arguably the strongest of all Westminster countries, as is the Select Committee review process.

New Zealand's RMS is embedded in a much broader set of arrangements that has two main features:

- An enduring set of norms, principles, rules, and decision-making processes which take the form of constitutional conventions and legislative rules. These include the Cabinet Office Manual, Parliament's Standing Orders, and various statutes including the New Zealand Bill of Rights Act, the Constitution Act, and the State Sector Act.
- An enduring set of institutions that are responsible for ensuring that the norms, principles, rules, and decision-making process are consistently applied. These include an independent and non-partisan public service, Parliamentary Select Committees, Parliament's Regulations Review Committee, the courts (principally through judicial review), the Legislation Advisory Committee, the Law Commission, and some government agencies such as the Ministry of Justice.

A system of regulatory management has evolved with two broad objectives:

1. To improve the quality of policy advice, and hence decision-making, by requiring analysis to be undertaken and assumptions clarified and for the disclosure of information relating to new regulatory proposals.
2. To create greater incentives to review the existing stock of regulation at appropriate intervals.

New Zealand was an early mover on regulatory reform in the OECD. The sector-based reform programme was among the most widespread and comprehensive of any of the established OECD countries. By contrast, New Zealand has been a cautious follower on regulatory management. Whereas New Zealand was a pioneer on regulatory reform in the use of auctions to allocate fisheries quotas and radio spectrums for example, it drew heavily on the experience of other OECD countries (Australia in particular) in the development of its RIS system. New Zealand's adoption of RIA coincides with the increase in the use of RIA across almost all OECD countries, rather than leading the way. More recently, New

Zealand has adopted its own unique approach to regulatory stewardship and has elected not to use administrative cost reduction as a tool for stock management.

Regulatory Coherence

Looking at the New Zealand system as a whole against the various dimensions of regulatory coherence:

- There is extensive focus on policy coherence horizontally across different domestic regimes and to a lesser extent vertically across levels of government through the RIS process, officials committees, the Cabinet Committee, and the Parliamentary Select Committee process.
- The policy development system also allows for consideration of international coherence, that is, consistency with international obligations and regional connectivity.
- There is less emphasis on coherence over time as New Zealand tends to take a 'set and forget' approach.
- There is less focus on regulator coherence, in the sense of how well the capability, mandates, and resources of the regulators are lined up.¹² While the RIS includes a section on implementation, reviews of RISs have highlighted that this is often the weakest section in the RIS and there is little sustained emphasis on building the capability of regulators.
- There is not the same across the board attention to coherence from the perspective of regulatees, for example the avoidance of duplication and inconsistencies in administrative requirements, as there is to policy coherence. Whereas some agencies, such as the Inland Revenue Department, have standard operating procedures that allow for consultation with affected parties, others do not. Around one-half of statutes contain consultation provisions.

Themes from the New Zealand Experience

Looking at the New Zealand experience, a number of themes have emerged, including the links between regulatory management and regulatory quality, the

¹² Since the completion of this review, there have been a number of decisions that aim to improve and professionalise the practice of regulation discussed in Manch, et al. (2015).

political approach to change, the particular emphasis on policy coherence and the lack of use of administrative cost reduction tools, and the focus on 'big' policy development rather than regulatory practice.

The *first* theme is that while New Zealand has been ranked consistently highly for both the quality of government and on regulatory quality, this ranking predates the introduction of a formal RMS and arose from a wide-ranging regulatory reform programme. The introduction of a formal RMS has enabled those gains to be locked in and sustained. However, they were not sufficient to offset a relative decline in regulatory quality as other OECD countries caught up with New Zealand.

The *second* theme is the modification in the political approach to change, moving from the 'crash through' approach to building a broader consensus for more reforms through more inclusive consultation so the changes are more likely to endure.

The *third* theme is the emphasis on policy coherence through the use of RIA, supported by good regulatory practice principles ('flow' policy tools). RIA is now standard in OECD countries, but New Zealand's approach to RIA has been different with great emphasis placed on integration of RIA into the policy process. Unlike comparable jurisdictions, formal techniques such as CBA or formal risk assessment do not form the centrepiece of the New Zealand system.

The *fourth* theme is that New Zealand has largely avoided the use of 'stock' management tools focused on administrative costs. Recent reforms of stock management have tried to focus on mainstreaming regulatory management as part of the public management duties of departments, rather than building separate stock management systems.

The *fifth* theme relates to the almost exclusive focus on the coherence of 'big' policy as opposed to 'little' or operational policy, the practices and capabilities of regulators, the effectiveness of regulation, or the experience of those being regulated.

The *final* theme is that as a result of the emphasis on coherence of 'big' policy, the main locus of attention is executive policy procedures, rather than those of parliamentary or judicial branches of the central government.

Parts 2 and 3 of this chapter explore the details of two regulatory changes to: building controls, and the licensing of motor vehicles. In particular, the chapter explores the drivers of the regulatory changes and the extent of the role played by the regulatory management system tools and procedures.

The failure of the performance-based building code, which led to widespread problems with 'leaky buildings' is instructive for examining the limits of regulatory management systems. The next section discusses how the primary failure was not the use of a performance-based building code as such, but how it was implemented; in particular not having a strategy in place to monitor how the new building technologies performed on the ground. A stronger regulatory management system would not have prevented the regulatory failure and would not have stopped the transfer of part of the wealth losses to taxpayers, but it may have resulted in the problem emerging earlier, reducing the losses.

Part 2: Leaky Buildings – Unpacking the Role of the Regulatory Management System in a Regulatory Failure¹³

1. Introduction – Leaky Buildings in a Nutshell

New Zealand's 'leaky homes' crisis' is widely regarded as an expensive example of regulatory failure (NZ\$11.3 billion [\$US9 billion] or around 13 percent of GDP in 1998). While individual house designs failed, it is less clear in what sense the reforms were a 'regulatory failure'. Arguably, as will be shown below, the reforms succeeded in achieving the initial goals of allowing more innovation and the adoption of new techniques, designs, and products in building construction.

¹³ This section of the chapter draws extensively on the PhD research of Dr Peter Mumford and subsequent papers by Dr Brent Layton and Mike Hensen, James Zuccollo, and John Yeabsley of NZIER. I am grateful for the comments from Dr Peter Mumford on an earlier version of this part of the chapter.

The reforms are, however, an example of how not to implement performance-based regulation and were a political failure. Although effective in achieving their objective, they were not efficient in the sense of achieving the objective at lower cost than other feasible alternative options. The policy objectives could have been achieved without incurring the costs of leaky buildings if the regime had been implemented better. The wealth losses were highly concentrated, and there was a public outcry that resulted in sustained political pressure for government intervention, increased regulation of building occupations, and government financial support to affected building owners.

The primary failure in the design of the initial regulatory regime was not the use of a performance-based building code as such, but how it was implemented. In particular, the system as deployed assigned responsibility to territorial local authorities that lacked the expertise to approve new building technologies and there was no monitoring 'in the field' to see how they were performing in practice.

A stronger RMS would have been unlikely to identify the complex interactions that created the regulatory failure and would not have stopped the reforms or the subsequent transfer of some of the wealth losses to taxpayers. It is possible, however, that more systematic scanning and monitoring might have identified the problem more quickly, reducing the losses incurred. More robust ex ante appraisal of the reforms may also have identified the risk posed by new building technologies and the need to monitor of how these technologies performed 'on the ground'.

2. Impetus for Change to the Building Code¹⁴

When the new building code came into force on 1 January 1993, New Zealand replaced its previous prescriptive or standards-based regulations for the construction of new buildings with a new performance-based regime. The aim of the reform was to improve overall economic performance by enabling greater innovation and efficiencies in the building sector. This in turn was expected to improve overall economic performance because the construction sector is large

¹⁴ This section and much of the rest of the chapter draws extensively on the research of Dr Peter Mumford (2011).

