

**Analysis**

**Design**

**Operation**

**Learning**

# **A Regulatory Policy Toolkit to Improve Productivity**



Asian Productivity Organization

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# A REGULATORY POLICY TOOLKIT TO IMPROVE PRODUCTIVITY

A Regulatory Policy Toolkit to Improve Productivity

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First edition published in Japan  
by the Asian Productivity Organization  
1-24-1 Hongo, Bunkyo-ku  
Tokyo 113-0033, Japan  
[www.apo-tokyo.org](http://www.apo-tokyo.org)

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# FOREWORD

Regulations are essential tools for governments to promote productivity, thereby enhancing the well-being of society. However, they should be carefully designed and regularly reviewed if their potential is to be realised.

The APO previously commissioned a toolkit that explored the regulatory management systems required at the nation-wide level to develop and maintain an effective stock of regulations. In this guide, the unit of analysis is the individual regulatory regime rather than the total system level. The guide identifies the wide range of resources available in the regulatory toolkit.

Good practice in reviewing a regulatory regime involves four distinct stages: analyse; design and deploy; operate; and learn. The careful planning of all the stages in this process leads to the institutionalization of good regulatory practices through which policies result in improvement of productivity and economic performance.

As part of continuing capacity-building initiatives for the public sector, the APO hopes that *A Regulatory Policy Toolkit to Improve Productivity* will enhance know-how on the key concepts and available resources on good regulatory practices that enhance long-term public-sector productivity and national competitiveness of APO members in the Asia-Pacific region.

Dr. Indra Pradana Singawinata  
Secretary-General  
Asian Productivity Organization  
Tokyo





# ABSTRACT

*“What has become apparent to me... is that... regulators lacked the information on the vast range of tools they might employ to achieve the government objectives... this has meant that regulators have relied too heavily on some tools while underutilising others that might have been more effective or efficient.”*

Arie Freiberg *The Tools of Regulation* (Page v 2010) [1].

This paper provides a toolkit of resources to use in the design of regulatory regimes. The guide discusses how to design each stage in the review process by identifying the key issues and questions and highlighting the resources available in the regulatory toolkit. It does not discuss how to do the actual analysis but highlights the options and the key resources available.

The regimes’ review spans four stages:

1. **Analyze:** Use policy analysis, starting with intervention analysis.
2. **Design and deploy:** Conduct detailed design, leading to stakeholder engagement and change management.
3. **Operate:** Enable administration of the regime including enforcement and capabilities of regulators.
4. **Learn:** Monitor, evaluate, and review.

Within these broad stages, there are a number of distinct sub steps. For example, stage 1 on intervention analysis includes four sub steps: (1) assess whether intervention is justified; (2) judge whether intervention by government is justified; (3) select what is the most effective government intervention; and (4) identify what form of regulation is needed. In total, 18 steps have been identified, spread across the four stages.

This guide provides a survey of high-level issues, selected case studies, and questions that need to be addressed as part of the design of an effective regulatory regime. In addition, it suggests useful resources to explore the issue in more depth. As a brief survey, this toolkit of resources cannot cover the range of topics raised in detail. Accordingly, in addition to references provided in endnotes, the document highlights links to selected resources for the reader to follow up. These include links to academic articles, practitioner-focused advice, and official guidance or practical how-to checklists.

# SECTION 1

## ABOUT THIS GUIDE

This section explains

- the purpose and context of this guide;
- the scope of this guide, i.e., what it covers and what it does not;
- how the guide has been structured; and
- the key sources of information for the guide.

### 1.1 The Purpose of This Guide

#### 1.1.A Good Practice Guide for the Design of Regulatory Regimes

A well-designed regulation plays an important role in promoting productivity and economic development, thereby enhancing the wider social wellbeing. One important channel through which a regulation can benefit an economy is its market creation and development role. Looking back in history, the introduction of legislation enabling the creation of the limited liability company was crucial to transforming England into the ‘workshop of the world’ and enabling the industrial revolution to spread throughout the West. A more recent example is the European Union’s adoption of the GSM standard, which became the global standard for cellphones, thereby enabling a global market for devices.

More generally, the state has played a central role in enabling the rise of business corporations in major economies [3]. Regulation also benefits the economy and the wider society by providing a framework of laws that enables businesses to operate and people to interact, thereby creating more certainty for business and reducing transactions costs and enabling competition in markets. Indeed, the state’s role in setting standards, legal enforcement, dispute resolution, and information sharing is crucial to productivity growth, economic development, and social wellbeing.

Good regulatory policy design is focused on the translation of policy ideas on what needs to happen into how that needs to be done on the ground to achieve the desired results. The design of an effective regime requires a wide range of tools and skills, though it often does not access the full range of tools in the regulatory policy toolkit.

In practice, the people who develop policy advice are often better versed in the broad-brush, big-picture strategic questions, while the staff that is good at delivery of regulatory services is often not involved in the policy questions on regulatory designs, powers, and functions.

The role of a good regulatory policy is to bridge such gaps and to translate ideas and policies into programs and regulatory interventions that could be reliably delivered, to achieve the outcomes that are expected.

This guide will discuss the thoughts, concepts, and tools required to add value to regulatory policy development and implementation. We will start with how ‘big’ policy analysis is conducted, and then discuss the role of the detailed regulatory policy design in translating policy concepts into practical tools that the frontline can use in delivering regulatory services.

This guide outlines the core components of good practice in the design of regulatory regimes. It highlights practical examples of good practices and key resources for those engaged in the business of developing regulatory policy.

It is intended that the reader will be able to draw on the frameworks and principles in this guide, tailor them, and apply them to a range of jurisdictions and regulatory environments.

### 1.1.B How This Guide May Be Used

The guide may be used by different readers, for a variety of purposes, including

- policy advisors involved in developing a regulatory policy regime;
- external reviewers and second-opinion advisors involved in examining proposals for a regulatory regime; and
- citizens, businesses, and civil-society organizations involved in the development of reforms in regulatory regimes.

## 1.2 Scope of This Guide

This guide provides a resource kit that highlights the key resources required for the design of high-performing regulatory regimes. The guide discusses how to design each stage in the review process by identifying the range of resources available in the regulatory toolkit. It does not discuss how to do the actual analysis but highlights the options and the available tools.

It covers: (1) policy and intervention analysis; (2) detailed design considerations; (3) selection of compliance and engagement strategies; and (4) approaches to monitoring and reviewing.

This guide does not deal in detail with the administration of regulatory policy, although it does discuss how compliance strategies need to inform the design of regulatory policy. This ground has already been well covered by the Australian National Audit Office’s “Administering Regulation” [4]; the New Zealand Government’s “Achieving Compliance” [5] guidance documents; and Malcolm Sparrow’s classic book on the craft of regulation [6]. Instead, the guide deals with the craft of designing new policies or reviewing existing regulatory regimes.

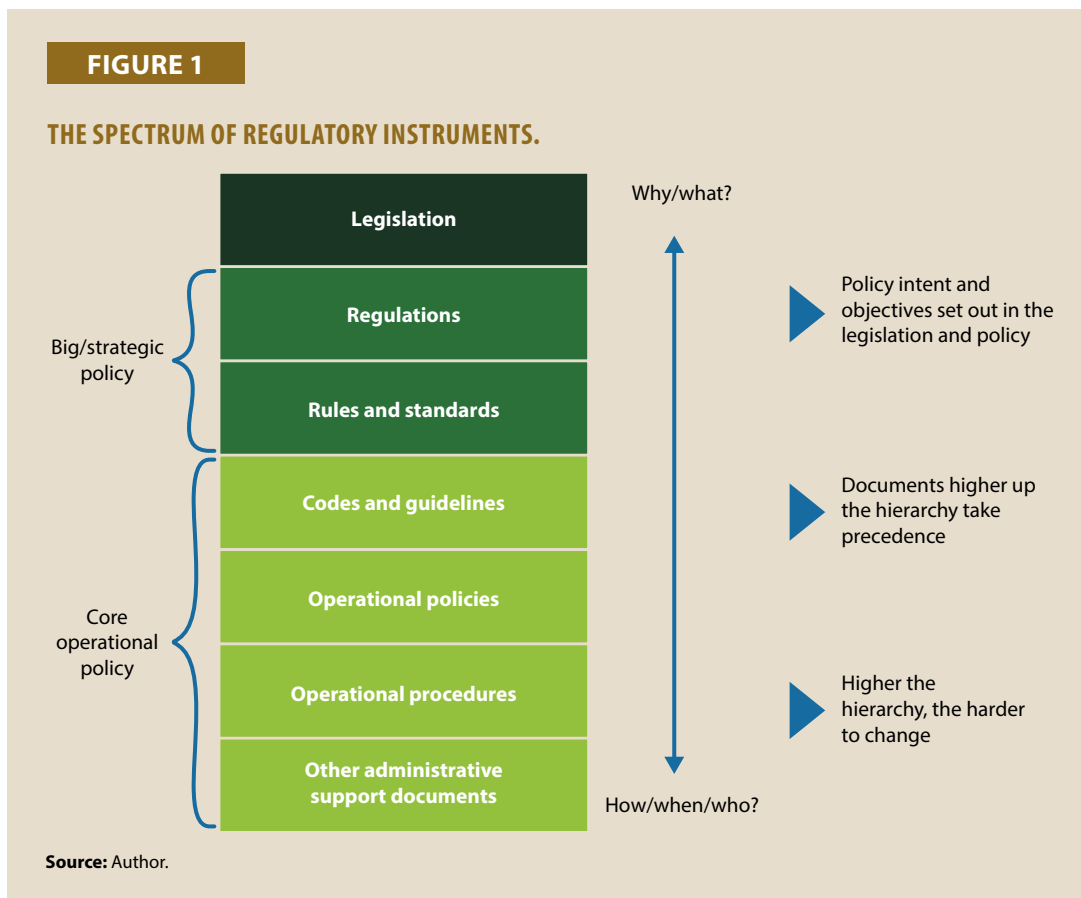
Regulation is used throughout this guide in the broad sense of the verb “regulate.” Regulation is used here in the sense of legal instruments used to give effect to governments’ policy objectives. While the terms used for legal instruments vary by jurisdiction, “legal instruments” here include all primary laws, secondary regulations, or tertiary rules [7]. The law governs behavior in two primary ways: expressive and functional. The expressive aspect gives expression to important democratic and ethical values such as human rights. The functional aspect has three broad dimensions:

- shaping behavior by permitting or encouraging some conduct, and preventing or sanctioning other conducts (e.g., criminal and tort laws);
- facilitating certain behaviors including both private arrangements and government functions (e.g., corporation and contract laws); and
- adjudicating disputes between parties, both private and government [8].

In this guide, our primary focus is on the first function, i.e., shaping behavior through the state’s coercive legislative power.

Freiberg observes [1], “All governments regulate but not all regulations are undertaken by governments.” International organizations and non-state actors also undertake regulations. With self-regulation of occupations, for example, non-state actors set, monitor, and enforce standards. This is much like what governments can do, but their powers do not derive directly from the coercive power of the state exercised through primary and subsidiary legislations. To manage scope, we mainly limit ourselves to direct government regulation.

The focus of the discussion is the regulatory regime. A ‘regime’ refers to a cluster of related regulatory interventions in a particular domain. Regimes operate at the intermediate or meso level, i.e., between the macro regulatory management system (Gill op. cit. in the previous APO toolkit on the Regulatory Management System) and the micro level of individual regulatory instruments. Figure 1 shows the micro level of regulatory instruments.



The locus and focus of the guide are shown in more detail in Table 1.

**TABLE 1**

**THE SCOPE OF THIS GUIDE AT A GLANCE.**

	In scope	Out of scope
Focus	Regulatory regime design	Design of regulatory management systems, i.e., meta regulation or micro-level individual regulatory instruments
Locus	Guide identifying the resources available in the regulatory toolkit	Policy analysis, legal drafting, and detailed design of individual regulatory tools
Lever	Primary and secondary regulations	Non-regulatory interventions such as taxes, information programs, and subsidies
Domain	Ex-ante designs of all the regulatory process stages	Ex-post regime operation

Source: Author.

## 1.3 Structure and Contents of This Guide

### 1.3.A Structure of the guide

After this introductory section 1, this guide is divided into six further sections:

- Section 2 (The Regulatory Context): It discusses the overall regulatory system and the stages of regulatory cycle for the review of a regulatory regime.
- Section 3 (Analyze Interventions): It focuses on regulatory policy analysis of the proposed regime starting with intervention analysis.
- Section 4 (Design and Deploy): It deals with the detailed design and deployment of the regime, including stakeholder engagement and change management.
- Section 5 (Regime Operations): It deals with the regime's operations, i.e., how the regime is administered including compliance and the associated resources as well as the capabilities required by regulators and regulatees.
- Section 6 (Learning): It deals with monitoring, evaluation, and review.
- Section 7 (Concluding Comments): It discusses the evolution of regulatory practices across countries.

## 1.4 Acknowledgement of Sources

The author of this guide has drawn on a range of academic and practitioner (or grey) literature made publicly available by government agencies. Full references for sources used are included at the end of this guide.

The author has drawn extensively on:

- *The Tools of Regulation*, Arie Freiberg, 2010 [1];

- *Regulatory institutions and practices*, New Zealand Productivity Commission, 2014 [9]; and
- *Laws That Work: How Laws Fail, and How We Can Do Better*, David Goddard, 2022 [10].

This guide highlights links to several selected resources for the reader to follow up. The following three icons have been used throughout the document to classify the resources:



indicates an academic resource;



indicates practitioner-focused analysis and advice; and



indicates official guidance or a practical how-to tool such as a checklist.

The guide also includes a number of practical examples. Often these draw on New Zealand's experience, because this is the jurisdiction that the author is most familiar with. This selection of examples is not meant to imply that New Zealand provides a model of 'best practice' regulation. In fact, some of the examples illustrate regulatory failures.

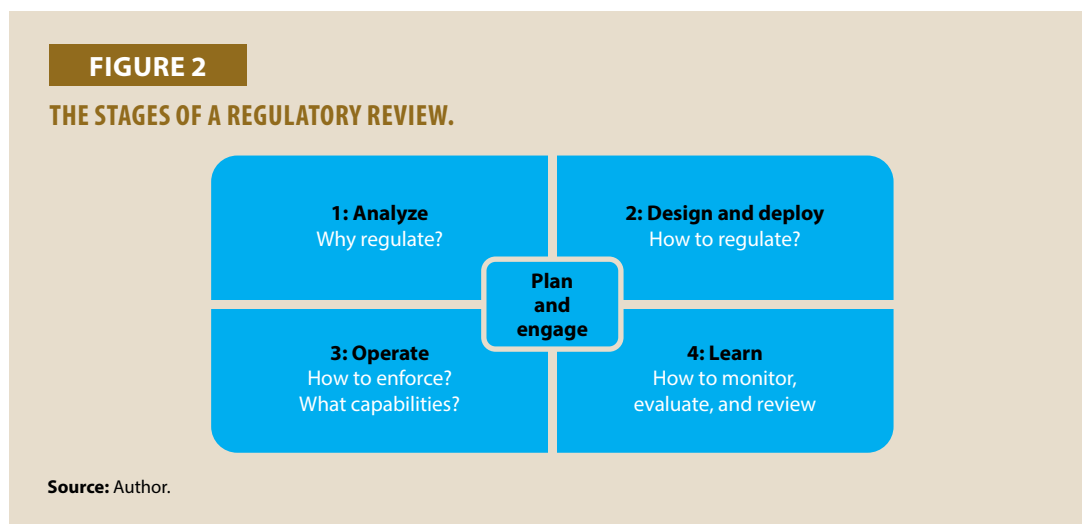
## SECTION 2

# THE REGULATORY CONTEXT

This section discusses:

- the stages of the regulatory review;
- who regulates and what makes up the regulatory space; and
- good regulatory practice principles.

