Policing Red Tape and Regulation

Drowning in Red Tape

Most of New Zealand’s problems - a lack of affordable housing, cost of living pressures, and inferior healthcare among them - can be traced to poor productivity. Poor productivity, in turn, can be traced to large amounts of time being spent on compliance activity, in comparison to productive activity.

The problem can be seen in nearly every sector. Construction is an obvious example, with everything from roads to houses caught up in red tape. Yet sectors as diverse as banking and finance, early childhood education, farming, and biotechnology complain that regulatory compliance is what holds them back from being more productive.

The problem manifests itself in three ways. They range from the obvious ‘seen’ costs to the less obvious ‘unseen’ costs to society.

The first is the most obvious. Activities that do go ahead are more expensive than they need to be. For example, public utilities spend extortionate amounts on traffic management plans, the cost of which is paid by their customers.

The second is more subtle. Activities that might have gone ahead do not meet the threshold of viability once regulatory costs are factored in. For example, a subdivision that might have provided new and more affordable homes is contemplated but not carried out due to the costs involved in getting consents.

The third is subtler still and the most pernicious. When people who try face large regulatory costs, people stop trying. The No. 8 wire culture that many New Zealanders like to think our country was built on gradually erodes as people find it more attractive to do less.

Despite these large costs of over-regulation, there is little serious attempt to deal with how government legislates and regulates. In comparison with the safeguards around government taxing and spending, Regulatory Impact Analysis is rarely done well by government departments, and MPs and media pay little attention to RIA.

As a result, Ministers and officials face little incentive to regulate responsibly. The political benefits of being seen to ‘do something’ are high, whereas the costs are often spread over many people long after the people responsible have moved on. This is a problem that deserves more serious attention, and ACT proposes real change to the incentives Ministers and officials face when they contemplate legislating and regulating New Zealanders’ lives.

A Comparison with Public Finance

There is much frustration with the quality of public spending. However at least public expenditure is done in an open and transparent way with regularly published public information, and procedures for testing whether money was spent properly. It may be because we know so much that public spending gets so much attention. However, this was not always the case.

The Fiscal Responsibility Act 1989 revolutionised fiscal discipline in New Zealand. It changed the rules of the game, by raising both political and public expectations that Governments will maintain ‘prudent’ levels of public debt and will on average over time return to surplus. Ensuring fiscal discipline gives New Zealand a buffer in case of future adverse shocks and events that could impact the fiscal balance sheet. It was introduced after a period of fiscal excess, poor economic performance and sustained economic stagnation.

While New Zealand now has useful tools for managing fiscal discipline, New Zealand’s regulatory environment continues to grow in restrictiveness and complexity. Over-regulation and red tape are plaguing every sector of this country, from early childhood education to farming. Regulatory overreach increases compliance costs and the costs of missed opportunities by stopping productive activity.

New Zealand needs something akin to a Minister of Finance, someone to act as a guardian for regulation, including legislation that affects how people go about their lives. Just as the Minister of Finance is supposed to mind the public purse by controlling the supply of money, a Minister of Regulation would exist to control the supply of regulatory power over people’s lives.

ACT has a solution that will revolutionise regulatory discipline in this country, the same way the Fiscal Responsibility Act did for fiscal discipline. ACT will introduce a Regulatory Standards Act to set a higher bar for new regulation, and will create a Minister of Regulation who will be responsible for applying the principles across sectors.
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How it will work

ACT will introduce a Regulatory Standards Act that will provide a benchmark for good regulation through a set of regulatory principles that all regulation should comply with. To administer the principles of the Act, a new Ministry of Regulation will be established. It would be substantially if not wholly funded from those positions currently performing regulatory oversight functions at the Treasury and MBIE.

The key functions of the Minister of Regulation and its dedicated Ministry would be to:

- Evaluate any new proposals by Government to legislate or regulate people’s person, property, or interactions with each other and the natural environment. It would make recommendations for a law to be passed or not, evaluating it against the requirement for problem definition and cost benefit analysis.
- Review existing regulations and red tape in specific sectors, and present Omnibus bills that would remove surplus rules and regulations to Parliament in collaboration with the relevant Minister.

The review process would work as follows:

- The Minister of Regulation would declare a sector that their Ministry will conduct an inquiry into.
- The Ministry of Regulation will dig into all regulations in the sector over six months, hearing from the people affected by the rules and testing them against the key principles of the Regulatory Standards Act. The review would include primary legislation as well as secondary and tertiary regulations.
- The Minister of Regulation would publish a report addressed to the relevant portfolio Minister, identifying the regulations that could be cut.
- The relevant portfolio Minister must respond within three months with approval for the regulations to be cut in an omnibus bill, and a timeline for when they will cut the remaining red tape. If the relevant portfolio Minister declined to remove a regulation, they would be required to explain to Parliament and the public why the regulation should remain in place.
- The Minister of Regulation will be responsible for introducing the omnibus bill and will publish an annual audit to report on progress towards achieving all of its recommendations against the agreed timelines.

