NEW ZEALAND
PRODUCTIVITY COMMISSION
Te Kōmihana Whai Hua o Aotearoa

Towards better local regulation

Draft report

December 2012

The Productivity Commission aims to provide insightful, well-informed and accessible advice that leads to the best possible improvement in the wellbeing of New Zealanders. We wish to gather ideas, opinions, evidence and information to ensure that our inquiries are well-informed and relevant. We are grateful for the submissions received to date on this inquiry, and welcome further submissions on this draft report to help further enhance our analysis, findings and recommendations of our final report in May 2013.

Towards better local regulation

Draft report – December 2012

The New Zealand Productivity Commission

Date: December 2012

Information on the Productivity Commission can be found on www.productivity.govt.nz or by contacting +64 4 903 5150

Disclaimer

Where the source of these statistics is the Longitudinal Business Database (LBD), the results are not official statistics, they have been created for research purposes from the prototype LBD component of the Integrated Data Infrastructure prototype (IDI) managed by Statistics NZ.

The opinions, findings, recommendations and conclusions expressed in this presentation are those of the New Zealand Productivity Commission. Statistics NZ takes no responsibility for any omissions or errors in the information contained here.

Access to the data used in this study was provided by Statistics NZ in accordance with security and confidentiality provisions of the Statistics Act 1975. Only people authorised by the Statistics Act 1975 are allowed to see data about a particular person, business or organisation. The results in this paper have been confidentialised to protect individual people and businesses from identification.

Careful consideration has been given to the privacy, security and confidentiality issues associated with using administrative data in the IDI. Further detail can be found in the Privacy Impact Assessment for the Integrated Data Infrastructure prototype (IDI) available from www.stats.govt.nz.

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Terms of reference

Local Government Regulatory Performance

Context

1. The Government has launched '*Better Local Government*', an eight point reform programme to improve the legislative framework for New Zealand's councils. It will provide better clarity about councils' roles, stronger governance, improved efficiency and more responsible fiscal management. These local government reforms are part of the Government's broader agenda. We are rebalancing the New Zealand economy away from the increased public spending and debt of the previous decade. We are building a more competitive and productive economy. This requires that both central and local government improve the efficiency of delivering public services.

2. Local government, at both regional and territorial level, is involved in many regulatory roles covering, for example, building, resource management, food safety, and alcohol. There is no consistent approach regarding what regulatory functions are most effectively achieved nationally or locally. There is also a concern in local government that functions are allocated to councils without adequate mechanisms for funding. The issue of what is best regulated at the national and local level is also important to the private sector which, through rates, taxes and fees, funds both. There are opportunities to improve New Zealand's productivity through a more efficient regulatory framework.

Scope

3. Having regard to the context outlined above, the Commission is requested to undertake an inquiry into opportunities to improve regulatory performance in local government. For the purposes of this inquiry, the Commission should:

Regulatory Functions of Local Government

a. identify the nature and extent of key regulatory functions exercised by local government;

b. perform a stocktake to identify which local government regulatory functions are undertaken on the direction of central government and which are undertaken independently by local government;

c. develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;

d. identify functions that are likely to benefit from a reconsideration of the balance of delivery between central and local government, or where central government could improve the way in which it allocates these functions to local government;

Improving Regulatory Performance in Local Government

4. Taking into account the principles developed in point (c) above:

e. assess whether there is significant variation in the way local government implements its regulatory responsibilities and functions, and the extent to which such variation is desirable. For example whether variation reflects differences in local resources or preferences or insufficient direction from central government;

f. identify opportunities for both central and local government to improve the regulatory performance in the local government sector. For example how to overcome any key capability, resourcing, or regulatory design constraints;

g. examine the adequacy of processes used to develop regulations implemented by local government and processes available to review regulations and regulatory decisions made by local government; and

h. recommend options to allow for the regular assessment of the regulatory performance of the local government sector, for example whether common performance indicators can be developed to assess performance.

Other matters

5. Where possible, the Commission should seek to quantify relevant costs and benefits of recommendations it makes in the inquiry. The Commission should prioritise its effort by using judgement as to the degree of depth and sophistication of analysis it applies to satisfy each part of the Terms of Reference.

6. The inquiry should not make recommendations that would directly affect representation or boundary arrangements for local government.

Consultation Requirements

7. The Commission should take into account existing and ongoing work in this area to avoid duplication, including the Government's eight point reform programme, resource management reviews, the Local Government Rates Inquiry, and the Auditor General's work on performance management.

8. In undertaking this inquiry the Commission should consult with key interest groups and affected parties. To ensure that the inquiry's findings provide practical and tangible ways to improve regulatory performance, the Commission should work closely with Local Government New Zealand, the wider local government sector and government agencies with regulatory regimes that affect local government.

Timeframe

9. The Commission must publish a draft report and/or discussion paper(s) on the inquiry for public comment, followed by a final report, which must be submitted to each of the referring Ministers by 1 April 2013.

HON BILL ENGLISH, MINISTER OF FINANCE
HON DAVID CARTER, MINISTER OF LOCAL GOVERNMENT
HON JOHN BANKS, MINISTER FOR REGULATORY REFORM

The draft report

The inquiry into local government regulatory performance has proven to be a wide and challenging piece of work. The content of this draft report has benefited greatly from constructive and robust feedback on all aspects of the inquiry. The inquiry process so far has involved extensive engagement with interested parties, including around 80 engagement meetings and receipt of nearly 60 submissions on the issues paper. The Commission surveyed councils, and 1500 businesses also responded to a survey about their interaction with councils.

The draft report contains some initial findings and questions for further investigation. The Commission is keen to receive further input from interested parties over the remainder of the inquiry period to help ensure a high-quality final report by 1 May 2013. Find out how you can provide submissions or feedback over the page.

Key inquiry dates

Draft report submissions due:	6 March 2013
Final report to Government:	1 May 2013

Inquiry contacts

For further information about the inquiry please contact:

Administrative matters:	T: (04) 903 5150 E: inquiries@productivity.govt.nz
Other matters:	Steven Bailey Inquiry Director T: (04) 903 5156 E: steven.bailey@productivity.govt.nz
Website	www.productivity.govt.nz
Media inquiries:	Catherine Jeffcoat: T: (04) 903 5160 catherine.jeffcoat@productivity.govt.nz
Postal address for submissions:	Inquiry into Local Government Regulatory Performance New Zealand Productivity Commission PO Box 8036 The Terrace Wellington 6143

Making a submission

The Commission wishes to benefit from the knowledge of the people interested in better local regulation. Effective engagement will also help that inquiries are well-informed and relevant.

How to make a submission

Anyone can make a submission. It may be in written, electronic or audio format. A submission can range from a short letter on a single issue to a more substantial document covering a range of issues. Where possible, you should provide relevant facts, figures, data, examples and documentation to support your views. While every submission is welcome, multiple, identical submissions do not carry any more weight than the merits of an argument in a single submission. Submissions may incorporate material made available to other reviews or inquiries that are relevant to this inquiry.

The Commission seeks to have as much information as possible on the public record. Submissions will become publicly available documents once placed on the Commission's website. This will occur shortly after receipt of the submission, unless it is marked 'in confidence' or accompanied by a request to delay release for a short period of time. The Commission can accept material 'in confidence' only under special circumstances. You should contact the Commission before submitting such material, to discuss its nature and how the material should be handled or presented.

Submissions may be sent through the website www.productivity.govt.nz, or by email or mail. Where possible, an electronic copy of submissions should be sent to info@productivity.govt.nz in Word or PDF. Submissions should include your name and contact details and the details of any organisation you represent. If the content of a submission is deemed inappropriate or defamatory, the Commission may choose not to accept it.

What the Commission will do with submissions

Submissions will play an important role in shaping the recommendations made to the Government in the final report. Where relevant, information from submissions may be cited or used directly in inquiry reports. As noted above, the Commission will publish submissions (unless arrangements have been made with the Commission regarding any confidential content).

Other ways to engage with the Commission

The Commission's engagement on the draft report will be a mix of the following activities:

- *receiving submissions from interested parties* – the Commission encourages you to make a submission either supporting the draft findings or outlining how and why they could be improved;
- *meetings the Commission requests* – from early January, the Commission will be seeking some further meetings with interested parties;
- *meetings requested by interested parties* – the Commission is open to meeting on request to hear and discuss the views of any interested party (and to present the findings of the draft report). If a number of parties from a city or region express interest in meeting, the Commission may run a discussion forum in those locations; and
- *'roundtables'* – the Commission may run its own 'roundtable' meetings for in-depth debate of the evidence and analysis of key issues in the report. It is not practical to invite all interested parties to those meetings. The Commission will, however, ensure an even-handed coverage of different viewpoints.

While it may not be possible due to time constraints to meet with every interested party, the Commission will do its best – across the activities above – to meet the needs of each party in some way. Please also note that meetings do not constitute a submission, so all parties are encouraged to make their views known by way of a submission that can be made public.

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Overview

This overview provides a summary of the Commission's draft inquiry report on opportunities to improve the regulatory performance of local government. The draft is designed to elicit further submissions to guide the Commission's thinking as it prepares final recommendations. Findings are still tentative at this stage, and the draft raises questions and is testing ideas.

About this inquiry

The Commission has been asked to:

- develop principles to guide decisions on which regulatory functions are best undertaken by local or central government, and identify functions that would benefit from a reconsideration of the balance of delivery between central and local government;
- identify opportunities for both central and local government to improve the regulatory performance of local government; and
- recommend options for regularly assessing the regulatory performance of the local government sector.

The Commission's work to date

The Commission's tentative findings have been informed by a comprehensive engagement process. This began in July with the release of the inquiry Issues Paper on which 59 submissions were received.

Information from the inquiry submissions has been supplemented by approximately 80 engagement meetings with representatives from local authorities, community groups, businesses and central government agencies. The Commission has also conducted two surveys – one aimed at eliciting the views of all local authorities in New Zealand and the other targeted at 1500 New Zealand businesses from a cross-section of industries. A number of case studies on specific regulatory areas have also been developed.

The Commission has also carried out extensive analysis of Statistics New Zealand data in order to better understand the nature and diversity across local authorities, including research into the composition of regional economies and labour markets.

Together, these have provided the Commission with a rich picture of the regulatory issues facing local government.

What is 'local government regulation'?

Local authorities are responsible for a wide range of regulatory functions, from land and resource use under the Resource Management Act 1991, to building construction standards, food and hygiene regulations, the control of liquor and gambling activity, and waste management. In fact, the Commission has identified some 30 pieces of primary legislation that assign regulatory responsibilities to local authorities, and many other secondary instruments.

Importantly, statutes that confer regulatory responsibilities on local government, including the responsibility to prepare district and regional plans, far outweigh the regulations made by local authorities under the powers of the Local Government Act 2002. Indeed, the Commission has found that most bylaws are made under enabling statutes rather than under the more general provisions of the Local Government Act. Overall, local authorities appear not to be using their powers of general competence to enter new areas of regulation; however, they will rigorously use existing regulatory tools to address community issues and concerns.

A 'whole of system' approach

Because almost all of local government's regulatory functions are devolved or delegated from central government, it is important to take a step back and look at the regulatory system in its entirety.

To this end, the Commission has adopted a 'whole of system' approach which recognises that local authorities are part of a broader regulatory system. It is the performance of the entire system that determines how well regulations achieve their objectives.

Adopting a 'whole of system' approach means examining the entire regulatory cycle – from policy analysis and the decision to regulate, to the design of regulation, allocation of regulatory roles, implementation, monitoring and enforcement and performance assessment.

Divergent views are creating tension between central and local government

An obvious and growing tension exists between central and local government. The Commission believes a key source of this friction is different understandings of the role of local government in New Zealand's regulatory system, and indeed in the broader constitutional context.

There is a tendency in central government to (incorrectly) view councils as simply operational arms of central agencies – subservient organisations that must be responsive to the instructions of the Minister. Local authorities on the other hand view themselves as largely autonomous organisations that have their own funding base and whose leaders are elected by, and accountable to, their local constituents.

In addition to creating confusion and frustration, the absence of a well-defined constitutional or fiscal relationship between central and local government can have implications for the design and implementation of regulations – particularly where the interests of local authorities do not align with the broader objectives of central government regulation.

The quality of regulations reflects central government processes

The Commission has found a number of shortcomings in the way that regulations are made at the central level – these including a lack of implementation analysis, poor consultation and weak lines of accountability. While these shortcomings are not universal across all agencies, they are common enough to be of concern.

These shortcomings were reflected in the Commission survey of local government (results available online) which illustrated a strong belief within the sector that central government neither understands, nor adequately considers, the impacts of new regulatory functions it assigns to councils.

This can reduce the flexibility of councils to allocate their internal resources and in doing so can draw resources away from areas with higher value to local communities.

How should roles be allocated between the tiers of government?

In principle, the Commission believes that regulatory functions should be performed closest to the community that is affected, unless there is good reason to centralise. By adopting this approach, regulatory decisions are most likely to reflect local preferences and lead to efficient outcomes.

However, there are circumstances in which the efficiency of local decision making needs to be balanced against the gains from coordinating or centralising. These circumstances include:

- where the costs or benefits of regulation spill over to other jurisdictions (eg when discharges into a river in one jurisdiction create clean-up costs for downstream jurisdictions);
- where cost-savings can be leveraged;

- where jurisdictions have populations with similar preferences and demands for regulatory services (in this case duplication can be reduced without reducing the efficiency gains from reflecting local preferences); and
- where the necessary competencies, information and resources are only available centrally.

The Commission has developed a framework to guide the allocation of regulatory functions.

National standards do not necessarily improve consistency

The Commission has found that national regulatory standards are often inconsistently applied. The inconsistency usually stems from different understandings by local officials working on the ground. Greater consistency can be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.

Monitoring and enforcement appears to be under-resourced

There is evidence to suggest that monitoring of local regulations is under-resourced and that this is undermining the achievement of regulatory objectives. Inquiry participants suggested that statutory timeframes are resulting in councils spending more resources on processing consents than they would otherwise consider efficient. The result is that other regulatory tasks (such as monitoring and enforcement) may receive fewer resources than necessary.

There may be gaps in the enforcement tools available to councils

While local authorities generally believe they have sufficient enforcement tools at their disposal, there is a strong feeling within parts of the sector that regulations would be considerably more effective if infringement notices were made further available to councils for a wider variety of noncompliant behaviour.

Cooperation on regulatory functions is widespread

The Commission has observed a considerable level of cooperation between local authorities on regulatory functions. Cooperation can capture many of the benefits of centralisation (such as economies of scale, access to skills and expertise, and the exchange of leading practice) while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences).

The intersection between Māori interests and local regulations is becoming increasingly important

Involving Māori in decision-making presents a significant opportunity and can act as a catalyst for innovation. Recent moves towards co-governance arrangements are, for those local authorities involved, one of the most fundamental changes to their nature and operations in recent times. To achieve meaningful involvement of Māori (and in particular to make co-governance arrangements effective), local authorities need to find new ways of working with their communities and carrying out environmental management.

Appropriately recognising the relationship of Māori to aspects of the environment involves effectively meshing two different systems of governance – local representative democracy, and the tikanga and kawa of local iwi. At present, this governance or 'system' issue is left largely up to local authorities to resolve. There are real questions about whether the current legislative framework effectively enables such relationships.

Mechanisms for assessing the regulatory performance of local government need improving

There are a number of weaknesses in the current systems used to assess the regulatory performance of local governments. These include insufficient use of performance information to identify performance improvements, the absence of feedback loops between central and local government and a lack of balance in what is measured.

The Commission is seeking feedback on a number of options for improving these performance systems.

Ways forward

In developing solutions to the issues identified to date, the Commission is focusing on a number of broad themes:

- Achieving a closer alignment of incentives among the different regulatory actors (including strengthening the accountability of central government for the quality of the regulations devolved or delegated to local government).
- Ensuring that there is adequate capability at both central and local levels to provide effective regulation and to lift the quality of analysis applied to regulatory design. This includes seconding local government staff to central government to assist with policy development and providing training to local government officers and Councillors when new regulatory responsibilities are introduced.
- Better co-ordinating regulatory activity to avoid unnecessary strains on the system (eg ensuring local authorities are given adequate lead time to prepare for regulatory change and phasing the introduction of new regulations to avoid bottle-necks).
- Improving the quality of engagement between central and local government through meaningful consultation.
- Encouraging a change of culture in both spheres of government so that they view each other as policy partners and co-regulators.
- Developing new tools to better understand how the regulatory system is performing.

1 About this inquiry

Key points

- Regulations touch many aspects of our lives – from the environment and buildings we live in, to the food we eat. Regulation is part of doing business and can have a major impact on a firm's profitability and growth. The impacts and outcomes of regulation are all around us.
- When designed well, and enforced efficiently and effectively, regulation can help achieve broader economic, social and environmental goals that underpin wellbeing.
- The Government has asked the Commission to undertake an inquiry into opportunities to improve regulatory performance in local government. Specifically to:
  - develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;
  - identify opportunities for both central and local government to improve the regulatory performance of local government; and
  - recommend options for regularly assessing the regulatory performance of the local government sector.
- Local government regulatory activities have a clear impact on regional economic growth, and ultimately national economic growth.
- The scope and breadth of the regulatory functions of local government cannot be overestimated – the Commission has identified over 30 pieces of primary legislation that confer regulatory responsibilities on local government, and many regulations in secondary instruments.
- Local government regulatory activity sits within a wider regulatory system that can be characterised as complex, multi-level and mutually dependent. This raises inherent risks to regulatory efficiency and performance.
- The Commission's approach to this inquiry is to take a 'whole of system' view. That is, to examine the underlying institutions, principles and processes of the regulatory system and identify possible performance improvements – in the regulation-making process, implementation, monitoring and enforcement, how regulatory roles and responsibilities are allocated and how regulatory performance is assessed.
- Specifically, the Commission has found scope for improvements in the overall regulatory system for local government through reforms that help:
  - align the incentives of all regulatory actors;
  - ensure adequate capability at both central and local level;
  - co-ordinate multiple regulatory activities; and
  - integrate multiple levels of government to ensure that regulation achieves its intended outcomes.

1.1 What this inquiry is about

The Government has asked the Commission to undertake an inquiry into opportunities to improve regulatory performance in local government. Specifically, there is a concern that there is no consistent approach to judging what regulatory functions are most effectively carried out nationally or locally. There is also a concern in local government that functions are allocated to councils without proper regard to how

they might be funded. The issue of what is best regulated at the national and local level is also important to the private sector which, through rates, taxes and fees, funds both, and is directly impacted by the performance and quality of regulation.

The aim of this inquiry is therefore to identify opportunities to improve New Zealand's productivity through a more efficient regulatory framework as it applies to the local government sector.

In short, the Commission has been asked to:

- develop principles to guide decisions on which regulatory functions are best undertaken by local or central government, and identify functions that would benefit from a reconsideration of the balance of delivery between central and local government;
- identify opportunities for both central and local government to improve the regulatory performance of local government; and
- recommend options for regularly assessing the regulatory performance of the local government sector.

The full terms of reference for this inquiry are reproduced at the front of this report.

Box 1.1 **Key inquiry questions**

- How could the allocation of regulatory functions between central and local government be improved?
- How can central and local government improve regulatory performance in the local government sector?
- How can the regulatory performance of the local government sector be measured in a manner that leads to continuous improvement in the way it regulates?

This inquiry into regulation has been called for as part of the Government's wider review of the local government sector. Better Local Government, published in March 2012, laid out eight steps for improving local government in New Zealand (Box 1.2). This inquiry is tasked with fulfilling one of those steps by reviewing "the balance of functions allocated to local government and ways to improve regulatory performance in the sector" (New Zealand Government, 2012, p.12).

Box 1.2 **Better Local Government**

'Better Local Government' is an eight-point reform programme to improve the legislative framework for New Zealand's 78 councils. The Commission's inquiry is point 6 on the programme:

1. Refocus the purpose of local government
2. Introduce fiscal responsibility requirements
3. Strengthen council governance provisions
4. Streamline council reorganisation procedures
5. Establish a local government efficiency taskforce
6. Develop a framework for central/local government regulatory roles
7. Investigate the efficiency of local government infrastructure provision
8. Review the use of development contributions

Source: New Zealand Government, 2012.

1.2 What this inquiry is not about

This inquiry is about local government regulatory performance. It is not about:

- the level of local government rates or development contributions – the terms of reference specifically focuses on regulatory functions. Although, to the extent regulatory effectiveness and performance are impacted, broader issues of funding, the allocation of regulatory functions, and regulatory design are examined;
- local government boundaries or amalgamation – this is specifically excluded by the terms of reference. However, the Commission does examine and make recommendations on regulatory performance improvements that relate to the alignment of policies and practices, coordination and collaboration, across administrative borders;
- how local government itself is regulated by central government (for example, statutory requirements for Long Term Plans – this is covered in point 8 of Better Local Government by the Local Government Efficiency Taskforce); and
- the nature or quantity of services local government provides (for example, swimming pools and rubbish collection).

1.3 Regulation and wellbeing

Regulations touch many aspects of our lives – from the environment and buildings we live in, to the food we eat. Regulation is a fact of life for industry. It is part of doing business, and can have a major impact on a firm's profitability and growth. The outcomes of regulation are all around us.

Box 1.3 **Defining regulation**

For the purposes of this inquiry, regulation is defined widely to encompass the full range of legal and informal instruments through which central government, local government and the community seek to influence the behaviour of individuals and business, and government itself, in order to achieve particular economic, social and environmental outcomes. Regulation includes primary legislation, subordinated legislation (delegated law making, including the bylaws and planning instruments for which local government has responsibility), licences, codes and consents, rules, informal instruments and agreements, and self-regulation.

Regulations are an important tool for preserving and advancing public interests. When designed well and enforced efficiently and effectively, regulation can play an important role in correcting market failures and improving the efficiency with which resources are used. In doing so, regulation can help achieve broader economic, social and environmental goals that underpin wellbeing. The OECD expresses the importance of regulation as follows.

> Regulations are indispensable to proper functioning of economies and societies. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services. (OECD, 2011, p.7)

Local government regulatory activities can have an impact on business productivity and regional economic growth, and ultimately national economic growth, through their impact on business behaviour and productivity (Chapter 3). Regional and territorial authorities' long term plans regulate the use of natural resources; and its infrastructure provides an essential foundation for the conduct of economic activities. The way it implements central government regulation and enacts bylaws encourages certain sorts of behaviour and, in doing so, affects the way individuals and business can conduct economic exchange.

Regulation is typically used to control or modify the behaviour of individuals or businesses and is justified in the interests of wider public benefit. However, if regulation has misplaced objectives, is used when it is not

needed, or is poorly designed and executed, it can fail to achieve policy objectives and have unintended consequences that harm the wellbeing of New Zealanders.

Because regulation involves the exercise of the coercive legal powers, the outcomes of regulation should be justifiable on the grounds of the public benefit. This also means that the system for making, administering and enforcing regulations must be procedurally fair. Importantly, the New Zealand regulation-making framework sets out well-established constitutional and legal principles relating to fairness and the preservation of individual liberty that need to be complied with if regulation is to be supported by society (for example, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993).

Box 1.4 **What are regulatory functions?**

Any regulatory regime has three working components – standard setting (identifying the regulatory goal or target), monitoring compliance with the regulatory standard and enforcement when there is noncompliance (Hood, Rothstein, & Baldwin, 2001). Together, these three elements form the basis for influencing the behaviour of individuals and businesses. These regulatory functions can be carried out by central government, local government, a mix of both, or by appointed non-governmental agencies. They can also be undertaken by the community or industry through self-regulation.

One important function within any regulatory regime is the provision for regulatory review to ensure that regulation is delivering the intended policy objectives at the least-cost to society.

At the heart of improving regulatory performance of central and local government is good design and implementation. So what does good regulation looks like? There have been many attempts to define or benchmark good regulation. Academic and governmental efforts to identify appropriate benchmarks for good quality regulation cluster around a relatively small number of themes (Baldwin & Black, 2008):

- the adoption of lowest cost, least intrusive methods of achieving mandated aims;
- the application of informed (evidence-based) expertise to regulatory issues;
- the operation of processes that are transparent, accessible, fair and consistent;
- the application of appropriate accountability systems; and
- the use of regulatory regimes that encourage responsive and healthy markets where possible.

The design challenge is to ensure that the regulation-making system creates the appropriate incentives, capability and capacity to produce good regulation.