### 2.1 The Stages of a Regulatory Review



Regulatory policymakers need to consider together the design of the regulatory regime, its implementation, planning the ongoing operation including the monitoring framework, and the evaluation strategy. If your jurisdiction has regulatory good practice principles (discussed in section 2.4 below), they provide a useful reference point alongside this guide.

The regulatory cycle shown in Figure 2 consists of the following stages:

1. **Analyze:** The process begins with using intervention analysis to understand the policy objectives, the underlying problem or opportunity, and how it links to wider social wellbeing.
2. **Design and deploy:** The detailed design of the regime includes stakeholder engagement and change management.
3. **Operate:** The regulatory agencies administer the regime including any enforcement based on statutory powers.

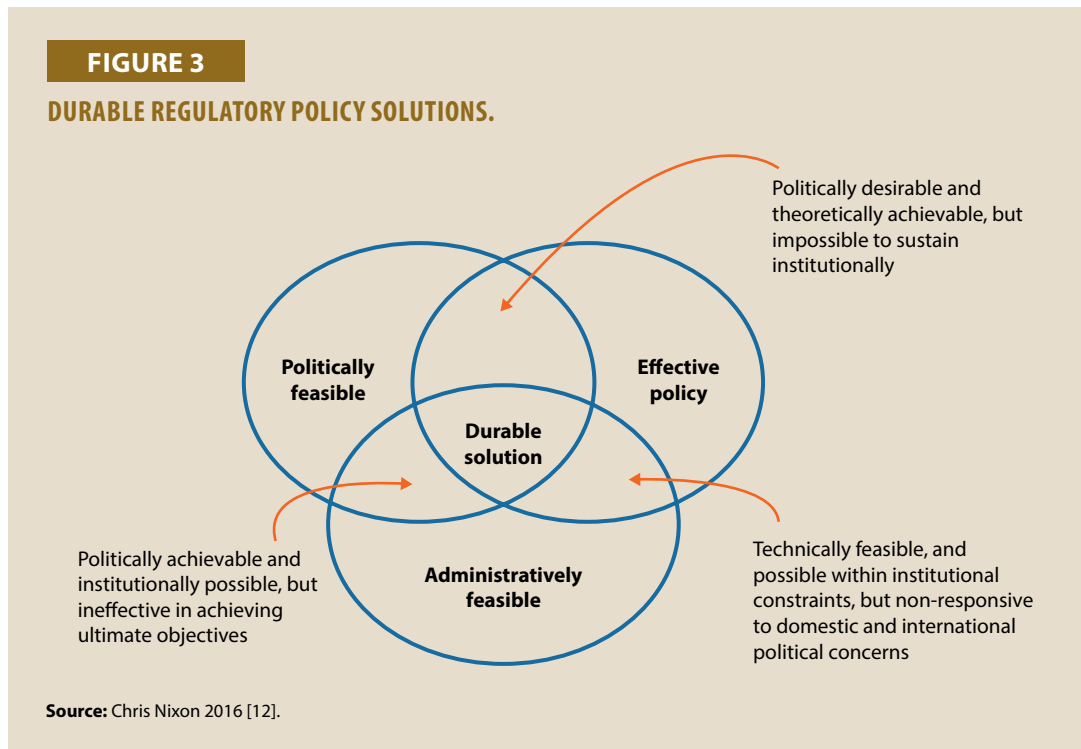
4. **Learn:** The operation of the regime is monitored, evaluated, and reviewed so that the effectiveness of the regime’s administration and its overall impact can be assessed.

While the stages assist with sequencing the tasks from the most general to the more specific, in addition to working through the individual steps it is also important to loop back to check if the emerging design is still on target. Step 11 (standing back) and step 18 (review) provide checkpoints along the way. The effectiveness of the overall regime is crucially dependent both on the regime being well designed so that the problem is addressed and on effective compliance strategies being in place to ensure that the intended policy objectives are delivered.

**2.1.A Policy and Delivery Need to be Joined Up**

Regulatory outcomes are coproduced [11] by the interactions of regulators and regulatees. Therefore, a key part of regulatory agency’s effectiveness is acting in ways that increase the legitimacy of the regulatory regime and lower the compliance costs for those the agency regulates.

The delivery of regulatory services is an important source of information for the policy development process. Information gathered as part of operating a regime can provide insights into the underlying problem and whether the regime is working as intended. The experience of frontline regulators and regulatees is important to understand whether the regime can be readily and effectively implemented.



**2.1.B Political Support Needed along with Capacity and Policy Analysis**

Well-designed regulatory regimes find the sweet spot at the intersections between what is effective policy, what can be delivered, and what is politically feasible (see Figure 3). What is effective policy focuses on the question, “have the right things been done?” What can be delivered asks the question, “have things been done right?” These two dimensions of effectiveness are explored in more detail in section 6 (Learning).



Figure 3 labels this sweet spot ‘durable solution.’ This diagram highlights that there is no point having a regime that is so-called ‘best practice,’ even with the political will required, if regulators and/or regulatees lack the administrative capability to operate the regime effectively. Similarly, a policy is bound to fail to achieve its objectives if it can be executed and has political support, but is not able to deliver on the intended objectives. Section 2 and 3 of this guide discuss how to design effective regulatory policy, and sections 4 and 5 discuss the factors that are critical to a successful implementation of the policy.

Figure 3 also illuminates the critical importance of political support. All policies have a political dimension. What is politically feasible can shift dramatically in a short space of time. Box 1 illustrates this for the case of gun control in New Zealand.

### BOX 1

#### Case study of gun control regulation in New Zealand and the role of the gun lobby

The history of gun control regulation in New Zealand had been a history of failure until recently. Gun ownership in New Zealand is widespread. It is estimated there are 1.5 million firearms with an adult population of around 4 million people.

New Zealand had a gun control regime that was deeply flawed and out-of-date by the end of the twentieth century. There was no firearms registry; and the register of people with gun licenses was paper based, disbursed, and inadequately resourced. The Arms Act had not been updated to take into account technological changes in firearms or citizens’ ability to access firearms through the internet. For more background on the history see:

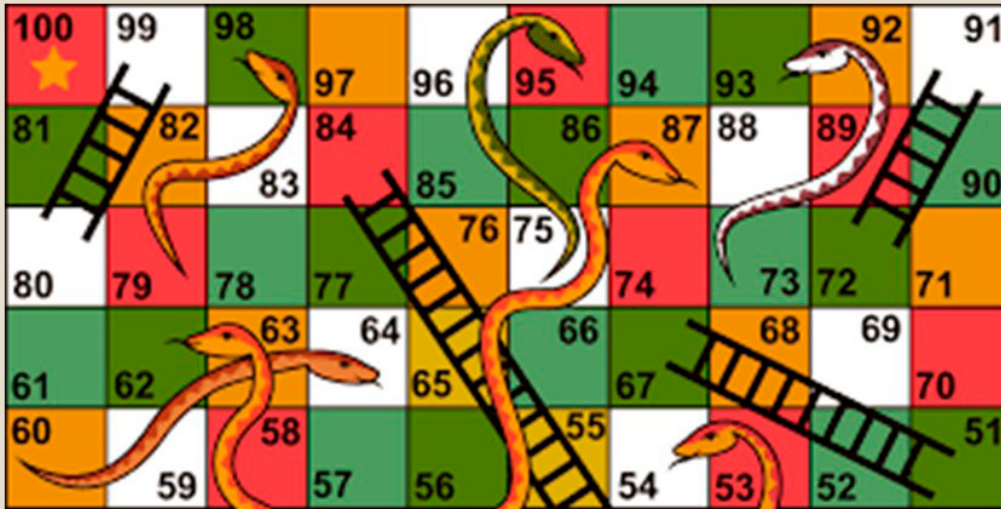
<https://www.rnz.co.nz/news/national/385058/a-short-history-of-nz-s-gun-laws-from-cutlasses-to-semi-automatics>.

Over the course of the next 20 years, successive Labour and National administrations, both led by powerful Prime Ministers with working majority in the legislature, introduced gun control bills in the Parliament. However, these bills did not pass into legislations, mainly in the face of opposition from the ‘gun lobby’ that included recreational shooters, gun clubs, and gun collectors among others. It took the horrors of the Christchurch Mosque shootings in 2019 to create the political mandate for substantive reforms of the gun-control regime. Major reforms were announced within a week of the shootings and enacted over the following few months.



In this guide we use a ‘stages approach’ because it is a powerful tool to organize and plan a regulatory review process. This approach does not purport to describe the actual regulatory policy development process, which generally resembles the game of snakes and ladders, as shown in Figure 4. Snakes and ladders is a classic board game that involves players racing to a finish line. Along the way, players may be able to climb up a ladder or slide down a snake.

**FIGURE 4**

**REGULAR CYCLES OR SNAKES AND LADDERS?**



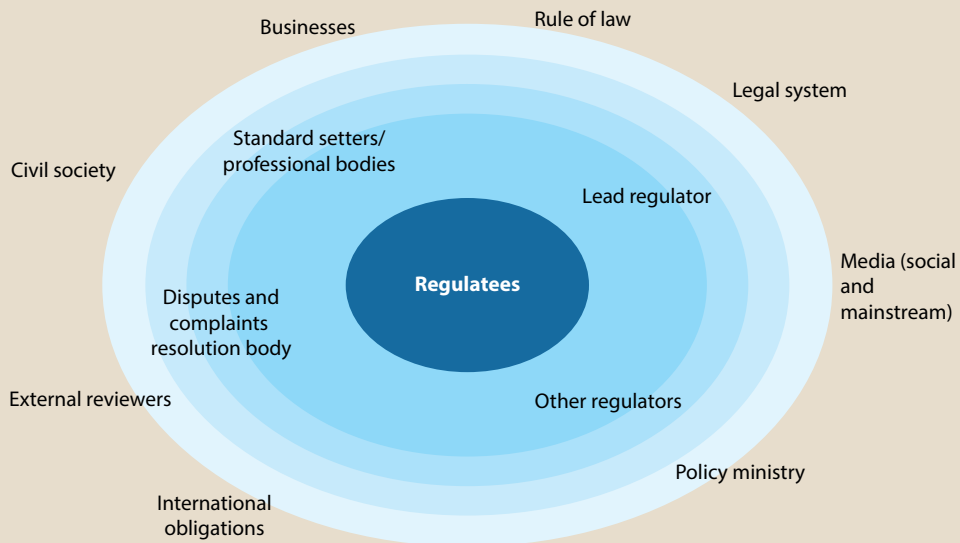
**Find out more:**

-  van der Heijden J. The politics of regulation: A review of the international academic literature. VUW State of the Art in Regulatory Governance Research Paper; 2021.08 [13].
-  Nixon C. Durable Policy Approaches: Framework Development and Brief Literature Review [12].

## 2.2 Who Regulates and What Makes Up the Regulatory Space

**FIGURE 5**

**STAKEHOLDERS DIAGRAM.**



Source: Author.

Figure 5 shows that there are a number of important players in any regulatory regime, in addition to the main regulator(s) and regulatees. For economic regulation, one often finds the players set out as per the diagram. The regulatee could be the direct immediate consumer or the supplier of goods and services. The precise numbers and roles of players will vary depending on the regime and the nature of the activity. Regulation provides the society with a framework.

This diagram also highlights that the regulatory space is a crowded one. To operate, markets and societies more generally need a regulatory framework of laws and rules, but also social understandings. Freiberg [1] discusses how informal social norms, cultures, ethical understandings, and soft laws such as codes of conduct all combine to create social understandings.

This wider framework provides the foundation that enables rights to be protected, market transactions to be completed, and contracts to be enforced. As a result, the notion of a free market or of deregulation is something of a myth, because all activity is ‘regulated’ in some form. The so-called free market needs a regime of property rights and a regime for dispute resolution. The question is not *whether* to regulate but *how* to regulate. The choice is whether to rely on social understandings and general legal frameworks or to design a more tailored regulatory regime.

### 2.3 How to Regulate and What Are the Options

Regulation can take three broad approaches: prescriptive or command-and-control regulation; performance or minimum-standards-based regulation; and principles-based or meta regulation. Traditionally, regulatory regimes were predominantly command-and-control. These regimes involved the setting, monitoring, and enforcement of rules [1]. More recently, greater emphasis has been placed on performance-based and principles-based regulations. In practice, because all designs involve trade-offs, a particular regime generally involves a mix of all three approaches.

Box 2 discusses the use of a performance-based building code in New Zealand and how that led to a problem with leaky buildings.

#### BOX 2

##### Case study of the New Zealand Building Code

###### *Leaky buildings and performance-based regulation*

The Building Code, part of the Building Act 2004, provides an example of a performance-based approach for constructing new buildings. “The Code describes performance requirements for the outcome of building work aspects, including structure, durability, fire safety, access, moisture, safety of users, services and facilities, and energy efficiency. Because it is performance-based, the Building Code states how a building must perform in its intended use, rather than describing how the building must be designed and constructed. It is important to note that you cannot design to less than the minimum standards, but owners and designers can choose to exceed them in order to meet their own requirements.” [1]

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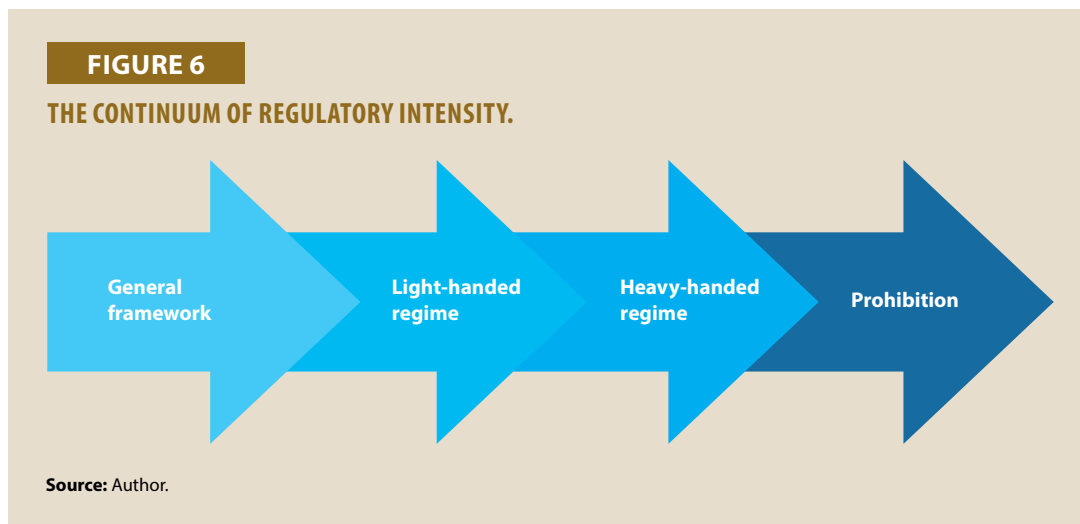
The unforeseen effect of a performance-based code was that it acted as the trigger for the ‘leaky homes’ crisis affecting timber-framed homes built from 1988 to 2004 that were not fully weather-tight. Estimates of the gross cost from avoidable repairs and replacement was approximately USD7 billion [1]. A number of factors contributed to the problem, including the unforeseen consequences of adopting designs from offshore unsuited to New Zealand’s climate, certain practices of builders, and a lack of regulatory capability to deal with the challenges posed by the regime.

The underlying problem was measurement, which posed a fundamental limit to the use of performance-based regulation. It proved difficult to measure whether a novel building design met performance requirements, particularly if such requirements were couched in general terms such as ‘adequate.’

**Source:** P. Mumford, IPS [14].

### 2.3.A Options for the Approach to Regulation

Figure 6 shows a continuum for how intensively to regulate. At one extreme is the option to simply rely on the general legal framework with no activity-specific regulation and to rely on the general commercial law regime covering contracts, consumer protection, dispute resolution, etc. Other options range in the continuum from light-handed to more heavy-handed regulation, culminating in outright prohibition.