The principles for good lawmaking

The principles of the Regulatory Standards Act can also be directly used by the public. If any group or individual feels a law or regulation has been made without adhering to the principles of the Act, they can get a declaration in court that the law was made in a way that’s inconsistent with good lawmaking. That wouldn’t cancel the law, but it changes the incentives for politicians and bureaucrats. It says, if you want to make knee-jerk, populist laws without regard for the rights of people they affect, you’re going to rack up a lot of hostile declarations from the courts.

The principles cover seven key areas, including the rule of law, protection of individual liberties, protection of property rights, the imposition of taxes and charges, the role of the courts, review of administrative decisions, and good law-making processes. Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

Problem definition
The regulation responds to a market failure where private action would not lead to the most optimal outcome where the benefits enjoyed by one party cannot be improved without reducing the benefits or increasing the costs to another party.

Cost–benefit analysis
The benefits outweigh the costs of the regulation.

Cost–benefit incidence
The benefits and costs of a regulation are fairly distributed.

Regulatory design
The regulatory response is the minimum necessary to achieve the objectives set out in the problem definition, is proportionate to the problem, and is set at a level that avoids unnecessary costs.

Workability
The regulation provides the minimum incentives needed for compliance, it is able to be enforced effectively, and is flexible enough to deal with special circumstances.

Simplicity
The regulation addresses a problem not addressed by other regulations and does not negatively impact the ability to comply with other existing regulations.

Given the potential overlap between the proposed Ministry functions and those of other economic agencies, resourcing for these new activities will come from within existing budgets.
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Why is a new Ministry needed?

ACT’s policy would ensure New Zealand is in line with the OECD’s Guiding Principles for Regulatory Quality and Performance, which states that regulatory reform policy should be adopted at the highest political level.1

Although new legislation and regulations in New Zealand are generally accompanied by Regulatory Impact Analysis, there is no systematic approach for upgrading the quality of existing regulations. New Zealand scores below the OECD average for ex-post evaluation of regulations.2

A lack of scrutiny of existing regulations is a major gap in ensuring regulatory quality.

A dedicated Minister and Ministry is needed to ensure action. A risk of leaving this important work in the hands of an existing Ministry is that such activities are likely to be deprioritised given most Ministers will have a work programme of new policies they wish to advance. A risk of setting up the work in an agency independent from government is that the agency will struggle to get cut-through to ensure their recommendations are put into action, rather than simply producing large reports that are left to collect dust on a shelf. To make a real dent in regulatory reform, any work programme needs to be geared towards accountability for results.

Other countries are well ahead of New Zealand in having formal institutions responsible for measuring and removing red tape, and for advancing broader regulatory reform.

In Australia, most states have a regulatory quality of oversight body, and there is an Office of Impact Analysis at the national level. The Tasmanian government produces an annual red tape audit report, which summarises progress towards cutting red tape since 2014.3

The audit report summarises the actions needed once the regulatory burden has been identified and provides a timeline for completion.

In the United Kingdom, each government department has a Better Regulation Unit, and there is a Better Regulation Executive that leads across departments, working with government departments to take through de-regulatory measures and shepherding them through the legislative process.4

ACT has a strong history of raising regulatory standards

ACT has always advocated for better lawmaking and better analysis for creating new regulations. ACT was responsible for raising the quality of Regulatory Impact Analysis by setting higher expectations for what Ministries and Departments should consider and document. Regulatory Impact Analyses (RIAs) are required for all new primary legislation and secondary regulations. The purpose of a RIA is to establish why new legislation or regulation is needed; how the proposed change weighs up against other options and against the status quo; the costs and benefits of the change and who bears those costs and benefits; and how the change will be evaluated once implemented.

Although this new approach to regulatory analysis was a much needed change, its usage has not always had the impact that was intended. The quality of thought and analysis by public servants varies vastly, and although the public service is expected to produce neutral advice, it is clear that analysis in past RIAs has been retrofitted to support the Minister’s (or in some cases, the Ministry’s) preferred option. Most concerning, too many new laws and regulations are introduced even when the RIA produced does not support the change, or under matters of urgency, before a quality RIA can be produced.

It is for these reasons that ACT believes more change is needed. The new Ministry of Regulation would be responsible for overseeing the RIA process and setting expectations for quality, and the Regulatory Standards Act creates new mechanisms for challenging laws and regulations that have already been enacted.

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Funded by the Parliamentary Service.
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What are some examples of how the Regulatory Standards Act could be applied?

Red tape can come in many forms. Some red tape is in the form of primary legislation, such as the Resource Management Act. Red tape can also be in the form of secondary legislation, for example the level of the minimum wage. Secondary legislation usually sets out the details of a policy, the processes that must be followed, or the acceptable ways an activity is carried out (e.g. what would count as giving ‘written notice’). There is also red tape in the form of criteria and regulations issued by government departments (in collaboration with the sector) and occupational registration and licensing bodies.