1.4 What is 'local government regulation'?

The Commission has identified around 30 pieces of primary legislation that confer regulatory responsibilities on local government, and many regulations in secondary instruments. The scope and breadth of the regulatory functions of local government are far-reaching. They have a direct impact on the conduct of personal and business activity across New Zealand. They cover a myriad of activities including (but not limited to) building construction standards, food and hygiene regulations, health hazards, the control of liquor and gambling activity, the storage of hazardous substances and waste management.

Additionally, the various planning instruments of territorial and regional authorities under the Resource Management Act (1991) – in particular district and regional plans – set the regulatory environment for personal and business activity, in localities across the country.

The district plan is the main document that sets the framework for managing land use and development within a territorial authority.

> District plans explain how the Council will manage the environment. They contain objectives, policies and rules set out to address resource management issues within the district. One of the main methods

> used by Councils is the use of rules that set out what activities you can do as of right (permitted activities), what activities you need resource consent for, and how certain activities may be carried out. District plan rules cover things such as residential development, the use of land for agriculture, the subdivision of land parcels, noise and the location and height of buildings (Waikato District Council, 2012).

Regional councils are responsible for managing the effects of using freshwater, land, air and coastal waters, through developing regional plans and issuing consents (Chapter 2). The importance of Regional Policy Statements for all activities using natural resources in a region is outlined by the Northland Regional Council's:

> The Proposed Regional Policy Statement doesn't set rules itself, but it does filter down into district and regional plans which contain the rules around how people, businesses and industry use Northland's resources (Northland Regional Council, 2012)

Statutes that confer significant regulatory responsibilities on local government, including the responsibility to prepare district and regional plans, far outweigh the regulations (bylaws) made by local authorities under the powers of the Local Government Act 2002 (Chapter 2). Indeed, the Commission has found that most bylaws are made under enabling statutes rather than under the more general provisions of the Local Government Act. For example, bylaws regarding stock movements on roads are typically made under section 72 of the Transport Act (1962). Because bylaws enacted under the Local Government Act are limited in their scope and impact in comparison to the regulatory responsibilities conferred on local authorities by specific statutes, the Commission has not prioritised these in its analysis.

1.5 The regulatory system is complex

The regulatory system is complex, with many parts, levels, and actors. For a start, as noted above, all regulatory regimes have a number of working components or functions:

- standard setting, which specifies what the regulatory goal or outcome is to be achieved;
- monitoring compliance with the regulatory standard;
- enforcement when there is non-compliance, and *ex post* performance monitoring; and
- a system wide review of regulatory regime to evaluate performance and whether achieving intended objectives.

A number of important design questions are raised when considering where regulatory functions are best carried out – either centrally, regionally or locally (Figure 1.1).

Each of these regulatory functions can be undertaken by different levels of government, and other entities. Figure 1.2 presents a continuum of arrangements from regulatory authority being conferred on a supranational organisation, through to regulation being undertaken by community groups and private entities (self-regulation). This report uses the general terms centralisation and decentralisation. The term decentralisation is used to mean the delegation or devolution of regulatory roles. For local government, delegation is where authority is conferred to local authorities, but is prescriptive and does not permit any discretion on the part of the local authority. In contrast, devolution is where powers are conferred on local authorities and there is substantial discretion and autonomy as to when and how to exercise such power. 'More centralised' means moving up the continuum, while 'more decentralised' means moving down the continuum.

Supranational arrangements are international groupings where decision-making is shared across the membership, like the European Union, World Trade Organisation and the OECD. Transnational arrangements are where central government chooses to give regulatory authority to an external organisation that crosses national boundaries – for example, Food Standards Australia New Zealand (FSANZ) or the proposed Australia New Zealand Therapeutic Products Authority (ANZTPA) for the joint regulation of medicines and medical devices. These sit most comfortably with central governments to fashion regulatory policy according to international requirements. These types of arrangements will effect some local regulation. Regulatory responsibilities can be devolved to or shared with community groups,

such as joint management agreements between local authorities and iwi, for example, the Waikato River Joint Management Authority.

Figure 1.1 Core components of a regulatory regime

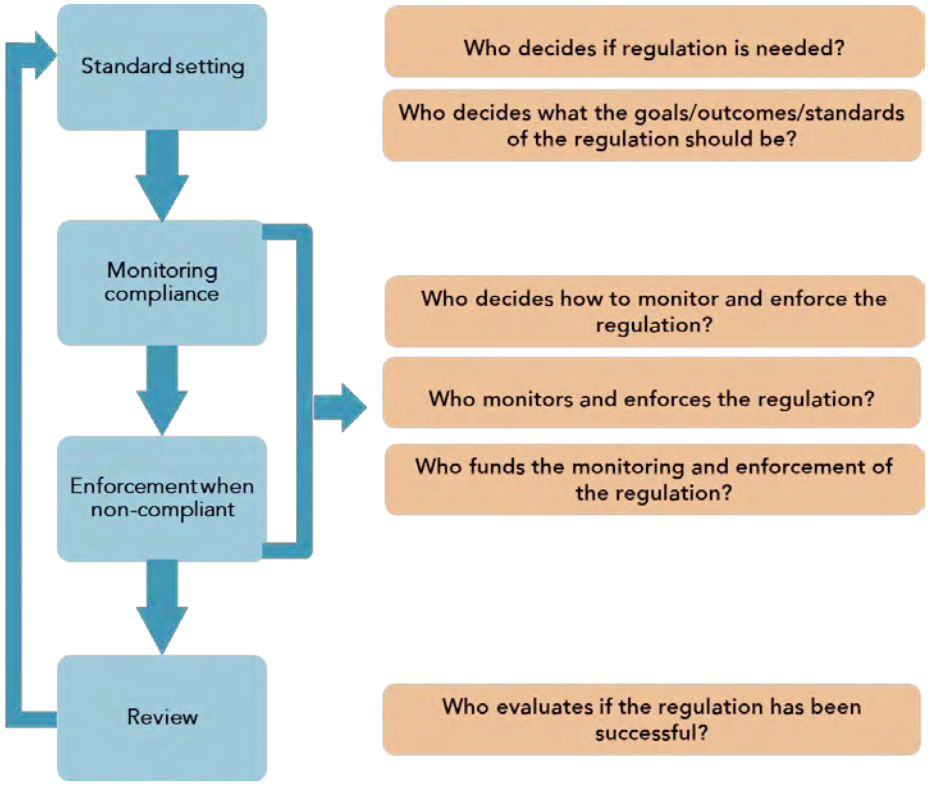
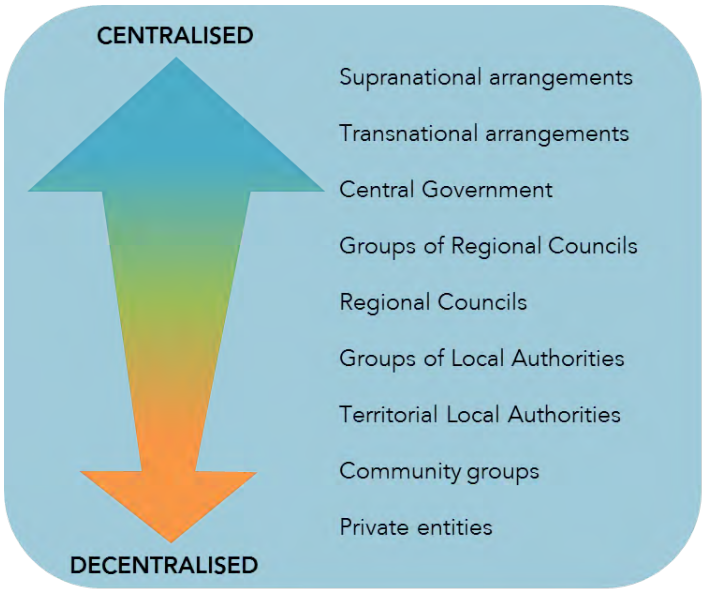


Figure 1.2 The continuum from centralised to decentralised regulation

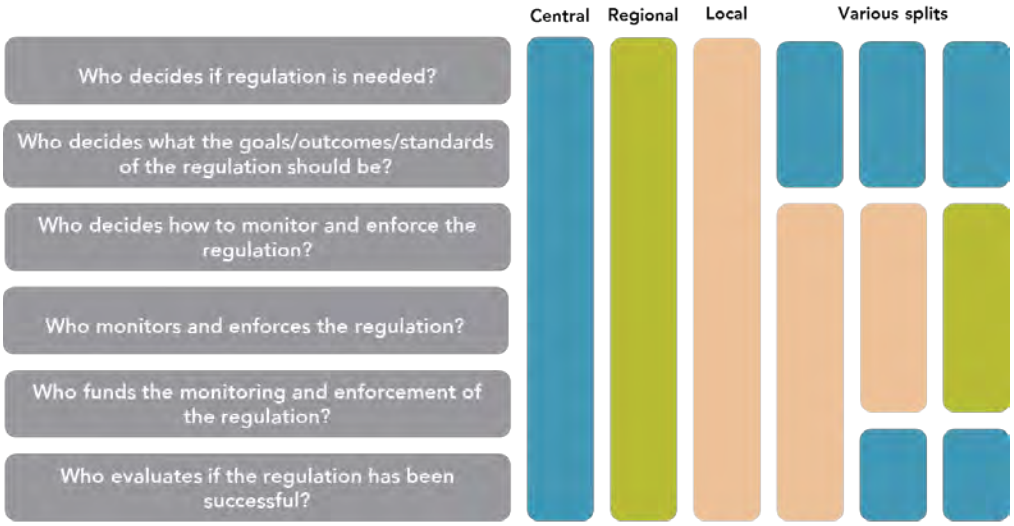


Policy design, including determining if regulation is needed and what and how the regulatory standard should be set, often originates in central government agencies. In many cases central government agencies retain an oversight or monitoring role. Local government has regulatory responsibilities under a range of statutes "owned" by a wide variety of central government agencies, including the Ministries of Primary Industries, Environment, Justice, Health, Transport and the Department of Internal Affairs, Business, Innovation and Employment (incorporating the Ministry of Economic Development, Department of Labour and the Department of Building and Housing).

Decision relating to how the standard is met, how compliance is monitored and how and by whom regulation is enforced can be undertaken at a number of levels of government (Figure 1.3). At the local

government level, regulatory roles may be undertaken by regional councils, unitary councils, and territorial authorities but also by special purpose agencies such as Building Consent Authorities, District Licensing Agencies, Trusts, Council Controlled Organisations, and co-governance or joint management arrangements between councils and iwi. Regulatory review may also be undertaken at a number of levels of government.

Figure 1.3 Some different ways to arrange regulatory functions



For example, the last column illustrates how air quality management is currently arranged (Box 1.5).

Box 1.5 Air Quality Management

"Air quality management in New Zealand is governed by the Resource Management Act 1991 (RMA) and involves a number of agencies. The Minister for the Environment is responsible for recommending national environmental standards to guarantee a set level of protection for the health of all New Zealanders. Regional councils and unitary authorities are in turn responsible for ensuring that national standards are met in their regions. The Ministry for the Environment liaises between and provides national guidance to councils, to assist them with improved air quality management and reports back to the Minister on progress in achieving the air quality standards."

Source: Ministry for the Environment, 2011, p.1

A set of common challenges arises in multi-level regulatory governance relations stemming from the fact that more than one level of government plays a role in designing, implementing and enforcing regulations (OECD, 2009c). The relationship between levels of government can be characterised by mutual dependence, since a complete separation of policy responsibilities and outcomes among levels of government is not possible. Certainly, if problems arise at the implementation stage (monitoring and enforcement) then this can mean that the regulatory objective may not be achieved, no matter how well designed the policy is. This can arise if, for example, there are:

- *coordination issues* – multiple implementing agencies fail to coordinate, or work at cross purposes;
- *resource and capacity issues* – implementing agency lacks adequate financial or organisational resources to achieve objective; or
- *timing issues* – implementing agency lacks time to develop procedures and skills needed to implement programme successfully.

There are complex roles and relationships between the different levels of government and different regulatory responsibilities. This is further complicated by the large number of institutions and actors in the overall regulatory system. There are around 30 central government department in New Zealand, each with a different regulatory lens and relationship with local government and, at the same time, there are numerous

local authorities (78 in total, made up of 67 Territorial Authorities[1] and 11 regional councils), each with different regulatory capabilities and responsible to a diverse range of communities. The regulatory system can therefore be described as simultaneously vertical (across different levels of government, and the private sector), horizontal (among the same level of government) and networked (OECD, 2009c).

1.6 Allocating regulatory functions

The principle of 'subsidiarity'

The Commission's approach to allocating regulatory functions between different levels of government is guided by the principle of 'subsidiarity'. This principle asserts that decision-making, powers, responsibilities and tasks should be handled by the lowest, or least centralised competent authority (level of government). Therefore, there is a presumption against centralisation, unless there is insufficient competence to carry out any particular function. The importance of competence in undertaking the regulatory role includes the ability to access the relevant information and the capability to undertake the role.

Local governments are closer to their constituencies; they have a superior knowledge of the preferences or demands of local residents and of other local conditions (Oates, 2005). Full advantage can be made of tailoring service levels to the particular tastes and other circumstances that characterise the individual jurisdiction (Oates, 1997). In this way, social welfare is maximised and the principle of subsidiarity is consistent with the concept of welfare enhancing efficiency (Loeper, 2007).

However, where the costs and benefits of regulatory activity materialise in other jurisdictions (spillovers), the welfare objective may best be met by allocating regulatory functions to a higher tier level of government. Spill-over benefits and cost may mean national requirements are placed on local authorities. There are also situations where higher levels of government may be able to provide regulatory activities more efficiency and effectively. This is where there are economies of scale and scope in service provision which enable the same regulatory services to be provided at lower cost.

Notably, the spirit of subsidiarity has a well-established history in New Zealand:

> Whereas it is necessary that provision should be made for the good order health and convenience of the inhabitants of towns and their neighbourhoods: And whereas the inhabitants themselves are best qualified, as well by their more intimate knowledge of local affairs as by their more direct interest therein, effectually to provide the same: And whereas the habit of self-government in such cases hath been found to keep alive a spirit of self-reliance and respect for the laws … be it therefore enacted. (Municipals Corporations Ordinance, 1842, preamble, quoted in Palmer, 2012)

The efficient allocation of regulatory functions will depend on the specifics of each case and require a careful examination of, among other things, the relative trade-offs between the value of local preferences, information and capability, the magnitude of any spillovers and potential cost savings that might be achieved through centralising. How the principle of subsidiarity is applied as a practical guide is presented in Chapter 5.

1.7 The Commission's approach

A complex, mutually dependent and multi-level regulatory system raises serious risks for good regulatory governance and effective regulation. The presence of multiple actors at different levels of government and across the same level of government creates a number of gaps that need to be managed (Box 1.6). Minding these gaps represents one of the primary challenges of multi-level governance.

[1] Seven of which also have the functions of regional councils, sometimes known as unitary authorities.

Box 1.6 **Mind the Gap**

- The *information gap* is characterised by information asymmetries between levels of government when designing, implementing and delivering public policy. Local government will tend to have more information about local needs and preferences, and also about implementation costs and local policies.
- A *capability and capacity gap* is created when there is a lack of human, knowledge (skill-based), or infrastructural resources (including public administration infrastructure) available to carry out tasks, regardless of the level of government.
- The *fiscal gap* is represented by the difference between local government revenues and the required expenditures for local authorities to meet their responsibilities. The existence of a fiscal gap between the revenues and required expenditures of local government indicates a direct dependence on higher levels of government for funding and for a fiscal capacity of local government to meet obligations.
- An *administrative gap* arises when administrative borders do not correspond to functional economic areas at the local level. This has implications for the implementation of effective regulation that requires a minimum scale that can sometimes only be obtained through policies favouring horizontal co-operation, thereby reducing territorial fragmentation.
- A *policy gap* results when there is incoherence between local policy needs and national level policy initiatives. It can occur when central agencies take purely vertical approaches to policy issues that are inherently cross-sectoral (for example, energy policy, water policy) with no cross agency coordination, and where implementation issues at the local level are not joined up and coordinated with central government (where the policy initiatives originate).
- An *accountability gap* is where there are unclear or overlapping responsibilities across and between levels of government for regulatory decisions or outcomes. The absence of clear accountabilities has direct implications for incentives on actors within the regulatory system and incentives for performance.

Source: Adapted from OECD, 2009c.

These gaps introduce risks to the integrity of the regulatory system, and may result in:

- the objective of the regulation not being met;
- duplication and overlapping responsibilities;
- regulations not 'talking to one another';
- unintended consequences;
- risks being borne by those not well placed to mitigate them;
- unnecessary costs for all parties;
- unnecessary infringement of property rights;
- perverse incentives, gaming and opportunism; and
- unclear accountabilities.

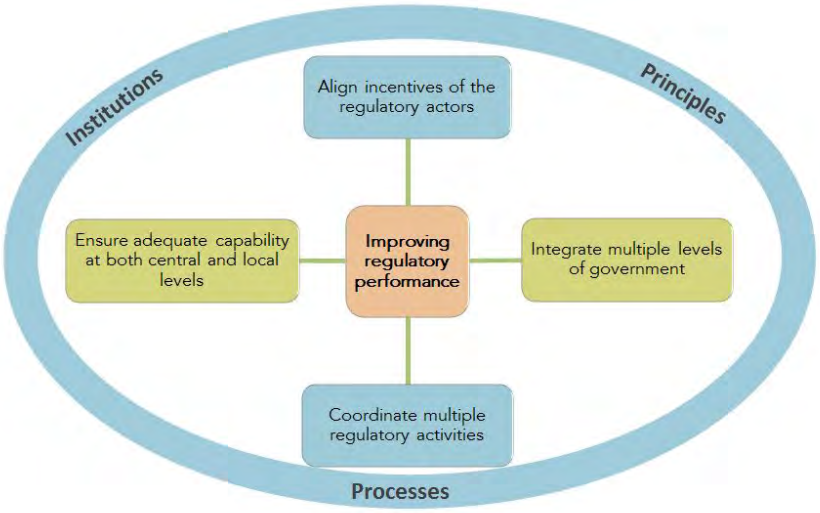
Taking a 'whole of system' view

The Commission's approach to this inquiry is to take a 'whole of system view'. That is, to examine the underlying institutions, principles and processes of the regulatory system and identify possible performance improvements – in the regulation-making process, implementation, monitoring and enforcement, how regulatory roles and responsibilities are allocated and how regulatory performance is assessed.

Specifically, the Commission has found potential improvements in the overall regulatory system for local government through reforms that help:

- align the incentives of all regulatory actors;
- ensure adequate capacity at both central and local level;
- co-ordinate multiple regulatory activities; and
- integrate multiple levels of government to ensure that regulation achieves the intended outcomes sought by society, while avoiding unnecessary costs or unnecessary infringement of rights.

Figure 1.4 Whole of system improvements



1.8 Building the evidence base

The Commission's tentative findings have been informed by a comprehensive engagement process. This began with the release of the inquiry Issues Paper to which 59 submissions were received. Information from the inquiry submissions has been supplemented by approximately 80 engagement meetings with representatives from community groups, local government, businesses and central government agencies. The Commission has also conducted two surveys – one aimed at eliciting the views of all local authorities in New Zealand (responses sought from a CEO or senior regulatory manager) and the other targeted at 1,500 New Zealand businesses from a cross-section of industries. Further, a number of case-studies on specific regulatory areas have been developed.

The Commission has also carried out extensive analysis of Statistics New Zealand data in order to better understand the nature and diversity across local authorities, including research into the composition of regional economies and labour markets.

Together, these have provided a rich picture of the regulatory landscape in which local government operates.

1.9 Guide to this draft report

The report is structured as follows:

Chapter 2 describes the evolution and structure of local government in New Zealand. The constitutional place of local authorities is examined focussing on their role, powers, and accountability, and the nature and foundation of their regulatory responsibilities.

Chapter 3 outlines the extent and nature of diversity across local authorities. Differences in circumstances, endowments and local conditions across local authorities mean that local authorities face distinct regulatory challenges which, in turn, drive different approaches to regulation at the local level.

Chapter 4 draws on the theoretical literature, and on the experiences of submitters, along with survey responses, to develop a framework for allocating regulatory responsibilities between different levels of government.

Chapter 5 considers funding issues arising from the allocation of regulatory responsibilities.

Chapter 6 describes the architecture and constitutional foundations of New Zealand's regulatory system.

Chapter 7 takes a critical look at the adequacy of central government regulation making and identifies areas where regulatory governance is below leading-practice. Options for improving regulation-making at the central level are explored.

Chapter 8 explores the extent of cooperation between local authorities. Although the focus is primarily on horizontal cooperation across councils, consideration is also given to the impact of central government on the incentives for local authorities to cooperate. A potential framework is offered that identifies possible opportunities for further cooperation across councils.

Chapter 9 acknowledges that it is important that those regulated are treated promptly, fairly and consistently. It examines the behaviour of local authorities as regulators, drawing from submissions, engagement meetings and the Commission surveys.

Chapter 10 explores the challenges that local authorities can face when monitoring and enforcing regulations. It begins by examining the factors that determine regulatory compliance and the impact of these factors on enforcement. The chapter then draws on available data to discuss the adequacy of compliance monitoring by local authorities and whether they have a sufficient range of enforcement tools at their disposal.

Chapter 11 examines the costs impact of regulation on business, and provides insights into which regulations impact most on firms' cost structures.

Chapter 12 examines the decision-making and appeals processes for local regulations made under the RMA. It considers how the system of decision-making and appeals can better interact together.

Chapter 13 examines the involvement of Māori in local authorities' regulatory decision making. It identifies local authorities' statutory obligations towards Māori and the Crown's on-going responsibilities under the Treaty of Waitangi. It evaluates the extent to which the regulatory policy and procedural requirements for local authorities facilitate participation by Māori in local authorities' decision making as part of satisfying the Crown's Treaty responsibilities.

The report concludes with Chapter 14 which considers how to improve regulatory performance assessment. Options are offered to improve performance assessment, involving more performance assessment at the 'system level' and opportunities to reduce the reporting burden. Feedback is sought on these options.

2 Local government in New Zealand

Key points

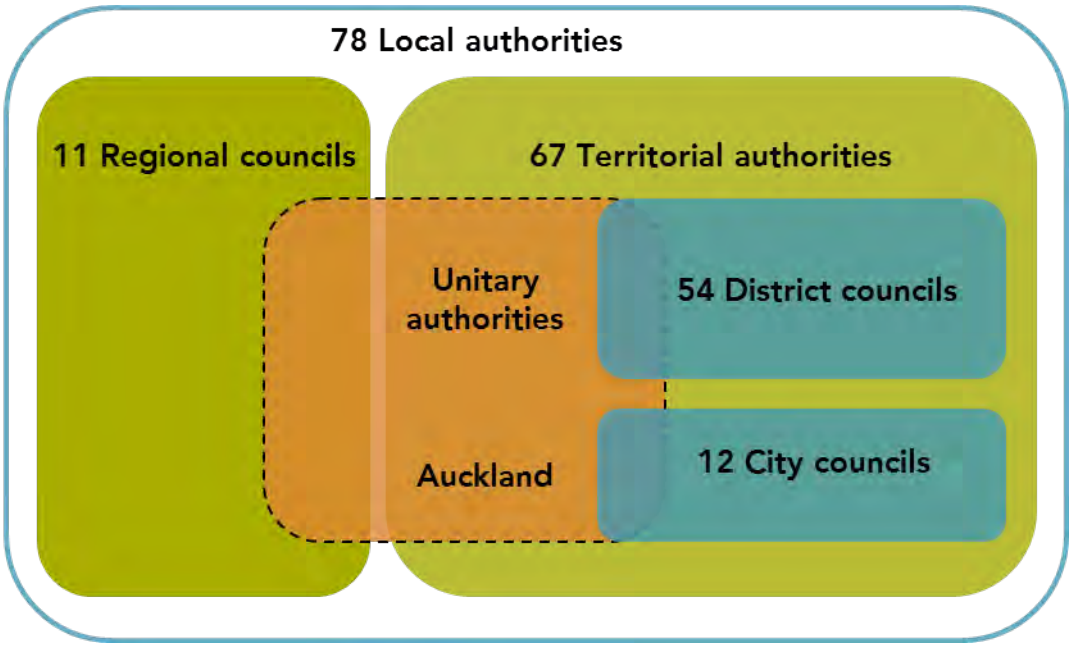
- There are significantly different understandings, both within central government and between central and local government, of the nature of the relationship between central and local government. These differences are evident at both the general and specific levels.
  - At the general level, there are differences in understandings of the overarching relationship between central and local government: in particular, there is disagreement about what the role of local government should be and to what extent it is, or should be, autonomous from central government.
  - At the specific level, there are differences in the context of specific regulatory frameworks: in particular, there are divergent views about the extent of local authorities' discretion in exercising specific regulatory functions and powers, and about the extent to which local authorities should be and are accountable to central government for their performance.
- It is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government, because these matters will determine what options for the design of the regulatory system are feasible or appropriate. In particular, these issues shape how the regulatory system deals with the nature of accountability and extent of autonomy of local authorities.
- The uncertainties and tensions between local and central government are detrimentally undermining the effectiveness of current regulatory frameworks. The different understandings of the role, powers, and accountability of local authorities have created confusion and inefficiency in regulatory systems.
- While local government is a creature of statute, it operates as a largely autonomous provider of services, funded separately by property taxation and held accountable by voters. In the absence of well-defined constitutional or fiscal relationships, local and central government are most accurately regarded as two spheres of a system of collective decision making, each with revenue-collection powers to fund the implementation of its particular policies and programmes.
- Contrary to common perceptions, almost all regulations made or administered by local authorities are undertaken on the direction of central government, or are responses to obligations established under Acts of Parliament.