This continuum is illustrated by the case of occupational regulation in New Zealand (see Table 2). It draws out the authorization spectrum from a reliance on general law, and ranges from a light-handed disclosure regime to more heavy-handed licensing.

It would be warranted to move along the continuum where existing means of protection from harm for regulatees are insufficient and significant harm to regulatees is possible; and where intervention by the government is likely to improve outcomes.

TABLE 2

## THE AUTHORIZATION CONTINUUM IN OCCUPATIONAL REGULATION.

Approach	Key features	New Zealand example
General framework: no specific rules	No restrictions on entry or use of titles. Reliance on the general framework of consumer protection and contract law.	Economists
Disclosure of information	Providers disclose certain information to enable the public to make an informed choice of provider.	Financial advisors
Negative licensing	List of named people barred from providing that service. Otherwise, entry is open.	Motor vehicle dealers
Certification	No restrictions on entry (any provider is allowed to practice). Formal certificates of competency for those meeting required standards with exclusive rights to a particular title.	Most para-medicals, e.g., chiropractors
Accreditation	Accreditation is akin to certification. The key difference is that accreditation is undertaken by a self-regulatory body.	Chartered accountants
Registration	Restricted entry to undertake specified tasks. Tasks limited to registered providers who meet objective criteria to provide a particular service.	Auctioneers
Licensing	Licensing is akin to registration and is limited to those who can undertake or supervise certain functions. Licensing also includes subjective criteria that providers must meet.	Lawyers

Source: Author.

## 2.4 Good Regulatory Practice Principles

A plethora of organizations have developed so-called best-practice principles for regulation. These include the APEC/OECD and numerous versions from the OECD, the World Bank, as well as principles that have been adopted in various individual jurisdictions. These statements vary in their purpose, approach, coverage, and focus. Some, such as the OECD Best Practice Principles on the Governance of Regulatory Policy are focused on the meta-governance level. Others focus on micro level individual regulatory instruments such as Regulatory Impact Analysis. The existence of so many alternative versions highlights that regulation is an area where there is no best practice in the strict sense of ‘one best way.’

There is no general theory of regulation to provide the theoretical underpinnings to best practices. The answers that academic scholarship has provided so far to questions such as what makes people and businesses comply with regulation “are simply too broad and varied, too context and time-dependent, and too individual and organization-specific to distil them down to mantras and catchphrases” [15].

In addition, every country has its own unique regulatory space, including systems for developing, deploying, operating, and reviewing legislation. Because each country’s context is unique, there is no ‘best practice’ in regulatory regime that applies to all domains within one jurisdiction or all jurisdictions regardless of the level of economic development and social understandings in operation.

Although there is no *best* practice in regulation, there are proven or *good* practices. When designing regulatory regimes, it is a good practice to develop a clear set of policy objectives and identify how these relate to overarching instrumental values including economy, efficiency, effectiveness, and equity. In addition, the regime should comply with some enduring non-instrumental values.

Freiberg [1] has distilled these down to seven principles: clarity, predictability and consistency, flexibility, accountability, correctability, proportionality and parsimony, and computability with human rights. Box 3 shows the regulatory principles approved by the New Zealand Government, which are similar to Freiberg’s list.

**BOX 3**

**New Zealand’s regulatory principles**

1. Proportionality: The burden of rules and their enforcement should be proportionate to the benefits that are expected to result.
2. Certainty: The regulatory system should provide certainty to regulated entities and be consistent with other policies.
3. Flexibility: Regulated entities should have scope to adopt least-cost and innovative approaches to meeting legal obligations.
4. Durability: Closely associated with flexibility, the regulatory system has the capacity to evolve to respond to new information and changing circumstances.
5. Transparency and accountability: Reflected in the principle are that rules development and enforcement should be transparent.
6. Capable regulators: This means that the regulator has the people and systems necessary to operate an efficient and effective regulatory regime.

**Source:** Based on the New Zealand Treasury [16].

These high-level principles are important touchstones as they describe the attributes of good regulation and can be used as the basis for the criteria for assessing different regulatory options, particularly in the design phase. However, as high-level design principles, they can only highlight but cannot help resolve the inevitable conflicts that arise between various principles.

In stage 2 (detailed design), the importance of proportionality cannot be overemphasized. Poorly designed regulatory regimes set thresholds too high. Regimes also morph in unexpected ways as they evolve over time. For example, a regime intended to protect regulatees risks benefiting the providers and indirectly harming regulatees if the regime restricts entry, competition, and innovation.

**Ask yourself:**

- Who makes up the regulatory space?
- How is the regulatory space occupied?
- What is the nature of the market?

(Continued on next page)

(Continued from previous page)

- What are the drivers of the need for the review?
- When another review, domestically or overseas, dealt with similar issues, how did they do it?
- What are the good-practice regulatory principles that are relevant?
- What methods, skills, and resources are going to be required?
- How will the experience of frontline regulators and regulatees contribute to the regulatory review process?

## 2.5 Conclusion

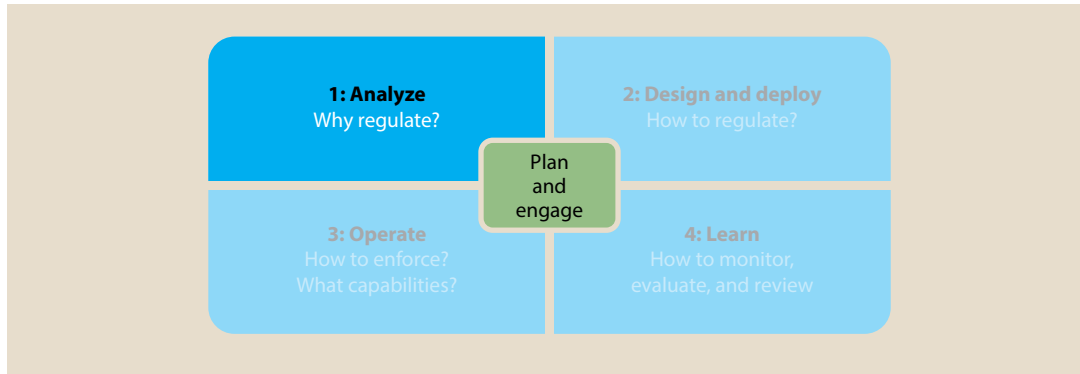
This section discussed the following areas:

- the stages of the regulatory cycle including policy and intervention analysis, detailed design, operation of compliance, and administration strategies and learning;
- who makes up the regulatory space, i.e., how multiple public and private actors interact to produce regulatory outcomes;
- how the regulatory space is occupied by a complex mix of informal social norms; soft laws (codes and guidelines); and formal laws regulations and rules;
- how to regulate, i.e., the range of choices open, including no activity-specific regulation, light-handed regulation, more heavy-handed regulation, and outright proscription; and
- good-practice regulatory design principles and why there is no single set of best-practice principles applicable across all jurisdictions and sectors.

In the next section, we explore the first stage of the regulatory cycle, which focuses on the policy analysis of the interventions required.

## SECTION 3

# STAGE ONE: ANALYZE INTERVENTIONS



This section discusses what a regulatory review needs to cover, followed by the below four steps:

- Step 1: Identify whether intervention is justified.
- Step 2: Identify whether intervention by the government is justified.
- Step 3: Identify what is the most effective government intervention.
- Step 4: Identify what regulatory functions are needed for the regulatory regime.

### 3.1 What a Regulatory Review Needs to Cover

Regulatory reviews vary from those that start from first principles to those that review a particular aspect of a regime that does not appear to be operating well. Regardless of the focus of the review, it is important to start from a clear statement of the problem or problems that the regime is trying to address.

#### 3.1.A What Are the Key Steps?

When designing the review process, it is important to consider the key milestones; what consultation process is planned and who will be consulted; what methodology or analysis is proposed; and the time and resources available to complete the task.

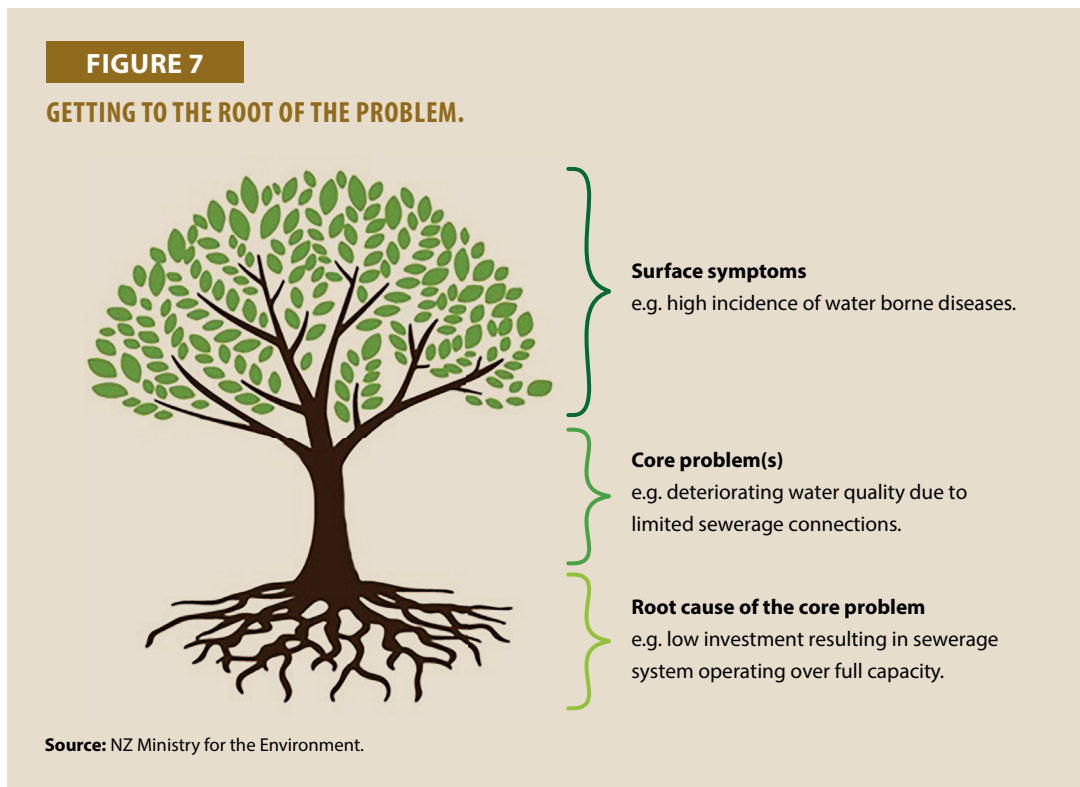
The planning needs to include early engagement with any counterparts at other levels of government such as state level or local level. Because of the growing importance of cross-border issues, it is important to consider early on if there are international obligations (discussed more in section 4.2) that need to be taken into account.

If the process is well designed, addressing the key questions covered by this guide, then the production of any Regulatory Impact Analysis (RIA) [17] is straightforward as the process will cover each of the components of an RIA.



### 3.2 Is Intervention Justified?

The first step in any decision to regulate is to assess the underlying problem or opportunity that the policy intervention is trying to address. A successful policy gets to the root of the problem and goes beyond symptoms to address the underlying causes. Problem definitions that define the solution instead of the problem, for example, ‘the problem is the lack of government regulation,’ do not get to the core of the problem. To get to the underlying cause(s), try using the ‘five whys,’ i.e., asking ‘why’ five times, to dig down to the core of the problem definition. Figure 7 uses an example to show how a clear problem definition is the key to success of intervention analysis.



The role of the government’s regulatory intervention may initially appear self-evident, but a robust problem definition is critical to ensuring that the government only regulates when it is justified. This approach allows for a full range of potential interventions to be considered.

Allen Consulting [18] observes, “In answering the question of whether there is a role for government, there are two conditions that must be satisfied.

First, there must be some form of market failure or over-arching policy rationale for government intervention, such as social welfare objectives.

Second, the consequence of that problem must be high, the potential to remedy the problem once it occurs must be poor, and there must be limited potential for the market or consumers to resolve the issue over time of their own accord.”

There is stronger case to rely on the general legal framework [19], with no activity specific regulation, if:

- the consequences of the issue are not major or serious;

- the ease of reversibility is reasonable; and
- the domain does not require high degrees of specialist knowledge.

However, reliance on general courts for dispute resolution of highly technical subject matters runs the risk of court failure [20]. A stronger case for intervention exists if significant irreversible harm is likely and the domain is highly technical.

**Ask yourself:**

- What is the size and nature of the underlying problem?
- What is the consequence of the problem?
- Is it a harm or a generic risk, such as health and safety faced by a broad range of businesses or specific to this activity?
- What is the probability of significant irreversible harm occurring?
- Will resolving disputes require ongoing high degrees of specialist knowledge?
- What are the desired outcomes? What behaviors will need to change in order to achieve this outcome?

**Find out more:**



For a useful summary of rationales for regulatory intervention, see Table 1 Page 30 in Understanding Regulation Theory, Strategy, and Practice, Robert Baldwin, Martin Cave and Martin Lodge [33].



For a framework that matches policy levers to types of problems, see Weimer Vining, Table 9.6, on page 251 [21].



Perez O. Responsive regulation and second-order reflexivity: On the limits of regulatory intervention. UBCL Rev 2011; 44: 743.



For a detailed framework of whether to regulate occupations, see Allen Consulting Group 2007 A framework for considering the use of occupational licensing [17].

### 3.3 Is Intervention by the Government Justified?

Policymakers can select from a number of approaches that range from explicit direct government regulation to coregulation with the relevant industry and self-regulation by the relevant industry. A good rule of thumb is that form follows function. Light-handed regimes with limited restrictions on entry and practice will not require direct government regulatory involvement, whereas more heavy-handed regimes involving licensing are more likely to require coregulation or direct government regulation.

#### Direct Government Regulation

Direct regulation or ‘black letter of the law’ approach generally involves primary legislation, secondary regulations, and tertiary rules and standards. A stronger case for explicit government

intervention exists if significant irreversible harm is likely, existing means of protection are insufficient, or the industry is unable to regulate itself adequately.

### Coregulation

With coregulation, the government provides the legislative framework that underpins the regime. However, the industry mandates a body that sets the codes and standards and administers the regime [22].

### Self-regulation

With self-regulation, unlike coregulation, industry is also solely responsible for enforcing the rules or codes of conduct as well as developing them. Self-regulation is worth considering when:

- risks of harm are moderate;
- industry expertise is required to address the technical issues involved; and
- there are ongoing incentives for industry members to comply with the regime.

#### Ask yourself:

- Are the existing means of protection from harm under general law sufficient?
- Does industry have the structure, capability, and incentives to regulate itself?

#### Find out more:



McCarty N. The Regulation and Self-Regulation of a Complex Industry. *The Journal of Politics* 2017; volume 79, number 4. <https://www.journals.uchicago.edu/journal/jop>



For a more detailed exploration, see the Australian Government's Best practice regulation handbook, 2010, Canberra, pp 34–35 [23].



For a deeper dive into the law and economics of co- and self-regulation, see [24], pp 342–351.

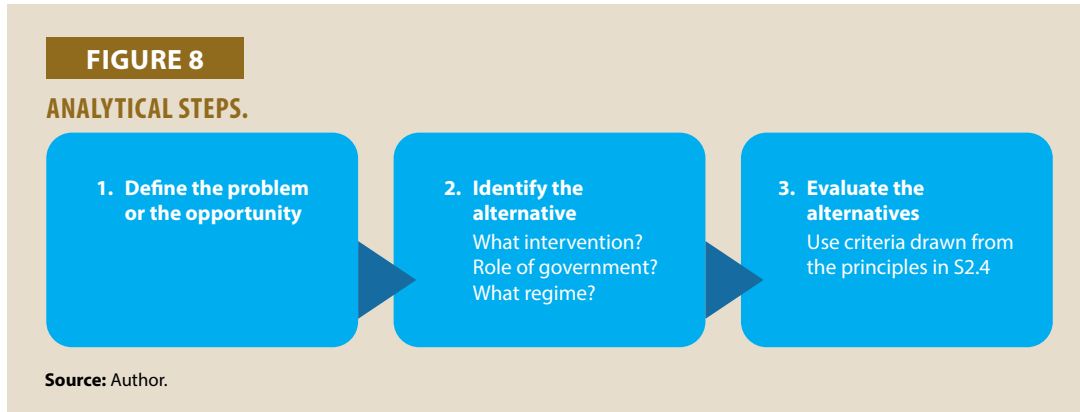
## 3.4 What Intervention Is Required?