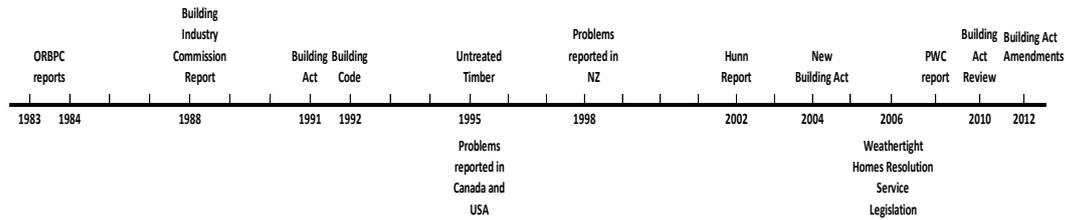
(representing approximately 4 percent of GDP) and provides important inputs into production and consumption in the rest of the economy.

New Zealand was not alone in making the change to building controls. New Zealand based its approach on the so-called Nordic Code, and similar reforms were introduced in Australia, Great Britain, Canada, and Japan around the same time. The origins of the performance-based building regime in New Zealand have been traced back to the late 1970s when professional associations and the building industry representatives reacted against the prescriptive standards-based regime that made the industry 'over-regulated and controlled'.¹⁵ **Figure 5.4** shows the chronology of the reforms starting in 1982 when the government established the Office of the Review of Planning and Building Controls. Although the office's two reports released in 1983 did not initially get political traction, the ground was laid for the 1988 report of the Building Industry Commission to be more positively received. This report was largely adopted by the government and provided the blueprint for the regime (**Box 3**) that was rolled out in the new Building Act 1991, and the performance-based building code that came into force at the beginning of 1993.

The legislative framework for building controls (Building Act 1991) may have been adequate to address the risks of performance-based regulation through effective control over novel technologies for which approvals were sought. Over time, however, the central regulator, which had broad objectives and limited funding, interpreted its monitoring and control functions narrowly by focusing on the operation of the regime overall rather than on specific new technologies. What was delivered, relative to the original design, was a regime where more emphasis was placed on the goal of reducing compliance costs. Quality control applying to alternative solutions was weaker due to the reliance on territorial authorities.

¹⁵ Office of the Review of Planning and Building Controls (1983), quoted by Mumford (2011, p.7).

Figure 5.4. Key Events in the Leaky Buildings Saga



NZ = New Zealand; ORPBC = Office of the Review of Planning and Building Controls; PwC = PricewaterhouseCoopers; US = United States.

Source: NZIER.

While the 1988 Building Industry Commission report provided the immediate trigger for change, the wide-ranging structural reform programme discussed in Part 1 of this chapter provided a policy context that favoured performance-based regulation. The new building code was introduced in New Zealand at a time when similar performance-based regimes were also introduced for health and safety, land use planning, the regulation of hazardous substances, and the introduction of organisms. Prescriptive regulations such as the old standards-based building code were seen as an anchor that contributed to a secular decline in New Zealand's relative economic performance. It was expected that the adoption of new designs and products enabled by the new performance-based code would act more like a sail than an anchor.

Moreover, the 1982 and 1988 reports had built a wide body of acceptance of the need for change among all the peak bodies concerned. The building-related professional associations, building material producers, and industry representatives supported the changes. The policy community within the bureaucracy was focused on delivering new approaches to regulation as demanded by a reformist government. The mood of the times, which emphasised the need to move to performance-based regulation, break down bureaucratic barriers, and minimise compliance costs, was reflected in the parliamentary debates and the report back from the Parliamentary Select Committee.

Box 3. The New Performance-Based Building Regime

Key features of the new building control regime included:

- A new national performance-based code – standards complemented by ‘alternative solutions’ that met new performance code requirements
- Consolidation of all building-related controls into a single law
- ‘One-stop shop’ for seeking building consents
- An independent oversight body (the Building Industry Authority)
- Building consents and inspections carried out by local authorities and authorised private building certifiers

(See Mumford, 2011, p.11, for more details)

3. The Sequence of Events

3.1. 1993–2005 – The Problem Emerges

The reforms were successful in introducing experimentation and innovation, but not in the way the original proponents of the regime had anticipated. Dwellings continued to be constructed using standard designs; but in a number of urban locations, a new style of dwelling became popular based on a Mediterranean design that needed less land area. Key features of this design included new cladding systems (for example, flush plaster finishes and the use of sealants to create a watertight seal), the lack of eaves, and cladding attached directly to wooden framing in which there was no drainage cavity. In addition, there was a change to the New Zealand standard for timber treatment, which allowed the use of kiln-dried (untreated) framing rather than the traditional chemically treated timber.

Unfortunately, New Zealand does not have the climate of the Mediterranean. New Zealand experiences heavy rain often accompanied by strong winds that can drive water through joints. In the absence of drainage cavities, water was not able to escape, resulting in rotting of the untreated timber framing.

It took some time for these design defects to become apparent as the houses literally rotted from the inside out. The problems first merged in British Columbia, Canada, which has a similar climate to New Zealand. It took some time before the lessons from British Columbia were applied to New Zealand. The main regulator – the Building Industry Authority – focused on monitoring the operation of the regime overall rather than specific new technologies. Nearly 7 years passed from

the first substantiated reports of the problem in British Columbia and sustained investigations into the nature and extent of the problem in New Zealand.

Three major reviews in the early 2000s placed different weights on the different factors that contributed to the problem. These factors included a lack of guidance, a lack of professional skills of builders and cladding installers, a lack of effective supervision, a lack of effective regulation, and consumers being insufficiently informed (**Box 4**).

Mumford (2011), in the most authoritative study to date, suggested that, overall, the problem had not been a result of poor work by builders, but that constructed buildings were also prone to failure. This raised something of a paradox – why had good builders built leaky buildings? Mumford attributed the leaky building problem to a range of factors that interacted in ways that had been difficult to foresee in advance. He concluded (email correspondence dated 14 October 2014) that the failure had resulted from:

The change from a standards-based regulatory regime – where technology shifts are on the margin and occur through a process of incremental trial-and-error – to a performance-based regime displaced traditional institutions for aggregating knowledge required for risk-based decision-making. At the same time, the new performance-based regime had been permissive of greater technology shifts, which demands more of decision makers who are operating in an environment of inevitable uncertainty. The significance of the regime change had not been well understood and new institutions did not evolve.

Box 4. Competing Explanations of the Leaky Building Problem

The perceived causes of the failures identified in the three reviews that were carried out:

- A competitive building environment, which created an imperative to cut costs, also led to the cutting of corners
- A lack of professional trade skills and judgment
- A lack of effective supervision and inspection – buildings were being built using a series of subcontractors, with no one having responsibility for overall quality control
- An emphasis on the product, not the building system. In this case the cladding product, not on whether that cladding, in that particular design, in those particular weather conditions, would keep the water out
- A lack of sufficient guidance in acceptable solutions and verification methods
- Consumers who were not sufficiently informed about the implications of the choices they were making
- Failures in the regulatory backstop, which ranged from inadequate consenting and inspections by territorial authorities, through to inadequate monitoring of outcomes by the Building Industry Authority

Box 5. Complex Causation of the Leaky Building Problem

The leaky buildings problem was due to the interaction of a range of factors, including:

- The tipping point problem – tolerance for the new designs was finely balanced; leaky buildings occurred due to the complex interactions between innovative designs, the New Zealand climate, uneven quality of monolithic cladding installation, and lack of owner maintenance
- Uncertainty arising from experiments – builders had inadequate knowledge of the uncertainty they faced when building with new materials and techniques
- Lack of information – success of the cladding required regular maintenance by owners, a feature that was not made clear to individual householders
- The difficulty of detecting latent defects – problems took time to emerge because the houses literally rotted from the inside out
- The problem of many hands – many players, including designers, builders, and subcontractors installing cladding, and building inspectors were involved in one construction
- Lack of monitoring – the main regulator, the Building Industry Authority, interpreted its monitoring role narrowly by focusing on the operation of the regime overall rather than specific new technologies
- The weakest link – the interaction of alternative solutions, new products, and the New Zealand environment required ‘expert’ judgments about how elements would operate as a system, but the front line regulators lacked the capability to provide this level of expertise

3.2. 2004 Building Reforms – Stopping the Rot

In 2004, a new Building Act that extensively modified the 1991 regime was enacted. Although the performance-based approach to building controls was retained, more emphasis was placed on strengthening consumer protection, and on providing more guidance and ‘how to’ documents. Key elements of the reforms included:

- strengthening the role of the central regulator (disbanding the Building Industry Commission and creating a new Ministry of Building and Housing)
- reviewing the performance-based Building Code, increasing the amount of support in relation to meeting code requirements through the provision of more ‘how to’ technical documents, and providing for bans on particular ways of building in particular circumstances
- ensuring that there is a base of capable (qualified and knowledgeable) people to undertake building design and critical elements of building work and inspection, notably by providing for

the licensing of building practitioners and requiring accreditation and audit of building consent authorities

- strengthening the competence of building consent authorities by requiring them to be accredited
- strengthening support for consumers through mandatory warranty terms implied in all contracts for building work, making builders liable for latent defects in their work (although the reforms did not mandate the means of delivering on warranties) (DBH, 2010).