2.1 What are local authorities?

Introduction

Local authority is the term used in legislation to refer to the two forms of local government in New Zealand: regional councils and territorial authorities. They were both established in 1989 as part of a radical reform of the structure of local government. The 1989 reforms abolished 691 multi-purpose and special-purpose authorities and replaced them with 13 regional councils, 83 city and district councils and one unitary council (a city or district council which also has the functions of a regional council). Box 2.1 outlines the evolution of local government in New Zealand. There are presently 11 regional councils, 67 territorial authorities (12 city councils and 50 district councils (of which 6 are unitary councils), and Auckland Council) (see Figure 2.1 following and Figure 2.2 on p.21). Regional councils and territorial authorities have different roles and functions and are intended to complement rather than compete with each other. This section briefly describes the establishment and functions of regional councils and territorial authorities and examines the differences and overlaps between them.

Figure 2.1 Types of local authorities



Box 2.1 The evolution of local government

19th century foundations

A spirit of devolution

- Municipal Corporations Ordinance 1842: identified each settlement of 2000 "souls" to be a borough and established a body corporate with powers to do such things as carry out road works, construct water and sewerage systems, make bylaws, impose rates, and "all such purposes as they may deem necessary for the good health and convenience of the inhabitants thereof." The ordinance was disallowed in 1845.
- New Zealand Constitution Act 1846 (United Kingdom): established municipal districts with elected councillors, who in turn elected the mayor and aldermen. The councils were responsible for electing the members of the lower houses of the two provincial legislatures for the North and South Islands. The Provincial Councils Ordinance 1848 reconfirmed the establishment of the two provincial legislatures.
- New Zealand Constitution Act 1852 (United Kingdom): established six provincial governments (Auckland, Taranaki, Wellington, Nelson, Canterbury, and Otago). Municipalities were also constituted in the four main city centres of Dunedin, Christchurch, Wellington, and Auckland. The provincial councils were designed to carry out in each province the work of subordinate legislation and administration.
- Provincial legislatures were abolished in 1876.

Ad hoc evolution

- Municipal Corporations Act 1867: provided for a uniform urban territorial authority structure.
- Counties Act 1876: created 36 counties in rural areas with elected councils. A new and complementary Municipal Corporations Act was passed the same year. From 1876, local bodies multiplied, with many ad hoc authorities being added, such as harbour boards, rabbit boards, and water boards.
- By 1908, the structure of territorial local government recognised the city, borough, county council, town board, and road board.

Local Government Act 1974

Fundamental restructuring

- In 1960, a report of the Local Bills Committee into the structure of local government assessed the evolution and efficiency of local government.
- Local Government Act 1974: directed the Local Government Commission to divide the country into regions with a directly elected regional council or an appointed united council in regions of smaller population. The Act also established community councils, district community boards, and communities.
- Local Government Amendment Acts in 1988 and 1989 were enacted to lay the foundations for fundamental restructuring reforms. The Acts defined the parameters for new structures, which were implemented by the Local Government Commission. Elected regional councils were established and conferred with water and soil conservation functions; and city or district councils were established based on a "community of interest".

Prescriptive and unwieldy

- The Local Government Act 1974 was heavily prescriptive: before local authorities did anything they needed to check to see that they were empowered to do it.
- The Act was over 700 pages long, filling an entire volume of the *Reprinted Statutes of New Zealand*.

Local Government Act 2002

- The Local Government Act 2002 was enacted following a review of the roles of local authorities under the Local Government Act 1974.

Aspirational and wide-ranging

- The Act restated the functions and powers of local authorities. It provides that the purpose of local government is to enable democratic local decision making and action by and on behalf of communities; and to promote the social, economic, environmental, and cultural wellbeing of communities, in the present and for the future.
- The Act confers local authorities with a power of general competence, to be exercised after the authority has complied with the consultative and other procedural and process requirements set out in the Act.

Prescriptive procedural and process requirements

- The Act requires local authorities to consult with communities, prepare policy statements, prepare a long-term council community plan and annual plan, follow a prescribed decision making process, and to use the special consultative procedure for these documents and other significant decisions.

Sources: Palmer (2012); Palmer and Palmer (2004).

Regional councils

Regional councils were established in 1989, partly in anticipation of the Resource Management Act 1991. (Wellington Region Local Government Review Panel, 2012, pp.22-23).

The Local Government Amendment Act (No. 3) 1988 stipulated that to the extent possible, the geographic boundaries of regional councils should conform to one or more water catchments. The Local Government Commission also took into account "regional communities of interest, natural resource management, land use planning and environmental matters" (Statistics New Zealand, 2006).

The 11 regional councils in New Zealand are: Bay of Plenty; Hawke's Bay; Manawatu-Wanganui; Northland; Taranaki; Waikato; Wellington; Canterbury; Otago; Southland; West Coast. The head of a regional council is the chairperson, elected by the regional council members after the council elections.

The responsibilities of regional councils pertain mostly to environmental management. The Department of Internal Affairs (DIA) identified the responsibilities of regional councils as including (DIA, no date, 'Councils' Roles and Functions'):

- sustainable regional wellbeing;
- managing the effects of using freshwater, land, air and coastal waters, by developing regional policy statements and the issuing of consents;
- managing rivers, mitigating soil erosion and flood control;
- regional emergency management and civil defence preparedness;
- regional land transport planning and contracting passenger services; and
- harbour navigation and safety, oil spills and other marine pollution.

As noted, regional councils also have particular responsibilities for Civil Defence and Emergency Management (CDEM). In the event of an emergency, regional councils and territorial authorities have very broad and far-reaching powers. However, the Commission has not included CDEM in the review, as it is not strictly a regulatory function and is already undergoing substantive review.

Box 2.2 **CDEM**

The Civil Defence Emergency Management Act 2002:

- promotes sustainable management of hazards;
- encourages and enables communities to achieve acceptable levels of risk;
- provides for planning and preparation for emergencies, and for response and recovery;
- requires local authorities to coordinate planning and activities;
- provides a basis for the integration of national and local civil defence emergency management; and
- encourages coordination across a wide range of agencies, recognising that emergencies are multi-agency events.

Local authorities are required to:

- ensure they are able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency; and
- plan and provide for civil defence emergency management within their own district.

Territorial authorities

When territorial authorities were established in 1989, the Local Government Commission gave considerable weight to the 'community of interest': "While the size of the community was a factor, the relevance of the components of the community to each other, and the capacity of the unit to service the community in an efficient manner, were the factors on which the commission placed most emphasis" (Statistics New Zealand, 2006).

There are currently 61 territorial authorities (or 67 including unitary authorities): 20 of those territorial authorities are in the South Island (24 including unitary authorities) and 41 are in the North Island (43 including unitary authorities). Eleven of the territorial authorities are city councils and 50 are district councils. Their role, however, is the same. The only distinction between city councils and district councils is that a city council serves a population of above 50,000 in a predominantly urban area (DIA, no date, 'Councils' Roles and Functions'). Six of the territorial authorities also have the powers of a regional council, making them unitary authorities. These are Auckland Council, Nelson City Council, Gisborne, Marlborough, Tasman District and the Chatham Islands Council.

Most territorial authorities (unless they are unitary councils) fit within the geographical boundaries of a regional council, although some territorial authorities fall within more than one regional council's geographic area. For example, Taupō District Council sits within the Waikato and Hawke's Bay Regional Councils, and Rangitikei District Council sits within the Manawatu-Wanganui and Hawke's Bay Regional Councils (LGNZ, 2011 'Council Websites and Boundary Maps'). The head of a territorial authority is the mayor, who is elected directly by the constituents of the district itself. Territorial authorities must defer to the environmental management policy statements of regional councils (LGNZ, 2011d).

Local Government New Zealand (LGNZ) identifies the functions and responsibilities of territorial authorities to be: "a wide range of local services including roads, water reticulation, sewerage and refuse collection, libraries, parks, recreation services, local regulations, community and economic development, and town planning" (LGNZ, 2011d).

The DIA lists territorial authorities' responsibilities as including the following (DIA, no date, 'Councils' Roles and Functions'):

- Sustainable district wellbeing.
- The provision of local infrastructure, including water, sewerage, stormwater, roads.
- Environmental safety and health, district emergency management and civil defence preparedness, building control, public health inspections and other environmental health matters.
- Controlling the effects of land use (including hazardous substances, natural hazards and indigenous biodiversity), noise, and the effects of activities on the surface of lakes and rivers.

Differences and overlap between regional councils and territorial authorities

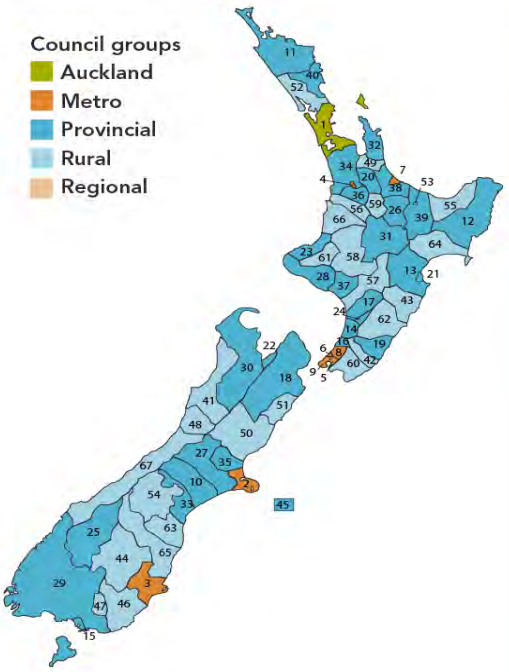
Although territorial authorities are nested within regional councils, they are distinct in their nature and role. Waikato Regional Council's submission emphasises this point, noting that "regional councils are different in their focus, concerns, world view, and relationship with communities and stakeholders, compared to territorial authorities. These differences are reflected in legislation, which often gives regional councils and territorial authorities different regulatory roles, for example under sections 30 and 31 of the RMA [Resource Management Act]" (sub. 45, p.3).

Opotiki District Council echoes this view, suggesting it is important to distinguish between the regulatory roles of regional and city/district councils: "City/District Councils have responsibilities for the delivery of all listed statutes, while regional Council responsibilities are limited. It is an important distinction as the two authorities have different roles and tend to have more different [sic] audiences" (sub. 36, p.2; sub. 49, p.35).

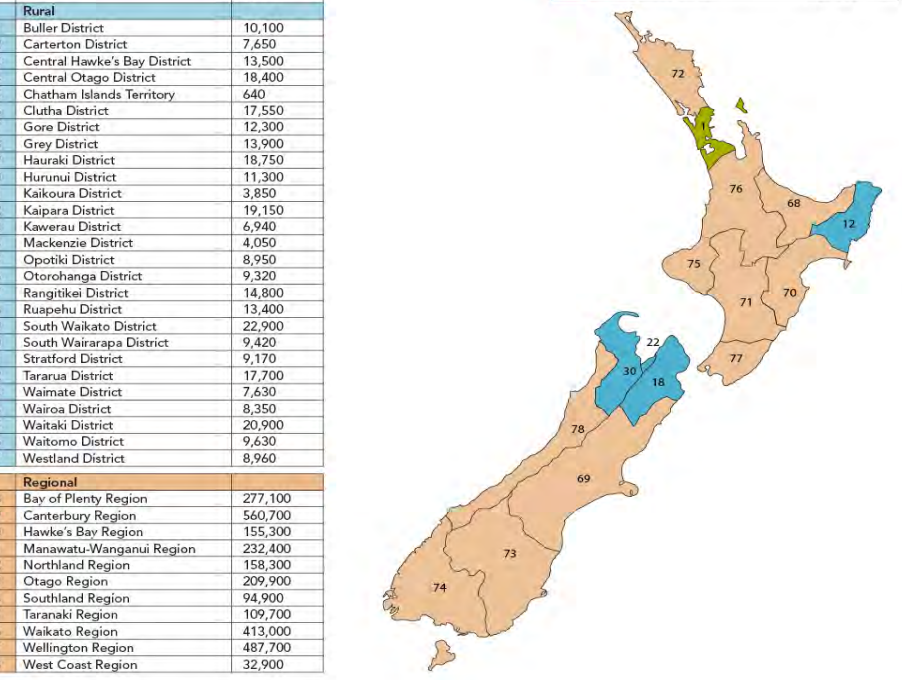
LGNZ's submission also emphasises the distinction:

> The different regulatory roles mean that regional councils face quite different challenges to territorial authorities in carrying out their roles. Regulatory activities […] under the Soil Conservation and Rivers Control Act, River Boards Act and Land Drainage Act are all pieces of legislation that relate specifically to regional council and unitary council functions – these are not listed but they are a considerable area of expenditure for regional councils. Civil defence and emergency management is another key function of all local authorities and is fundamental to the structure and make up to local government. - (sub. 49, p.36)

Figure 2.2 New Zealand local authorities



No.	Council name	2011 population figures
1	Auckland Council	1,486,000
	Metro	
2	Christchurch City	367,700
3	Dunedin City	126,000
4	Hamilton City	145,600
5	Hutt City	103,000
6	Porirua City	52,700
7	Tauranga City	115,700
8	Upper Hutt City	41,500
9	Wellington City	200,100
	Provincial	
10	Ashburton District	30,100
11	Far North District	58,500
12	Gisborne District	46,600
13	Hastings District	75,500
14	Horowhenua District	30,700
15	Invercargill City	53,000
16	Kapiti Coast District	49,800
17	Manawatu District	30,000
18	Marlborough District	45,600
19	Masterton District	23,500
20	Matamata-Piako District	32,000
21	Napier City	57,800
22	Nelson City	46,200
23	New Plymouth District	73,800
24	Palmerston North City	82,100
25	Queenstown-Lakes District	28,700
26	Rotorua District	68,900
27	Selwyn District	41,100
28	South Taranaki District	26,900
29	Southland District	29,600
30	Tasman District	48,100
31	Taupo District	34,100
32	Thames-Coromandel District	27,000
33	Timaru District	44,700
34	Waikato District	64,300
35	Waimakariri District	48,600
36	Waipa District	46,100
37	Wanganui District	43,500
38	Western Bay of Plenty District	45,800
39	Whakatane District	34,500
40	Whangarei District	80,500



No.	Council name	2011 population figures
	Rural	
41	Buller District	10,100
42	Carterton District	7,650
43	Central Hawke's Bay District	13,500
44	Central Otago District	18,400
45	Chatham Islands Territory	640
46	Clutha District	17,550
47	Gore District	12,300
48	Grey District	13,900
49	Hauraki District	18,750
50	Hurunui District	11,300
51	Kaikoura District	3,850
52	Kaipara District	19,150
53	Kawerau District	6,940
54	Mackenzie District	4,050
55	Opotiki District	8,950
56	Otorohanga District	9,320
57	Rangitikei District	14,800
58	Ruapehu District	13,400
59	South Waikato District	22,900
60	South Wairarapa District	9,420
61	Stratford District	9,170
62	Tararua District	17,700
63	Waimate District	7,630
64	Wairoa District	8,350
65	Waitaki District	20,900
66	Waitomo District	9,630
67	Westland District	8,960
	Regional	
68	Bay of Plenty Region	277,100
69	Canterbury Region	560,700
70	Hawke's Bay Region	155,300
71	Manawatu-Wanganui Region	232,400
72	Northland Region	158,300
73	Otago Region	209,900
74	Southland Region	94,900
75	Taranaki Region	109,700
76	Waikato Region	413,000
77	Wellington Region	487,700
78	West Coast Region	32,900

Source: Data and map supplied by the Department of Internal Affairs

Despite distinct roles, there is also overlap between regional and city/district councils. For example, because territorial authorities must give effect to regional councils' Regional Policy Statement, there is a need for coordination between a regional council and the territorial authorities within its boundaries. As Environment Southland notes, "…in preparing and effectively implementing a Regional Policy Statement, regional councils need a high level of support from the territorial authorities and their planning documents. Obtaining that support and agreement is sometimes difficult to achieve" (sub. 28, p.1; see also Waikato Regional Council sub. 45, p.3). Perhaps unsurprisingly, there is a difference in focus between these different authorities, which can sometimes lead to tension. Environment Southland notes:

> There is a tendency for territorial authorities to focus in at the site level of land use policy and to some extent have a lesser recognition for the wider district or region-wide policy options. Environment

> Southland has been promoting a regional hazard register where all four councils would contribute to the database and use it on a daily basis for land use decision-making. The three territorials have seen that collaborative approach as them giving something away, at the instigation of the regional council. Patch protection and politics quickly come to the fore ahead of the practicality of such an option. (sub. 28, p.2)

Waikato Regional Council further notes:

> At present there is considerable overlap between regional and local regulatory roles, particularly with respect to land use, transport and natural hazard management. For example, territorial authorities, through their district plans, are responsible for establishing land use zones and granting subdivision and land use consents. The regional council is responsible for the integration of land use and infrastructure, and for the control of the use of land for purposes such as water quality management and natural hazard management. Regional councils also have important transport management responsibilities, and there is a strong relationship between transport and land use management. (sub. 45, p.3)

2.2 The constitutional place of local authorities

Uncertainty and tension

The constitutional place of local authorities is a contested and complex issue. Uncertainties and tensions characterise local authorities' role, powers, and accountability, and understandings of the relationship between local authorities and other governmental institutions. In particular, the relationship and allocation of functions between local and central government has always been a volatile issue.

During the course of this inquiry, the Commission detected a fundamental tension between central and local government about these issues. There are different understandings, both within central government and between central and local government, of the nature of the relationship between central and local government. These differences are evident at both the general and specific levels. At the general level, there are differences in understandings of the overarching relationship between central and local government: in particular, there is disagreement about what the role of local government should be, and to what extent it should be autonomous from central government. At the specific level, there are differences in the context of specific regulatory frameworks: in particular, there is disagreement about the extent of local authorities' discretion in exercising specific regulatory functions and powers, and about the extent to which local authorities should be and are accountable to central government for their performance.

The uncertainties and tensions surrounding the constitutional place of local authorities stems in large part from the pragmatic and ad hoc evolution of local government in New Zealand. As Dr Kenneth A Palmer (1993, p 23) points out: "The theory and place of local government in the political system does not derive from any formal constitutional entitlement." Instead, "local government evolved from a practical contrivance lacking any developed constitutional conception of the powers with which it should be entrusted" (Wellington Region Local Government Review Panel, 2012, p.20)

The uncertainties and tensions could also be attributable to the natural friction which arises where two or more governmental institutions interact and exercise governance and authority in overlapping spheres. Legal and political scholars recognise that some friction is desirable for a healthy democracy, as it builds inherent checks and balances into the system. However, the desirability of tension must be weighed against the desirability of certainty and efficiency in government.

F2.1 The level of tension between central and local government about their respective roles may now be at a level that is unhealthy and could undermine the development and performance of regulatory functions.

Box 2.3 **New Zealand's unwritten constitution**

A constitution describes and establishes the major institutions of government, states their principal functions and powers, regulates the exercise of those functions and powers, and governs the relationship between governmental institutions and other political actors.

Unlike many other countries, New Zealand does not have a single written constitution. However that does not mean that it does not have a constitution. Rather than being found in one formal document, New Zealand's constitution is to be found in a collection of sources which together establish the framework of our constitution. The major sources of New Zealand's constitution are:

- **The Constitution Act 1986**. This Act is the principal formal statement of New Zealand's constitution. It broadly describes and identifies the major institutions of government.
  - The Queen is the Head of State of New Zealand and the Governor-General is her representative in New Zealand. As a matter of convention, the Queen and the Governor-General exercise their legal powers only on the advice of the Prime Minister or Ministers who have the support of a majority of the House of Representatives.
  - The executive: only Members of Parliament may be Ministers of the Crown. The Crown may not levy taxes, raise loans, or spend public money except by or under an Act of Parliament.
  - Parliament: consists of the Sovereign and the House of Representatives. Each Parliament has a term of three years, unless it is earlier dissolved. Parliament has full power to make laws.
  - The judiciary: the independence of which is protected by long-established constitutional principles, which are affirmed by the Act.
- **The prerogative powers of the Queen**. These powers are part of the common law and exist independently of statutes.
- **Other New Zealand statutes**. These include: the State Sector Act 1988, the Electoral Act 1993, the Judicature Act 1908, the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989, and the New Zealand Bill of Rights Act 1990.
- **Certain English and United Kingdom statutes**. Certain relevant English and United Kingdom statutes were confirmed as part of the law of New Zealand by the Imperial Laws Application Act 1988, including the Magna Carta 1297, the Bill of Rights 1688, the Act of Settlement 1700, and the Habeas Corpus Acts.
- **Judicial decisions**. Certain decisions of the courts, for example, uphold rights of the individual as against the state and determine the extent of the state's powers.
- **The Treaty of Waitangi**. The Treaty is a founding document of government in New Zealand and a fundamental part of our constitutional framework.
- **The conventions of the constitution**. Conventions are certain practices that regulate, control, and in some cases transform the use of the legal powers sourced from the prerogative or conferred by statute. Conventions are not enforceable by the courts, but are of critical importance to the working of the constitution.

Source: Keith, 2008

Why does agreeing on issues of constitutional place matter?

It is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government, because these matters will determine what options for the design of the regulatory system are feasible or appropriate. In particular, these issues shape how the regulatory system deals with the accountability and extent of autonomy of local authorities.

In that light, the objective of the following section is to explore the constitutional place of local authorities. The first part examines the constitutional foundations of the establishment, role, and powers of local authorities. The second part considers the ways in which local authorities are accountable to other governmental institutions and to their electorates.

F2.2 It is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government, because these matters will determine what options for the design of the regulatory system are feasible and appropriate.

The establishment, role, and powers of local authorities

Local authorities are a creature of statute; they are established and empowered by legislation. This means that local government can be – and has been – dramatically restructured and reshaped by central governments through legislative change. The establishment of regional councils and territorial authorities was described earlier in this chapter (see section 2.1 above).

Statute identifies the intended role of local authorities. The Local Government Act 2002 identifies the purposes of local authorities as:

- To enable democratic local decision making and action by, and on behalf of, communities.
- To meet the needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

The Local Government Amendment Act 2012, most of which came into force on 5 December 2012, made several material changes to the Local Government Act 2002. One of those changes was to the stated purpose of local government. Until this date, the second purpose of local government was to promote the social, economic, environmental, and cultural wellbeing of communities. As Geoffrey Palmer and Matthew Palmer (2004, p.249) observed in regard to this purpose: "These aspirational statements are significant for the breadth with which they envisage local government contributing to the governance of the community. It is a much more ambitious aim than merely attending to the drains, roads, and rubbish."

It is yet to be seen what impact, if any, the change in purpose will have for local authorities' regulatory functions or the activities they undertake in support of those functions.

Statutes and regulations invest local authorities with substantial regulatory powers. The starting point is the Local Government Act 2002. Section 12 deals with the status and powers of local authorities. The essential features are (from Palmer & Palmer, 2004, p.250):

- A local authority has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction.
- It has full rights, powers, and privileges for the purposes of performing its role.
- The rights, powers, and privileges that it has are subject to the provisions of the Local Government Act itself, other enactments, and the general law.
- Territorial authorities must exercise their powers wholly or principally to benefit the district and a regional council must exercise its powers wholly or principally for all or a significant part of its region.