Good regulatory policy analysis involves keeping an open mind to the range of possible interventions, including the potential to rely on general legal remedies for the problem rather than defaulting to 'black letter of the law' regulation. Consider the nature of the problem posed by the activity. Would the problem be solved by:

- providing information to regulatees such as consumers, agents, or victims?
- improving regulatees redress?
- targeting a specific aspect of the service?
- setting voluntary standards?

- or, specifying some services that the government will purchase on behalf of all citizens and businesses?





A regime could contain a tailored mix of interventions needed to address the root cause of the problem. This may involve intervening to regulate a specific part of the product or service rather than the activity as a whole.



**Ask yourself:**

- What is the setting for the market?
- What are the objectives of the regulation?
- What is the nature of the main hazards that people need protecting from?
- How can you avoid detrimental effects on competition?
- Who are the target regulatees, such as consumers, and how can you protect them?
- Is redressal or prevention more important?
- To what extent might other developments (e.g., emerging technology) reduce the need for regulation?
- Who should be regulated: organizations or individuals?

**Find out more:**

-  Bini L., Dainelli F., Giunta F. Is a loosely specified regulatory intervention effective in disciplining management commentary? The case of performance indicator disclosure. *Journal of Management and Governance* 2015; vol 21, 63–91.
-  For a detailed framework on whether to regulate occupations, see: Allen Consulting [17].
-  For a useful tool applied to occupational regulation, see: the New Zealand Cabinet Office Circular [25].
-  For a list of alternative instruments for helping consumers, see: OECD [26].

### 3.5 What Type of Regulatory Regime Is Needed?

There are a number of policy questions to be considered before a regime is designed. Direct government regulation may be preferred over other levers including industry self-regulation (see 3.4 and 3.3 above, respectively) when:

- significant harm to regulatees such as consumers is possible;
- existing means of protection from harm for regulatees are insufficient; or
- intervention by government is likely to improve outcomes.

Regulation can take a number of forms. Freiberg [1] distinguishes a number of different types of regulation including (1) economic regulation, such as price controls; (2) structural regulation through controls on physical design, e.g., a building code or process design; (3) regulation of information such as labelling requirements; and (4) regulation by authorization, e.g., licensing that regulates entry and use of titles. Because regulation by authorization is a widely used type of regulation in the Asia region, this type of regulation will be the main focus of this toolkit of resources.

If explicit regulation by authorization is required, what type of regulatory function is required? Table 2 in Section 2.4 shows a continuum from light-handed to heavy-handed regulation using occupational regulation as an example. Using regulations at the light-handed end of the spectrum could involve disclosure or negative licensing, ranging from accreditation and certification and concluding with registration or licensing.

Moving along the continuum would be warranted where existing means of protection from harm for regulatees are insufficient, and significant harm to regulatees is possible while intervention by the government is likely to improve.

#### Ask yourself:

- What is known about the magnitude of these problems?
- What type of regulation: economic, structural, information disclosure, or authorization, best addresses the underlying problem(s)?
- What kind of response would be proportionate?
- What would minimize the chances of unintended consequences?

#### Find out more:



For a detailed framework on whether to regulate occupations, see: Allen Consulting [17].



Turck D, Bresson J.-L., Burlingame B., et al. Guidance on the preparation and presentation of an application for authorisation of a novel food in the context of Regulation (EU) 2015/2283. EFSA Journal 2016; volume 14, issue 11. <https://efsa.onlinelibrary.wiley.com/toc/18314732/2016/14/11>



For a useful tool, see: Cabinet Office Circular [21].

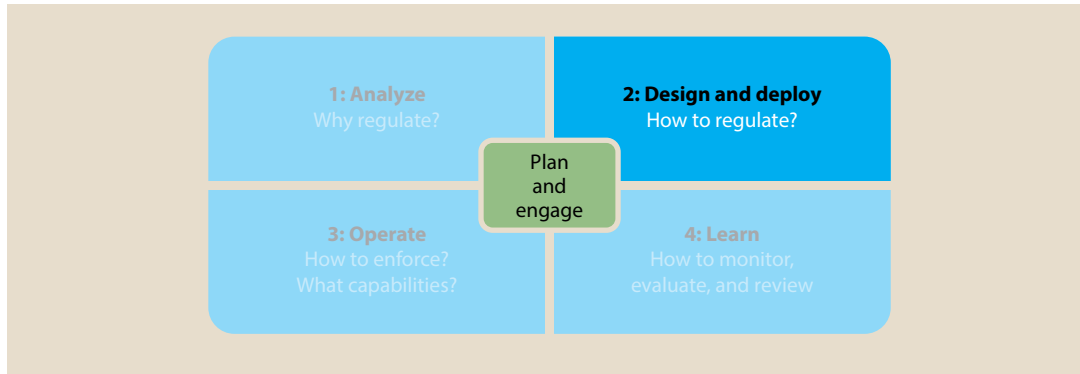
### **3.6 Conclusion**

This section discussed:

- Planning a regulatory review needs to focus on all four key stages; identifying key milestones at each stage; the consultation process required at each stage; the analytical approaches; and the time and resources required to complete the various tasks.
- The first step in ascertaining whether intervention is justified is to start from a clear statement of the problem or problems that the regime is trying to address.
- The second step focuses on clarifying whether intervention by the government is justified rather than relying on more general legal frameworks.
- The third step focuses on comparing explicit regulatory intervention with other potential policy levers.
- The fourth step is to identify the specific regulatory approach required.
- In the next section, we explore the second stage of the regulatory cycle, which focuses on designing and deploying the regime.

## SECTION 4

# STAGE 2: DESIGN AND DEPLOY



This section discusses:

- why the design team will need to be able to access a range of skills and knowledge;
- step 5: how cross-border issues are addressed;
- step 6: what compliance regime is required;
- step 7: what dispute and appeal mechanisms are appropriate;
- step 8: what other legal powers are needed to deliver the functions;
- step 9: how to effectively organize those functions;
- step 10: how the regime will be funded;
- step 11: when standing back, will the regime work as planned;
- step 12: how to engage with stakeholders; and
- step 13: how to implement the change.

### 4.1 Introduction

Once a regime has been determined to be justified, there remain a range of detailed operational policy, legal, and institutional issues that need to be addressed. These issues include the powers and functions that the regulatory agency will need, and the compliance strategy that is required.

The team working on the design will require access to a range of different skills and knowledge from what was needed in the policy analysis phase. Legal expertise will be required on enforcement

and appeal rights; and public management skills and experience will be required for questions of organizational choice and design as well as funding.

The author of Ecclesiastes, a book in the Bible, famously observed that ‘there is nothing new under the sun.’ Although each jurisdiction is unique, the regulatory challenges each country faces are not. A good starting point for scoping out the detailed design of a regulatory regime is to look for comparators either from other domains within your country or from the same domain in comparable overseas jurisdictions.

**Ask yourself:**

- Has this regulation been tried elsewhere?
- Is there a well-established and successful international model that should be used as a starting point for the proposed legislation?
- What precedents are there in comparable societies for the proposed approach adopted in the legislation?
- Was the approach a success in those other societies? How do we know? [1]

## 4.2 Cross-border Issues

One key question that needs to be considered upfront as part of the commissioning of the design process is: how will cross-border issues be addressed? Cross-border issues concern both matters that arise from international agreements and issues that arise from the interface between any domestic regime and that of another country.

It is important to consider international obligations for goods and services, because of provisions under the World Trade Organisation’s Technical Barriers to Trade (TBT) and General Agreement on Trade in Services (GATS) provisions for trade in services, along with any Free Trade Agreements and Mutual Recognition Agreements (MRAs). MRAs are particularly important for ASEAN countries under the ASEAN Mutual Recognition Arrangement on Services and for New Zealand and Australia under the Trans-Tasman Mutual Recognition Arrangement. In addition, there are other international agreements such as those on human rights and intellectual property that may need to be taken into account.

In an era of globalized trade, international regulatory cooperation is increasingly important. Regulatory cooperation occurs across three dimensions:

- **What to cooperate on:** The areas could be regulatory policies (making rules); regulatory practices (interpreting, applying, and enforcing rules); or regulatory organizational management (supporting the administration of rules).
- **How intensive the cooperation is:** Intensity can range from informal networks of national regulators through mutual recognition agreements to formal regulatory partnerships.
- **Who the actors are:** Arrangements can be bilateral, sub-regional/regional, plurilateral, or multilateral.



Smaller and developing countries in the region tend to be standard takers rather than standard makers. Increasingly, regulatory regimes will need to allow for interoperability, if not full equivalence or integration.

Cross-border issues also arise because of interfaces between a domestic regime and those applicable in other countries. For example, nationals regulated by a domestic regime can simultaneously provide their goods and services offshore. This situation can give rise to conflicting requirements (e.g., inconsistent standards) or potential gaps where no law applies.

### Ask yourself:

- What obligations in international agreements (such as FTAs and GATS) apply to this regime?
- Are there any gaps or overlaps between the domestic regime and those applicable overseas?
- How would the regime affect nationals regulated by the regime who provide their goods and services offshore?
- Is there a need for cross-border regulatory policy, enforcement, or administration?

### Find out more:



Hoekman B. Trade Agreements and International Regulatory Cooperation in a Supply Chain World. Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/04; 2015.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2553887](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553887)



On international regulatory cooperation, see:  
[https://www.eria.org/uploads/media/policy-brief/Under-the-Radar\\_International-Regulatory-Cooperation-in-ASEAN-and-New-Zealand.pdf](https://www.eria.org/uploads/media/policy-brief/Under-the-Radar_International-Regulatory-Cooperation-in-ASEAN-and-New-Zealand.pdf)



On regulatory interfaces, see: David Goddard [10].

## 4.3 Compliance Regime

The key legal issue in the detailed design of the regime is how compliance is achieved. So, it is important to consider the full range of policy options. It is tempting to default to the traditional compliance model based on deterring non-compliance through enforcement action. Enforcement through criminal sanctions such as prosecutions, fines, and suspending or revoking operating licenses remain useful tools to fall back on.

More modern approaches to compliance place greater emphasis on an escalation strategy that uses a range of targeted administrative sanctions. Administrative actions include warnings and cautions, improvement notices, injunctions, banning orders, etc. [27].

The key to this approach is the reality that the population is diverse and needs to be segmented with different instruments tailored for each segment. It starts from the premise that most citizens and businesses will willingly comply with the regime's requirements and do not need to be deterred. Non-compliance can arise if there is lack of

- (1) awareness and understanding, e.g., if the rule is not clear or well understood;

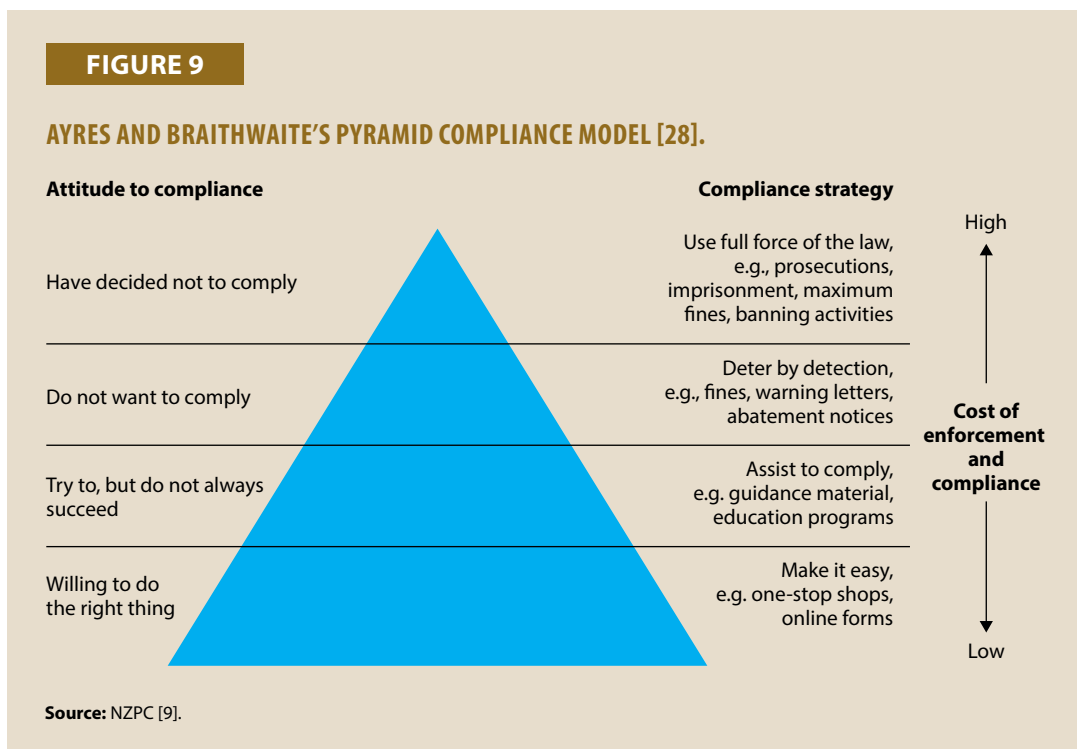
- (2) ability to comply, e.g., the required technical support is missing; or
- (3) willingness to comply.

This approach suggests that the regulated population can be segmented into four types based on awareness, ability, and willingness. Figure 9 shows how the Ayres and Braithwaite’s [29] Compliance Pyramid segments the population of regulatees into four types, namely,

- willing compliers who want to do the right thing;
- muddled non-compliers who do not comply because of lack of information or ability;
- deliberate non-compliers who would only comply if the benefits exceeded the costs; and
- recalcitrant non-compliers who are unwilling to comply regardless of the sanctions.

The precise mix of regulatees in each segment of the pyramid will vary across time, between countries, and from one domain to another. An effective compliance strategy will require information and intelligence to build up a picture of the patterns of compliance behavior. This is discussed further in Section 6.2 on monitoring.

A key issue with compliance is the identification problem: different segments cannot readily be identified in advance. The key insight from the compliance pyramid is that the barriers to compliance are different for each segment, so different compliance strategies are needed for each level. The costs of enforcement at the higher segments are an order of magnitude higher than lower down. This cost differential suggests that a compliance strategy should focus on moving non-compliant regulatees down the pyramid.



The design of the regulatory regime will need to assign a range of powers, functions, and associated resources to the regulatory agency so that it can operate an effective compliance regime. These capabilities include:

- analytical functions to assess and design programs for different segments of regulatees;
- education and information programs to encourage voluntary compliance;
- information-gathering powers to monitor trends in compliance;
- powers of investigation to target specific offenders; and
- powers to deter non-compliers through legal sanctions.

### Ask yourself:

- What is the balance between coercion of and cooperation with the targets of regulation?
- What mix of criminal, civil, and administrative sanctions will be required as part of the compliance strategy?
- What powers are needed to support an escalating compliance strategy?
- Are the powers and sanctions proposed for the regulatory agency adequate and proportionate?
- Who will be covered by the regime?
- What intermediaries does your agency involve and why?
- What are the challenges of involving those intermediaries?
- Can compliance obligations be reduced for some groups?

### Find out more:



Freiberg on sanctions, pp. 205–251 [1].



Ayres and Braithwaite; 1992. Chapters 2 and 3 [29, 29].