Although individual house designs failed and the implementation of the reforms meant they were a political failure, the reforms were not a failure of performance-based regulation as such. Arguably, as shown in **Box 6**, the reforms succeeded in achieving the initial goals of allowing more innovation and productivity in building construction and may indeed have a positive net present value (NPV) (Layton, 2010). Rather, it was a failure in how to implement a performance-based regime in a way that achieved the policy objective of greater building innovation while ensuring that downside risks were kept within manageable limits.

That is not to suggest that the weather tightness problem was not important or should not be treated seriously. Individuals affected had suffered major financial losses and considerable emotional distress. Moreover, New Zealand would have been better off had it captured the innovation benefits but avoided the weather tightness issues. In effect, the NPV would have been higher if this particular technological experiment had been curtailed or modified before so many buildings were built. The weakness of the regulatory system was that it did not apply the appropriate expertise in approving this technology and, given that innovation will inevitably involve some risk-taking, it did not monitor the technology 'in the field' to see how it was performing in practice. As the wealth losses had been concentrated, there was sustained political pressure for government intervention.

Box 6. Evaluation of Leaky Buildings – Regulatory Failure or Successful Regulatory Experiment?

PricewaterhouseCoopers (PwC), in a report for the Department of Building and Housing, estimated that the total number of New Zealand houses built between 1992 and 2008 with weathertightness problems, at the midpoint estimate of 42,000 affected houses, was forecast to cost a total of \$NZ11.3 billion (2008 dollars) (PwC, 2009). However, this estimate is something of a high tide mark. By focusing on the total fiscal costs and not netting out transfers and other benefits, the economic cost of leaking buildings was overstated. Layton (2011) and Hensen, Zuccollo, and Yeabsley (2013) made changes to the PwC estimate to make it comparable to the net present benefit calculation in a cost–benefit analysis. In particular, the PwC methodology ignored the gains in productivity and building performance, which was the reason the reforms had been introduced. Hensen, Zuccollo, and Yeabsley (2013) concluded (emphasis added to the original) ‘Depending on how much the changes increased productivity in the building sector, and the value of the health and other unquantifiable social costs they generated, it is not inconceivable that the changes in 1991 generated a positive net present benefit when compared with maintaining the pre-1991 regulatory regime.

It would be wrong to conclude from these rough calculations that the weathertightness problem does not matter, or was not a regulatory failure...What the calculations do highlight is that to evaluate a policy or proposed policy it is important to compare apples with apples and to try to enumerate all costs and benefits on a common basis. Just looking at the costs will inevitably give a one-sided perspective.’

3.3. After 2004 – Picking up the Pieces and Socialising the Losses

The 2004 reforms sought to address the sources of the problem, to reduce the likelihood of leaky building–type situations arising in future, but innovation would continue to be permitted. Thus, the performance-based regulatory approach was retained but the Building Act 2004 had many more checks and balances, and the central regulator was given more funding. This left open the question as to who would bear the losses. For many of the individuals affected, the damage to their residences and investment properties was a major financial and emotional blow. Liability for the damage lay jointly and severally with the builders, architects, and building consent authorities (and, potentially, building material suppliers).¹⁶ However, because the builders and architects traded as limited liability companies, many of which had disappeared in the intervening decade or could not be located, legal attention turned to the role of the regulators.

¹⁶ Building material suppliers appear to have been able to shelter behind the demanding requirements set for installation. Although some settlements occurred, they largely appear to have escaped additional liability.

In 2005, the High Court had found the Crown not liable for defective work; but attention also focused on the building consent authorities, most of which were territorial authorities, which had deep pockets because of their ability to tax through the rates base. The government stepped in and implemented a scheme by which the central government subsidised repair work in return for the homeowner giving up their legal claim against the Crown or territorial authority. In 2006, legislation was passed establishing the Weathertight Homes Resolution Service. The Crown and territorial local authorities participating in the scheme each provided a 25 percent direct payment to the building owners to cover agreed repair costs.

3.4. 2009 Review of the Building Act – Retreat into Rules

The team reviewing the Building Act initiated in August 2009 worked with representatives of the building and construction industry, local authorities, and homeowners, on improving the operation of the new regime. This review found that, although there had been improvements in the quality of building work since 2004, the system was more costly and less effective than it could be. A court case during the review (2010) in the Court of Appeals clarified that territorial local authorities owed a duty of care to owners, whether occupants or not, to make sure that buildings were habitable. This meant that territorial local authorities faced considerable liabilities, as in many cases they were the only party left for homeowners to sue, as others had either been liquidated or could not be located.

A key finding of the review was poor assignment of risk and responsibility due to an excessive reliance on building consent authorities, which had limited control over the quality of buildings, and a lack of effective recourse for owners whose buildings had failed to perform. The review (DBH, 2010, p.1) highlighted:

- a 'negative dynamic ... whereby those best placed to manage risk (that is, building practitioners) are less likely to actively manage it'
- the perverse incentive facing consent authorities to take a risk-averse 'retreat in rules' approach because they faced high risk in consenting alternative approaches and they do not receive any benefits from risk taking.

In response to the review, a two-part policy response was proposed (DBH, 2010, p.1): 'provision of a more balanced accountability model with a supporting consumer package (the consumer package), and the introduction of a more efficient approach to consenting (a stepped system)'.

The results of the 2009 review were enacted in the Building Amendment Act 2012 and its associated regulations brought into force the risk-based consenting system.

The weathertightness failures in New Zealand were costly – if not in a net public benefit sense, then at least for the building owners who faced significant wealth losses. This raises the question of how regulatory regimes should be designed to be more durable and avoid breaking down in the face of concentrated losses. It suggests that the appraisal of reforms need to focus on detailed institutional design and the need to avoid large losses concentrated on those unable to manage the risks. In conclusion, we now turn to the role of the RMS in appraising the new building code regulatory regime.

4. Role of the Regulatory Management System

At the time the Building Act 1991 was introduced, New Zealand lacked a formal RMS. There were no formal requirements for appraising new regulatory regimes beyond the standard process applying to developing Cabinet papers and no requirements to manage or review the stock of existing regulations. Neither was there a requirement for additional policy scrutiny through a RIA. The design of the building control regime reflected the thinking of the times, which favoured a move towards performance-based regulatory regimes in this and a number of other domains. The new regime was designed to reduce the excessive administrative and compliance costs of the old regime and to enable the adoption of new designs and technologies.

The amendments introduced with the 2004 Building Act and the 2009 review were all subject to the RIA processes – but by then the 'rot had set in'. This raises the question, if a RIA requirement had been in place when the new regime was being adopted, would the problem have been averted?

Three features of this case are relevant to this question:

1. the problem of unpacking causation in the face of complexity,
2. the problem with granularity of information, and
3. the limitations of ex ante appraisal in assessing regulatory experiments.

The Problem of Unpacking Causation in the Face Of Complexity

The three major reviews in the early 2000s all placed different weights on the different factors (**Box 2**) that contributed to the problem. In this chapter we have followed Mumford's thesis that the way the legislative design was implemented meant that the adoption of experimental designs without adequate quality control led to the leaky buildings problem. But even with perfect hindsight, this causation is difficult to attribute.