This Act heralded a changed approach to the legislative grant of powers to local authorities. The approach of the previous legislation (the Local Government Act 1974) was that before local authorities did anything they needed to check to see whether they were empowered to do it. The 2002 Act abandoned this prescriptive approach and moved towards a power of 'general competence'. Under a power of general competence, local authorities can do anything that is not expressly forbidden by law or given exclusively to another organisation (Palmer & Palmer, 2004, p.250). The Local Government Act 2002 does not contain a pure power of general competence, as it places some limitations on local authorities' competence. The Act also lays down prescriptive procedural and process requirements which a local authority must follow in its decision making.

In addition to this general grant of power by the Local Government Act, a number of other statutes and regulations grant powers to local authorities. For example, the power to levy rates is found primarily in the Local Government (Rating) Act 2002, while the power to make bylaws is found in several statutes, including the Local Government Act 2002 and the Bylaws Act 1910. Subject-specific legislation also confers on local authorities a huge number of powers, of a range of types and scope. The result is that local authorities operate within a complex regulatory system under legislation and regulatory frameworks that have been enacted at different times.

A range of types of powers: devolved and delegated powers

The powers invested in local authorities are many and varied. Some powers conferred on local authorities are prescriptive and do not permit any discretion on the part of the local authority. Instead, the local authorities' role is as implementer. These are often referred to as 'delegated' powers. Legislation delegates functions and responsibilities to local authorities, and provides mechanisms for central government direction, intervention and/or performance monitoring. An example of this type of power is where a Minister specifies through Order in Council a national standard which all local authorities must enforce: the order might direct how the local authority is to undertake the specific regulatory function, set specific performance targets, and provide for penalties where the target is not met. The Food and Hygiene Regulations 1974 are a good example of this type of power.

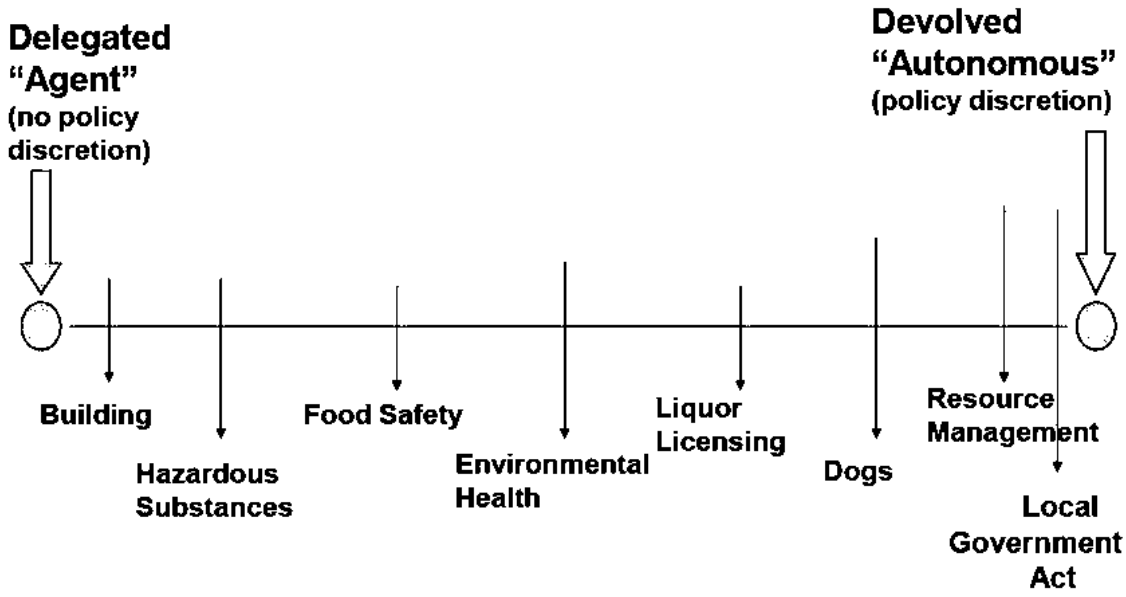
Other powers granted to local authorities confer on them substantial discretion and autonomy as to when and how to exercise those powers. In these cases, local authorities operate autonomously of central government and are empowered to choose which activities to undertake and how to pay for them. They act in consultation with their local communities. These types of powers are often referred to as 'devolved' powers. Powers of this type enable local authorities to set policy agendas and objectives, develop strategies for achieving those objectives, and evaluate the performance of those strategies. Powers granted under the Resource Management and Local Government Acts are good examples.

Other powers granted to local authorities fall somewhere between these two types.

The classification of 'type' of a particular power is not easy and is often contested. It was clear from submissions and the engagement meetings that there is considerable disagreement both within local and central government and between local and central government on the classification of types of powers. In particular, there are different views as to whether a particular power is prescriptive and does not permit any discretion on the part of the local authority, or whether the power is one which confers the local authority with autonomy to decide how and when to act.

Figure 2.3 shows how Tasman District Council classified the types of regulation.

Figure 2.3 Devolved or Delegated Functions



Source: Tasman District Council, sub. 6, p.4

Where there is uncertainty within and between both government sectors about what the relationship is, it is likely to hinder ongoing work on improving regulatory delivery, and may prove an obstacle to effectively implementing changes to the regulation.

Accountability of local authorities to central government

Accountability means that a governmental institution must answer for its actions to other members of the political community.

There can be a view within central government that because local authorities are creatures of statute, they are in some way an agent of the central government, required to implement national priorities and in some way accountable to central government for their operational performance. Under this view, empowering statutes create something of an 'agency relationship' between the local authority and the Minister or government department that initiated and promoted the relevant statute.

This view over-simplifies the situation. The nature and extent of local authorities' accountability to central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks specifically provide that a local authority is accountable for its operational performance to the relevant Minister or government department, directly or indirectly. For example, under the building regulatory framework, the Minister for Building and Construction has powers of intervention if the Minister believes that the territorial authority is not fulfilling its statutory functions. The Chief Executive of the Ministry of Business, Innovation, and Employment also has powers to review the performance of local authorities in exercising their statutory functions and powers.

However, in the absence of explicit statutory recognition of a line of accountability, a local authority is not accountable to the relevant Minister or government department for the exercise of its statutory powers. Further, it is unhelpful to characterise the relationship between central and local government as an 'agency' relationship. In political science and economics, the term 'agency relationship' is used to describe the situation where a party or parties (the principal(s)) can influence or try to influence the actions of another party (the agent). Such influence could be exerted through legal means (for example, via legislation or regulations) or by political means (such as lobbying). Under such a broad definition, central and local government could each be seen to be principals and agents, depending upon the particular context. The legal definition of an agency relationship is much narrower and not applicable to the relationships between political institutions.

The characterisation of local authorities as an agent of central government seems to reflect a misunderstanding of the respective roles of, and relationship between, local and central government. Local authorities are established and empowered by statute, and operate within a regulatory framework largely established by Parliament and the executive. However, local authorities operate as a largely autonomous provider of services and accountable to their own communities. In these ways, local authorities are different from many other institutions that are also creatures of statute. Local authorities, for example, have materially different characteristics and powers compared with District Health Boards or school boards. The Commission agrees with the following submission:

> The regulatory roles played by local authorities are for the most part specific roles within complex regulatory frameworks. Parliament has mandated local authorities to undertake some roles within these systems and the executive arm of Government to undertake others. The legal obligation on both the local authorities and the executive arm of Government is to act in accordance with the law. … There is no inherent agency or accountability relationship between a local authority and the executive, just because a Minister has promoted the relevant piece of legislation. Such relationship only exists where Parliament has explicitly legislated to create it. (SOLGM, sub. 48, p.3)

Accountability to the Minister of Local Government

The Minister of Local Government has primary responsibility for policy and legislation affecting local government and the overall efficiency and effectiveness of the legislative framework within which local government operates. The Minister is also tasked with leading the relationship between central and local government. Except where specifically provided for in legislation, the Minister is not answerable for local authority decisions and cannot intervene in them. The flip side is that, unless specifically provided for in legislation, local authorities are not accountable to the Minister for the exercise of their powers.

The Minister has statutory powers of intervention in specific, defined circumstances. Some subject-specific legislation provides that the Minister may intervene where a local authority is unable to fulfil its functions or powers; the power in the Building Act 2004 (discussed above) is an example of this. In addition, the Minister has general powers of intervention under the Local Government Act 2002. Our interpretation is that the intervention powers of the Minister are intended to be a last resort for use in a serious case involving a breakdown of local authority governance. In such a situation, the Minister can appoint commissioners to govern the local authority or call an election to replace the councillors. In August 2012 the Minister of Local Government relied on these powers to appoint Commissioners to perform and exercise the powers and duties of the Kaipara District Council. The Council had requested the appointment of the Commissioners after a Crown Review team found serious problems in the management and finances of the Council.

Increased powers of ministerial intervention

The Local Government Amendment Act 2012 expands the powers of the Minister of Local Government to intervene in local authorities. In particular, it provides that where there is a "significant problem" in relation to a local authority, it is justified for the Minister of Local Government to intervene by requiring the local authority to provide him or her with certain information; by appointing a Crown Observer, Crown Manager, Crown Review Team, or Commissioners; or by calling an election of a local authority. "Problem" is defined broadly in the Bill as: (1) a matter or circumstance relating to the management or governance of the local authority that detracts from, or is likely to detract from, its ability to give effect to the purpose of local government; (2) a significant or persistent failure by the local authority to perform its statutory functions or duties; or (3) the consequences of a state of emergency. A problem includes a failure by the local authority to demonstrate prudent management of its finances. "Significant" is defined to mean that the problem will have actual or probable adverse consequences for residents and ratepayers.

The Local Government Amendment Act 2012 gives the Minister a significant amount of discretion as to when and how to intervene. There is no check on the exercise of that discretion by, for example, an independent agency. However, the Minister will be required to publish on the Department of Internal Affairs website a list of matters that will be relevant to the use of the intervention powers. The first list must be published by 31 March 2013. The Act also requires that the intervention must ensure, as far as is practicable, that a local authority's existing organisational capability is not diminished.

In developing the principles guiding the exercise of these new intervention powers, it will be important that reference is given to the overall nature of the relationship between central and local government. Exercising intervention powers judiciously will need to have close regard to the retained purpose of local government - enabling democratic local decision making.

Local government's relationship with other central government institutions

Various other central government agencies exercise certain functions and powers relating to local government. The Department of Internal Affairs provides policy advice to the Minister of Local Government and information about local government to ministers, other government departments, councils, and the public. The Local Government Commission is an independent statutory body whose members are appointed by the Minister of Local Government. Its main role is to make decisions on the structure and representation requirements of local government.

Accountability of local authorities to Parliament

Local authorities are accountable to certain officers and offices of Parliament. The Controller and Auditor-General is the watchdog over local authorities' financial matters. The Auditor-General conducts the audits of local authorities' accounts, performance audits at her discretion for some specific functions, and conduct inquiries, reporting to Parliament when necessary. The Parliamentary Commissioner for the Environment investigates complaints about local authority decisions on environmental issues. In addition, parliamentary select committees have the power to scrutinise local bills promoted by local authorities, and some other legislation that pertains to local government. Rarely, select committees will conduct inquiries into the system of local government. Ombudsmen, appointed by Parliament as independent review authorities, have the power to inquire into complaints against local government organisations.

Accountability of local authorities to the courts

Local authorities must act in accordance with the law and are subject to the jurisdiction of the courts and tribunals for how they exercise their powers. Local authorities are subject to judicial review and the courts also hear appeals against local authorities' decisions under various statutes. Local authorities are accountable through civil liability in damages for wrongs they do.

Accountability of local authorities to their communities

Local authorities are accountable to their communities. Regular elections are the key element of local authorities' accountability to their communities. One of the two purposes of local government, as identified by the Local Government Act 2002, is the enabling of democratic local decision making and action by, and on behalf of, communities. The Local Elections Act 2001 sets out how the local electoral system works. Elections are held every three years for every local authority and community board, and are normally conducted by postal voting although other methods may be chosen.

The accountability of local authorities to their communities is also realised through public meetings, extensive consultation requirements, media scrutiny, and the requirement that local authorities conduct their business in an open, transparent, and democratically accountable manner. The ways in which communities participate in local authorities' decision making is described in Box 2.4.

Box 2.4 **Public participation**

A major focus of the Local Government Act 2002 (LGA) is encouraging and enabling public participation in local authorities' decision making. The principal obligation of local authorities is to "give consideration" to the community views in all decision making (s 78(1) of the Local Government Act). Local authorities identify community views in a number of formal and informal ways. The formal processes include:

- Ordinary consultation processes.
- Special consultative procedure (a prescribed process of formal consultation that must be followed when making certain decisions).

- Processes developed to provide opportunities for Māori to contribute to decision making (as identified in Chapter 12).
- Referendum or poll of electors.
- Public delegations addressing local authority meetings.

Local authorities also identify community views in more informal ways, such as through informal discussions between members and ratepayers, town-hall meetings, local media, informal focus groups, and opinion polls.

Responsibilities of local authorities towards Māori

Local iwi can have a strong interest in the exercise of local authority regulatory functions. Interests in environmental management regulations are particularly strong where there is a kaitiaki relationship. The RMA includes reference to the kaitiaki relationship, which it defines as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship."

The Waitangi Tribunal describes kaitiakitanga as being the 'obligation side' of rangatiratanga, rangatiratanga being guaranteed under Article two of the Treaty. Expressing rangatiratanga by exercising the rights and responsibilities of kaitiaki at the local level can be seen as part of the Treaty relationship. The regulatory decision-making process a local authority uses can impede or enable the exercise of rangatiratanga. However, the Treaty relationship and obligations are between iwi and the Crown, of which local government is not formally part.

The Local Government Act includes a specific Treaty of Waitangi clause, which provides that the Crown's Treaty obligations are recognised and respected by placing obligations on local authorities to facilitate participation by Māori in local authority decision making processes (see s 4). Participation by Māori in the decision making process is considered in detail in Chapter 12.

Summing up

Issues concerning the constitutional place of local authorities are complex, contested, and the subject of some degree of tension, particularly between local government and central government. Some tension between actors in the political system is inevitable and perhaps also desirable for enhancing accountability and performance. However, for regulatory systems to work well, the actors involved must have mutual respect for and understanding of other actors and their roles. The following quote describes the constitutional place of local authorities well:

> While local government is a creature of statute, it operates as a largely autonomous provider of services, funded separately by property taxation and held accountable by voters. In the absence of well-defined constitutional or fiscal relationships, local and central government are most accurately regarded as two spheres of a system of collective decision-making, each with revenue-collection powers to fund the implementation of its particular policies and programmes… (Local Futures Research Project, 2006, pp.13-14)

2.3 Regulatory responsibilities of local government

Regulatory responsibilities conferred by Acts of Parliament

The Commission has been asked to take stock of those regulatory functions undertaken on the direction of central government and those undertaken independently by local government. Table 2 represents a starting point for considering the former – functions performed by local government under a central government statute.

Table 2.1 Regulatory activities undertaken by local government

Primary legislation	
Legislation and Agency	**Regulatory responsibilities of local government**
Biosecurity Act 1993 Ministry for Primary Industries	The Biosecurity Act 1993 allows regional councils to control pests by developing pest management strategies (sections 71 to 83). These set out the objectives of the strategy, the pests to be managed or eradicated, and the methods of management.
Building Act 2004 Ministry of Business, Innovation, and Employment	Territorial authorities are Building Consent Authorities. They issue building consents and undertake building inspections under the Building Act 2004, but have no role in setting building standards and cannot set higher or lower building standards than the Building Code. Regional Councils are Building Consent Authorities for dams; these usually require resource as well as building consent.
Dog Control Act 1996 and Impounding Act 1955 Department of Internal Affairs	The Dog Control Act 1996 makes councils responsible for the control of dogs and makes the registration of dogs mandatory each year. Councils must adopt dog control policies, maintain the dog registration system and enforce this Act. The Impounding Act 1955 requires every local authority to provide and maintain a public pound (two or more local authorities may jointly provide and maintain a public pound).
Forest and Rural Fires Act 1977 Department of Internal Affairs and Department of Conservation	Territorial authorities are sometimes a 'Fire Authority' for part of their jurisdiction. As a Fire Authority, territorial authorities must promote and carry out fire control measures, can make bylaws to do so (which could include fire bans), give warnings about fire risks, and must comply with the standards of the National Rural Fire Authority in doing so.
Freedom Camping Act 2011 Department of Internal Affairs and Department of Conservation	Under this Act, freedom camping is considered to be a permitted activity everywhere in a local authority (or Department of Conservation) area (section 10), except at those sites where it is specifically prohibited or restricted (section 11). Bylaws must not absolutely prohibit freedom camping (section 12). Bylaws need to designate the places where freedom camping is not allowed, or where it is restricted in some way (for example for a limited duration, or only in self-contained vehicles).
Food Act 1981 Ministry for Primary Industries	The Responsible Minister can set standards other than the 1974 Regulations (largely to give effect to Food Standards Australia New Zealand (FSANZ) standards made under the Joint Food Standards Agreement). Territorial authorities may be asked by businesses to grant an exemption from the 1974 regulations where there is evidence that a food safety programme is in place, and the applicant will take all reasonable steps to comply with all other applicable food standards and regulations. Territorial authorities may inspect premises and vehicles for compliance.
Gambling Act 2003 Department of Internal Affairs	Territorial authorities are required to develop class 4 (section 101) and TAB venue policies that must specify whether gambling machines are allowed and, if so, where they may be located. The policies may also specify any restrictions on the number of machines that can operate in a class 4 venue. Territorial authorities must decide consent applications on the basis of the policies they develop.
Hazardous Substances and New Organisms Act 1996 (HSNO) Administered by the Environmental Protection Agency for Ministry for the Environment	Section 97 instructs territorial authorities to enforce the HSNO Act in or on any premises situated in the district of the territorial authority. Regional councils play an enforcement role under the HSNO Act where this role overlaps with their functions under the RMA; as under the RMA, they are responsible for controlling hazardous substances (under their functions relating to managing the discharge of contaminants into the environment). The HSNO Act does not prevent stricter standards from being introduced by a territorial authority or regional council under the RMA.

Primary legislation	
Legislation and Agency	**Regulatory responsibilities of local government**
Health Act 1956 Ministry of Health	This Act makes it the duty of every local authority to improve, promote and protect public health within its district. Local authorities are empowered and directed to appoint staff, inspect their districts, take steps to abate nuisances or health hazards, make bylaws and enforce regulations made under this Act (subject to the direction of the Director-General of Health).
Litter Act 1979 Department of Internal Affairs	Territorial authorities are listed as 'Public Authorities' under the Litter Act 1979 and as such are responsible for the regulation of litter (defined as including "any refuse, rubbish, animal remains, glass, metal, garbage, debris, dirt, filth, rubble, ballast, stones, earth, or waste matter, or any other thing of a like nature"). Litter Control Officers can request the removal of litter and issue infringement notices and fines.
Maritime Transport Act 1994 Maritime New Zealand	Local authorities are required to provide navigational aids inside the ports they operate. Regional councils are required to have and update regional oil spill plans and to notify the director of the Maritime Safety Authority regarding hazardous substances on ships, or substances being discharged from ships in their waters. The Act also confers powers of investigation and enforcement (prosecution) to local authorities for acts endangering safety.
Prostitution Reform Act 2003 Ministries of Justice and Health and the Department of Labour	Local authorities are empowered to regulate the location and advertising of brothels through bylaws.
Sale of Liquor Act 1989 Ministry of Justice	This Act makes all territorial authorities District Licensing Agencies. Their role is to consider applications for the various kinds of liquor licences and for managers' certificates. Territorial authorities appoint inspectors to monitor compliance with liquor licences. The National Liquor Licensing Authority hears appeals of licence applications, and can make an order to suspend, revoke, or vary licences (including on the basis of requests from inspectors and constables for reasons including breach of conditions).
Transport Act 1962 Ministry of Transport	This Act allows territorial authorities to make bylaws about road use, and lists the offences enforceable by parking wardens.
Land Transport Act 1998 Ministry of Transport	Road controlling authorities (which include territorial authorities) have the power to make bylaws about almost any road-related matter.
Waste Minimisation Act 2008 Ministry for the Environment	The Act requires territorial authorities to adopt a waste management and minimisation plan to promote effective and efficient waste management and minimisation within their district.
Local Government Act 1974 Department of Internal Affairs	Residual regulatory powers – roads, sewerage and stormwater, waste management, navigation and safety; other matters. Navigation responsibilities include those relating to Harbourmasters appointed by regional councils. Continues to confer by-law making powers in various statutory areas.
Fencing of Swimming Pools Act 1987 Ministry of Business, Innovation, and Employment	Territorial authorities must take "reasonable steps" to ensure compliance with the Act's fencing requirements within their district.
Land Drainage Act 1908	The Act confers on local authorities the same powers with respect to cleansing, repairing or other maintenance as were had by elected drainage (and river) boards. Local authorities may order the removal of obstructions to waterways and dams, and may also be compelled to do so by individuals.

Primary legislation	
Legislation and Agency	**Regulatory responsibilities of local government**
Electoral Act 1993 Ministry of Justice	Enables electoral officers of local authorities to obtain from the Electoral Commission certain specified information required for any election, by-election or poll required by, or under, any Act.
Land Transport Management Act 2003 Ministry of Transport	Directs where funds are disbursed through Regional Land Transport Strategies.
Reserves Act 1977 Department of Conservation	Section 65 gives the administering body of any recreation reserve the power to pass bylaws to control public access and movement. This includes regional councils.
Soil Conservation and Rivers Control Act 1941	Some residual enabling clauses for local authorities and catchment, drainage and river boards to perform certain functions (for instance purchasing plant and machinery) for soil conservation and river control purposes.
Land Transport Act 1998	Now the statute governing parking control – Land Transport (Road Safety and Other Matters) Amendment Act 2011 repealed Transport Act 1962. Also covers transport services licensing which regional councils are involved with).
Burial and Cremation Act 1964 Ministry of Health	Requires local authorities to establish, maintain and regulate cemeteries (where sufficient provision is not otherwise made), and grants local authorities power to carry out those responsibilities.
Conservation Act 1987	Section 35 stipulates that, "A local authority may make contributions out of its general fund or account for the management, improvement, or maintenance of any conservation area even if the area is outside its district."
North Shore Boroughs (Auckland) Water Conservation Act 1944	City council may have control of the lake and gathering grounds as if the lake were public waterworks of the council. Grants by-law making powers to city council for a range of conservation, regulation and other purposes.
Takutai Moana Act 2011 Department of Conservation	If a customary marine title planning document is lodged with the local authority that has statutory responsibilities in the district or region where that title is located, the local authority must take the planning document into account when making any decision under the LGA 2002 with respect to the customary marine title area.
Public Transport Management Act 2008	The Public Transport Management Act 2008 confers various powers on regional councils – standard setting for commercial public transport services; regulation of commercial public transport services; requirements for public transport services to be provided under contract by the council.
Local Government Official Information and Meetings Act 1987	Regulates the public availability of official information held by local authorities.
Public Works Act 1981 Ministry of Transport; Ministry for Primary Industries; Land Information New Zealand	This Act regulates the execution of public works, including by local government. The Act grants local authorities powers necessary to carry out public works, including (but not limited to) acquiring necessary land, managing compensation processes, conducting surveying, and managing road traffic.
Climate Change Response Act 2002 Ministry for the Environment	Local authorities are subject to the Kyoto Protocol.
Health (Drinking Water) Amendment Act 2007 Ministry of Health	Creates additional duties for local government under the Health Act 1956 by including the requirement of a local authority to report on drinking water quality within its district as required by the Director-General or Medical Officer of Health. The Act creates an obligation on water suppliers and water carriers (including local

Primary legislation	
Legislation and Agency	**Regulatory responsibilities of local government**
	authorities) to monitor drinking water and take all practical steps to comply with standards.
Government Roading Powers Act 1989 Ministry of Transport	Local authorities are vested with various powers to execute, manage and consent work on roads, motorways and highways. The Act also confers by-law making powers to local authorities, for instance with respect to state highways.
Land Transport Management Amendment Act 2008 Ministry of Transport	Amends the Land Transport Management Act 2003. The Act manages the process of developing and maintaining land transport systems to achieve "an affordable, integrated, safe, responsive, and sustainable land transport system" (section (3)(1)). This largely affects regional and unitary councils, who must ensure the production, by a regional transport committee, of a regional land transport programme.
Historic Places Act 1993 Ministry for Culture and Heritage	The Act's purpose "is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand." Local authorities are required to adhere to the Act, and may be authorised to manage, maintain and preserve a historic place or area, in conjunction with the New Zealand Historic Places Trust (the Trust). Local authorities may transfer land to the Trust for the purposes of the Act.
Walking Access Act 2008 Ministry of Agriculture and Forestry	The Act enables controlling authorities (which can include local authorities, as appointed by the New Zealand Walking Access Commission) to enact bylaws to maintain walkways within their jurisdiction, and regulate their use.
Airport Authorities Act 1966 Ministry of Transport	The Act empowers local authorities to act as airport authorities, for the purpose of establishing, maintaining, operating or managing an airport. Local authorities and airport authorities are authorised to make bylaws for a range of purposes relating to the management and operation of airports.
Waikato-Tainui River Settlement Act 2010 Office of Treaty Settlements	The Act gives effect to the settlement of raupatu claims (2009); and establishes co-management arrangements of the Waikato River by the Waikato Regional Council and Tainui.
Local Government (Auckland Council) Act 2009 Department of Internal Affairs	The Act establishes the Auckland Council as a unitary authority for Auckland, conferring appropriate powers on Council.
Wildlife Act 1953 Department of Conservation	Minister can coordinate the policies and activities of local authorities that relate to the Act.