Taylor C. The evolution of compliance. *Journal of Investment Compliance* 2005; vol 6, no 4, 54–58.



ANAO's "Administering regulation" [4].



NZ Government's "Achieving Compliance" [5].



Legislation Design and Advisory Committee.

<https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/compliance-and-enforcement-2/cha-22/>

## 4.4 Dispute and Appeal Mechanisms

Regulations can give rise to disputes between two or more regulated parties or between the regulator and the regulatee. For disputes between regulated parties, there are a range of consensual processes, such as mediation, conciliation, or negotiation, in which the parties attempt to reach an agreement. There is growing interest in alternative dispute resolution (ADR) because of the time taken, costs involved, and uneven quality of the more formal legal adjudicative processes [30].

Adjudicative processes, such as litigation or arbitration, involve an arbitrator or a court to determine the outcome. Some scholars attribute the growth and pervasiveness of regulation to the failure of courts to solve contract and tort disputes cheaply, predictably, and impartially [31].

Any regulatory regime that gives the regulator a range of powers and functions will need to be given the legal authority to exercise those powers. However, a balance needs to be struck. These powers need to be limited as follows:

- Dispute mechanisms need to be specified.
- Low-cost alternative dispute mechanisms need to be available.
- Regulatees need the right of appeal and review.
- Regulatees need the right of redress.
- The performance expected of the regulatory body needs to be defined.
- How the body will be held to account needs to be clear.

### Ask yourself:

- To resolve disputes, what is the role of more consensual process (mediation, conciliation, or ADR) relative to litigation?
- How to balance the need for the regulator to have the required legal authority with the regulatees' need for the right to appeal and review?

### Find out more:



Cortes P. Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and Information Technology* 2010; Volume 19, Issue 1, Spring 2011, pp. 1–28.



Chapter 11 Regulatory institutions and practices. New Zealand Productivity Commission [9].



See: Legislation Design and Advisory Committee Legislation Guidelines, Chapter 28 on appeal and 29 on alternative dispute resolution.  
<https://www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf>

## 4.5 Other Legal Powers

To support the operation of a regulatory regime, there is a myriad of operational policy questions that need to be addressed. These questions will differ depending on the approach of the regulatory regime (e.g., light-handed versus heavy-handed or prescriptive versus performance-based)

discussed in section 2.3. They will also vary depending on whether the proposed regime is based on self-regulation, coregulation, or regulation by a government body.

The regime's design also needs to address building in learning about the scheme's operational impacts and overall effectiveness. The upfront design of the regime also needs to include consideration of the monitoring framework and the evaluation strategy. Statutory legal powers may be needed to gather the information necessary for monitoring and escalate the monitoring interventions if required. Any information required for the review or evaluation of the regime will also need to be provided for.

Monitoring will help surface problems with operations but monitoring alone will generally not be sufficient to assess effectiveness. A regime may operate very economically and efficiently but still not achieve its intended outcomes. Learning is discussed further in section 7.

There are a variety of mechanisms to respond to information about how a regime is working in practice, including:

- delegated rulemaking;
- use of legislated principles and default rules; and
- safe harbors.

Discretion and delegated rulemaking are discussed further in Box 4. If delegation is proposed, will decision rights be delegated to a single person? Will one body make all the decisions, or will there be multiple decision-makers?

#### BOX 4

##### Delegated decision-making and discretion

###### Delegated decision-making

- The delegation of decision-making authority is consistent with legislative requirements and any public-service-wide or organizational directives.
- Procedures for exercising delegated authority are documented and staff are trained in applying them.
- The exercise of delegated authority is monitored and subjected to quality-assurance processes.

###### Exercising discretion

- The agency has clearly stated principles and values that guide the exercise of discretion.
- A decision-making framework document specifies what decisions need to be made, by whom, and when.
- Decision makers understand relevant legal requirements so that their decisions can withstand legal challenges.

**Source:** Compliance Common Capability Programme [10].

**Ask yourself:**

- What functions are required to carry out the role?
- What powers would be required to carry out the functions?
- How can the regime be structured so that it can adapt to new technologies or new circumstances?

**Find out more:**



Eberlein B, Grande E. Beyond delegation: transnational regulatory regimes and the EU regulatory state. *Journal of European Public Policy* 2005; vol 12, Issue 1, 89–112.



Appendix 1 of David Goddard [10].



The Judge over your shoulder. CLO; 2019.  
<https://www.crownlaw.govt.nz/publications/judge-over-your-shoulder/>



PCO website on drafting instructions. <https://policy-to-law.pco.govt.nz/pco-templates-and-tools/#templates>

## 4.6 Allocation of Functions

As part of the design of a regulatory regime, functions will need to be allocated to particular organizations. This may require establishing a new body if the regime involves new functions and no suitable existing organization can perform those functions.

It is good practice to consult, at an early stage, the lead public agency responsible for the government machinery, about whether to create a new public body or alter the functions of an existing one and the governance and accountability arrangements that might be. This consultation is recommended because different organizational forms differ in the governance and reporting requirements and how the interface with the government is managed.

Where direct government regulation is the preferred regulatory approach, the statutory function can be assigned to one of the following four main public organizational forms:

- a ministry or department that is part of the civil or public service;
- a statutory board or committee (for example, an occupational regulation board makes decisions, but registry, administrative, and support services are provided by the lead ministry or department);
- a statutory arms-lengths public body focused on the regulatory regime; and
- a bespoke statutory entity.

There are no hard and fast laws or bright-line rules on public organizational choice, because, at different times, particular forms are supported by particular ‘administrative doctrines’ [32]. The ministry with overall responsibility for the government machinery or for drafting legislation generally provides advice on the choice of the organizational form.

One regulatory form that needs particular caution is the establishment of independent regulators. The need for caution arises because it is easy to conflate the exercise of statutorily independent regulatory powers with the need for an organization that is an arms-length independent regulator. Regulatory independence does not require an organization that is an independent regulator. The case for an arms-length independent regulatory organization is stronger when, for example, maintaining public confidence requires that the regulator be seen to be independent. Similarly, a good case exists where it avoids conflicts of interest for the regulator of a market where government-owned suppliers compete with private firms [33].

#### 4.6.A What Type of Entity?

The decision about where to locate responsibility for a regulatory regime will depend on the existing institutional arrangements. Is there an existing entity that is a natural home for the regulatory functions required? Other factors include the relative desire for independence from the government and access to sources of funding. Of the four public organizational forms, the least desirable option is the creation of a bespoke statutory entity. Designing and building a robust statutory organizational form from scratch is a daunting, costly, and slow undertaking; and is not recommended unless there are compelling reasons why other forms are not feasible.

##### Ask yourself:

- Which organizational form is best suited for these regulatory functions?
- Are the proposed arrangements for the operation of the regulatory regime cost-effective and likely to achieve high levels of compliance?
- Does the regime rely on one agency to provide services (such as the inspection function) to another? If so, are the two agencies' priorities sufficiently aligned so that this setup would be reliable?

##### Find out more:



Finn D. The Organisation and Regulation of the Public Employment Service and of Private Employment and Temporary Work Agencies - The Experience of Selected European Countries – the Netherlands, Denmark, Germany and the United Kingdom; 2016. Policy Research Report, prepared for the Korea Labour Institute. <https://tinyurl.com/yk57xw5c>



Chapter 9.2 Institutional Form in Regulatory institutions and practices. New Zealand Productivity Commission [9].



Legislative Design and Advisory Committee. <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/new-powers-and-entities-2/chapter-20/>

## 4.7 How the Regime Will Be Funded

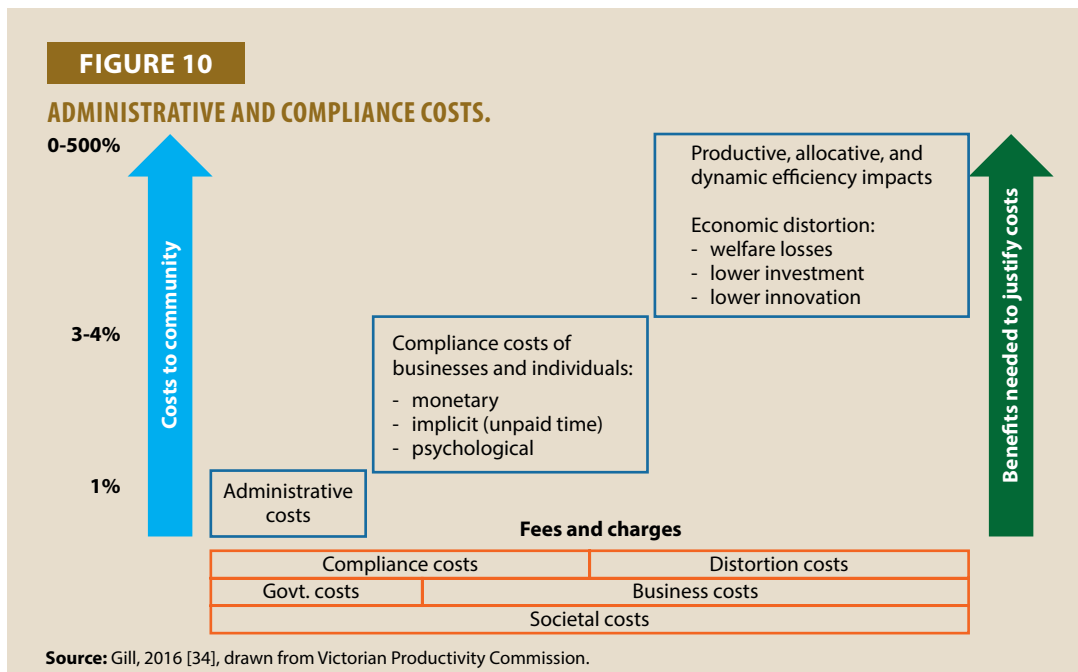
The activities of the regulator need to be funded either from general tax revenue or from specific fees and charges. For general tax-funded activities, the normal public accountability regime should apply. Fees and charges pose particular issues. Any regulatory regime needs to ensure that

- the legal authority exists for the fees to be set, capped at a point in time and adjusted over time;

- the level of fees is constitutional and sustainable; and
- adequate accountability is in place for the use of fees.

Particular care is required to ensure that the level of fee does not become so excessive that it becomes a tax. A fee becomes a tax when it is set at a level that exceeds the direct cost of the regulatory activities. In a number of jurisdictions, setting fees in excess of costs is unconstitutional. Fees should not be used to cross-subsidize other activities such as advocacy and policy advice.

Although administrative costs may attract critical attention, they are a small fraction of the total cost of regulation. Figure 10 shows the direct administrative cost of a regulatory regime. This cost is compared with the compliance costs imposed on individuals and businesses by that regime, and with the costs from undesirable distortions in regulatees' behavior as a result of the regime. Compliance costs are typically double or triple the administrative costs, but these are dwarfed by distortionary costs, which are an order of magnitude higher.



**Ask yourself:**

- Should the regulatory functions be subject to a fee?
- What level of the regulator's costs should the fees be capped at?
- How should the level of the fees be adjusted over time?
- What other funding and funding sources would be required?
- How sustainable is that function and funding?
- How can public accountability for how the funding is used be achieved?



**Find out more:**

See: Chapter 12 in Regulatory institutions and practices. New Zealand Productivity Commission [9].



World Bank. Funding Regulatory Agencies. World Bank; 2019.  
[https://elibrary.worldbank.org/doi/10.1596/978-1-4648-1434-1\\_ch6](https://elibrary.worldbank.org/doi/10.1596/978-1-4648-1434-1_ch6)



See: Chapter 17, Legislation Design and Advisory Committee Legislation Guidelines; 2021.  
<https://www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf>

## 4.8 Standing Back

When the detailed design has been developed and consultation undertaken, it is important to stand back from what is proposed and take stock of the likely result. It is useful to look at the regime as a whole and how well the parts will work together.

**Ask yourself:**

- Why do you think this will work?
- Where are the weak points?
- What behavioral assumptions are made and how robust are they?
- What unintended consequences or behaviors need to be guarded against?
- What incentives are created or changed and how will these play out over time?
- Is it possible to use a regulatory sandpit to test the regime before it is rolled out?
- Can the regime be designed so that adaption practices and changes in technologies can be accommodated?
- Is there anything else that could be regulated (e.g., standards for products or services)?
- Are the likely costs (administrative compliance and distortion combined) proportionate with the harms that might be avoided?
- What would be the potential effect of not regulating?
- Are there opportunities for simplification? Are there any loopholes that need closing?
- Is the burden imposed on the regulated sector by process requirements reasonable?

**Find out more:**

Jeroen van der Heijden. Implementing Regulation; 2023.  
<https://www.wgtn.ac.nz/chair-in-regulatory-practice/pdfs/2023-State-of-the-Art-in-Regulatory-Governance-13-Implementing-regulation.pdf>



NZ Legislation Design and Advisory Committee.  
<https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/>

## 4.9 Engaging with Stakeholders

Engaging with stakeholders in the regulated sector is essential for the regime to deliver the desired outcomes. There are two parts to this engagement:

1. It leads to increased mutual understanding. Achieving ‘buy-in’ is crucial for a regime to achieve successful and adequate levels of compliance.
2. It also increases the knowledge of the regulatory agency, the people, and the businesses being regulated. This context improves its intelligence, for example, on potential compliance targets and assists with design of the compliance strategy.

Engagement in policymaking allows those who are affected by a decision or interested in an issue to be involved in policy design and its operation.

Good planning is essential to successful engagement. Engagement should start early in the policy development process, so that it forms part of each of the phases, namely, analysis, design, operation, and learning, discussed in this toolkit of resources document.

A common practice in Westminster jurisdiction is to distinguish green papers from white papers and exposure drafts.

A *green paper* is a policy options paper used for regulatory proposals of major significance. It includes most of the elements of a regulatory impact analysis such as the problem definition and objectives, and identifies some options to achieve the objectives (but not a single preferred option).

A *white paper*, by contrast, discusses the preferred option and how it is proposed to be rolled out.

An *exposure draft* involves the release of a version of the proposed detailed draft for a regulatory regime before it is finalized. This draft takes the regulatory approach as given but gives stakeholders a chance to provide feedback on how the regime might operate in practice.

## 4.10 Engagement Varies with Power over Decision-making

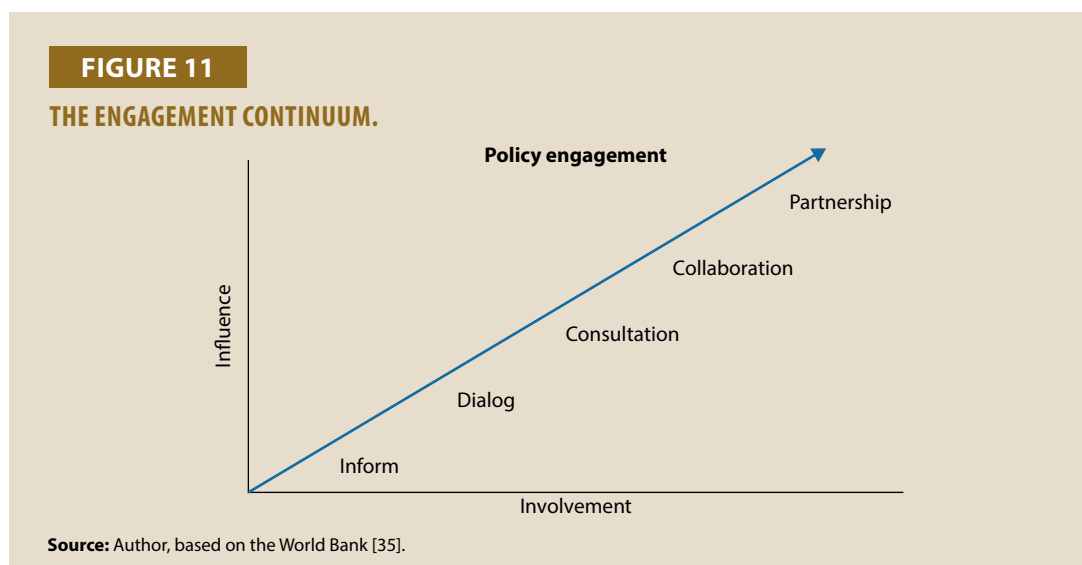


Figure 11 illustrates the range of approaches to engagement that can have increasing involvement and power over decision-making. Engagement can take a range of forms:

- **Inform:** Provide information to help people understand the issues and the options, but without direct involvement in decision-making, i.e., ‘I tell, I decide.’
- **Dialog:** Provide information as the basis for a sustained discussion, but without direct involvement in decision-making, i.e., ‘we discuss, I decide.’
- **Consult:** Formally seek feedback on proposals before final decisions are made, i.e., ‘we discuss before I finally decide.’
- **Collaborate:** Work directly with stakeholders in the design or decision-making process, including to identify alternatives or preferred solutions, i.e., ‘we discuss, we decide.’
- **Partnership:** Work together on the options and the decisions, i.e., ‘we develop together before we decide.’