The Granularity of Information

Detecting the defects in leaky buildings required detailed information about how specific technologies were performing on the ground in particular locations. This is different from the sort of information that would be gathered at the regime level on the overall performance on the new building code. This granular information was costly and difficult to obtain. Indeed, if the simultaneous move to use untreated framing timber had not occurred, the evidence of the leaky buildings problem may not have become evident for a number of years. Monitoring and review regimes focused on the organisation or regime level, do not require information at the level of granularity that looks at the ground performance of specific technologies.

The Limitations of Ex Ante Appraisal in Assessing Regulatory Experiments

All regulatory reform is something of an experiment,¹⁷ revealed in this case study (**Box 3**) as the changes unleashed complex dynamics in the behaviour of regulators, those being regulated, and physical systems. RIA systems attempt to appraise reforms before they are implemented. As Greenstone (2009, p.111) observed, this is 'the point when we know the least about them'.

¹⁷ See Mumford (2011, p.151) for a discussion of regulations as experiments.

In the case of 'leaky buildings', it seems implausible that a desk-based appraisal would have highlighted the risk of the complex dynamic interactions discussed in **Box 3** that led to the leaky buildings problem. If those closest to the action—builders, building owners, front-line regulators, and oversight regulators—did not detect what was going on, it hardly seems credible that a desk-based appraisal by a policy analyst would have been effective. To the extent something as complex as leaky buildings can be attributed to one cause, it reflects failings in the way the regime was implemented rather than flaws in how it was designed. In particular, the system as deployed assigned responsibility to territorial local authorities that lacked the expertise to approve new building technologies; further, there was no monitoring 'in the field' to see how these technologies were performing in practice. These problems arose from how the regulatory design was implemented and occurred after a RIA would have been undertaken. However, RMSs consist of more than RIA. It is to the potential impact of the overall RMS that this case now turns.

5. What Difference Could An Enhanced RMS Have Made?

In the final section, we pose a hypothetical question: 'What role could an enhanced RMS have played in the case of leaky buildings?' To be specific, if the regulatory regime proposed by the 1988 Building Industry Commission report had been subject to the current New Zealand RMS, would the outcome have been different? This is an exercise in counterfactual history for which there is no definitive answer. But it is worth reflecting on. In particular, it is important to reflect on which elements of the problem could have been foreseen and which could not have been.

Each country has a unique regulatory system to make laws, regulations, and rules and to review them. As discussed in Part 1, a range of OECD countries including New Zealand have introduced measures targeted at improving regulatory policy development and strengthening their institutions to make their regulatory systems more effective. A high-performing or requisite regulatory system needs to have three components:

- a quality policy cycle,
- supporting policy practices (such as consultation), and
- capable oversight institutions.

The Regulatory Policy Cycle

Looking at the regulatory policy cycle, there are two main regulatory management tools that are important to this case – the role of RIA in the review of new regulations and the role of stock management provisions, in particular, the stewardship responsibilities to keep regulatory regimes under review.

Regarding RIA, for the reasons outlined above, it seems implausible that a desk-based appraisal would have highlighted the specific risk of the complex dynamic interactions discussed in **Box 3** that led to the leaky buildings problem. In the unlikely event that it had, the 'mood of the times' was such that the regime would have been adopted in any case.

The Treasury's Regulatory Impact Analysis Handbook (2013) identified a range of generic problems identified in this case study (that is, risk with how regulations are administered and enforced, the need for monitoring, and the capability of regulators), but the guidance provides little support on how to manage these risks. These requirements are generally the weakest section of a RIA in New Zealand and are honoured more often in the breach than in the observance. In practice, the sorts of dynamic operational risks that actually arose are ones that are not well handled by the RIA process. It seems unlikely that a desk-based appraisal would have identified and highlighted the challenges and vulnerabilities in the implementation and operation of performance-based regulation.

However, a more robust ex ante risk-based appraisal of the reforms might have identified the generic risks posed by use of innovative new building technologies. In this chapter, we have identified the complex interaction of a range of factors that caused the leaky buildings problem. The introduction of a new regulatory regime usually involves a degree of experimentation. As the various parties respond to the changes in the constraints they face and the information they receive, there is the general risk of unintended consequences. Although a more rigorous risk appraisal would not have highlighted the potential specific risk of catastrophic failure, it may have highlighted that the existing mechanisms for allocating liability for long duration latent defects were not very effective.

There is a stronger case that stock management provisions would have an effect despite the difficulty of detecting latent defects. Regulatory management in New Zealand prior to 2008 could be loosely characterised as 'set and forget' followed

by 'management by crisis'. Now, however, there is an increased emphasis on stock management with performance monitoring of organisations and regimes by the lead department and best practice assessments of regimes by the Treasury. However, in the case of leaky buildings, extremely granular information was required to undertake monitoring of how the new building technologies performed 'on the ground'. Even if this information was available, a sophisticated judgment would have been required and that judgment was not in tune with the mood of the times. It is implausible that central departments would have identified the specific problem faster than Building Industry Authority did.

However, it may be possible that the dialogue triggered by more systematic scanning and monitoring would have identified the potential generic risk posed by use of new technologies and the need for more granular information. If action had been taken more promptly based on that information, the losses incurred could have been lower. Policy development and review do not occur in a vacuum, so the following sections discuss the role of supporting practices and institutions.

Supporting Practices

The policy cycle needs to be augmented by a number of supporting practices including consultation, communication and engagement, accountability and transparency, and learning.

The move to a performance-based building code was in response to pressure from the building industry and consultations had been held with many stakeholders. The building-related professional associations, building material producers, and industry representatives all supported the changes. There had been considerable communication and engagement on the design and subsequent roll out of the changes.

The key government institutions – the Building Industry Authority (the independent central oversight body) and the territorial local authorities (local regulators) – were subject to the standard range of accountability and transparency provisions for which the New Zealand government is highly regarded. The critical gap in terms of supporting practices was the lack of mechanisms for learning about the performance of these new building technologies and practices on the ground.

Oversight Institutions

Looking at the oversight institutions, New Zealand has two key players – the Treasury, which is the lead on regulatory policy issues, and the Parliamentary Counsel, which takes a leading role in the drafting of primary legislation. The mandates and oversight of these bodies do not extend to local government. There is only indirect influence through the oversight of the relevant central government department. In the case of leaky buildings, territorial authorities played a key role in authorising the adoption of new building technologies. In decentralised systems it is important that the lead institution also assumes a role in developing the regulatory management capability of subnational governments. Local regulation capability and coordination remain a problematic area in New Zealand (New Zealand Productivity Commission, 2013b).

6. Conclusion

All regulatory changes have the nature of an experiment, as it is uncertain how the patterns of actual behaviour will evolve over time. Thus, it is important to have the ability to learn both about whether the regulatory regime is necessary, efficient, and effective, and about how to implement and deploy the regime effectively.

The 'leaky buildings' case is salutary as it highlights the importance of how 'the devil is in the detail' in the way the regulatory design is deployed. The reforms were an example of how not to implement performance-based regulation and were a political failure as a result. Although effective in achieving their objective, they were not efficient in the sense of achieving the objective at lower cost than other feasible alternative options.

Part 1 of this chapter concluded that the main focus of the current New Zealand RMS was on policy coherence as opposed to the practices and capabilities of regulators or the effectiveness of regulations. This emphasis means that, even if the current stronger RMS had been in place, it would have been unlikely to have stopped the reforms from occurring or have altered how the reforms were implemented. The RMS is largely silent on matters relating to the capability of regulators and the implementation of regulations.

It is possible, however, that more systematic scanning and monitoring could have identified the generic risk more quickly, reducing the losses incurred, but this is speculative at best. A more robust ex ante risk appraisal of the reforms may also have identified the generic risk posed by new building technologies and the need for monitoring by the central regulator about how these technologies performed 'on the ground'. However, the granularity of the information was such that the problem on the ground was unlikely to emerge from monitoring or review at the overall regime level.