Secondary legislation	
Secondary Legislation **- Enacting (primary) legislation** **- Agency**	**Regulatory responsibilities of local government**
Food and Hygiene Regulations 1974 (Health Act 1956 and the Food and Drug Act 1969) Ministry of Health	The Food Hygiene Regulations require registration of food-associated premises with their local authority. Every local authority is required to inspect all premises that should be registered in their area, and to enforce the specific hygiene regulations.
Camping Grounds Regulations 1985 (Health Act 1956) Ministry of Health	Local authorities are required to enforce the provisions of the regulations within their district; and to inspect camp grounds. Local authorities are also authorised to conduct regular inspections of relocatable homes.
Amusement Device Regulations 1978 (Machinery Act 1950) Ministry of Business, Innovation, and Employment	The Regulations vest in local authorities the power to grant permits for Amusement Devices. Section 11(6) states: "The fee required to be paid for an application for a permit shall be: (a) for 1 device, for the first 7 days of proposed operation or part thereof, $10; (b) for each additional device operated by the same owner, for the first 7 days or part thereof, $2; (c) for each device, $1 for each further period of 7 days or part thereof."
Building (Dam Safety) Regulations 2008 (Building Act 2004)	The Building (Dam Safety) Regulations 2008 prescribe the criteria for dam specification and came into force on 1 July 2012. This legislation operates under Section 161 of the Building Act 2004, which requires regional councils to adopt a policy on dangerous dams.
NES for Air Quality 2004	The National Environmental Standards on Air Quality (2004) set out 14 standards. The NES prohibits certain activities that discharge significant quantities of atmospheric toxins; sets five standards for outdoor air quality; establishes a design standard for wood burners in urban areas; requires greenhouse gas (methane) emissions to be collected and destroys at landfills over 1 million tonnes of refuse.
NES for Sources of Human Drinking Water 2007	The National Environmental Standard for Sources of Human Drinking Water requires regional councils to take the effects on drinking water quality into account when granting water permits or discharge permits; and including or amending rules in a regional plan in relation to permitted activities. Regional councils and territorial authorities are also required to impose a notification requirement on certain resource consents if a specific event occurs that may have a significant adverse effect on a drinking-water source. *(Legislation New Zealand)*
NES Telecommunications Facilities 2008	These regulations provide national environmental standards for telecommunication facilities. The standards relate to the radiofrequency fields of all telecommunication facilities and the dimensions and noise levels of telecommunication facilities in road reserves. *(Legislation New Zealand)*
NES Electricity Transmission 2009	These regulations provide national environmental standards for electricity transmission. The regulations categorise activities that relate to the operation, maintenance, upgrading, relocation, or removal of existing transmission lines. Activities are categorised as permitted activities, controlled activities, restricted discretionary activities, non-complying activities, or discretionary activities. *(Legislation New Zealand)*

Secondary legislation	
Secondary Legislation **- Enacting (primary) legislation** **- Agency**	**Regulatory responsibilities of local government**
NES Contaminated Soils	These regulations provide a national environmental standard for activities on pieces of land whose soil may be contaminated in such a way as to be a risk to human health. The activities are removing or replacing a fuel storage system, sampling the soil, disturbing the soil, subdividing land, and changing the use of the piece of land. The activities are classed as permitted activities, controlled activities, restricted discretionary activities, or discretionary activities. *(Legislation New Zealand)*
NPS Coastal Policy 2010	The National Policy Statement on Coastal Policy 2010 is designed to guide local authorities in their management of the coastal environment. The document states policies in order to achieve the purpose of the RMA 1991 with respect to New Zealand's coastal environment.
NPS Electricity Transmission 2008	The national policy statement on electricity transmission requires local authorities to give effect to its provisions in plans made under the RMA.
NPS Renewable Electricity Generation 2011	The national policy statement on renewable electricity generation covers the construction, operation, maintenance and upgrading of new and existing structures for renewable electricity generation.
NPS Freshwater Management 2011	The NPS for freshwater management provides a guide to councils on achieving national objectives for water management through regional policy statements and plans.

Regulations done "on their own initiative"

The inquiry terms of reference specifically require the Commission to identify regulations that local authorities have undertaken of their own initiative. In fact, the Commission has found no examples of bylaws being made that were not obviously required or empowered by statute law. The one possible exception is a ban on genetically modified crops in a region, which LGNZ describes as 'legally dubious'.

The Commission has encountered a generally low level of understanding about the origins of new regulations. For instance, the increase in the use of NES can require local authorities to put in place additional regulations, to reflect the new standards. Examples include NESs for Air Quality (which affect the kind of woodburners people can use to heat their homes, and may require upgrades) and soil contamination (which can require testing to be undertaken if the use of a piece of land changes). Individuals and businesses will experience this as a new regulatory intervention by their local authority.

F2.3 Contrary to common perceptions, almost all regulations made or administered by local authorities are undertaken on the direction of central government, or are necessary for carrying out their duties under Acts of Parliament.

2.4 The effect of the power of general competence

There is some reason to question the common assertion that the power of general competence has led to an 'explosion' in local regulation. Apart from these claims not being borne out when specific examples are reviewed, a 2008 survey of local government by the Local Government Commission showed that, although 28% of Councils that responded to the survey believed they had undertaken new activities since the power of general competence was introduced:

> It should be noted that certain provisions in the predecessor Act (Local Government Act 1974) provided local authorities with wide powers in certain areas. Upon reviewing examples of new activities or

> ventures that councils provided, the Local Government Commission notes that few, if any, could not have been entered into under the 1974 Act.
>
> …
>
> As an example of the previous wide powers, in its submission to the Local Government Commission on the review of the Local Government Act 2002 the Society of Local Government Managers (SOLGM) noted that under the 1974 Act some local authorities provided subsidies for such things as attracting general practitioners to small rural areas and retaining post offices in local communities.
>
> In summary, the Commission concludes that many of the survey responses to Q4b may result in part from a lack of knowledge of the 1974 provisions. The impact of conferring full capacity, rights, powers and privileges on local authorities has not seen a significant change in the activities of local authorities. (Local Government Commission, 2008, pp.18-19)

Or, as one local elected member participating in an engagement meeting put it:

> "It's nice to know that we have the power of general competence, but I haven't yet found anything I can use it for."

The Commission has also found no instances where local authorities had made a regulation that was not either required by statute or reasonably required for fulfilling a role delegated by statute.

Claims of local authorities acting *ultra vires* (beyond their powers) or undertaking a range of actions that would have been *ultra vires* under the old Act, are therefore likely to be largely incorrect. Complaints about the power of general competence are more likely to stem from a disagreement about the extent to which any part of government should be involved in regulating an individual's private property rights, as they see them. In this sense, it is much more an issue of political or ideological orientation than an issue about local authorities acting *ultra vires* or about the effect of the power of general competence. Resolving disputes about how local authorities use their regulatory discretion (where this is present) is best done through an exercise of local democracy (which remains the purpose of local government).

3 Diversity across local authorities

Key points

- New Zealand's local authorities are diverse in terms of their size, social make-up and industry structure.
- Reflecting this variation, New Zealand's local authorities face distinct regulatory challenges and so may adopt differing approaches to local government regulation.
- The available data suggests that the economic growth experience across New Zealand's local authorities has been diverse.
- Given diverse local economics and other regional differences, the regulatory policies of central government may lead to different outcomes in different regions, suggesting the need for careful consideration of the regional impacts of national policies.

This chapter outlines the extent and nature of diversity across local authorities. This responds to the Inquiry's Terms of Reference, which tasks the Commission with investigating the drivers of local government regulatory variation. Differences in circumstance, endowments and local conditions across local authorities mean that local governments face distinct regulatory challenges. Partly as a result of these differences, economic growth also varies across local authorities. This variation is likely to drive different approaches to regulation at the local level, which may also be affected by different preferences across local communities and local governments.

3.1 Local authorities are naturally different

There is a great deal of diversity across New Zealand's local authorities. Some forms of variation are obvious, such as geographic size, population, and population density. Physical endowments – such as land, water and other natural resources – also obviously differ substantially across the country. Reflecting these and other regional attributes, the industry structure of local economies and local demographic profiles differ significantly across the country.

New Zealand's local authorities are socially diverse

Social differences across regions in New Zealand are a key source of local variation. Demographic and social differences may partly be natural, but may also be driven by the way land and other resources are used, which can impact on the rate and type of job growth. This variation may reflect different regulatory imperatives, relating to such factors as development consent and environmental management pressures.

Current population levels and projected growth rates vary considerably across local authorities. Over the 25 years from 2006 to 2031, New Zealand's population is projected to grow from 4.185 million to 5.149 million – an increase of around 22% (Statistics NZ, 2010). Of this growth, around 60% is projected to be in the Auckland region, while Queenstown Lakes District is projected to have the single highest rate of population growth of any Territorial Authority (TA), at an annual average growth rate of around 2.2%.[2] At the same time, the population of around two-fifths of New Zealand's TA areas is expected to decline over this 25 year period (Statistics NZ, 2010).

F3.1 New Zealand's national population is projected to grow over the next 25 years, but almost half of New Zealand's TA areas are expected to decline in population over this period.

[2] These figures reflect the 'medium' projections calculated by Statistics NZ (2010).

While the high-density urban TAs generally experience high rates of population growth, the highest rates of historical and projected population growth are associated with some of the rural tourism, recreation and retirement locations, such as Queenstown Lakes District, Selwyn District, Rodney and Waimakariri (Statistics NZ, 2010; PC, 2012a, p.77, see Figure B.2). In urban TAs, population growth pressures are also influenced by differences in ethnic composition. In particular, Māori and Pasifika populations tend to have higher levels of growth due to natural increase, which can contribute to higher levels of overall population growth in local authorities with relatively higher Māori and Pasifika populations. In addition, international migrants tend to settle in main urban areas, predominantly Auckland, Christchurch and Wellington, while the rest of the country tends to lose population to international migration (PC, 2012a, pp.71-72).

Internal migration is another source of population growth and decline. For example, since the mid-2000s Auckland has tended to lose migrants to other regions within New Zealand (PC, 2012a, p.72), with certain age brackets (20-24; mid-30s; above 60) being more mobile (PC, 2012a, pp.71-72). Higher mobility within these age groups is likely to reflect different drivers (for instance retirees moving closer to family and to 'retirement-friendly' locations), meaning that different local authorities are likely to experience in-flows of groups with different priorities, who may have different expectations about the role of local government.

Local labour forces differ across the country

Local populations also typically provide labour into the local economy. Differences in aspects of the local workforce such as age, labour market participation, and worker skillsets result in different labour supply at the local level. Partly as a result of these differences, labour productivity is likely to vary across the country, although regional productivity data is currently unavailable. These factors influence the type of economic activity that occurs in different locations and thereby influences incomes at the local level.[3]

Indeed, income levels vary across the country and are generally associated with the degree of urbanisation and population density. According to Census 2006 data, the highest average (mean) income levels in the 25-44 year-old age bracket were in Wellington, followed by Auckland. TAs adjacent to both of these cities also had high average incomes, as did Queenstown Lakes District (generally a statistical outlier). There was greater distribution of income levels in the North Island than in the South Island, with both the lowest and highest average income levels situated in North Island TAs (see Figure B.6). Variation in the income levels of local populations may result in differing regulatory priorities of local authorities across New Zealand, as well as different levels of regulatory capacity due to lower financial resources. This suggests that some regulatory variation is to be expected across TAs in New Zealand. It also suggests the need for some degree of flexibility in local government implementation of central government regulations – reflecting local preferences as well as local capacity.

F3.2 Differences in demography, labour markets and local incomes across New Zealand's local authorities may drive different regulatory needs and capacity at the local government level.

Physical endowments and industry structures vary across the country

Local endowments – including natural resources – vary across the country. For example, farmland is widely distributed across rural New Zealand whereas mining and mineral resources are concentrated in the West Coast, Taranaki and Waikato regions (MBIE, forthcoming). Physical infrastructure (such as buildings and roads) also varies in its concentration across the country. Buildings and roads are obviously concentrated in New Zealand's larger cities, particularly Auckland. However, network infrastructure that links different locales – such as roads and telecommunications – plays an important role for all locations. These differences in natural and man-made physical endowments are one factor driving differences in the industry structure of local economies and economic activity across TAs.

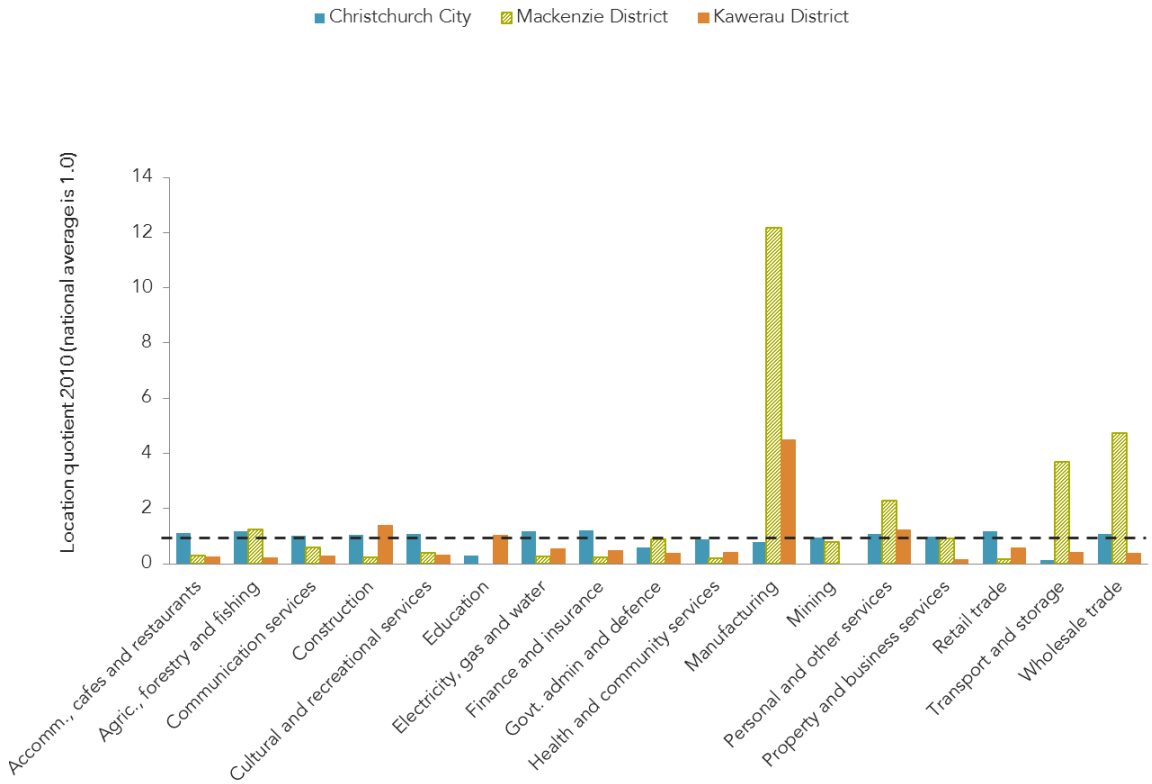
For some authorities, particularly the larger ones, the industry composition of the local economy is fairly similar to the structure of the national economy. These TAs tend to be regional 'hubs' that provide services

[3] This data is outlined in Appendix B.

for more specialised neighbouring TAs. These more specialised 'spoke' authorities tend to be less populated, with local employment concentrated in fewer industries.

By way of example, with the exceptions of mining and agriculture, the distribution of employment across industries in pre-earthquake Christchurch was very similar to the national average, indicating a broadly similar industry structure (Figure 3.1). In the Mackenzie District, on the other hand, the industry structure is very different from the national average with employment concentrated in electricity, gas and water supply; followed by accommodation, cafes and restaurants; and agriculture, forestry and fishing. Most other industries have a far lower presence in Mackenzie District than on average in New Zealand. As an example of another spoke local economy, employment in Kawerau District is heavily concentrated in manufacturing – reflecting the previous importance of the nearby Norske Skog newsprint mill (now being scaled down) for the local economy.

Figure 3.1 Industry structures of Christchurch City, Mackenzie District and Kawerau District



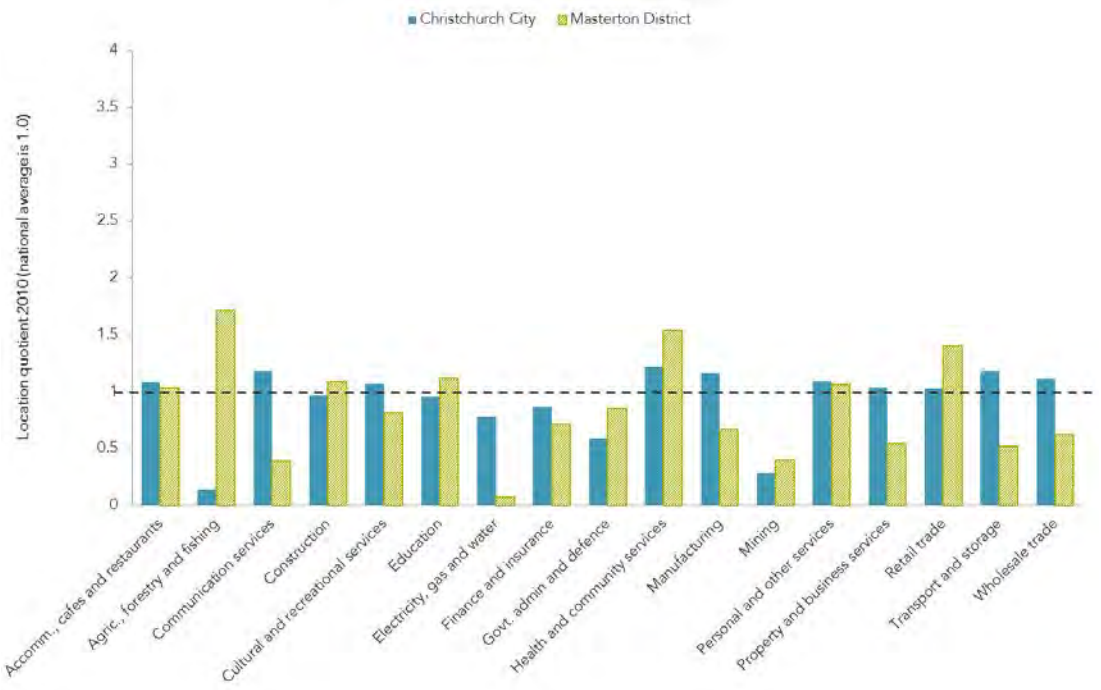
Source: Productivity Commission estimates; using Statistics NZ data (prototype Longitudinal Business Database)

Notes:

1. The industry structure of TAs was calculated using employment data from the prototype Longitudinal Business Database (LBD). The percentage of employment in each industry is compared to the percentage of employment in that industry across the country as a whole.
2. A figure above or below the dotted black line (at 1.0) indicates that the percentage of employment in the given industry is higher or lower in that TA, compared to the national average

Interestingly, industry structure is not solely a function of size. Figure 3.2 compares the industry structures of Christchurch and Masterton. Even though Christchurch is much larger than Masterton, both TAs act as regional 'hubs' – Christchurch in the Canterbury region, and Masterton in the Wairarapa. Both TAs have a broadly similar industrial structure to the national average.

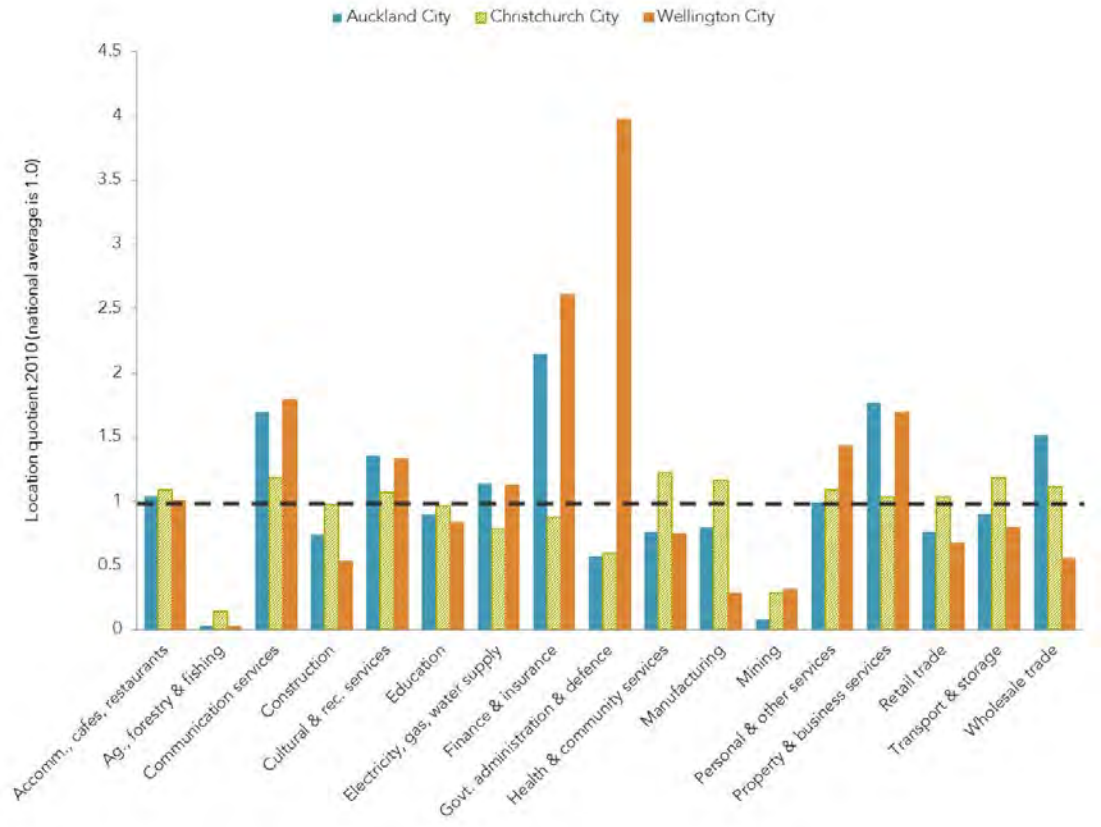
Figure 3.2 Industry structures of Christchurch City and Masterton District



Source: Productivity Commission; Statistics NZ (Prototype LBD)

Although New Zealand's larger metropolitan areas tend to act as hubs to the surrounding regions, they also have their own distinctive structural characteristics (Figure 3.3). In particular, Auckland and Wellington's industry structures are much less similar to the national average than that of Christchurch. Wellington, as to be expected for the capital city, has a large government administration and defence sector, while both Auckland and Wellington have large finance sectors compared to the national average. So even for New Zealand's major metropolitan centres, there is significant local variation in industry structure.