There are several responses that can be taken by a portfolio Minister once a problematic regulation has been identified:

• Repeal the legislation.
• Amend the legislation.
• Repeal and replace the legislation.
• Instruct their department to repeal/amend/replace the criteria or regulations.
• Work with occupational bodies to either reform criteria, or establish work-arounds if negotiation is unsuccessful.

Here are some examples of regulations that do not appear to meet the principles of the Regulatory Standards Act:

• Some regulations are introduced with noble intentions, but are not revised even in the face of strong evidence the regulations have failed to achieve their purpose.
  ◦ Pseudoephedrine in over-the-counter medicine was banned in 2009 to counter the production of meth. Has the regulation been successful in stopping or even slowing the P epidemic? No. Has the regulation increased the costs and harm to everyday New Zealanders every time they catch a cold? Absolutely. The Regulatory Standards Act is needed to get rid of regulations such as this where time has proven that the regulation does not work, and is causing unnecessary costs and harm.

• Temporary traffic management in New Zealand has become so bureaucratic and requires so much regulation, it has become an entire industry. Temporary traffic workers need to have qualifications, reflecting the breadth of guidelines they have to comply with. The costs of temporary traffic management are greater than simple inconvenience — although that is also a cost that needs to be considered. Costs also have a flow on effect to wider infrastructure outcomes. For example, in some cases temporary traffic management made up 20 per cent of the total project cost for a new EV charging station. The costs are hitting everyone from civil construction companies, to councils and ratepayers, to children who might not get a Santa parade this year because the costs of running one are too high.
  ◦ If you drove through Motueka in early May, you might have noticed that the Christmas lights and flags were still up. That’s because the costs of removing them are too high. To remove the decorations at 5am requires a traffic plan, two pilot vehicles, and a spotter on foot to help people across the road if it is at a junction.5
  ◦ While Waka Kotahi are currently transitioning to new regulations, there is no guarantee that they will be an improvement on the last lot once they are implemented.

• The ECE sector faces a host of regulations aimed at protecting the safety and wellbeing of children and improving the quality of their education. However, not all regulations are made equal, and over-regulation is strangling the sector right now. It is not only restricting the supply of new ECEs and the availability of places in existing ECEs, it is exhausting the workforce. Regulations have become so overly prescriptive of how qualified professionals undertake their day-to-day tasks, it is no wonder that 74 per cent of ECE teachers believe the Government is taking the sector in the wrong direction.6 For example:
  ◦ If children need to be given medicine or a product that could be considered a medicine under the Ministry of Education’s broad criteria, ECE providers need to follow strict procedures. First, the medicine needs to be provided by the parent, even for products as common as nappy cream, and ECE providers can only use what is provided by the parent. Providers need written authority from parents provided at the beginning of each day, and workers needs to fill out a form every time they administer the medicine: recording the date and time it

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was administered and evidence of parental acknowledgement. This requirement applies to a wide range of activities that you’d expect to be part of the day-to-day functions of an ECE, from applying nappy cream to giving a child Paracetamol, ear drops or cough medicine.\(^7\)

ECE providers need to keep a record of all food served during the service’s hours of operation (other than that provided by parents for their own children). Records show the type of food provided and are available for inspection for three months after the food is served.\(^8\)

Providers need to keep a detailed record of nearly all their activities. For example, they need a record of the time each child attending the service sleeps, and checks made by adults during that time.\(^9\)

Providers need to show evidence of opportunities provided for parents and adults providing education and care to contribute to the development and review of the service’s operational documents.\(^10\)

Nappy changing facilities need to display a procedure for changing nappies and that procedure needs to be consistently implemented.\(^11\)

Changes to the Credit Contracts and Consumer Finance Act (CCCFA) have radically altered the regulatory requirements for consumer lending, treating registered banks like loan sharks. Over-regulation not only introduces unnecessary complexity and invasiveness for borrowers and lenders alike, but can drive consumers to less secure or less scrupulous lenders.

- There is no sense of scale of risk when it comes to applying CCCFA regulations, whether it be an application for a $500 increase in a credit card limit, a credit card with a $5,000 limit, or application for a $500,000 home loan.

- The CCCFA applies analogue regulations to a world that has largely gone digital. For example requiring lenders to email a customer to tell them a disclosure is available in internet banking. If the lender wants to email a customer the disclosure they must gain consent, but no consent is required to send the disclosure by post.

Another example of regulations not keeping up with the digital age is the need to prove your physical address. Anti-Money Laundering legislation is making it harder for migrants and backpackers to open bank accounts, as they are unlikely to have a physical address. But the implications are wider than just overseas visitors if you consider how many people actually receive their bills in the mail these days.

The CCCFA captures insurance provided by a bank where there is a credit contract, but the same insurance provided by an insurer directly is not.

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