Although increasing involvement in the development of regulatory policy can improve legitimacy and impact, it also comes at a cost. A balance always needs to be struck between the scope and length of the engagement and the requirement for the government to work efficiently and make the ultimate decisions.

Engagement is fundamental to the success of the design and operation of a regulation, but it is time-consuming and resource-intensive for both regulation designers and regulatees. Moreover, greater engagement need not necessarily result in better policy design. Indeed, it may make the design worse. When the costs of the regime are concentrated and benefits are diffuse, as is often the case for regulation, then the involvement will be skewed toward those with the strongest self-interest [36].

To strike the right balance, it is important to carefully select where the 80/20 solution would lie on the continuum in Figure 11, i.e., 80% of the benefits for 20% of the costs. A useful rule of thumb is to select the lowest level of engagement in Figure 11 to achieve what is required. Over time, as trust and maturity in the relationship grows, it may be possible to move up the scale in the continuum. Increasing trust in the relationships with key stakeholders can be useful as the design of the regime proceeds from policy analysis through detailed design to application. At each stage of the engagement process, it is better to under-promise and over-deliver, rather than over-promise and dash expectations.

#### Ask yourself:

- Is the main objective driving the public engagement process
  - to gather a wider range of perspectives on the problem, and possible solutions;
  - to test proposed policy solutions, focusing on how they would be implemented; or

(Continued on next page)

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- to deepen awareness and build legitimacy for the proposed changes?
- What is the lowest intensity of involvement required to address the public engagement objective?
- Who has final decision rights, i.e., where should engagement occur in the World Bank continuum in Figure 11?

#### Find out more:



Almond P, Gray G. Frontline Safety: Understanding the Workplace as a Site of Regulatory Engagement. Law and Policy 2017, volume 39, issue 1, 5–26. <https://onlinelibrary.wiley.com/toc/14679930/2017/39/1>



DPM&C Policy Project toolbox.

<https://www.dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/community-engagement>



See: Chapter 4 of Australian Government Best Practice Regulation Handbook [23].

## 4.11 Change Management

The design of a regime must be able to be built. It is important to join up those involved in the overall design with those doing the detailed design (such as drafting instructions) and those who will be implementing the new regime. This connection is particularly important where a new and novel regime is proposed. As discussed in Section 4.1, using features of an existing design for another regime makes implementation easier and increases the opportunities for learning across regimes.

A credible change management plan needs to be ready to implement, covering the ‘what’ and the ‘how’ of changes, after firm regulatory decisions are made by political decision-makers.

### 4.11.A The ‘What’ of Change

For the regime to be rolled out, consider the precise changes to the existing legislation, any regulations and guidance that need amending, business support systems affected, and details of staff to be transferred and budget required.

### 4.11.B The ‘How’ of Change

How the change is implemented is just as important as the specifics of ‘what’ changes are proposed. Staff affected by changes typically experience stages involving resistance; transition (anger and bargaining); acceptance; and adoption.

The ‘how’ dimension of change management program needs to understand any possible resistance to change and develop a plan to overcome the resistance before it becomes a significant obstacle. As part of the transitional arrangements, it is important to consider how those currently covered will be affected and whether some provisions are grand parented.

The ‘what’ dimensions of change management need to focus on the staff, systems, and processes required to support the new regime. Box 5 provides a case study of a policy change leading to perverse results due to failures in the design of the implementation of the change. An agile project

management approach is based on delivering requirements iteratively and incrementally throughout the life cycle. By contrast, waterfall projects involve a ‘big bang’ approach with a number of changes being implemented at the same time. With waterfall projects, it is particularly important to allow adequate resourcing and timelines to execute the change including piloting and testing before going live.

### BOX 5

#### Case study of the rollout of accredited employer scheme

##### *Perfect storm or a bridge too far [1]?*

Immigration New Zealand (INZ), a business unit within a larger department, introduced a new Accredited Employer Scheme to deal with the surge in demand for labor after New Zealand emerged from the COVID-19 lockdown. It was based on a new high-trust model that shifted responsibility onto employers to provide information, with INZ staff taking a light-touch risk-based approach to applications. The independent reviewer commented on how the scheme went live in particularly challenging circumstances. There was a “perfect storm” of adverse conditions, namely:

- (1) implementation of a new policy that merged six previous employer visas into one new scheme;
- (2) implementation of necessarily new business processes (the three gateways, plus the post-decision checks);
- (3) introduction of a new technology platform, ADEPT, which was not fully operational at the time of launch and had not been subject to user-testing;
- (4) adopting published standard processing times that could not have been tested for operational feasibility prior to going live;
- (5) implementation by an almost entirely new visa operations team (200 people were recruited in 2022 to process AEWV applications); and
- (6) under immense pressure from the government, employers, and the New Zealand community more generally, to get migrant workers into the country quickly.


“...it quickly became apparent that the volumes of applications were exceeding INZ’s capacity to process them in accordance with the published timeframes.” In addition to falling significantly short of published processing targets, quality assurance also suffered. Complaints and investigations relating to the scheme increased dramatically, thereby leading to public concerns about the exploitation and abuse of migrant workers under the scheme.


**Source:** Based on NZ Public Service Commission’s Review of the administration of the Accredited Employer Work Visa Scheme [37].

**Ask yourself:**

- What resources are required to implement the changes to existing rules, systems, and staff?
- Should user-testing be conducted and a trial to pilot the systems be required by the regime before it is rolled out?
- Should legacy administrative systems continue to operate in parallel during the transition?
- How could possible resistance to change be overcome?

**Find out more:**

 Sirkin H.L., Keenan P., Alan Jackson Harvard Business Review 2005.  
[https://hbr.org/2005/10/the-hard-side-of-change-management?utm\\_medium=paidsearch&utm\\_source=google&utm\\_campaign=intlcontent\\_strategy&utm\\_term=Non-Brand&tpcc=intlcontent\\_strategy&gad\\_source=1&clid=Cj0KCCQiA5-uuBhDzARIsAAa21T9FXCdI4Z5aeYjkLLPRhR907vEA5omtaGESzKPS8UGSwjx97FLpYqQaAg6-EALw\\_wcB](https://hbr.org/2005/10/the-hard-side-of-change-management?utm_medium=paidsearch&utm_source=google&utm_campaign=intlcontent_strategy&utm_term=Non-Brand&tpcc=intlcontent_strategy&gad_source=1&clid=Cj0KCCQiA5-uuBhDzARIsAAa21T9FXCdI4Z5aeYjkLLPRhR907vEA5omtaGESzKPS8UGSwjx97FLpYqQaAg6-EALw_wcB)

 Lercel D. Gaining Perspective of an Industry's Readiness for Regulatory Change: A Case Study from the Aviation Industry. *Journal of Management and Strategy* 2019; Vol. 10, No. 3, 15–26.

## 4.12 Conclusion

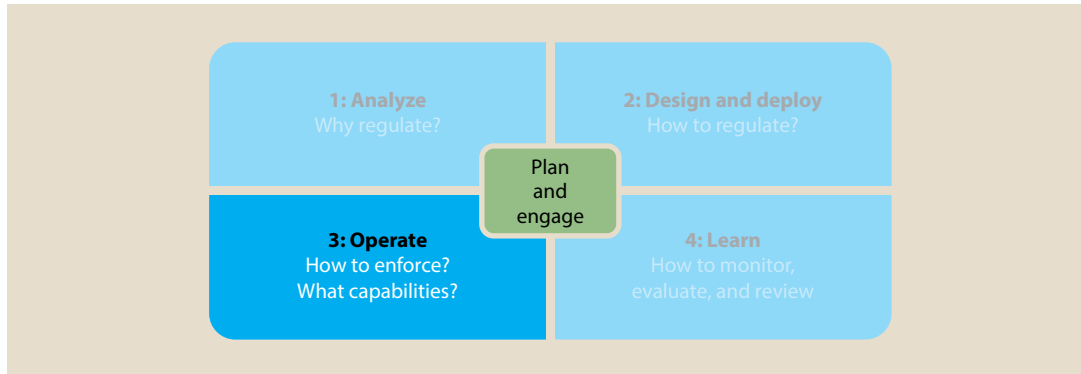
This section discussed:

- How cross-border issues, including international obligations, need to be factored in at the beginning of the process.
- The compliance regime requires the powers and functions to pursue a range of different compliance strategies.
- Counterbalancing compliance is regulatees' access to a range of suitable appeal mechanisms.
- There are a number of choices in the organizational form for allocating regulatory functions, but independent regulator is a rare special case.
- The cost recovery through fees needs a specific legal authority where the level is capped and adjusted over time, and there is public accountability for the use of funds.
- Engaging with stakeholders needs to be considered as part of the design of the review plan
- A good rule of thumb is to adopt the lowest intensity approach to the engagement required to achieve an 80/20 solution.
- Change management needs to focus both on what needs altering and how any resistance to change will be managed.

In the next section, we explore the third stage of the regulatory cycle, which focuses on operating the regime.

## SECTION 5

# STAGE 3: REGIME'S OPERATION



This section discusses:

- the desirability of taking a mix-and-match approach to achieving compliance;
- step 14 (how to operate the compliance strategy); and
- step 15 (what resources and capabilities are required for the regulator).

### 5.1 Taking a Mix-and-match Approach to Compliance

Section 4.3 discussed the design of the compliance approach and the importance of having an escalation strategy that includes a mix of administrative, criminal, and potentially civil sanctions. This section summarizes how a compliance regime is operated and the desirability of taking a mix-and-match approach to achieving compliance.

#### 5.1.A Responsive Regulation

The key idea underpinning Ayres and Braithwaite's [29] responsive regulation and the compliance pyramid in Figure 9 was that achieving compliance requires a range of enforcement levers. These levers start from persuasion (at the base) through warning and civil penalties up to criminal penalties; license suspensions; and license revocations. The regulatory agencies' escalation strategy should start with 'carrots' and only resort to 'sticks' if compliance is not achieved. This escalation strategy harnesses the willing voluntary compliance by individuals and businesses, and focuses high-cost enforcement effort on deliberate non-compliers.

Responsive regulation is a useful framework in the design phase for assessing the powers and functions required for a regulatory regime to be effectively enforced. The framework helps regulatory agencies develop strategies to maximize its effectiveness. It highlights that the regulatory agencies' effectiveness is conditional on the financial resources available to them and having the requisite legal power to exercise discretion. However, the 'responsive regulation' approach is no longer at the cutting edge of how regulatory agencies actually design their compliance strategies and put them into practice.

### 5.1.B Beyond Responsive Regulation

Since Ayres and Braithwaite’s seminal contribution [29], there have been a number of developments in the academic literature on regulatory strategies. These developments include Smart Regulation (Gunningham, *et al*) [38]; Problem-Centered or the Regulatory Craft approach (Malcolm Sparrow) [39]; Really Responsive Regulation (Baldwin and Black) [40]; and Risk-Based Regulation (Julia Black) [41].

Space does not permit covering this extensive developing field in any detail here. Fortunately, a good survey of the literature is available in Baldwin, *et al* (see chapters 12 and 13) [42]. In addition, the New Zealand Productivity Commission [9] (see Chapter 3) provides a useful integration of risk-based and responsible regulation approaches. What the literature highlights is that there is no general theory of crime or of regulation that would enable the development of a generally applicable regulatory best practice or resolve the inevitable conflicts that arise between principles. Instead, approaches need to be tailored to the particular jurisdiction, domain, and behavioral drivers for different segments of regulatees.

As a result, the compliance strategies of most regulatory agencies follow a mix-and-match approach that draws insights from different elements of the developing academic literature. For example, the New Zealand Government Achieving Compliance guide [5] proposes the use of a “risk-based, proportionate compliance strategy.”

Exploring how to design and operate a compliance strategy in any detail is beyond the scope of this toolkit of resources, which has focused on the regime design. However, there are a range of practical resources that already address this issue (listed ahead).

#### BOX 6

#### Case study of COVID-19 compliance

##### *The compliance pyramid in action*

Providing the legal powers required for the compliance strategy was a key part of the design of New Zealand’s response to COVID-19 through the Alert Level system. The case study discusses how officials drew extensively on the academic literature derived from the seminal work of Ayres and Braithwaite [29] in developing the compliance regime. This was because the population comprised people with a range of capabilities and motivations to comply with any legal requirements around lockdowns and social distancing.

The Parliamentary Committee reviewing the draft legislation asked the advisers to provide further information on academic research relating to the policy underlying the Act. In the memo to the Committee, after canvassing the insights from the academic literature, officials went on to provide advice directly based on the compliance pyramid. “The All-of-Government COVID-19 Compliance Response has adopted a graduated response model to compliance.” The approach is to:

(Continued on next page)



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- (1) Engage with the parties and communicate with them to identify whether their current behaviors or activities are contrary to the government's response to COVID-19.
- (2) Educate them on the current requirements (if necessary) to correct their behaviors or activities.
- (3) Encourage compliance measures if required.
- (4) Warn only where evidence of education exists and when offences are repeated or are sufficiently serious.
- (5) Resort to arrest or prosecutorial measures only if absolutely necessary.

**Source:** Undated Memorandum to the Chair of the NZ Parliament's Finance and Expenditure Committee from the All of Government Law Reform Team.

## 5.2 Elements of a compliance strategy

The critical importance of how well the regime is actually operated for its overall effectiveness cannot be overstressed. No matter how well-designed a regulatory regime is, effective enforcement will be critical to the regime achieving its objective(s).

The application of a regulatory regime on the ground involves carrying out a number of tasks. These tasks include gathering information on regulatees' behavior, assessing the drivers of compliance, identifying risks and harms, developing rules and standard operating procedures, and developing tools to engage with regulatees. In addition, there is a need to put in place a learning strategy to assess how effectively the regime is operating (discussed in the next section). Common tools include:

- (1) supplying information in clear accessible formats through multiple channels;
- (2) providing education material so that regulatees understand what their obligations are and how to comply; and
- (3) streamlining processes such as online registrations so that they are user-friendly, simple, and convenient.

Effective compliance often also involves using the media as a useful channel to communicate the regime's objectives and requirements.

The DREAM framework shown in Table 3 highlights five core tasks [1].

**TABLE 3**

### THE DREAM FRAMEWORK FOR REGULATORY TASKS.

1. Detecting	Gaining information on undesirable and non-compliant behavior.
2. Responding	Development of operating policies, rules, and tools to deal with the problems discovered.

(Continued on next page)

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3.	Enforcing	Application of policies, rules, and tools on the ground.
4.	Assessing	Measurement of success or failure in enforcement activities.
5.	Modifying	Adjusting tools and strategies in order to improve compliance and address problematic behavior.

Source: Baldwin, *et al*, pp. 211 [43].

**Ask yourself:**

- Who is required to take steps to comply with the regulation?
- What can be done to encourage compliance?
- Can some compliance obligations be reduced or eliminated?
- What can be done to make compliance as simple and easy as possible?