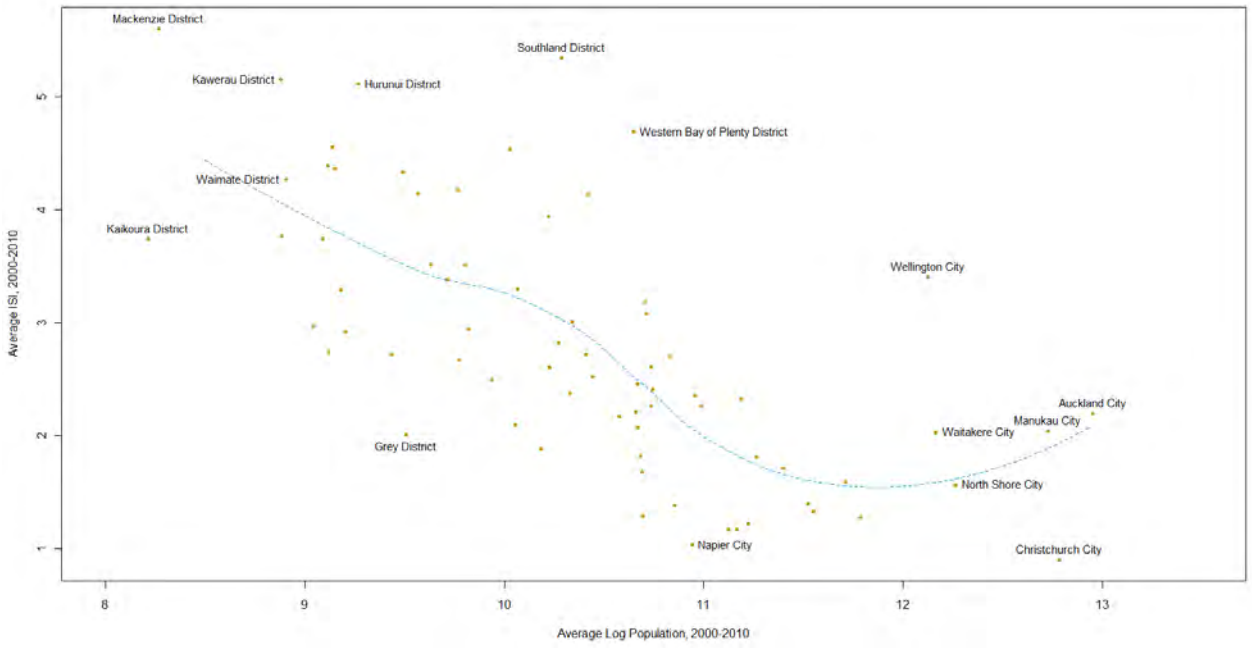
Figure 3.3 Industry structures of Auckland, Christchurch and Wellington cities



Source: Productivity Commission; Statistics NZ (Prototype LBD)

Notwithstanding variation in the size of hub TAs and differences in industry structure across New Zealand's larger cities, there is a clear correlation between size (in population) of TAs and industry structure across the country. This reflects the general pattern of larger hub cities and more specialised spoke peripheral regions. As such, smaller TAs tend to have a much more specialised industry make-up than larger TAs (Figure 3.4). Understanding the nature of this specialisation is important as it suggests that smaller TAs have more specific regulatory requirements.

Figure 3.4 Industrial structure index (ISI) and average TA population, 2000-2010



Source: Prototype LDB (Statistics NZ); Productivity Commission estimates.

Notes:

1. An ISI figure of zero indicates perfect alignment of industrial shares between one TA and New Zealand as a whole, while a figure of any positive number X indicates X percentage points differences between that TA and New Zealand. Larger TAs (in population) are further to the right on the x axis, and also tend to be closer to the national average in industry shares. As noted above, Christchurch is the TA most similar to the national average in New Zealand.[4]

F3.3 Physical endowments vary across New Zealand's TAs, as does industrial activity. Employment data indicate a pattern of larger hub TAs, which tend to have fuller suites of industries, along with a larger number of more specialised smaller authorities.

F3.4 Greater industrial specialisation in smaller TAs suggests more specific regulatory needs in smaller authorities. This provides one explanation for variation in regulatory activity across New Zealand's TAs.

[4] The Industrial structure index (ISI) provides a measure of the similarity of the industrial structure in one region to New Zealand and is calculated as $ISI_i = 100 \times [\sum_{j=1}^{n} |S_{i,j} - S_{NZ,j}|/n]$ (1)

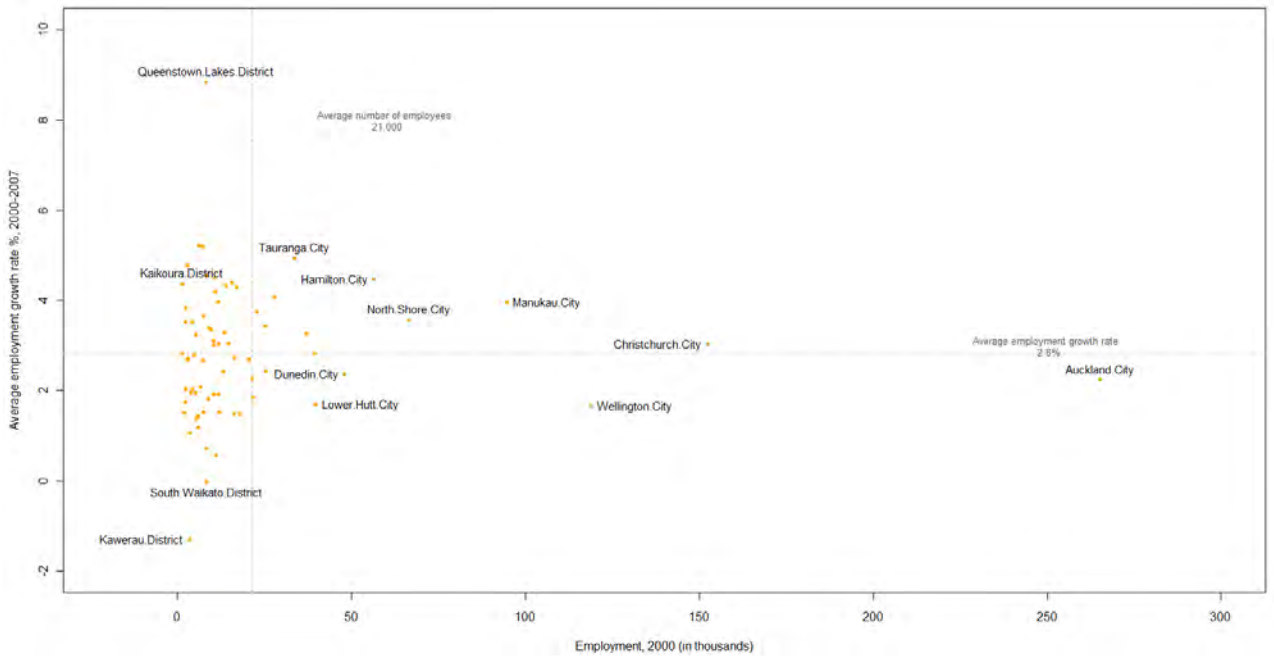
$S_{i,j}$ is the employment share of industry j in region i, and $S_{NZ,j}$ the employment share of industry j in NZ. n is the total number of industry, n=17 in 1-digit Australia New Zealand Standard Industry Classification 1996.

3.2 How have New Zealand's regions been performing?

New Zealand's regions have had mixed growth experiences

There are no official estimates of economic growth at the level of the TAs.[5] However, employment growth rates can be used as a proxy for regional economic activity – with the caveat that this data does not capture the effects of differences in labour productivity. Employment growth data suggests that economic activity has been far from uniform across TAs. As Figure 3.5 shows, the employment growth experiences of New Zealand's larger TAs (in terms of population) have been relatively similar to one another, while the experiences of smaller TAs have varied much more. While some have tended to have employment growth levels far above the national average, others have had much lower employment growth levels (indeed Kawerau District has lost employees between the years 2000-2007).

Figure 3.5 Regional employment growth and employment levels



Source: Prototype LBD (Statistics NZ); Productivity Commission estimates.

This pattern of employment growth rates reflects the generally higher degree of industry specialisation in New Zealand's smaller TAs, that potentially exposes them to idiosyncratic economic shocks (both positive and negative) relative to the larger authorities. This employment data reinforces that of the industry structure data in demonstrating that New Zealand's larger regions tend to be more economically robust (they are supported by a more complete suite of industries), while economic outcomes tend to be much more variable across the smaller, more specialised TAs.

The recent experience of Kawerau District exemplifies the more exposed nature of smaller TAs in New Zealand. Restructuring and wide-scale redundancies at the nearby Norske Skog newsprint mill, on which Kawerau District is heavily reliant for employment, represent a significant shock to the local economy given its industrial make-up. As indicated above, Kawerau District has a very uneven industrial structure, with a heavy reliance on manufacturing. While its shares of construction and education are similar to the national average, other industries are virtually non-existent. This means that an idiosyncratic shock to the manufacturing sector will have had considerable negative effects on employment levels and overall economic performance, and therefore, community wellbeing. As Box 3.1 explains, it is important to understand the causes and effects of economic growth at the local level, since economically strong regions are an important component of national economic growth.

[5] Statistics NZ (2006a) developed a prototype measure of regional GDP and estimated it for the years 2000-2003. Based on regional production data, this project calculated regional GDP figures for 15 regions, and 16 industries within those regions See Statistics NZ (2006a; 2007).

Box 3.1 **Regional economic growth is important for national growth**

International research has found that region-specific factors, in addition to national factors, can be important determinants of regional economic growth. Because of its impact on business productivity and the transformation of physical endowments into factors of production, the local government sector potentially has a big influence on local economies. In turn, local economies make a large contribution to national economic growth, making regional economic performance of national concern.

Strong regions

Recent research from the OECD (2009b; 2011; 2012a) has emphasised the importance of promoting regional growth for the national economy. The OECD research finds a small number of major regional 'hubs' tend to contribute most to national economic growth.[6] A much greater number of regions contribute far less at the individual level, but collectively make up a significant proportion of national economic growth. Across the OECD countries, this generally follows a one-third, two-third rule whereby a few economically significant regions (around 4% of the total number of regions) contribute around one-third of aggregate growth, with two-thirds from all other regions (OECD, 2011). Because around two-thirds of economic growth is spread over a large number of smaller regions, a relatively small increase in the economic growth performance of smaller regions can have a strong impact on national economic growth.

Regional employment data from New Zealand demonstrates a similar growth pattern. Prior to Auckland's amalgamation, the five largest TAs in New Zealand (7% of TAs) accounted for over 40% of national employment growth.

Region-specific factors play a role in determining regional growth and decline

The OECD classifies two types of region – larger "TL2" regions, and smaller "TL3" regions. Under the OECD's classifications, New Zealand has two TL2 regions (the North and South Islands) and 14 TL3 regions, which mostly correspond to Regional Council boundaries.[7] Research on how regions grow (OECD, 2009b) identified six main factors contributing to regional economic growth or decline in both types of region. These were:

- National or common factors (for instance, monetary policy);
- Regional population growth (relative to national rates);
- Relative regional labour productivity;
- Relative regional employment rates;
- Relative regional labour participation rates (the size of the labour force relative to the working-age population); and
- Relative regional population of working age.

National factors were most important in determining the growth and decline of larger (TL2) regions, as well as growth in smaller (TL3) regions. For declining TL3 regions, local productivity loss was the single most important factor (OECD, 2009b, pp.56-58). These findings indicate that careful attention needs to be paid to both national and local policies in ensuring regional economic growth – which in turn is an important component of national economic performance.[8]

Source: OECD (2009b, 2011, 2012a)

[6] The OECD refers to 'hub' regions as the "small number of relatively large, dynamic regions" (OECD, 2011, p.18).
[7] See OECD (n.d., p.41). Nelson, Tasman and Marlborough are grouped together in one TL3 region. TL2 regions are larger regions within the OECD countries; TL3 regions are micro-regions that are contained within the larger TL2 regions. In 2011 the OECD classified 362 TL2 regions and 1,794 TL2 regions (OECD, 2011b).
[8] The BERL 'Regional Rankings' report (2012) employs economic indicators to assess regional performance – resident population, GDP, number of business units, FTE employment, and relative openness (BERL 2012).

F3.5 New Zealand's TAs have had mixed employment growth experiences. Employment growth has been steadier in larger TAs, while varying significantly across smaller TAs.

3.3 Variation may drive different approaches to local government regulation

Variation in local endowments may explain different regulatory approaches

Local variation may underpin differences in regulatory approaches by local government. Differences in size, demographics, physical endowments, industry structure and economic growth rates across TAs suggest different regulatory priorities. Similarly, variation in rates of population growth and decline places different regulatory pressures on local authorities. These differences may provide the impetus for local authorities to develop regulatory competencies in areas most relevant to their particular circumstances.

Local variation may therefore drive regulatory differences across councils. While some TAs may require regulatory expertise in only a very few areas in which they specialise, others require it to cover a wide range of regulatory activity, although this may change over time depending on whether particular industries are growing or declining in the local authority. Having an accurate picture of industry structure across regions in New Zealand is useful as it indicates the different regulatory needs of different regions, at different times. A forthcoming *Regional Economic Activity Report* produced by the Ministry of Business, Innovation and Employment (MBIE, forthcoming) is a valuable resource in this respect. Such data becomes further relevant when one considers opportunities for regulatory cooperation and learning between local authorities (as discussed in Chapter 8 of this report).

Different local preferences may be another source of regulatory variation

Differences in local preferences; local capacity and capability; and different interpretations of councils' roles are also likely to impact on councils' regulatory activities. In the context of regional economic development, it may be particularly useful to reflect on the role of councils: what do councils do to encourage regional economic growth, and what do we think they should be doing?

Most submissions from local government indicated that local variation and local preferences required a differentiated approach to regulation, and emphasised the positive outcomes of regional regulation. Southland District Council noted for instance, "There can be instances where local government regulation, such as Resource Management Act (RMA) zoning techniques, can add to efficiency and community cost-effectiveness by providing for more logical and practical infrastructural servicing" (Southland District Council, sub. 5, p.2).

Local authorities play differing roles in encouraging regional economic growth

Regulatory variation between councils appears greatest in their interpretation of their role in pursuing regional economic development. Some councils take an active role in pursuing economic development. Rotorua District Council, for instance, adopted in September 2011 a Sustainable Economic Growth Strategy, including a 'destination marketing plan'. It focuses on supporting key industries (forestry and wood processing, tourism, and geothermal and agricultural sectors); lifting the region's reputation as a lifestyle destination and investment/business location; and adopting an approach to regulation that is "enabling" (Rotorua District Council, sub. 11, pp.4-5). The Greater Wellington Regional Council has, similarly, responded to a national imperative to lift growth by resolving to be more 'business friendly', in the fulfilment of its regulatory responsibilities (Greater Wellington Regional Council, sub. 37, p.2). Mackenzie District Council endorsed the BERL (2012) report's conclusion that "small or medium-sized rural local authorities … are often keen to encourage economic growth" (Mackenzie District Council, sub. 21, p.4).

Other authorities appear to have been less explicit in pursuing economic growth in their area.[9] The Greater Wellington Regional Council's submission hints that there may be inconsistent guidance from central government as to the methods that local government should employ to fulfil their mandate:

> … regional planning requires a strategy that provides high level guidance on what the various statutory planning activities are aiming to achieve, and ensuring the integration of functions under the RMA, Local Government Act (LGA) and the Land Transport Management Act (LTMA). The Auckland Plan provides this strategic guidance within Auckland, but there is currently no process for this to occur in other regions. Clear strategic direction would ensure the regional, district and other local authority plans and policies are aligned and co-ordinated within the region, removing any duplication of activity as well as reducing the ability for extensive litigation and all levels of the planning process. It could also allow better alignment of environmental, economic, social and cultural objectives. (Greater Wellington Regional Council, sub. 37, p.5)

The fact that only Auckland has been given such strategic guidance suggests that while the LGA has given all local governments a mandate to pursue growth (Cheyne, 2008; Dixon, 2005; Wallis & Dollery 2002), there is less clarity around the appropriate methods local government should employ to achieve that mandate. This lack of clarity arises from contradictory edicts from central government regarding the appropriate role of local governments and can, therefore, only be remedied by removing these contradictions.

While local variation may explain differences in local government regulation, local variation therefore also has implications for central government. Because local variation may imply different regulatory priorities across TAs, it is important for central government to carefully consider the regional effects of national policies; the allocation of local and central regulatory responsibilities; as well as the mandate given to local government to pursue regional economic growth. The inter-related nature of these issues underpins the approach adopted in this report – to examine the overall consistency of New Zealand's regulatory system.

F3.6 Local variation likely drives different regulatory approaches. Part of this variation in regulatory approach appears to be differing interpretations of local government's role in promoting economic growth.

F3.7 The appropriate role of local government in fulfilling its mandate to pursue economic growth has been left unclear by central government.

Q3.1 To what extent should local government play an active role in pursuing regional economic development?

3.4 Conclusions

Physical endowments, industry structure, demographic profile, and economic performance all vary across New Zealand's TAs. These differences give rise to different regulatory pressures on local government, providing an explanation for regulatory variation at the local level. In addition, there seem to be different interpretations of the role of local government in promoting economic growth at the local level. These issues are important to understand, since strong regional growth is important for the national economy.

[9] It should be noted that the questions in the PC's (2012) Issues Paper did not specifically request information on local government pursuit of regional economic development.

4 Allocating regulatory responsibilities

Key points

- The Commission has developed a framework for allocating regulatory responsibilities between different levels of government underpinned by the principle of subsidiarity – decision making, powers, responsibilities and tasks should reside with the lowest, or least centralised competent authority (level of government).
- If the issue to be regulated is a local one, and people affected by the decision are represented by the jurisdiction, and the jurisdiction has the information and capability to make a decision, then devolving decision making to those affected is likely to be the most efficient solution.
- Many local issues, however, also have benefits or costs that extend beyond the boundary of the local jurisdiction. Local decision making can be rebalanced to capture these broader interests in a number of ways – from the provision of guidance or direction, to a clarification of responsibilities, to a reassignment of role to the centre – depending on the relative weight given to the magnitude of spillover effects and the value accorded to local preferences.
- Where preferences are more homogeneous, greater consideration should be given to the efficiencies that come from avoiding duplication of decision making at the local level.
- Systematic analysis of the capabilities and information required to undertake regulatory tasks is required when designing a regulatory regime and assigning regulatory roles. How information and knowledge will be diffused between actors in a regulatory regime, particularly where tasks are allocated across different levels of government, is also an important consideration in the design of regulation.
- A central tenet of good regulatory design is that risk should be allocated to those parties able to manage it through the actions they are able to take. A misallocation of risk can have costly consequences and those costs may fall on parties unable to mitigate them efficiently. Insufficient attention has been given to the ability to manage risk in the allocation of regulatory roles.
- Uncertainty about roles and accountability, and problems in coordinating activity are likely to occur when regulatory responsibilities are split between central and local government.
- Both local and central government need to work on a constructive engaged relationship for the development of quality regulations and the delivery of regulatory outcomes.
- Feedback is sought on proposed guidelines for allocating regulatory roles and evaluating the assignment of roles.

The Commission was asked to develop principles to guide decisions on which regulatory roles are best undertaken by local or central government in New Zealand. This chapter looks at theories underpinning the allocation of responsibilities between different levels of government and summarises the views expressed in submissions, surveys and engagement meetings. The chapter then develops guidelines for the allocation of regulatory roles and concludes by testing the guidelines on two regulatory areas.

4.1 What does theory tell us?

Decision making

The issue of how best to allocate responsibility between different levels of government has been debated for decades. Oates (1972) made the case that, in the absence of cost savings from centralisation and any effects spilling over (either benefiting or imposing costs) on other jurisdictions, it is efficient for responsibility to be decentralised because local governments are better able to make decisions that align with the preferences of their constituencies.[10] This conception of efficiency is consistent with the principle of subsidiarity - that decision making, powers, responsibilities and tasks should be handled by the lowest, or least centralised competent authority (level of government).

People express their preferences in political systems by voting. That said, the voting system requires a choice between representatives, rather than choosing between policies directly. This introduces inexactness in the expression of policy preferences. Despite this, voting ensures that people's preferences can be represented and elected officials held accountable for their actions (Rehfeld, 2011). According to Tiebout (1956), people who are dissatisfied can move to another jurisdiction that more closely matches their preferences.[11]

Political responsiveness to voter preferences at the local level coincides with better decision making when:

- there is local financing and fiscal authority at the local government level so that politicians bear the costs of their decisions and deliver on their promises;
- local communities are informed about the options, and the resources available;
- communities can express their preferences;
- there is a system of accountability so that the community is able to effectively monitor the performance of local government (World Bank, 2001).

What happens when preferences are not represented by the jurisdiction making the regulatory decision, when regulatory decisions made in one jurisdiction spill over, imposing costs or conferring benefits on other communities? And, in what circumstances would you sacrifice local tailoring of regulations to achieve efficiencies from centralisation if efficiencies could be achieved?

The efficient allocation of responsibilities will depend on the specifics of each case. It will hinge on the relative value placed on heterogeneous local preferences against the magnitude of spillovers and the cost savings that might be achieved from centralisation (Lin, 2003). It is also likely to depend on the range of mechanisms available for taking the relevant costs and benefits into account.

The discussion gives rise to three findings from the literature on the allocation of regulatory responsibilities:

F4.1 Better regulatory decisions will be made, and overall wellbeing improved, when those who bear the costs and benefits from the regulation have representation in the jurisdiction making the decision.

F4.2 If there are spillover effects, better regulatory decisions will be made if the costs and benefits that are borne by those outside the decision making jurisdiction are taken into account.

[10] The central normative result of Oates Decentralization Theorem is that whenever spillovers are insignificant and local preferences sufficiently heterogeneous, decentralisation — ie, each local jurisdiction chooses its policy independently — achieves a higher level of social welfare than any uniform policy. Conversely, if local preferences are sufficiently homogeneous and spillovers sufficiently large, political integration — ie, voting over a uniform policy — can be Pareto improving (Loeper, 2007).

[11] Decentralisation thus facilitates choice for people and regulatory competition. It may also encourage experimentation and innovation in public policy. Decentralisation results in a variety of policy approaches at the local level, some of which will be more successful than others. Once given policies have been shown to work, they can be taken up by other decentralised units as well as central government (Faguet, 1997).

F4.3 There are advantages from local decision making if preferences are heterogeneous because local governments are better at aligning local preferences than central governments, but where preferences are more homogenous across the country, there may be advantages from reducing the effort and cost of multiple decision makers.

The decision between centralisation and decentralisation of regulatory decision making is typically characterised as a trade-off (Besley and Coate, 2003), however van Zeben (forthcoming) identifies a continuum of trade-offs which depend on the nature of the regulatory problem:

> If the problem is inherently local, without any externalities, accommodating interjurisdictional differences in conditions and preferences will be the first-order consideration… then… minimize regulatory costs and achieve economies of scale… Conversely, if the problem is a transboundary one, the capture of externalities will be the first-order consideration, and the accommodation of heterogeneity and realization of economies will be second order. (van Zeben, forthcoming, p.68)

While the heterogeneity of preferences and the magnitude of spillovers are important in deciding who should make regulatory decisions, consideration also needs to be given to who has the regulatory competency to undertake different regulatory responsibilities. The principle of subsidiarity has a caveat – responsibility should reside with the lowest level *competent* authority. What level of government has the greatest competency to set the regulatory standard, implement the standard and enforce it?

Competency

Competencies include the ability to access the relevant information and the capability to undertake the specific responsibility or role, including the governance role. These competencies may be held at different levels of government. For example, in many cases central government is better able to gather and assess the information about the wider implications of a regulatory policy and may have the technical expertise to set a regulatory standard, while decisions about how to achieve the standard are often better left to local governments who have greater knowledge of local preferences, conditions and costs.

Separating regulatory standard-setting from implementation and enforcement is one of the ways in which relevant national interests and technical expertise can be captured while giving appropriate effect to community knowledge and preferences. For example, it may be efficient for central government with its access to technical expertise to set the standard for acceptable levels of particulate matter in the air but for local government, with its greater knowledge of local conditions and costs, to determine how the standard should be met[12] (Lin, 2003).

The increasing complexity of regulation can also play a part in determining the allocation of roles. For example, the planned joint trans-Tasman therapeutics products regulator (which is a reallocation of a regulatory role from a national to a transnational body) is, in part, driven by the need for enhanced regulatory capability to keep pace with product innovation in the pharmaceutical industry (NZIER, 2000).

The increasing use of performance-based rather than prescriptive regulation also requires different skills and capabilities which may influence decisions about where regulatory roles should be located (Mumford, 2011). The discussion gives rise to further findings from the literature on the allocation of responsibilities:

F4.4 When allocating regulatory responsibilities, consideration should be given to what level of government has, or can most efficiently obtain, the relevant information needed for effective decision making and implementation.