If regulations are by nature experimental, then monitoring and review are required to learn whether the regulatory regime is working as intended. The sorts of dynamic operational and implementation risks that actually arose are not well handled by the RIA process. Although there is a formal requirement for monitoring and review to be addressed as part of the regulatory impact assessment, in practice this is the weakest section of a RIA in New Zealand and is honoured more often in the breach than in the observance. But New Zealand is no exception in that regard. According to the OECD (2010, p.50), ex post evaluation of regulation 'is a near universal weakness' across OECD countries.

The following and last part of this chapter explores the role of the RMS in the case of the successful reform of vehicle licensing. The reforms were successful due to a combination of strong sponsorship from bureaucratic and political leaders, focused programme leadership from middle management, and effective use of CBA and financial and spatial modelling to provide rigour to the policy process. The RMS played a supportive, reinforcing, indirect role, but without significantly affecting the outcome directly.

Part 3: Vehicle Licensing – Unpacking the Role of the Regulatory Management System in Successful Regulatory Reform

1. Introduction – The Reform in a Nutshell

By contrast with leaky buildings, New Zealand's Vehicle Licensing Reform (VLR) is widely regarded as an example of successful regulatory reform. New Zealand used to have a stringent regime for inspection of the light vehicle fleet, with annual inspections for vehicles up to 6 years old, then 6-monthly thereafter. The

regime of regular testing had been in place since 1937. The cost–benefit analysis (CBA) for the Warrant of Fitness (WoF) option finally adopted estimated that annual savings were NZ\$150 million (US\$130 million) with an NPV over 30 years at an 8 percent discount rate of over NZ\$1.8 billion.

The CBA showed that reducing the frequency of inspections could make significant savings in the resource costs of inspections together with the value of time savings and the avoidance of unnecessary repairs. There were, however, costs. Although vehicle defects contribute to only a small proportion of crashes,¹⁸ when compared to human and other factors, there was a risk of a small increase in accidents and injuries. However, the savings from reduced inspections significantly outweighed the potential increased costs of death and injuries. What was more politically controversial was the effect on rural garages, which would lose a regular line of business inspecting vehicles.

At the time of writing (early 2016), the reforms to the WoF (and to the certificate of fitness applying to heavy vehicles) have been implemented, but the interim review scheduled to be undertaken 2 years after implementation and a full review 4 years have yet to be done. However, the reforms were subject to regular monitoring and interviewees did not highlight any problems with the changes since they have been rolled out.

2. Impetus for Change to the Vehicle Licensing System¹⁹

The system of regular inspections for light vehicles was introduced in 1937 with the intention of reducing road crashes that may result from vehicle defects, and

¹⁸ Vehicle faults contribute to about 2.5 percent of all fatal and injury crashes (or 0.4 percent where it is the sole cause). Of all New Zealand vehicle-fault crashes, approximately 15 percent of vehicles did not have a current Warrant of Fitness.

¹⁹ This part of the paper draws extensively on the interviews with staff at the Ministry of Transport (MoT), the New Zealand Transport Agency (NZTA), and the New Zealand Institute of Economic Research (NZIER) involved in the reforms. A number of staff from NZIER worked extensively on the vehicle licensing reforms, but the author was not directly involved in any way. The opinions expressed in this paper are the sole responsibility of the author and do not reflect the views of the Economic Research Institute for ASEAN and East Asia (ERIA), NZIER, or the New Zealand government. The research was supplemented by official papers published on the government website (<http://transport.govt.nz/land/vehiclicensingreformconsultation/overviewofvehiclicensingreformbackground/>).

any consequent deaths or injuries. Initially for most light vehicles, inspections had been 6-monthly but in the mid-1990s this was amended to annually, for vehicles up to 6 years old and 6-monthly after that. This was the most frequent light vehicle safety inspection regime in the OECD. The substantial improvements in light vehicle technology and durability since 1937 suggested review might be warranted. In particular, the improvements raised questions about whether a further relaxation of the regime could reduce regulatory burdens without undue costs from increased accidents triggered by vehicle defects.

The vehicle licensing reform programme had four elements: the WoF rules applying to light vehicles, the Certificate of Fitness rules applying to heavy vehicles, the annual vehicle licensing regime, and transport services licensing (**Table 5.1**). This case study will focus on the reform of the WoF applying to light vehicles. For completeness, it should be noted that the changes in the Certificate of Fitness proceeded (with large projected savings of about a quarter of those for WoF), the changes to transport services licensing did not eventuate, and changes to annual vehicle licensing were minimal.

Three forces acted together to create the impetus for change to the WoF inspection system:

- the public value proposition (the size of the prize),
- the internal organisational dynamics that created pressure for change, and
- an external authorising environment supportive of change.

The Public Value Proposition (the size of the prize)

The Ministry of Transport (MoT), as part of its regulatory reform review programme in 2011, had undertaken a comprehensive scan of the transport sector regulations and identified a dozen priority areas, one of which was vehicle licensing reform. A two-page note was created for VLR, along with other priority areas, which established the potential value proposition and the case for change. The scope for improvement in vehicle inspection had been well known to policymakers in the sector for some time. For example, in 1999 NZIER conducted a CBA for the Land Transport Safety Authority (now the New Zealand Transport Agency [NZTA]) of the WoF system, which suggested reform was warranted. In short, vehicle inspection was an obvious candidate for reform as 'the size of the prize was well worth going after'.

Table 5.1. Vehicle Licensing Reforms at a Glance

Element	Status Quo Ante	What Changed
Light Vehicles	Annual Warrant of Fitness inspections for first 6 years and every 6 months thereafter	No annual inspections for the first 3 years. Annual inspections for vehicles 3 years and older and first registered on or after 1 January 2000. No change for older vehicles
Heavy Vehicles	Certificate of Fitness inspections conducted by a separate garage from vehicle repairs	Inspection and repairs could be undertaken at the same facility and greater choice was available of inspection provider was enabled. No change in the frequency
Transport Services Licensing	Licences issued so long as applicants meet basic criteria	No change
Vehicle Licensing	Annual licensing fee collected through a range of channels.	Minor technical changes to the payments system.

Source: Compiled by the author.

Internal Organisational Dynamics within MoT and NZTA

The Chief Executive of the MoT was encouraging his organisation to stand back from the day-to-day management and look at the regulatory regimes afresh. He encouraged staff to respond to what was later termed the 'greatest imaginable challenge'. To respond to the challenge the ministry had been restructured into a matrix organisation, akin to a professional services firm. The VLR provided a programme that was suited to test the potential of the new structure. Within the NZTA, the leadership was emphasising a drive for results and a 'can do' culture about making this happen. Both organisations were conscious of the need to factor practical implementation issues into the policy design. As a result, in both organisations there was a willingness to look afresh and work together on reviewing the regulatory system that was in place.

An External Authorising Environment Supportive of Change

The combination of a potential public value proposition and an organisation's willingness are crucial but not sufficient to achieve change: what is also needed is political support from the external authorising environment.

At the start of the reform process, a national coalition government was beginning its second term with a continued agenda for 'better regulation, less regulation'.²⁰ Although vehicle licensing reform did not feature on any manifesto or explicit political agenda, it was in line with the philosophy of the government of the day. The new Minister of Transport and the Associate Minister consistently supported the changes being pursued, even in the face of a well-resourced lobbying campaign discussed below.