**Find out more:**

-  Cambridge Handbook of Compliance. Rooij B. v., Sokol D., eds. Cambridge University Press; 2021.
-  Baldwin R., Cave M., Lodge M. Understanding Regulation Theory, Strategy, and Practice [33].
-  Jeroen van der Heijden. Responsive regulation in practice: a review of the international academic literature; 2020. <https://apo.org.au/node/307316>
-  Gunningham N. Compliance, Enforcement, and Regulatory Excellence. RegNet Research Paper No. 124; 2017. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929568](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929568), or <http://dx.doi.org/10.2139/ssrn.2929568>
-  Goddard D. Making Laws That Work: How Laws Fail, and How We Can Do Better [10].
-  European Commission. Better regulation – simply explained; 2006. <https://op.europa.eu/en/publication-detail/-/publication/cccc188f-0d33-4c44-8407-eddd6242d967>
-  Productivity Commission, New Zealand. Regulatory institutions and practices New Zealand [9].
-  ANAO. Better Practice Guide to Administering Regulation; 2014 [4].
-  New Zealand Government. Achieving Compliance: A Guide for Compliance Agencies in New Zealand; 2011 [5].

### 5.3 Resources and Capabilities Required by the Regulator

Regulatory agencies typically need to undertake a wide range of tasks to support their compliance role, including gathering intelligence, analysis of regulatees’ behavior, providing information and education programs, auditing, monitoring and surveillance, investigations, and compliance actions. In addition, regulatory regimes based on authorization require support for registration and licensing functions. And, unless part of a wider public agency, operations will require a range of corporate and support services (finance, human resources, knowledge management communications, etc.).

Agencies will need a workforce with a mix of skills and experience to undertake this wide range of activities. Staff will need a range of technical tools and corporate support functions so that the tasks can be completed.

### 5.3.A Organizational Cultures are Pivotal

High-performing organizations are more than the sum of their staff and their work tools. Organizations develop cultures that provide staff with formal standard operating procedures, more informal playbooks, and also, underlying values. These underlying values shape priorities (‘what is valued around here’) and behaviors (‘how we do things around here’).

### 5.3.B Decision Maps of Key Players’ Roles

When developing or revising a regulatory regime, it is important to assess what roles different organizations will need to play in operating the regime. David Goddard [10] suggests developing “a decision map showing what decisions are made by each relevant actor (citizens, businesses, government agencies, courts, etc.), with as much detail as possible about each stage in the process (numbers, time frames, costs, etc.).” The decision map will help address questions about whether each organization has the capacity, the capability, and the will to perform its respective roles. The New Zealand experience with leaky buildings (see Box 2) highlights the importance of the administrative capability to implement more sophisticated performance regimes.

If the analysis of the decision map has identified concerns, those will need to be addressed. So long as the funding is available, concerns about capacity generally can normally be addressed by increased resourcing. (Cost recovery is discussed in section 4.7). Issues of capability need to be addressed either through increased resourcing or through modification of the regime. One example would be to modify the default rules to reduce the complexity of the regime or the role of the organization in the regime. If none of these options is workable or achievable then there is high risk of failure. The overall design of the regime will then need to be reconsidered.

#### Ask yourself:

- What organizations will be making decisions about how the regime will operate?
- Will each of those institutions have the capacity, capabilities, and the will to perform their roles?
- How can any concerns about institutional will, capacity, and capabilities be addressed?

**Source:** Goddard D. Appendix 1 [10].

#### Find out more:



Goddard D. Making Laws That Work: How Laws Fail, and How We Can Do Better [10].



New Zealand Productivity Commission. Regulatory institutions and practices [9].

## **5.4 Conclusion:**

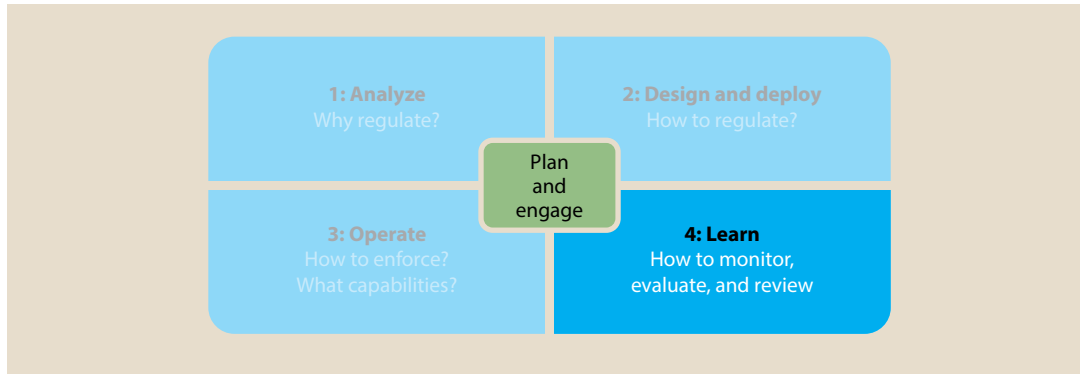
This section discussed:

- the desirability of taking a mix-and-match approach to achieving compliance;
- the importance of facilitating and encouraging voluntary compliance and dealing with non-compliance; and
- the critical role of institutional will, capacity, and capabilities if the regime is to be effective.

The next section will turn to the role of learning facilitated by monitoring, evaluation, and review.

## SECTION 6

# STAGE 4: LEARNING



This section discusses:

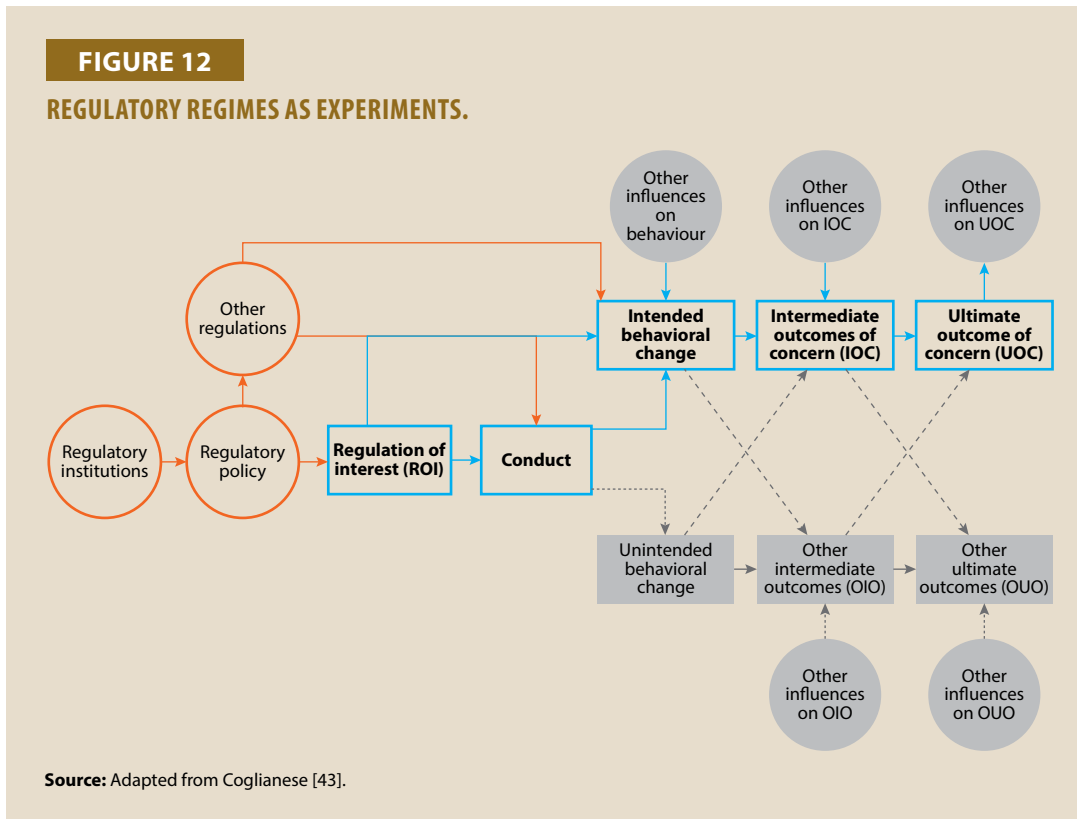
- the importance of continuous learning because of fundamental uncertainty about how well a regulatory regime will work;
- step 16 (how to monitor the regime including the sources of information);
- step 17 (how to evaluate the regime’s effectiveness); and
- step 18 (the different types of reviews that can be used to assess a regulatory regime’s performance).

### 6.1 The Importance of Continuous Learning

Regulatory regimes commonly face the problem of a set-and-forget approach. As the name suggests, once the design of the regulatory regime is completed and approved, it is left to the regulator to operate with minimal oversight or review. Over time, a set-and-forget approach leads to unexpected and often perverse outcomes as the regime becomes out of date.

Figure 12 illustrates that regulatory changes are, by nature, an experiment, because it is usually uncertain how the patterns of actual behavior will evolve over time. Good monitoring will enable finetuning of the implementation and should also provide early warning of any substantial policy issues that might require the regime design to be amended.

The adoption of a learn-then-act approach requires ongoing commitment, but is more likely to ensure that the regime is performing. Learning, in the everyday sense of the act or the process of gaining knowledge, can be used in the policy process (discussed in sections 1 and 2 earlier) in two ways. It can help assess the effectiveness and efficiency of the design. It can also help assess how to implement and enforce the regime more effectively.



### 6.1.A Learning Requires Information

Learning about regulation arises from a range of sources, including formal processes such as monitoring, reviews, audit, intelligence, feedback, and evaluation, as well as more informal feedback and learning by doing.

Much of the information required can be generated as part of the standard operating procedures of regulators and regulatees. However, the design and collection of this information needs forethought. A good design process will include consideration of how structured information will be collected and curated so that it can be included in the regulatory process at a low cost. By contrast, attempts to assemble information after the event can be time-consuming and costly.

#### Ask yourself:

- What data collection and analyses processes are possible that will yield real-time information on how the regime is operating?
- How will it be possible to set a baseline or benchmark to assess the regime's impact?

## 6.2 Monitoring

Monitoring is focused on the operation of the regime. It is used to assess whether regulation is operating as intended. Monitoring information is primarily useful to finetune the operation of a regulatory regime. However, a well-designed monitoring process will also gather information that can provide an early warning of any unforeseen impacts or policy issues that need to be addressed.

Monitoring information comprises:

- (1) structured information (often supplied by regulatees) that is used to assess the effectiveness of compliance activities;
- (2) industry intelligence, which provides on-the-ground perspective on issues such as whether there are loopholes in the regime being utilized; and
- (3) performance information, which tracks whether the outcomes of concern are improving or deteriorating.

#### Ask yourself:

- Does the data show whether the regime is operating consistently with the overall regulatory design?
- Does the regime have the capacity required and the capabilities needed to deliver?
- Is there a structured process to assess whether the regime is dealing with emerging issues and risks?
- Are the required financial and technical resources available to support the regime's operation?

#### Find out more:



NZ Treasury. Guidance Note Best Practice Monitoring, Evaluation and Review; 2019.  
<https://www.treasury.govt.nz/sites/default/files/2019-12/guidance-note-monitoring-evaluation-review.pdf>

## 6.3 Evaluation

Changes in business practices, government priorities; or the wider environment can all have an impact on the effectiveness of the regime. Information that arises from monitoring and review should be able to reveal whether a regulation or an overall regime is working as intended or not. The role of overseeing the operation of a regulatory regime also implies a responsibility for planning how that regime will be maintained and updated. The exercise of regulatory stewardship means taking a proactive and collaborative approach to the care of a regulatory regime throughout its life cycle. Clarity concerning what 'stewardship' responsibility involves is still emerging,

Evaluations can focus on one of two questions: 'are we doing things right?' or 'are we doing the right things?' Different types of evaluations are required depending on the question to be addressed and the stage of the process.

Evaluation can either be ex-ante or ex-post. The latter takes two main forms: a formative evaluation that provides information on improving a process; and a summative evaluation that provides information on short-term impact or long-term effectiveness. Evaluations can be either formative (reviewing the process) or summative (reviewing the outcomes).

Ex-post evaluation of regulation is a near-universal weakness across OECD countries. According to the OECD [44], “Few countries assess whether underlying policy goals have been achieved, whether any unintended consequences have occurred, and whether there is a more efficient solution.”

### Ask yourself:

- Is the regulation still justified, i.e., is there a recognized problem that the regulation seeks to address?
- Is the regulation effective in achieving the objectives for which it was introduced?
- Is the regulation efficient by achieving the objective at a cost lower than other feasible options?

### Find out more:



The UK Treasury Magenta book provides an authoritative primer on evaluation [45].



NZ Treasury. Guidance Note Best Practice Monitoring, Evaluation and Review; 2019.  
<https://www.treasury.govt.nz/sites/default/files/2019-12/guidance-note-monitoring-evaluation-review.pdf>

## 6.4 Reviews

A review here refers to a deliberative examination with a view to taking action. Unlike evaluation (a more formal term with a more precise meaning and a well-defined body of practitioners), reviews can take an extremely wide variety of forms. Reviews can focus on one of three levels: (1) macro or overall, country-wide system level; (2) meso level of the operation of the overall regime or legislation; and (3) micro level review of individual cases.

For more information on system-level reviews, see the previous APO toolkit on the Regulatory Management System [2]. In brief, the regulatory stock management tools that different countries have adopted include the standard cost model; regulatory guillotine; red-tape reduction targets; “one in, two-out” or “one-in, one-out” (“one in, X out” or OIXO); regulatory budgeting; and the use of sunset provisions. These review tools vary in their breadth (i.e., how wide the coverage is); depth (i.e., the focus on administrative costs or wider distortions); and frequency (regularly programmed or ad hoc).

Reviews that occur at the level of an individual case or transaction provide a means of assessing a procedure and fairness of process. In section 3 (Detailed Design), we discussed the design of review and appeal processes at the case- or individual-transaction level. This latter type is not the concern of this section of the toolkit of resources. Instead, we focus the rest of the discussion on reviews aimed at the regime level. There are two main options:

- (1) statutory reviews; and
- (2) ad hoc reviews.



With a statutory review, the law that establishes the regime also includes a provision in the statute for a review of the regime at a defined time. Reviews embedded in statutes can cover the regime as a whole or focus on a particular aspect. Sunset clauses, a particular type of statutory review, are discussed in Box 7.

### BOX 7

#### Sunset clauses

Sunset clauses are a particular type of ex-post review. A sunset clause provides that the regime will cease to operate at a defined time in future, unless the legislature explicitly approves its continuation through a new mandate. Sunset provisions in legislation are not that common, unless there is a clear end point such as Covid 19 Public Health Response Act 2020.

The experience with sunset reviews has been disappointing. They tend to create a block obsolescence problem with a lot of legislation expiring at the same time. As a result, the legislature mechanically rolls the law over, rather than undertaking a substantive post-implementation review of the operation of the regime. Review clauses are more commonly used.

With an ad hoc review, adverse events, regulatory failures, or occasionally a change in government administration can act to trigger a review of the regulatory regime's operation. Across the OECD, the formal system of 'policing' regulatory regimes is built around 'warning alarms going off' rather than 'regular routine patrols.' There is a plethora of ad hoc review mechanisms at varying levels but fewer formal requirements for review of the operations of regulatory regimes.

There is not an a priori reason to assume that the 'alarms' going off will signal the most costly and least effective regulation. Gill and Frankel [38] observe that "the likelihood of an ad hoc review is:

- highest where both the costs and benefits of regulations are concentrated (workplace safety);
- high where the costs are concentrated, and the benefits are dispersed (leaky buildings);
- lower where both the costs and benefits of regulations are dispersed (general standards like weights and measures); and
- lowest when benefits are concentrated, and costs are dispersed (occupational regulation)."