[12] It is more usual to see higher tiers of government setting standards, giving discretion to lower tiers of government as to the means of achieving them, although there are cases where lower level government set the standard and the means to achieve it is left to the higher tier.

F4.5 When allocating regulatory responsibilities, consideration should be given to the capabilities required of the role and the existence and quality of governance and accountability arrangements within the jurisdiction tasked with the role.

Relationships and systems

Allocating regulatory responsibilities between levels of government necessitates interaction and knowledge and information flows between them. Lin (2010) observes that the literature has been largely agnostic about the nature of the underlying contractual environment between levels of government. As outlined in Chapter 2, the regulatory responsibilities undertaken by local and central government in New Zealand are specific roles within particular regulatory regimes and there is no overarching principal-agent relationship between central and local government.[13] The problems likely to be encountered when regulatory responsibilities are allocated between different levels of governments include a lack of clarity about roles and accountability for outputs, and problems in coordinating activity (Lin, 2010).

F4.6 Good regulatory outcomes are more likely to be achieved when there is clarity of role and coordination between levels of government responsible for standard-setting and implementation.

Accountability

Finally, it is worth returning to the general conditions under which governments can make good decisions about the use of public resources in line with the preferences of their constituents, outlined at the beginning of this chapter. The decision about where to allocate regulatory roles may be constrained by the quality of the government structures available. Even where the benefits, costs and information requirements are well-aligned within the jurisdiction, regulatory decision making or implementation may be poor if the government structure is inherently inefficient or lacks accountability (Kerr, Claridge and Milicich, 1998). In theory, local government decision making can be more closely monitored than a more distant central authority (Bailey, 1999; Bardhan and Mookherjee, 2011; Seabright, 1995), but central government agencies may have better internal monitoring and guidelines for conflicts of interest than local governments.

F4.7 Good regulatory decision making and implementation will be compromised if the level of government responsible is inherently inefficient or unaccountable.

Applications of the theory

A few studies have attempted to develop a framework for applying the theory to solve the allocation of regulatory responsibilities or to evaluate actual allocations of responsibilities and their attendant problems. For example, in the United States, the Congressional Budget Office (1997) conducted two case studies which examined which level of government would most efficiently set standards, choose control methods and manage research for protecting drinking water and controlling ground level ozone. And in the European context, van Zeben (forthcoming) investigated the allocation of regulatory responsibilities in the European Union Emissions Trading Scheme. In New Zealand, Kerr, Claridge and Milicich (1998) addressed the allocation of regulatory responsibilities between central and local government under the Resource Management Act 1991. A second paper (Claridge and Kerr, 1998) applied their framework to the protection of kiwi habitat. The Commission owes much to the work of Kerr, Claridge and Milicich in the New Zealand context in the development of its thinking on this issue.

Before attempting to turn theory into practical guidelines, the next section of this chapter presents submitters' experiences with regulation, where local government has a regulatory role.

[13] In some cases the relationship is specified in particular statutes for particular purposes. See for example subpart 3 section 11 of the Building Act 2004.

4.2 What do submissions and survey results say?

A mismatch between local and national preferences, priorities and costs

Submissions to the inquiry highlighted many instances of a mismatch between local and national interests, preferences and priorities. As Clutha District Council observed "all too often local authorities end up caught in the crossfire between national and local needs." (Clutha District Council, sub. 32, p.4)

South Taranaki District Council commented in its submission that with respect to the requirements of section 6 of the Resource Management Act:

> …matters of national importance are funded by local ratepayers. There is sometimes an imbalance in some districts where significant values may exist. Why not administer these values nationally and fund from the national purse? (South Taranaki District Council, sub. 39, p.4)

It was also noted that nationally consistent standards have uneven costs and impacts across the country:

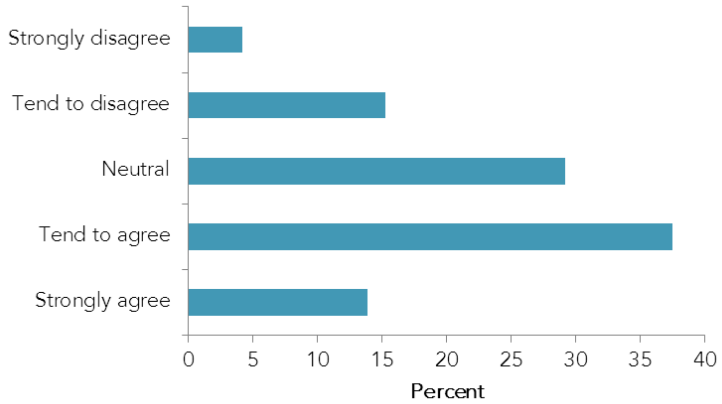
> Even minimum standards need to be approached with caution. Adherence to any minimum standard has a cost implication. What might be quite an acceptable minimum standard (or cost) for one local authority, given the significance of failure (measured by number of people impacted and the potential for the problem to aggregate given close proximity), might be inordinately expensive for a small and widely dispersed community. (Waitomo District Council, sub. 9, p.4)

A particular issue for local authorities has been the costs of meeting national drinking water quality standards. Local decision making may well have prioritised the required spending in a different way, according to the needs and preferences of their local population.

> In order to meet the National Drinking Water Standards Council has already spent $3.5m on plant upgrades and has a further $2.5 m of work programmed. This was an absolute requirement on Council, despite the fact that independent analysis showed a negative cost-benefit ratio for small-medium schemes such as ours. If Council had been able to make its own choices there could have been much better uses of $6m (eg, road safety, where a similar investment would save many lives instead of simply reducing the incidence of stomach upsets). It is also quite possible that ratepayers themselves would have had other priorities for that money, whether through rates or retaining it themselves. (Clutha District Council, sub. 32, p.1)

The Commission's survey of local authorities also suggests that there is conflict between the level of the regulatory activity needed to create nationally desired benefits, and the level appropriate for local priorities. Around half of the respondents tended to agree or strongly agree that there are conflicts between local pressures and the regulatory objectives of central government (Figure 4.1).

Figure 4.1 Percentage of local authorities who agreed or disagreed that local political pressures often conflict with the regulatory objectives of central government regulations



Source: Productivity Commission

F4.8 Submissions point to a mismatch between national and local preferences and priorities when it comes to regulation. Around half of local authority survey respondents agreed that there are conflicts between local priorities and regulations originating at central government level.

There are costs in operating across multiple local authorities

An obvious consequence of councils regulating in accordance with the needs of their local communities is that there is likely to be variation between councils in their approach. This is likely to result in different costs for businesses, which operate across local authority jurisdictions.

The members of the Electricity Networks Association, for example, reported significant issues as a result of distribution lines crossing multiple territorial and regional local authorities. The Association was particularly concerned about the costs involved in monitoring and submitting on proposed district and regional plan changes:

> Given the sheer number of district and regional plans, this is a cost to the industry and to electricity customers as a whole, compounded by particular costs and issues for those infrastructure providers who deliver across multiple council boundaries. (Electricity Networks Association, sub. 12, p.1-3)

Businesses are not the only entities that potentially bear the cost and the frustration of regulatory variation across local jurisdictions.

> Variation amongst local authorities' approaches to regulatory function is the source of endless frustration for Iwi and Hapu throughout Northland, and there have been long standing calls for better alignment of regulatory functions amongst agencies that have an influence on a particular resource. (Whangarei District Council, sub. 10, p.4)

Views on the trade-off between business costs and local regulation

Businesses and other entities operating across multiple jurisdictions can face different regulatory requirements in different locations but it is hard to assess whether the costs faced are significant and greater than the benefits of local variation in regulatory approach that may be driven by local preferences and conditions. Nevertheless, a number of submitters expressed a view:

> … In our view, a greater level of national guidance would far outweigh any benefits arising from total local flexibility in these matters, when the costs are considered..... There is significant variation in the way local government implements RMA regulatory functions in regard to distribution infrastructure. In our view, the expense and uncertainty caused by such variation outweighs any local benefit of that variation. (Electricity Networks Association, sub. 12, pp.1-3)

> Where decentralisation is creating clear impediments to nationally-important business activity then there is a clear argument for considering centralisation of the regulatory function. For example, different rules on the location and acceptability of cell-phone towers are proving a hindrance to establishing the telecommunications network that New Zealand strives for. Similarly, with tourism a strong contributor to GDP, the fragmented approach to freedom camping rules may not be in the country's best interests. (Tauranga City Council, sub. 2, p.8)

In a survey of 1500 businesses undertaken by the Commission, 1079 answered a question about the number of councils they had dealt with over the past three years about regulatory issues (Box 4.1).

Box 4.1 **Survey of business – headline results**

- Almost 70% of businesses had only dealt with one council. Of the 30% that had dealt with more than one council, 19% had dealt with two councils and 6% with three.
- Firms dealing with more than one council tended to be larger (more than 20 employees) while small and medium enterprises (SMEs) tend to deal with just one council.

- The manufacturing/mining and retail trade sectors are more likely to deal with more than two councils.
- Construction, communication and mining businesses were more likely to report unnecessary costs due to regulatory inconsistency between councils.
- The regulatory areas that the construction, communication and mining sectors were more likely to encounter were planning/land use/water use consents, and building and construction consents.

Source: Productivity Commission

The results above corroborate the observation of Whangarei District Council:

> This may create extra costs on business – especially those of a significant scale to operate over a number of different jurisdictions. However, most operations would generally be of a significant enough scale that they could employ specialists to deal with such issues and cost at a low level. By and large, businesses in New Zealand tend to be of a small and medium size, which would often only operate in one or two locations (with the possible exception of Auckland until recently) and would only need to deal with minimal inconsistency. (Whangarei District Council, sub. 10, p.4)

While costs incurred by businesses operating across regulatory jurisdictions can be significant, they are relevant for a relatively small number of large firms and a defined number of regulatory areas, principally the RMA and building regulation. This suggests that targeted solutions could be adopted for reducing these costs while maintaining the benefits of local tailoring of regulation.

F4.9 Approximately 70% of businesses in New Zealand only deal with one council and for those businesses that operate over more than one jurisdiction, this is over a limited range of regulatory matters.

F4.10 Targeted approaches could be adopted for reducing the costs for businesses operating across multiple jurisdictions while maintaining the benefits of local tailored regulation.

Capability gaps and how to deal with them

Submissions from local authorities raised concerns about capability and capacity gaps in undertaking regulatory roles.

> An example is the difficulty that rural local authorities are facing in attracting and employing suitably qualified building control officers to implement the new regulations that have come into effect. Often, new regulations impose extensive training requirements to improve the capability of the organisation in the new area… (Waitomo District Council sub. 9, p.6)

> We agree that sufficient capability and capacity is an issue; the paper asserts that local government may have problems but in our experience so too does central government in many areas. (Tasman District Council sub. 6, p.5)

Tasman District Council noted that regional councils collaborating to deal with the regulation of dams under the Building Act is an example of managing a high-risk/low-frequency regulatory function but this could equally have been a central government function. (sub. 6, p.5)

Queenstown Lakes District Council points out that dealing with increasing regulatory complexity or industry innovation is not always achieved through a more centralised approach. This part of the Council's submission is reproduced in Box 4.2.

Box 4.2 **Where does capability lie in the regulation of jet-boating and rafting?**

The District Waterways Authority [LDWA] had powers to make bylaws to regulate the activities of multiple jet-boating and rafting operators on rivers within the District, such as the Shotover and Kawarau. The LDWA developed and implemented operating procedures and protocols to improve safety, such as mandatory driver training, testing and licencing, radio protocols and minimum safety equipment, all of which were adopted by the then Maritime Safety Authority and incorporated into Maritime Rule Part 80. That Rule came into effect in February 1999. It has just recently been replaced by Rule Part 81 – Commercial Rafting in 2011 and Rule Part 82 – Commercial jet-boating in 2012. In the 12 years that Rule Part 80 was in effect, there were no changes made to reflect changes in the commercial jet-boating or rafting markets and neither were there additional rules made or amendments made to cover other commercial water-based activities such as river surfing.

From being a leader in the development of regulatory measures to enhance safety in commercial water-based activities through the user forum of the LDWA, the Queenstown Lakes District has ceased innovating in the regulation of this industry – which was done in association with the industry – and is unable to respond to new products in the water based adventure tourism market as they develop.

A consequence of this stifling of innovation at the local level and the inability of a national regulator to respond quickly to developing trends was the furore created around the tragic death of an international tourist in a river surfing accident and the subsequent Government enquiry into adventure tourism. Unfortunately, the response of the enquiry is the development of generic national standards that are not readily able to be monitored or enforced.

Source: Queenstown Lakes District Council sub. 52, p.6-7.

Managing risk

A number of submissions focussed on the ability of local authorities to manage or mitigate risk associated with the exercise of their regulatory responsibilities. The ability of local authorities to manage risk gained prominence following leaky homes and the collapse of buildings in the Canterbury earthquakes. However, the risk of poor outcomes from the requirements on territorial authorities to manage natural hazards, hazardous substances and contaminated land under section 31(1)(b) of the Resource Management Act, are also of concern to territorial authorities.

The Local Government New Zealand submission pointed to a lack of consideration by policy-makers of the potential liabilities faced by local government in the allocation of building consent functions.

> In the allocation of functions due consideration also needs to be given to the allocation of liability. There are examples where local authorities assume unnecessary liability as they execute required functions. Sometimes this is a result of central government establishing policy and making it operative without full consideration of the consequences for delivery of the policy. (LGNZ, sub. 49, p.5)

Many submitters to the Commission's Housing Affordability inquiry commented on Building Consent Authorities' limited ability to manage risk in the face of potential liability – the requirement for more information, more time taken and an increase in the number of inspections – all of which increased compliance costs but may not have been efficient or for that matter, effective solutions (Productivity Commission, 2012, p.160).

A central tenet of good regulatory design is that risk should be allocated to parties able to manage it through the actions they are able to take, and where there is alignment between the costs and the benefits from taking on risk. A misallocation of risk can have costly consequences and those costs may fall on parties unable to mitigate them efficiently. Submitters were of the view that insufficient attention has been given to the ability to manage risk in the allocation of regulatory roles.

F4.11 There are issues with insufficient regulatory capability but this can be found at all levels of government. There are a number of ways of dealing with capability gaps that do not always require a reassignment of roles to a different level of government.

F4.12 A misallocation of risk can have costly consequences. Insufficient attention has been given in the past to the ability to manage risk when allocating regulatory roles.

Views about the relationship between central and local government regulators

Submissions pointed to a disconnect between central and local government in the design and delivery of regulation:

> A constant theme that we have heard from our members (and as the national agency experience on a regular basis) is the lack of local government involvement in the design and review of regulatory frameworks. (LGNZ, sub. 49, p.4)

> It is also notable that although both the above pieces of legislation [The Alcohol Law Reform Bill and the Food Bill] involve roles being played by local authorities, they are each being developed by an agency which we do not believe would regard knowledge of the local sector as part of their core staff competencies. (SOLGM, sub. 48, p.10)

It is hard to escape the conclusion that better regulations and better regulatory outcomes could be advanced by a more constructive, engaged, relationship between central and local government.

F4.13 Both local and central government need to work on a constructive engaged relationship for the development of quality regulations and the delivery of regulatory outcomes.

Principles for allocating regulatory roles

The Commission sought comment from submitters on the factors that may be important in deciding where to allocate regulatory responsibilities.

Waitomo District Council raised the important distinction between heterogeneous and homogenous preferences:

> The issues and priorities of communities can be quite specific and are best met by locally informed regulations. However, there are certain regulations [where] national standards or regulation setting could be beneficial where the implications of anything going wrong would be more or less uniform regardless of locality. (Waitomo District Council, sub. 9, p.6)

The Institution of Professional Engineers New Zealand (IPENZ) submission focussed on local judgements, clarity about respective national and local interests, and cost efficiency:

> Deciding whether a regulatory function should be undertaken locally or centrally the following issues need to be considered:
>
> - Regulation should be designed nationally if there are health and safety issues involved
> - Regulation should be designed locally if local value judgements are involved
> - Regulatory design requires case by case decisions on whether community based regulations need to be made within national frameworks – this requires clarity and transparency on the respective national and local interests
> - Decisions on delivery i.e. approvals, monitoring and enforcement, need to be based on cost efficiency grounds – economies of scale and scope, and good customer service.
>
> Therefore the issues of who designs and who delivers regulation need to be considered separately for each form of regulation. (IPENZ, sub. 17, p.3)

Waikato Regional Council pointed to competency being an important factor:

> One factor for considering where a function should be undertaken is where the expertise in a particular issue lies, whether locally, regionally or nationally. New Zealand has limited human resources in some fields and these should be applied to best effect. (Waikato Regional Council, sub. 45, p.12)

Tasman District Council submitted that:

> The Productivity Commission should develop principles around the assignment of regulatory functions that should be transparent; reflect the balance of national and local/regional interests in the outcomes sought; align governance and accountability arrangements and funding responsibilities with the extent of discretion conferred; in relation to local government functions, be consistent with the Local Government Act 2002 and other regulatory responsibilities; and fairly recognise risk, liability, transition and implementation issues. (Tasman District Council, sub. 6, p.7)

Tasman District Council concluded that the factors influencing assignment of roles "are not always unilateral and the optimum assignment is the interplay between factors" (Tasman District Council, sub. 6, p.7).

4.3 Allocating regulatory roles: a guiding framework

The findings from the literature, and the rich evidence and findings from submissions provide a good basis for developing a framework for allocating responsibilities between central and local government. This section develops guidelines to assist in determining what level of government should undertake the regulatory roles that make up an effective and efficient regulatory regime.

Where is the source of the regulatory problem?

Consistent with the literature, the Commission starts from the position that if the issue to be regulated is purely a local one, with local impacts, then devolving decision making to those affected is likely to be the most efficient solution. This is contingent on the people affected by the decision being represented by the jurisdiction (the absence of spillover effects), and the jurisdiction having the information and capability to make a decision. Where the impacts are purely local, if preferences are relatively homogeneous, costs could be reduced from reducing the effort of multiple decision makers.

This raises the question of what constitutes a local or national interest. There are some activities where the rules should be the same across the country and applied consistently, such as driving on the left hand side of the road. In this case the spillover costs from each local jurisdiction making its own decision about what side of the road to drive on would be substantial. It could also be argued that preferences for what side of the road we drive on are relatively homogeneous. The decision as to which side of the road we should drive on is logically a national one.

Other activities, such as local parking restrictions, appear at first glance to be purely local in effect. However, judging what can be considered a purely local effect can present difficulties. For example it could be considered that there is a national interest in campervans having places to park overnight while travelling through New Zealand. This was the case during the 2010 Rugby World Cup. This example exemplifies the difficulty in judging whether effects can ever be considered to be "purely" local.

In practice, most activities to be regulated fall somewhere on the spectrum with varying degrees of local and national impacts, and for some activities, the issue of the magnitude of local versus national effect can be hard to gauge.

Where do the benefits and costs fall?

Many decisions that are proximate and therefore local in nature also have effects – benefits or costs – that extend beyond the boundary of the jurisdiction making the decision. Box 4.3 outlines some common circumstances where costs or benefits spill over to other jurisdictions.

Box 4.3 **Common types of spillover effects**

- When a harmful effect extends beyond the jurisdiction eg, where the allowable discharge into a river in one jurisdiction flows into another jurisdiction imposing clean-up costs, or where the social costs of alcohol-harm don't just impact locally but spill over at the national level in costs to the health, justice and welfare systems. This leads to over-production of the activity creating the harm because the wider costs are not borne by those creating the harm.
- Where a benefit extends beyond a jurisdiction, but the costs are borne locally eg, the national benefit of protecting biodiversity. This leads to under-provision of the benefit because those incurring costs locally receive only part of the benefit, while others can 'free-ride' from their effort.
- Costs can accrue to organisations when they operate across multiple jurisdictions and face different regulatory decisions or different approaches to the implementation of regulations. There is a trade-off to be made between the benefits of consistency in approach for these organisations against the benefit of variation in approach taken by local communities.
- Network externalities occur when, for example, telecommunications towers are sited on land in one jurisdiction to serve people in other jurisdictions but the network effect (everyone being connected) benefits everyone. Co-ordinating access through jurisdictions can be costly yet are necessary to obtain the beneficial 'network effect' of everyone being able to access the network.

Source: Adapted from Kerr, Claridge and Milicich (1998)

Questions to ask:

- Who benefits from the regulation? Are they represented in the jurisdiction making the decision?
- Who bears the costs? Are they represented in the jurisdiction making the decision?
- What is the magnitude of costs and benefits?

What are the options for taking costs and benefits into account?

Once the magnitude of the costs and benefits and who bears them have been identified, the next issue is to determine how these can be dealt with through the design of the regulatory regime. In considering the options, the objective information about the magnitude of the costs and benefits and where they fall will be important, but so will subjective valuations – for example, the relative weight given to local preferences compared to the costs incurred by businesses operating over multiple jurisdictions. There are a number of options for rebalancing in favour of the national interest, from the provision of guidance or direction, to a clarification of responsibilities to a reassignment of role to the centre.

Questions to ask:

If the interests extend over local boundaries but are still primarily local in effect:

- Are there mechanisms for coordinating between local jurisdictions, eg, regional protocols?

If the interests extend nationally, consideration needs to be given to the nature and size of the national interest, in looking at options:

- Could national interests be taken into account by the provision of more guidance about the outcomes sought, or should the statute enabling the regulation be more prescriptive?
- Does more direct accountability for regulatory performance need to be established?
- Should there be a national standard?

- If the benefit of local regulation accrues nationally should the local jurisdiction be funded (or incentivised or assisted) to provide it?
- Should regulatory decision making or that part of the decision making where there is a significant national benefit, costs or risk, be centralised?

Who has the information and the capability?

Systematic analysis of the capabilities and information required to effectively undertake regulatory tasks is required when designing a regulatory regime and assigning regulatory roles. However, an analysis of how information and knowledge is diffused and deployed to appropriate areas in the regulatory system, and how capabilities are obtained and maintained in a regulatory regime, is also vitally important.

Questions to ask:

- Who has the relevant information (eg, technical information and information about preferences) for regulatory decision making?
- Who has the relevant information for effective implementation?
- How will information and knowledge be diffused and appropriately deployed in the regulatory regime?
- Will an effective diffusion of information be compromised by splitting regulatory roles between central and local government?
- Who has sufficient capability to make regulatory decisions? Who has sufficient capability to implement regulation?
- How will capability be maintained? Are there opportunities for co-operation/sharing of expertise among jurisdictions to maintain capability or fill a capability gap?

Who is able to manage risk effectively?

Risk should be assigned to the parties able to manage it through the actions they are able to take.

Questions to ask:

- What are the risks assigned along with the allocation of regulatory role?
- Does the jurisdiction have the information and the capability to mitigate risks?
- Does the jurisdiction have the tools available to effectively mitigate risk?
- Could the risks identified be reassigned to parties better able to manage them?

Are there efficiencies from reducing duplication?

If preferences are relatively homogeneous, costs could potentially be saved from reducing the effort of multiple decision makers.

Questions to ask:

- Are preferences relatively heterogeneous (different) or homogenous (the same)?
- If they are relatively homogeneous, would it be more efficient for the role to be carried out by a larger grouping at one level of government (eg, a cluster approach or shared services arrangement) or centrally?

Does the jurisdiction have effective governance and accountability in place?

In working through the allocation decision, based on a consideration of where the costs and benefits fall and where the relevant information and capability is located, the jurisdiction chosen may not have the required governance and accountability arrangements in place to undertake the regulatory role.

Questions to ask:

- Are adequate accountability and governance arrangements in place?
- If not, can the required governance and accountability arrangements be put in place?
- Could the role be assigned to another jurisdiction at the same level of government?
- Could the role be better undertaken a different level of government?

Where regulatory roles are split, what is the relationship between levels of government?

The problems likely to be encountered are a lack of clarity about roles and accountability for outputs, and problems in coordinating activity.

Questions to ask:

- Where there is a statute conferring regulatory powers, does it specify the nature of the relationship between central and local government?
- What mechanisms are in place to ensure clarity about roles and accountability for outputs?
- How important is it that the respective regulatory roles are coordinated?
- Is splitting roles between central and local government likely to compromise regulatory effectiveness?