3. Sequence of Events

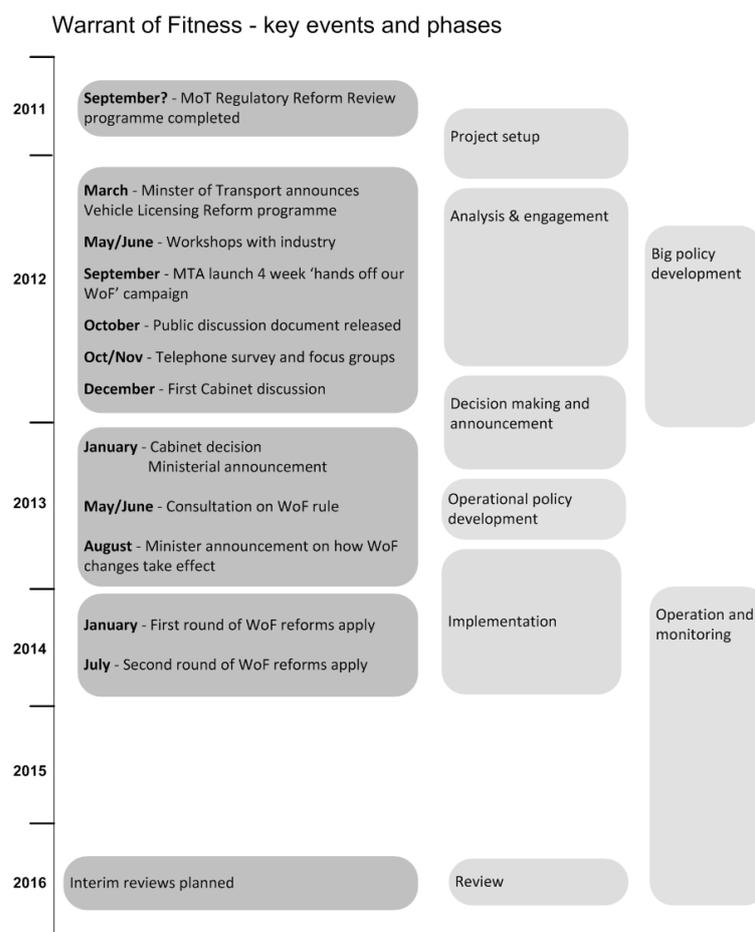
The programme has eight overlapping phases:

- project design and setup (late 2011–March 2012)
- analysis and policy engagement (early 2012–mid-2013)
- big policy development (mid-2012–December 2012)
- decision-making and announcement (December 2012–February 2013)
- operational policy development and engagement (March–August 2013)
- implementation (August 2013–July 2014)
- ongoing operation and monitoring (January 2014–present)
- review (scheduled for 2016 and 2018).

The key events and phases are shown in **Figure 5.5**.

²⁰ Measures supporting the delivery of the Government Statement on Regulation are:
 - 'Departments required to provide annual regulatory plans of all known and anticipated proposals to introduce, repeal or review legislation or regulation
 - Departments required to certify Regulatory Impact Statements and provide assurance that all policy options have been analysed and major risks and uncertainties identified
 - Departments required to put in place systems for continually and systematically scanning existing regulation to identify possible areas for reform or further review
 - Ministers required to certify that new regulation is consistent with the Government Statement on Regulation' (New Zealand Treasury, 2009).

Figure 5.5. Timeline for Light Vehicle Licensing Reform



MoT = Ministry of Transport; MTA = Motor Trade Association; WoF = warrant of fitness.
Source: Compiled by the author.

Project Design and Set-Up (late 2011–March 2012)

A number of features of the project design contributed to the ultimate success of the policy:

- The project was well resourced – both the MoT (enabled by the new matrix structure) and the NZTA devoted considerable staff resources to the project and financial resources were available to bring in external experts to lead the preparation and review of the CBA and undertake other technical analysis.
- The project was jointly led and managed by the MoT and the NZTA – the dedicated project team were collocated (in the MoT for the big policy and decision-making and in the NZTA for operational policy and implementation phases), with project management responsibility jointly shared between a staff member from the NZTA and the MoT staff and a

joint steering group that included both chief executives and key senior leaders.

- The project was well planned with detailed timelines.
- The project design included active communication and engagement with external stakeholders, but also organisational staff so that the policy design included consideration of implementation issues.
- The project design also factored in the formal requirements of the RMS including the RIS, allowing for interdepartmental consultation on the Cabinet paper, among others.

The project set-up phase culminated in March 2012 with the Minister of Transport publicly announcing the review and subsequently releasing the detailed review's terms of reference. The announcement emphasised public engagement with website pages and included an email address for questions and the shared leadership between the MoT and the NZTA.

Analysis and Engagement

To undertake the analysis, a multidisciplinary analysis team was set up separately from the policy team. A feature of the land transport sector is that it is relatively data rich with an extensive long running dataset (the Crash Analysis System). This team had the skills and resources required to undertake safety analysis, the economic analysis in the CBA, and subsequently the financial viability analysis that included the spatial impact of the proposed reforms on the automotive repair industry.

Stakeholder engagement was a feature of the initial analysis and subsequent big policy and operational policy development. There was extensive sector engagement through a Technical Advisory Group²¹ and wider public engagement through a website

(<http://www.transport.govt.nz/land/vehiclelicensingreformconsultation/#documents>). Engagement started with a series of workshops and a conversation paper for transport sector stakeholders to help promote discussion on the strengths and weaknesses of the existing systems. This was followed up with the release in September 2012 of a consultation document for public comment. The last stage

²¹ The Technical Advisory Group worked with the industry on the potential impacts to the industry. The group involves representatives from Vehicle Testing New Zealand, Vehicle Inspection New Zealand, Motor Trade Association, New Zealand Automobile Association, and Road Transport Forum.

of the public engagement was a telephone survey and series of focus groups to take the pulse of public sentiment on the issues.

This active outreach and engagement did not stop the industry from mounting a communications campaign on their own. Led by the industry lobby group, the Motor Trade Association, a large TV-based 'Hands off the WoF' campaign was launched at a cost of over \$NZ1 million. Engagement with the industry carried on in parallel with the lobbying campaign. However, overall the process of engagement was effective in getting most but not all stakeholders to be positive about the proposed reforms.

Big Policy Development

This was not a 'project design that started with writing the Cabinet paper'. Policy development was shaped by the analysis and at the core of the analysis was the CBA. The CBA identified a number of options and these options then shaped the advice in the Cabinet paper and the accompanying RIS (Ministry of Transport, 2013). The size of the NPV varied depending upon the option (Ministry of Transport, 2012):

- Option 1 – Annual inspections for all new vehicles, with 6-monthly inspections for vehicles after 12 years (NZ\$0.6 billion);
- Option 2 – First inspection at 3 years of age, with annual inspections thereafter (NZ\$2.1 billion);
- Option 3 – Inspection based on distance travelled plus a default inspection for vehicles that have not had an inspection within 3 years (NZ\$2.1 billion);
- Option 4 – Inspection at sale with no periodic inspection (NZ\$2.8 billion);
- Option 5 (no WoF) had the highest NPV but all the options provided for significant saving compared to the status quo.

Decision-Making and Announcement

As might be expected with an active and well-funded publicity campaign, ministers engaged actively in the decision-making process. The initial paper considered by the Cabinet in late 2012 was not approved. Formally, Cabinet papers are never rejected; they are only deferred or withdrawn. As a result, officials worked with the Minister of Transport to develop a revised paper which included a new option 2A. Option 2A was similar to option 2, but with 6-monthly

inspections for vehicles manufactured before 1 January 2000. The NPV of this option (NZ\$1.8 billion) was lower than that of option 2 (\$2.1b) as light vehicles first registered before 1 January 2000 remained on 6-monthly inspections for their lifetime. This was the option that the Cabinet approved, leading to a public announcement on 27 January 2013.

One issue that attracted a lot of ministerial attention was the impact on the ability of garages to service remote locations. Officials were able to provide ministers a one A3 page diagram that drew on some sophisticated geospatial analysis to show that the impact on rural servicing was limited. This A3 proved very important in helping the reform over the line. Three factors contributed to this analysis being undertaken:

- MoT officials were acutely conscious of the importance of winners and losers.
- NZTA had a performance measure relating to the geographical coverage of ready access to land transport services.
- The requirement for the RIS to include an assessment of the impact of the reforms reflected in the RIS guidance that emphasised looking at a range of impacts on different groups.

The RIS requirement strengthened the hand of those that wanted to undertake detailed financial modelling of the impact on rural garages, which in turn was influential in helping get political commitment to the reforms.