#### Ask yourself:

- Should a full or partial formal review of the operation of the regime be programmed?
- Are the costs and benefits of the regime concentrated or dispersed?
- Particularly if the costs are likely to be dispersed, what programmed review mechanism is required?

**Find out more:**



Gill D., Frankel S. Learning the Way Forward? The Role of Monitoring, Evaluation and Review [38].

## 6.5 Conclusion

This section discussed:

- How there is fundamental uncertainty about how a regulatory regime will work out in practice, which makes learning through monitoring, evaluation, and review very important.
- Monitoring draws upon both formal and informal information on how well a regime is working.
- Evaluation (whether formative or summative) is a formal, structured process used to assess one of the two questions: ‘are we doing things right?’ and ‘are we doing the right things?’
- There are a number of different types of reviews that can be used to assess a regulatory regime’s performance.
- Programmed reviews are particularly important if the costs of the regime are likely to be dispersed.

The next and final section explores the causes of regulatory failures and draws out some conclusions.

# SECTION 7

## CONCLUDING COMMENTS

This concluding section discusses:

- the importance of the country context;
- how regulation is a craft rather than a science, and is still evolving;
- the causes of regulatory failures; and
- future trends.

### 7.1 Country Context

This guide has set out the elements of the regulatory toolkit of resources and the stages that the regulatory regime can go through. It is important to emphasize that this 'stages' model is not intended to describe what happens. Rather, it is an attempt to prescribe a planning tool that sets out the available design options.

To be clear, the tools discussed in this guide do not purport to be best practices. When designing a regulatory regime, there is rarely a 'best practice' in the strict sense of one best way.

Different countries have different starting points from which they set out to review a regulatory regime. Regulatory regimes are developed and reviewed in a variety of national contexts that include:

- (1) a set of constitutional provisions, legislative rules, social understandings, norms, and styles of political leadership;
- (2) the overall set of institutions and public law framework, such as a freedom of information law and open government policies and practices; and
- (3) complementary interfaces with competition policy, sectoral regulation strategies, and international trade and investment rules.

Regardless of the differences in their starting points, regulatory spaces, and the underlying constitutional arrangements, all countries face a similar range of options for the regulatory choices they make. This toolbox is intended to help regulatory regime designers be aware of the wide range of tools and practices they can select from in order to improve the regulatory performance.

### 7.2 Regulatory Failures

Regulatory failures are widely discussed but often misunderstood. David Goddard [10] identifies four distinct types of regulatory failure:

- **Damp squibs:** These are regulatory regimes that promise much and deliver little.
- **Overshoots:** These are cases where the impact of a regime was much broader than intended.
- **Nasty surprises:** These refer to regimes with unforeseen and unintended indirect effects.
- **Backfires:** These are results of failure to think through entirely foreseeable incentive effects.

**BOX 6**

**Case study of regulatory failure**

*Excessive aviation safety regulation*

The US Aviation Safety Regulations introduced after 9/11 are a classic example of a regulatory backfire. More people have died in the USA as an indirect result of the aviation regulations than those who perished in the disaster of 9/11. This is because the regulations have made people substitute from planes to automobiles. Air travel is the safest forms of travel known to people in contrast to travel by car which is 100 times more dangerous. Figure 13 uses the intervention logic to show what the designer intends and how people actually respond, which can culminate in undesirable results.

More generally, this highlights “the risk of too much air safety regulation” that has the perverse effect of causing more casualties. While the regulations were designed to increase safety, by not taking into account cross price elasticities, the net impact may be negative. However, the impacts are not obvious as the counterfactual is not observed, and the harm is spread over a series of isolated auto accidents. As a result, there is no political pressure to reverse this regime.

**Source:** Weisman D., Van Doren P. [46].

What the case study in Box 8 highlights is that what is regarded as a ‘failure’ depends on where the reader sits and what the regime was expected to deliver. As discussions around Figures 12 and 13 have brought out, all regulatory regimes are something of an experiment as they unleash a range of expected and unexpected behavioral changes that play out over time.

This prompted an academic, Jeroen van der Heijden, to suggest, “Rather than asking ‘will regulatory failure happen or not?’, the question should be ‘when will regulatory failure happen, and how do we respond?’. Let’s try not to fear regulatory failures but to accept them as a fact of life, learn from them when they occur, and do better next time.” [47]

**Find out more:**



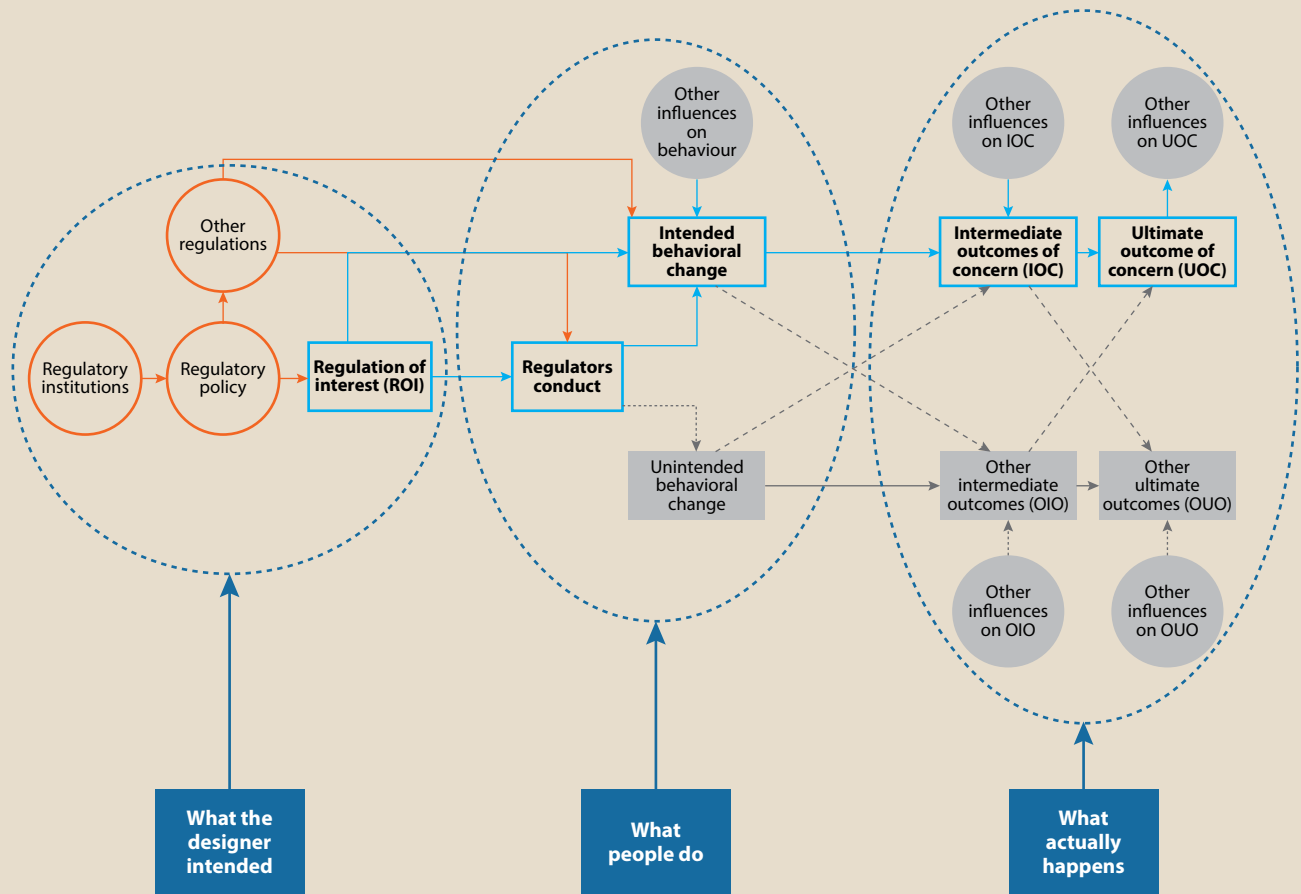
Black J. Learning from Regulatory Disasters. LSE Legal Studies Working Paper No. 24/2014; 2014. Available at SSRN: <https://ssrn.com/abstract=2519934> or <http://dx.doi.org/10.2139/ssrn.2519934>



New Zealand Productivity Commission, Regulatory institutions and practices, Chapter 4 [9].

FIGURE 13

## INTERVENTION LOGIC (INTENTIONS, ACTIONS, AND OUTCOMES).



Source: Author.

### 7.3 Regulatory Choices

The craft of good regulatory design lies in knowing how to select the right tools and apply them in the right way at the right time. Looking back, over the last few decades, there have been a wide range of new approaches, including performance-based regulation, risk regulation, responsive regulation, smart regulation, and better regulation. No doubt, in future, the academic literature will continue to develop, but mostly likely without the emergence of a general theory of regulation.

Looking ahead, over the next few decades, we can anticipate a number of emerging trends: the growth of international regulatory cooperation; behavioral insights-informed regulation (“nudging”); and regulatory stewardship.

# APPENDIX: KEY QUESTIONS BY STAGE

Before you start, ask yourself:

- Who makes up the regulatory space?
- How is the regulatory space occupied?
- What is the nature of the market?
- What are the drivers of the need for the review?
- How did others, domestically or overseas, deal with a similar issue?
- What are the good-practice regulatory principles that are relevant?
- What methods, skills, and resources are going to be required?
- How will the experiences of frontline regulators and regulatees contribute to the regulatory review process?

## Stage 1: Intervention Analysis or Why You Should Regulate

### Step 1: Identify whether intervention is justified

- What is the size and nature of the underlying problem?
- What is the consequence of the problem?
- Is it a harm that is a generic risk, such as health and safety risks faced by a broad range of businesses, or is it specific to the activity?
- What is the probability of a significant irreversible harm occurring?
- Will resolving disputes require ongoing high degrees of specialist knowledge?
- What are the desired outcomes? What behaviors will need to change in order to achieve the outcomes?

### Step 2: Identify whether intervention by the government is justified

- Are the existing means of protection from harm under general law sufficient?
- Does the industry have the structure, capability, and incentives to regulate itself?

### Step 3: Identify what is the most effective government intervention

- What are the objectives of the regulation?

- What is the nature of the main hazards that people need protecting from?
- How can you avoid detrimental effects on competition?
- Who are the target regulatees, e.g., consumers, and how can you protect them?
- Is redressal or prevention more important?
- To what extent might other developments (e.g., emerging technology) reduce the need for regulation?
- Who should be regulated: organizations or individuals?

#### **Step 4: Identify what form of regulation is needed**

- What is known about the magnitude of these problems?
- What type of regulation, whether economic, structural, information disclosure, or authorization, best addresses the underlying problem(s)?
- What kind of response would be proportionate?
- What would minimize the chances of unintended consequences?
- Has this regulation been tried elsewhere?
- Is there a well-established and successful domestic or international model that could be used as a starting point for the proposed legislation?
- What precedents are there in comparable societies for the proposed approach adopted in the legislation?
- Was the approach a success in those other societies? How do we know?

## **Stage 2: Detailed Design or How You Should Regulate**

#### **Step 5: How are cross-border issues addressed?**

- What international agreements (such as FTAs and GATS) apply to this regime?
- Are there any gaps or overlaps between the domestic regime and those applied overseas?
- How would the regime affect nationals regulated by the regime who provide their goods and services offshore?
- Is there a need for cross-border regulatory policy, enforcement, or administration?

#### **Step 6: Which compliance regime is most effective?**

- What is the balance between coercion of and cooperation with the targets of regulation?

- What mix of criminal, civil, and administrative sanctions will be required as part of the compliance strategy?
- What powers are needed to support an escalating compliance strategy?
- Are the powers and sanctions proposed for the regulatory agency adequate and proportionate?
- Who will be covered by the regime?
- What intermediaries does your agency involve and why?
- What are the challenges of involving those intermediaries?
- Can compliance obligations be reduced for some groups?

**Step 7: What dispute and appeal mechanisms are required?**

- To resolve disputes, what is the role of more consensual processes (mediation, conciliation, ADR) relative to litigation?
- How to balance the need for the regulator to have the required legal authority with regulatees' need for the right to appeal and review?

**Step 8: What other legal powers are needed to deliver the functions?**

- What functions are required to carry out the role?
- What powers would be required to carry out the functions?
- How can the regime be structured so that it can adapt to new technologies or new circumstances?

**Step 9: How best to organize those functions?**

- Which organizational form is best suited for those regulatory functions?
- Are the proposed arrangements for the operation of the regulatory regime cost-effective and likely to achieve high levels of compliance?
- Does the regime rely on one agency to provide services (such as inspection function) to another? If so, are the two agencies' priorities sufficiently aligned for the setup to be reliable?

**Step 10: How will the regime be funded?**

- Should the regulatory functions be subject to a fee?
- What level should the fees be capped at?
- How should the level of the fees be adjusted over time?
- What other funding and funding sources would be required?



- How sustainable is that function and funding?
- How can public accountability for how the funding is used be achieved?

**Step 11: Standing back, will the regime actually work as designed?**

- Why do you think this will work?
- Where are the weak points?
- What behavioral assumptions are made and how robust are they?
- What unintended consequences or behaviors need to be guarded against?
- What incentives are created or changed and how will these play out over time?
- Is it possible to use a regulatory sandpit to test the regime before it is rolled out?
- Can the regime be designed so that adaptation practices and changes in technologies can be accommodated?
- Is there anything else that could be regulated (e.g., standards for products or services)?
- Are the likely costs (administrative compliance and distortionary combined) proportionate to the harms that might be avoided?
- What would be the potential effect of not regulating?
- Are there opportunities for simplification? Are there any loopholes that need closing?
- Is the burden imposed on the regulated sector reasonable by process requirements?

**Step 12: How best to engage with stakeholders?**

- What is the main objective driving the public engagement process?
- What is the lowest intensity of involvement required to address the public engagement objective?
- Who has final decision rights?

**Step 13: How best to implement the change?**

- What resources are required to implement changes to existing rules, systems, and staff?
- Should a trial be conducted to pilot the systems required by the new regime before it is rolled out?
- Should there be a pilot?
- How possible resistance to change might be overcome?

### Stage 3: How You Operate the Regime

#### Step 14: How is it best to operate the compliance strategy?

- Who is required to take steps to comply with the regulation?
- What can be done to encourage compliance?
- Can some compliance obligations be reduced or eliminated?
- What can be done to make compliance as simple and easy as possible?

#### Step 15: What resources and capabilities are required for the regulator?

- What organizations will be making decisions about how the regime will operate?
- Will each of the institutions have the capacity, capabilities, and the will to perform its role?
- How can any concerns about institutional will, capacity, and capabilities be addressed?

### Stage 4: How You Learn about a Regime's Effectiveness

#### Step 16: How best to monitor the regime?

- What data collection and analyses processes are possible that will yield real-time information on how the regime is operating?
- How would it be possible to set a baseline or benchmark to assess the regime's impact?
- Does the data show whether the regime is operating consistently with the overall regulatory design?
- Does the regime have the capacity required and the capabilities needed to deliver?
- Is there a structured process to assess whether the regime is dealing with emerging issues and risks?
- Are the required financial and technical resources available to support the regime's operation?

#### Step 17: How best to evaluate the regime's effectiveness?

- Is the regulation still justified, i.e., is there a recognized problem that the regulation seeks to address?
- Is the regulation effective in achieving the objectives for which it was introduced?
- Is the regulation efficient in achieving the objective at a cost lower than other feasible alternatives?

#### Step 18: What types of reviews can be used to assess a regulatory regime's performance?

- Should a full or partial formal review of the operation of the regime be scheduled?
- Are the costs and benefits of the regime concentrated or dispersed?
- Particularly, if the costs are likely to be dispersed, what review mechanism is required?

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**Endnote:**

The author is grateful to Dr. John Yeabsley, Chris Silvester, and Sophie Silvester for their support and review.