Operational Policy Development

With the big policy phase over, the project entered a new phase. The project team was relocated to the NZTA (the agency that would oversee the ongoing operation of the changes), but the overall programme structure (including joint project manager and joint chief executive leadership) remained in place. The new option approved by the Cabinet had not emerged from a process of identifying what was politically feasible; rather, it came from pure rational policy analysis based on optimising the NPV. Detailed development of this option required careful design to implement the changes, so the load of inspection work was spread over the year. As a result, a transitional phase-in was developed. In April 2013, the government issued a consultation document on the proposed amendment to the rules. Finally, in August 2013 the government announced that the WoF initial changes would take effect from 1 January 2014 for some light vehicles and from 1 July 2014 for others.

Implementation

With the completion of the operational policy phase, the programme shifted into change implementation. This involved a significant change management task, with big changes in information technology systems and operating procedures, and most importantly getting enforcement staff and providers on board with the changes. NZTA lead a series of workshops all over the country to explain to the vehicle testing industry what the changes would entail. The success of the implementation was reflected in the successful transition to the new regime in 2014.

Ongoing Operation, Monitoring, and Review

This case study has been prepared at a time when the impact and outcome from the VLR has yet to be formally assessed. The programme plan includes provision for an interim review (formative evaluation) after 2 years and a full review (summative evaluation after 4 years' operation). In addition, in a data-rich sector such as land transport, there are a number of indicators that the NZTA intend to monitor, including WoF and CoF prices, access to WoF and CoF services, road safety statistics on the number of crashes, deaths, and injuries, and causal factors. WoF and CoF fail rates by nature and level of vehicle defects, performance ratings for WoF and CoF inspectors, and WoF and CoF related infringements. Until the results of the interim and full review emerge, the benefits remain projected, but to date there has been no information in the monitoring that suggests the benefits would not be realised or the costs any higher than anticipated.

Standing back from the individual stages, a number of features of this case help to explain the success of the programme to date:

- the leadership and mandate for change provided by the two chief executives and their senior leadership teams;
- the political support provided by the minister and the associate minister;
- the effective partnership between the MoT and NZTA in teaming up and driving change through the policy phase and into execution;
- the openness of the process with high transparency and stakeholder engagement built into the design from the onset;
- the rigorous analysis used to support the policy process including safety analysis of crash data, use of CBA, and financial modelling;
- project design and project management disciplines which ensured that the project was properly structured, planned, resourced, and supported.

Interestingly, this list does not include many of the elements of an RMS. It is to the role of an RMS that we now turn.

4. Role of a Regulatory Management System

The entire discussion of the case so far has proceeded almost without reference to the formal RMS. The programme was underpinned by a strong public value proposition, was well resourced and designed, well led, with strong political support, effective communication and engagement, and stakeholder management. On the face of it, the impact of the RMS was limited.

At the time the VLR programme was launched (March 2012), the main focus of the New Zealand RMS was on the flow of new regulations. There were no formal requirements to manage or review the stock of existing regulations, beyond the light-handed requirement for regulatory scanning and planning announced in the 1989 Government Statement on Regulation.²² The reforms that emerged for the programme were subject to the policy scrutiny through the usual departmental consultation process on Cabinet papers and a regulatory impact assessment, but that came at the end of the process.

There are no formal legal requirements in New Zealand that require a generic policy development process or public engagement, although Cabinet expectations for how new regulations are developed are embodied in the 2009 Cabinet Office Circular (New Zealand Government, 2015) and the guidance in the RIA Handbook (New Zealand, 2013). In the case of VLR, the project design included a detailed policy development and stakeholder engagement process. For example, there was extensive stakeholder engagement in the analysis phase, then formal consultation at the big policy phase with a discussion document, and another round of consultation on the details of the proposed rule-making. The

²² The Cabinet minute setting out the detail of the Government Regulatory Policy statement (Cabinet Minute (09)27/11) set out deadlines for departments to provide regulatory plans by mid-December 2009 and scans by 30 June 2010. The 2009 Cabinet Circular – CO(09)8 – Regulatory Impact Assessment Requirements: New Guidelines – has recently been withdrawn with the contents now included in Treasury guidance. In August 2012, as the VLR approached its crucial stage, the Treasury published Best Practice Regulation assessments of all departments including those of MoT. These assessments were at a higher level of granularity at the regime level, so they do not specifically mention the WoF/Certificate of Fitness project.
<http://www.treasury.govt.nz/economy/regulation/bestpractice/bpregmodel-jul12.pdf>

whole programme was transparent, with all the key papers being publicly available on the Internet. In addition, there was regular industry stakeholder engagement throughout the process.

Although the formal RMS had limited direct impact, it would be a mistake to conclude that it had no effect. The planning in the project design factored in the formal requirements of the RMS that had to be met, including the RIS and interdepartmental consultation on the development of the initial Cabinet paper (on the public consultation document) and the final decision paper. As a result, the 'disciplines' provided by the RMS provided a buttressing or scaffolding effect that helped the VLR programme stand on its own.

Two examples were made by interviewees to illustrate this. First, the government policy statement on 'Better Regulation, Less Regulation', although not directly important, strengthened the mandate of the two chief executives as they drove the reform through some internal resistance within their organisations.

Second, the RIA – although largely based on CBA and hence not onerous to produce – did play an indirect role in the success of the policy. This was because of its focus on regulatory impact. In a sense, the RIS was telling people to do what they already knew was required to run a robust policy process – but the formal requirement strengthened the hand of the programme team in securing commitment and resourcing. This analysis was influential in helping ministers decide to proceed with the reform.

5. What Difference Could An Enhanced RMS Have Made?

In the final section, we pose a hypothetical question 'What role could an enhanced RMS have played in the case of vehicle licensing?' To be specific, if the reform regime proposed by the development of the 2012 Cabinet paper had been subject to an enhanced RMS, would the outcome have been different? A high-performing or requisite regulatory system needs to have three components:

- a quality policy cycle (including good analysis and legal policy development);
- supporting policy practices (such as engagement, accountability, transparency, and consultation); and
- capable oversight institutions (for big policy, legal policy, and administration).

The WoF is a textbook case study of a high-quality policy process, supported by extensive consultation and engagement, high levels of transparency, and in an area where rich datasets make monitoring easy. In this case the role of the oversight institutions was limited. New Zealand has two key oversight institutions – the Treasury, which is the lead on ‘big regulatory policy’ issues, and the Parliamentary Counsel, which takes a leading role in the drafting of primary legislation and secondary regulations. The Treasury’s review role had a limited but supportive impact on the big policy development in this case and the legal issues raised by the rule-making were limited.

What is striking about this case is ‘the dog that didn’t bark’ (Doyle, 1892) – why did it take so long for the New Zealand vehicle inspection system to respond to improvements in vehicle technology and reliability? In part, this reflects the extent of the focus of the New Zealand RMS of the time on the flow of new regulations rather than the stock of existing regulations. An enhanced RMS, with an enhanced emphasis on active management of the stock, would have triggered an earlier review of the outdated WoF system.

This case study has been prepared at a time when the impact and outcome from the VLR has yet to be formally assessed. There is a formal requirement for monitoring and review to be addressed as part of the RIA. In the case of VLR, this includes details on the indicators that would be monitored as part of business as usual and provision for an interim review after 2 years and full review after 4 years.

6. Conclusion

The case of WoF reform makes a simple point – with a robust policy process the elements of the RMS are easy to comply with. That is not a criticism of the RMS as a piece of dull regulatory compliance. One of the objectives of the RMS is to provide insurance against the risk of a poor policy development process. Where the policy process is robust, the role of the formal RMS is more limited and indirect. That is not to say the RMS had no effect and adds no value, however. The RMS (at least in New Zealand) is designed to highlight poor process. The public value of the RMS comes from encouraging good policy processes to occur by stopping poor regulations being introduced and ensuring outdated ones are reviewed.

The RMS played a supportive but minor direct role in the outcome of this case. Consistent with good generic policy development, there was an active process of engagement with stakeholders and transparency about the options and the trade-offs. A RIS was prepared (based on the CBA) at the end of the policy process, which had a minor impact on the policy outcome. The oversight institutions, though supportive, were not extensively engaged in the reform. The main impact of an enhanced RMS would have been that it would have triggered an earlier review of the outdated and costly WoF system.

Summary Comment

This paper has explored the evolution of regulation in New Zealand from sector-based regulatory review, through the adoption of a RIA, to the current increased emphasis of stock management. It showed how the evolutionary journey went through a number of phases as the capability to develop and manage regulations matured over time. Parts 2 and 3 explore how the RMS was applied to two case studies of regulatory change – one regulatory failure (building controls) and one success (the reform of motor vehicle licensing). The case studies highlight that an RMS is not a ‘silver bullet’, as regulations are by nature ‘experiments’, some of which will fail regardless of the RMS system in place.

However, the New Zealand experience suggests enhancing the RMS is analogous to buying an insurance policy with a low deductible and low premium (Gill, 2013). One pays a regular but low premium to receive a sporadic series of small claims, but with the added potential for a very large payoff thereby averting some significant damage. This analogy suggested that the RMS imposes low costs and has the potential to pay its way by identifying more effective interventions. Occasionally, the RMS process may avoid significant harm.

References

- Ayto, J. (2011), *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?*
<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf>

- Conway, P. (2011), 'How to Move Product Market Regulation in New Zealand Back Towards the Frontier', *OECD Economics Department Working Papers*, No. 880, Paris: OECD Publishing.
- Department of Building and Housing (DBH) (2010), *Regulatory Impact Statement on the Building Act Review*. <http://www.dbh.govt.nz/ris-building-act-review#aid3>.
- Doyle, A.C. (1892), 'The Adventure of Silver Blaze' in *The Memoirs of Sherlock Holmes*.
- Gill, D. (2011), 'Regulatory Management in New Zealand: What, How and Why?', in S. Frankel (ed.), *Learning from the Past, Adapting for the Future. Regulatory Reform in New Zealand*. Wellington: LexisNexis NZ, pp.173–214.
- Gill, D. (2013), 'Applying the Logic of Regulatory Management to Regulatory Management in New Zealand', in S. Frankel and D. Ryder (eds.), *Recalibrating Behaviours: Smarter Regulation in a Global World*. Wellington: LexisNexis NZ, pp.559–99.
- Gill, D. and S. Frankel (2014), 'Learning the Way Forward? The Role of Monitoring, Evaluation and Review', in S. Frankel and J. Yeabsley (eds.), *Framing the Commons: Cross-Cutting Issues in Regulation*. Wellington: Victoria University Press.
- Greenstone, M. (2009), 'Toward a Culture of Persistent Regulatory Experimentation and Evaluation', in D. Moss and J. Cisternino (eds.), *New Perspectives on Regulation*. Cambridge, MA: The Tobin Project, pp.111–25.
- Hensen, M., J. Zuccollo, and J. Yeabsley (2013), 'Weathertight Buildings and Performance-based Regulation: What Lessons can be Drawn from a Complicated and Evolving Situation?', in S. Frankel and D. Ryder (eds.), *Recalcitrant Behaviour Smarter Regulation in the Globalised World*. Wellington: LexisNexis NZ, pp.449–95.
- James, C. (1986), *The Quiet Revolution: Turbulence and Transition in Contemporary New Zealand*. Wellington: Allen & Unwin.
- Layton, B. (2011), 'Regulating the Building Industry – A Case of Regulatory Failure', in S. Frankel (ed.), *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand*. Wellington: LexisNexis NZ, pp.311–37.
- Manch, K., P. Mumford, S. Raj, and B. Wauchop (2015), 'Watching the Birth of the Regulatory Profession', *IPS Policy Quarterly*, 11(4), pp.71–6.

- McGee, D. (2005), *Parliamentary Practice in New Zealand*. Wellington: Dunmore Publishing Limited. http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/ppnz/00HOOOCPNZ_271/chapter-27-the-legislative-process#_Toc267314
- Ministry of Transport (2012), *Vehicle Licensing Reform: Interim Cost Benefit Analysis Report. Warrant of Fitness Reform Options*. <http://transport.govt.nz/assets/Import/Documents/VLR-Cost-Benefit-Analysis-Report.pdf>
- Ministry of Transport (2013), *Vehicle Licensing Reform: Regulatory Impact Statement. Warrant of Fitness and Certificate of Fitness*. <http://transport.govt.nz/assets/Import/Documents/VLR-Regulatory-Impact-Statement.pdf>
- Mumford, P. (2011), *Enhancing Performance-Based Regulation: Lessons from New Zealand's Building Control System*. Wellington: Institute of Policy Studies. www.victoria.ac.nz/vbs/research-services/documents/PeterMumford.pdf
- New Zealand Government (2015), *Government Response to the New Zealand Productivity Commission Report on Regulatory Institutions and Practices*. <http://www.beehive.govt.nz/release/government-drive-lift-regulatory-quality>
- New Zealand Productivity Commission (2013a), *Local Regulation Final Report*. <http://www.productivity.govt.nz/inquiry-content/1510?stage=4>
- New Zealand Productivity Commission (2013b), *Towards Better Local Regulation*. www.productivity.govt.nz/sites/.../towards-better-local-regulation.pdf
- New Zealand Productivity Commission (2014), *Regulatory Institutions and Practices. Final Report*. <http://www.productivity.govt.nz/inquiry-content/1788?stage=4>
- New Zealand Treasury (2009), *Statement on Regulation: Better Regulation, Less Regulation*. <http://www.treasury.govt.nz/regulation/informationreleases/statement>
- New Zealand Treasury (2012a), *The Best Practice Regulatory Model: Principles and Assessments*. www.treasury.govt.nz/regulation/bpr/bpregmodel-jul12.pdf
- New Zealand Treasury (2012b), *A Revised Regulatory Standards Bill. A Treasury Discussion Document with Indicative Legislation*. <http://www.treasury.govt.nz/economy/regulation/inforeleases/pdfs/reg-2320508.pdf>

- New Zealand Treasury (2013), *Regulatory Impact Analysis Handbook*.
<http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook>
- New Zealand Treasury (2015), *The Best Practice Regulatory: Principles and Assessments*. <http://www.treasury.govt.nz/regulation/bpr/bpregpa-feb15.pdf>
- Organisation for Economic Co-operation and Development (OECD) (2011), *OECD Economic Surveys – New Zealand*. Paris: OECD Publishing.
- Palmer, G. (1979), *Unbridled Power*. Wellington: Oxford University Press.
- Palmer, G. and M. Palmer (1997), *Bridled Power: New Zealand Government under MMP*. Auckland, New Zealand: Oxford University Press.
- PricewaterhouseCoopers (PwC) (2009), *Weathertightness – Estimating the Cost*. Report prepared for the Department of Building and Housing.
www.dbh.govt.nz/UserFiles/File/News/WHRS/pdf/PWC-weathertightness-estimating-cost-full-report.pdf
- Sapere Research Group (2015), *Regulatory Impact Analysis Evaluation 2015. Report Prepared for the Treasury*.
<http://www.treasury.govt.nz/regulation/informationreleases/riareview>
- Scott, P. (2013), 'Competition Law and Policy: Can a Generalist Law be an Effective Regulator?'. In S. Frankel and D. Ryder (eds.), *Recalibrating Behaviours: Smarter Regulation in a Global World*. Wellington: LexisNexis NZ, pp.385–448.
- Social Progress Imperative (2014), *Social Progress Index*
<http://www.socialprogressimperative.org/data/spi>
- Transparency International New Zealand (2014), *Corruption Perceptions Index*.
<http://www.transparency.org.nz/Corruption-Perceptions-Index>
- United Nations Development Programme (UNDP) (2014), *Human Development Index Statistical Tables*. Table 1: Human Development Index and its Components. <http://hdr.undp.org/en/data>
- World Bank (2015), 'Country Data Report for New Zealand, 1996–2014', in *Worldwide Governance Indicators*.
<http://info.worldbank.org/governance/wgi/pdf/c168.pdf>
- World Justice Project (2015), *Rule of Law Index*.
<http://worldjusticeproject.org/rule-of-law-index>