4.4 The one-page guide

Local & proximate: Allocate the regulatory function locally unless there is a good reason to allocate elsewhere

Where do the benefits and costs fall?		• Who benefits from the regulation? Are they represented in the jurisdiction making the decision? • Who bears the costs? Are they represented in the jurisdiction making the decision? • What is the magnitude of costs and benefits?
What are the options for taking costs and benefits into account?	**If the interests are still primarily local**	• Are there mechanisms for coordinating between local jurisdictions, eg regional protocols?
	If the interests extend nationally	• Could national interests be taken into account by the provision of more guidance about the outcomes sought, or should the statute enabling the regulation be more prescriptive? • Does more direct accountability for regulatory performance need to be established? • Should there be a national standard? • If the benefit of local regulation accrues nationally should the local jurisdiction be funded (or incentivised or assisted) to provide it? • Should regulatory decision making or that part of the decision making where there is a significant national benefit, costs or risk, be centralised?
Who has the information and the capability?	**Information**	• Who has the relevant information (eg technical information and information about preferences) for regulatory decision making? • Who has the relevant information for effective implementation? • How will information and knowledge be diffused and appropriately deployed in the regulatory regime? • Will an effective diffusion of information be compromised by splitting regulatory roles between central and local government?
	Capability	• Who has the capability to make regulatory decisions? Who has the capability to implement regulation? • How will capability be maintained? Are there opportunities for cooperation/sharing of expertise among jurisdictions to maintain capability or fill a capability gap?
Who is able to manage risk effectively?		• What are the risks assigned along with the allocation of regulatory roles? • Does the jurisdiction have the information and the capability to mitigate risks? • Does the jurisdiction have the tools available to effectively mitigate risk? • Could the risks identified be reassigned to parties better able to manage them?
Are there efficiencies from reducing duplication?		• Are preferences relatively heterogeneous (different) or are they homogenous (the same)? • If they are homogeneous, would it be more efficient for the role to be carried out by a larger grouping at one level of government (eg a cluster approach or shared services arrangement) or centrally?
Does the jurisdiction have effective governance and accountability in place?		• Are adequate accountability and governance arrangements in place? • If not, can the required governance and accountability arrangements be put in place? • Could the role be assigned to another jurisdiction at the same level of government? • Could the role be better undertaken at a different level of government?
Where regulatory roles are split, what is the relationship between levels of government?		• Where there is a statute conferring regulatory powers, does it specify the nature of the relationship between central and local government? • What mechanisms are in place to ensure clarity about roles and accountability for outputs? • How important is it that the respective regulatory roles are coordinated? • Is splitting roles between central and local government likely to compromise regulatory effectiveness?

4.5 Using the guidelines to evaluate or reallocate regulatory roles

The following two case studies demonstrate how the guidelines might assist in evaluating the allocation of regulatory responsibilities between local and central government. These are short summaries that *indicate the type of analysis that would need to be conducted;* they are not full analyses of the regulatory issue that would be required for definitive advice about the allocation of regulatory responsibilities.

Example 1: Protection of kiwi habitat

Box 4.4 **The allocation of roles for protection of kiwi habitat (from Claridge and Kerr, 1998)**

Where is the source of the regulatory problem?

- In the Far North 38% of the district is identified as kiwi habitat. Slightly under half of this habitat is publicly owned conservation land; the rest is private or Māori land.

Where do the benefits and costs of protecting kiwi habitat fall?

- Kiwi are a national public good therefore the preferences of all New Zealanders should be reflected.
- Consequently, some privately owned land in the Far North is designated a kiwi habitat significant natural area (SNA) in the Far North District Plan.
- Limiting the use of one-fifth of private land in the Far North places a major economic restriction on the region. Furthermore, the burden falls heavily on individual farmers, some of whom effectively have up to half (and even more in some cases) of their farms affected by the SNA requirements

What are the options for taking costs and benefits into account?

- Clarifying what central government requires with respect to protection of kiwi habitat.
- Allocating some national resources to buy some additional kiwi habitat as conservation estates and/or partially compensate farmers to address the problems of the unfunded mandate.
- Allocating resources to the Ministry for the Environment or DOC (or other agency) to provide specifically for advice and dissemination to local authorities of scientific knowledge and expertise regarding implementation.

Who has the information?

- Information and skills related to kiwi science (eg, What is the life cycle of the kiwi? How much habitat is required to support a given kiwi population?), could be held centrally or locally but in this case is mainly held centrally. Scientific knowledge is primarily a function of resources. Central government has an advantage in this through economies of scale. It is better resourced to employ specialists. Coordination with other areas of kiwi habitat and overall conservation priorities is information held centrally.
- Information about preferences is also important, for example, what value is placed on protection of the kiwi? To get the best information the decision making jurisdiction should be at least as large as the area of effects. Because people all over New Zealand have preferences about kiwis, decision making at a national level will better reflect these subjective preferences.
- A range of information is also held locally, for example, where are the significant natural areas (SNAs)? Are farmers complying with regulations? Farmers are more closely associated with local government than central government which allows for better monitoring, better access to local information, and possibly greater trust.

Who has the capability to protect kiwi habitat?

- Successful protection of kiwi requires more than refraining from destructive activities in areas of kiwi habitat. Active measures on the part of the landowner also play a part: stock may need to be

fenced and weeds eradicated. Pests need to be trapped and farm dogs kept under control. Whichever level of government is responsible for implementation, it will need to work with landowners and elicit their goodwill and cooperation. Local government may be at an advantage here. It may be able to form more effective on-going relationships with farmers and other affected local people.

What is the risk?

- The risk is that there is insufficient kiwi habitat protection nationally and this will result in an unsustainable kiwi population.
- To mitigate this risk, Claridge and Kerr conclude that SNAs should not be discretionary for local governments. They recommend the publication of a National Policy Statement on SNAs. As well as providing a definition and criteria for the term "significant" it would establish what central government required and what was discretionary for local government.

Conclusion

- The current allocation of regualtory roles under the RMA would benefit from recognition of the national importance (benefit) of kiwi habitat protection but there is too much discretion given to local authorities for establishing SNAs for kiwi habitat. Too many of the costs of protecting kiwi habitat in the national interest are borne locally. Clarification of section 6c of the RMA and measures to assist the Far North to protect kiwi habitat are recommended. The current allocation of roles is othewise appropriate given the information and capabilities required for policy design and implementation to protect kiwi habitat.

Source: Claridge and Kerr (1998)

Example 2: Building regulation

Box 4.5 **Allocation of roles in the building control system**

Where is the source of the regulatory problem? Who benefits?

- Building is an inherently local activity and the benefits of building regulation accrue mostly to building owners and their users. People need to know that the buildings they inhabit are safe and that the quality of construction and workmanship meets minimum standards. Faults may be hidden in a building and may not become evident for many years. There is also a national interest in ensuring consistent and appropriate standards for buildings in New Zealand.

Who has the information?

- Building standards is a largely technical matter requiring expertise that is most easily acquired at a national level. The Building Code is a national code with variation for different types of conditions eg, topographical and weather conditions, that need to be interpreted and matched to local conditions.
- Determining a minimum national standard can impose building requirements and costs on consumers that they might not otherwise choose. Improving building safety comes at a cost and central government is better placed to balance the benefits against the costs compared to other regulations that are also principally designed to save lives.
- Mumford (2011) points to issues with information and knowledge diffusion in the move to a performance-based building control system in 1991.

> The problem of dispersed knowledge could be described as an institutional problem: existing institutions for aggregating, evaluating, codifying, and diffusing knowledge had been side-lined and no substitute had been put in place. (p.185)

Mumford's analysis suggests that improving information and knowledge diffusion could yield better results for the building control system than a reallocation of roles to a higher level of government. Centralisation *may* result in regulatory actors being better informed but there are other mechanisms that could also achieve this in a delegated regulatory system.

Who has the capability?

- The capability for setting building standards is most likely to be acquired centrally. Local governments are closer to where building occurs and therefore have a natural advantage in undertaking building inspections. Issuing building consents could be done locally or centrally, however there are possibly economies of scope associated with local authorities also being responsible for resource consents for land use. Currently consenting and inspections are done locally through accredited building consent authorities.

- Mumford (2001) identified capability issues – the different skills and capabilities required in implementing performance-based rather than prescriptive regulation – as a contributor, along with poor information and knowledge diffusion, to New Zealand's leaky building problem. Acquiring the necessary skills and capabilities for effective implementation of the Building Act 2004 has been identified as a problem in submissions. Maintaining capability in areas where the skills are needed less frequently is also a problem. A reallocation of roles – a move to the centre or to regional hubs – has been considered as a way of improving and maintaining capability.

Who is able to manage risk effectively?

- In its submission to the Commission's *Housing Affordability Inquiry* the former Department of Building and Housing wrote:

> Residential consumers and building consent authorities bear the brunt of the risk associated with building work that fails to perform, despite having the least control over the quality of that work. Building practitioners on the other hand are able to manage and mitigate risks through the quality of their work… and…while building consent authorities face high risk they do not realise any benefits from risk-taking within the context of a building project, thus creating incentives for building consent authorities to be risk averse. (Department of Building and Housing cited in PC, 2012a, p.159)

- Many submissions to the *Housing Affordability Inquiry* commented on the impact on building consent authorities' handling of building consents – the requirement for more information, more time taken and an increase in the number of inspections – all of which increase compliance costs. Parties carrying risk will try and mitigate the risk with the tools they have available to them but these 'solutions' may not be optimal or even effective.

Conclusion

- Reforms to the Building Act in 2010 and 2011 have been an attempt to reallocate risks between industry participants, principally to builders and architects, and by encouraging greater due diligence on the part of clients. However, a reallocation of regulatory functions centrally or to regional hubs could also increase the quality of building consenting and inspecting functions.

- There remains the issue of how information and knowledge can be diffused effectively in a regulatory regime where roles are split between central and local government and across local authorities.

Sources: PC, 2012a; Mumford, 2011.

4.6 Further development of the guidelines

The Commission seeks comment and feedback on the framing of the guidelines and their usefulness in making decisions about which regulatory roles are best undertaken by local or central government.

Q4.1 Have the right elements for making decisions about the allocation of regulatory roles been included in the guidelines? Are important considerations missing?

Q4.2 Are the guidelines practical enough to be used in designing or evaluating regulatory regimes?

Q4.3 Are the case studies helpful as an indicative guide to the analysis that could be undertaken?

Q4.4 Should such analysis be a requirement in Regulatory Impact Statements or be a required component of advice to Ministers when regulation is being contemplated?

Q4.5 Should the guidelines be used in evaluations of regulatory regimes?

5 The funding of regulation

Key points

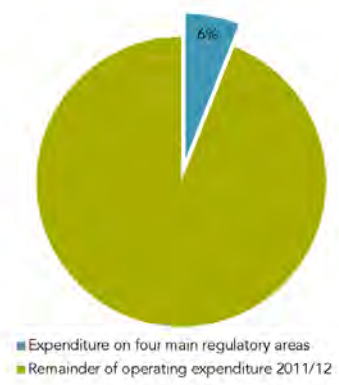
- The results of the Commission's survey show that almost half of councils identify building and construction consents as the regulatory function that takes up the most staff time and resources. Planning, land use or water consents were identified by 40% of councils.
- The Commission estimates that the four main regulatory activities undertaken by councils constitute, on average, around 6% of local authority operating expenditure (with a range of 2–10% in the councils examined).
- If the benefits of regulation accrue locally then it is appropriate that the associated costs are managed locally. The funding of regulatory functions is ultimately a policy matter for individual local authorities, based on the requirements of section 101(3) of the LGA, 2002.
- Regulations should be reviewed to remove centrally-set specific fee amounts. Fees should be determined by local authorities (subject to the requirements of section 101(3) of the LGA).
- The local government sector has a strongly held view that central government passes regulatory functions to local authorities without sufficient consideration of the funding implications for councils.
- Unfunded mandates occur when central government imposes additional responsibilities and costs onto local government without the funding necessary for their provision, or the ability to fully recoup the cost of carrying out these responsibilities.
- Unfunded mandates can lead to national and local priorities not being delivered to the optimal level. They can weaken the discipline on central government to make sure that the total benefits outweigh the total costs of regulation and can also lead to inequitable cost bearing, inefficient financing and under-resourcing of regulatory functions.
- Many local authorities that engaged with the inquiry were of the view that regulatory functions delegated to them should be at least part funded through taxation. Such funding would be highly likely to come with strong accountability requirements.
- There are a number of principles that should be considered if fiscal transfers for regulatory services are to be made.
- The Commission is yet to reach a conclusion on the issues arising from unfunded mandates in the provision of regulatory services and welcomes submissions on this topic.

5.1 Regulatory responsibilities have funding implications

The allocation of regulatory responsibilities will inevitably have implications for funding. The Commission's survey of local authorities asked participants to identify those regulatory activities that took the most time and resources over the past three years. Almost half of councils (49%) identified building and construction consents as the regulatory function that took up the most staff time and resources. Planning, land use or water consents were identified by 40% of councils. The remaining 11% of councils chose water quality monitoring and control, dog control or liquor licencing and alcohol control.

Based on an analysis of 21 territorial authorities from across the country, the Commission estimates that the four main regulatory activities undertaken by councils constitute, on average, around 6% of local authority operating expenditure (with a range of 2–10% in the councils examined).

Figure 5.1 Local government regulatory activity as a proportion of local government operating expenditure



Source: Productivity Commission

Who should pay for regulations?

Consistent with the principles outlined in the previous chapter, if the benefits of regulation accrue locally then it is appropriate that the associated costs are managed locally. In such circumstances local authorities have three broad options:

- fund regulatory functions from rates;
- recover costs through fees and user charges; or
- some combination of the above.

The option selected is ultimately a policy matter for individual councils. However, Section 101(3) of the LGA 2002 lists the considerations that local authorities must take into account in determining their funding needs (Box 5.1).

Box 5.1 **Local Government Act 2002 section 101 (3)**

The funding needs of the local authority must be met from those sources that the local authority determines to be appropriate, following consideration of —

(a) in relation to each activity to be funded —

(i) the community outcomes to which the activity primarily contributes; and

(ii) the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals; and

(iii) the period in or over which those benefits are expected to occur; and

(iv) the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity; and

(v) the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities.

Source: Local Government Act 2002.

Fees set by central regulations

A number of regulations set the fees that can be charged by local authorities for the regulatory services they provide. In part, this stems from regulatory design that predates the power of general competence; greater legislative specification led to greater certainty for local authorities that their reasonable actions

would not be subject to judicial review. Since the power of general competence has been given to local authorities, the benefit of high prescription no longer exists. A number of these set charges have not been reviewed in some time, resulting in ratepayers effectively subsidising the private benefits of regulation.

> The costs of regulatory functions are mostly met through fees and charges rather than rates except where central government sets the fees for example licensing fees under the Sale of Liquor Act and the Amusement Devices regulations. In these cases the fees set do not meet the costs of the service provided which results in rate payers subsidising regulatory functions required…. (Hutt City Council, sub. 51, p.2)

> Amusement Devices Regulations – Department of Labour set the fees a fair while back ($11 fees since 1978) but local authorities need to enforce and cover costs of after-hours visits. (Hutt City Council, sub. 51, pp.9-10)

As noted by SOLGM, this is out of step with current charging policy set out in the LGA.

> We should also note that the interface between other legislation and section 101(3) introduces a degree of artificiality into the analysis of benefits. Some older legislation constrains local authorities' ability to recover fees to a specific dollar amount. It is not clear that legislators have access to the right information, or the right incentives to be able to set a price that bears relationship to the cost of a service. Such legislation is not often reviewed, and associated regulations are reviewed even less frequently. The obvious result is that the maxima become dated and over time bear less and less relationship to the cost of the activity. (SOLGM, sub. 48, pp.14-15)

The Commission sees merit in bringing regulations that set specific fees into line with the funding policy set out in the LGA (section 101(3)).

R5.1 Regulations should be reviewed to remove specific fee amounts and make those fees at the discretion of local authorities, subject to the requirements of section 101(3) of the Local Government Act 2002.

5.2 The problem of unfunded mandates

What is an unfunded mandate?

In general terms, an unfunded mandate is a statute or regulation that requires local government to perform certain duties that are not accompanied by funding for fulfilling the requirements.

> Within local government one of the most frequently repeated expressions of dissatisfaction about central government (government) concerns the issue of "unfunded mandates" – the charge that government is imposing additional responsibilities and costs onto local government without the funding necessary for their provision, nor indeed the ability to fully recoup the cost of carrying out these responsibilities. (LGNZ, 2006, p.1)

However, not all things that might be claimed to be unfunded mandates by the sector are a problem. The 2006 Rates Inquiry noted a number of requirements, such as the process for local authority decision making, that should be funded by local authorities. These are the costs of local authorities carrying out their business. For example, the cost of the long term planning process.

When are unfunded mandates a problem?

Following the principles for allocating regulatory responsibilities in Chapter 4, local decision making is desirable when it is more likely to maximise allocative efficiency. Imposing a national requirement can result in a different resource allocation decision than the local community might have made. Central government imposes regulatory standards for air and drinking water quality, for example, that requires expenditure which a local community might not choose. Clutha District Council is clear in its submission that had the council been able to make its own choices, it would have spent the money required to upgrade its water supply on other public safety priorities (sub. 32, p.1). In that case, local preferences would not have been maximised, which can undermine efficiency.

Usually, the justification for a national requirement is that although it undermines local allocative efficiency, it will maximise benefits to the country as a whole.

This is also the case where central government expects local authorities to regulate areas where the benefits accrue outside a local authority's jurisdiction in the national interest. However, when functions are not accompanied by related funding, there is little incentive for the local authority to resource the optimal level of regulatory activity. For example, in the case study presented in Chapter 4, a requirement on a local authority to expend resources protecting kiwi habitats in the national interest, imposes costs on the local authority, while the benefits are enjoyed by all New Zealanders. In these cases unfunded mandates are likely to lead to a suboptimal level of national benefits from the regulation.

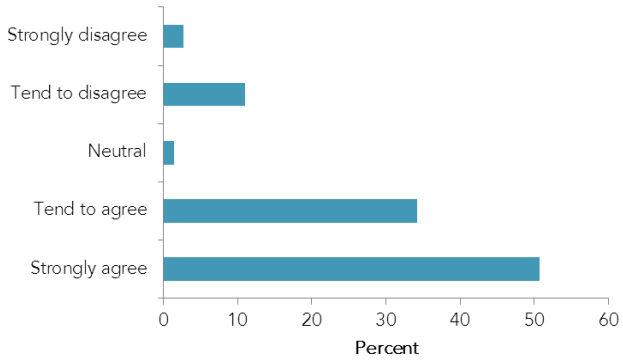
Unfunded mandates, therefore, can lead to both national and local priorities not being delivered to the optimal level. Where this occurs, unfunded mandates are a problem.

As well, unfunded mandates can weaken the discipline on central government to ensure that all costs are fully considered in policy design and that the total benefits of regulation outweigh the total costs. Unfunded mandates can also be inequitable (Claridge, Kerr and Milicich, 1998).

Prevalence of unfunded mandates

The Commission's survey of local authorities showed there is a strong belief within the local government sector that central government neither understands, nor adequately considers, the financial implications of new regulations assigned to local authorities (Figure 5.2).

Figure 5.2 Central government passes regulatory functions to local government without sufficiently considering the funding implications for councils



Source: Productivity Commission

F5.1 The local government sector has a strongly held view that central government passes regulatory functions to local authorities without sufficient consideration of the funding implications for councils.

5.3 Ways to address unfunded mandates

Many local authorities that were engaged with the inquiry were of the view that regulatory functions devolved to them should be at least part funded through taxation. Where national requirements for regulation distort local allocative efficiency, there are some international precedents for intergovernmental transfers. These are a feature of most European systems of local government, including the UK.

Two common approaches for dealing with unfunded mandates are discussed below.

Specific grants

Specific grants tie funding to a particular activity. Internationally they are used to promote policy objectives by supporting the provision of services that are crucial to achieving policy outcomes (Bailey, 1999).[14]

Specific grants could be used to fund regulatory activities where there are spillovers into other jurisdictions. For example, local authorities with significant kiwi populations could receive specific grants tied to the protection of habitats.

Q5.1 Do any regulatory functions lend themselves to specific grants? If so, what is it about those functions that make them suitable for specific grants?

General grants

General grants are commonly used in equalisation schemes, where they are designed to ensure that the same minimum level of service is provided across local authorities, and that it costs the same to the consumer (Bailey,1999).

In the context of regulatory functions, general grants could be allocated to a local authority on the basis that they have a disproportionate need for regulatory services, or that their revenue base is insufficient to enable them to supply a minimum level of services. Local authorities would be free to allocate the grant between regulatory functions, thus allowing them to reflect their local community's priorities. However, because general grants are not targeted at particular regulatory regimes, they cannot be used to fund spillovers per se.

Q5.2 If general grants were to be considered, on what basis could 'needs assessments' be undertaken? What indicators could be used to assess need?

5.4 Funding versus local autonomy

Keeping accountabilities clear is possibly the most problematic objective for nationally funding some regulatory functions at the local level. It is highly unlikely, within the context of New Zealand's system of public management, that central government would simply provide funding without accountability for how that money is spent. As such, central funding may come at the cost of a greater involvement of central government in local regulatory issues. The compliance costs of accountability arrangements alone may mean that there may be a relatively high bar for seeking central funding.

To date, the Commission has not received any submissions expressly addressing the accountability requirements that would inevitably come with central funding. Stakeholder's views on this issue, and on the trade-off between central funding and local autonomy, are sought.

Q5.3 What would appropriate accountability mechanisms for funding local regulation through central taxation look like? How acceptable would these be to local authorities?

5.5 Principles for funding

The Commission has not reached any firm conclusions about how regulation should be funded at the local level. However, drawing on the international literature, there are some general principles that are important to consider (Box 5.2).

[14] Specific grants can also be used to increase the provision of services other than the one funded (Bailey, 1999). This happens where local authorities use the rates funding they would have spent on the activity to both lower rates and increase spending on another priority.

Box 5.2 **Principles for funding**

Where the benefits of regulations are captured within a jurisdiction:

- the costs should also be funded from within the jurisdiction; and
- the funding mechanism is a local policy matter.

Where there is a case for a fiscal transfer from one jurisdiction to another:

- the objectives of the funding should be clearly specified;
- funding arrangements should be structured in such a manner to create an incentive for the efficient delivery of regulatory services;
- the case for funding should be subject to a rigorous and transparent examination of the costs and benefits, including the transaction costs associated with the transfer;
- there should be appropriate accountability for delivering the regulatory outcomes funded from the transfer;
- the mechanism through which the funding decision is made should be designed in a manner that encourages the revelation of the marginal cost of delivering the regulatory service; and
- the transfer should be predictable, to allow the recipient to adequately plan for the delivery of the regulatory service.

Source: Adapted from Bailey, 1999; Shah, 2006; Steffensen, 2010; World Bank, 2007.

6 The regulation-making system

Key points

- To fully understand local regulation, a wider appreciation of the overall regulatory system is required.
- New Zealand regulatory process centres round the three branches of government – the legislature, the executive and the judiciary. These branches of government operate within a framework that is deeply intertwined with New Zealand's constitution.
- The institutions, principles and processes through which regulations are made are important determinants of the quality of regulatory intervention.
- To promote rigorous analysis, Cabinet requires that a Regulatory Impact Statement (RIS) accompany all proposals sent to Cabinet for consideration. If a proposed policy is likely to have a significant impact on the New Zealand economy, or if there is significant risk or uncertainty around the policy, the RIS must be reviewed by the Regulatory Impact Analysis Team (RIAT) within Treasury.
- Most matters that go to the Cabinet for a decision are first considered by one or more Cabinet committees. Once a bill is introduced to the House, Select Committees examine the bill in detail. This can provide the public with an opportunity to comment on proposed legislation and participate in committee inquiries.
- Post-implementation reviews are a key source of feedback to Government on how well regulations are achieving their intended outcomes. Such feedback is central to the continuous improvement of a regulatory system.

This chapter provides an overview of the institutions, principles and processes through which regulations are made at the central government level (i.e. the regulatory system). The chapter provides a background to the checks and balances aimed at ensuring the quality of regulations as well as consistency with New Zealand's broader constitutional framework.

6.1 The constitutional foundations of regulation

New Zealand regulatory process is driven through the 'three branches of government' – the executive, the legislature, and the judiciary. Together, these three branches of government, and the institutions that support them, are responsible for the formulation and interpretation of statutes and their associated regulations.

The executive consists of the Prime Minister, Cabinet and the public service. The key role of the executive is to conduct government, decide on policy and administer legislation. Most of the major decisions made by Government are first agreed by Cabinet. The Cabinet is advised by the public service which is (by convention) politically neutral and bound to provide honest, frank and independent advice to the government of the day regardless of the political party in power.[15]

The legislature comprises the Sovereign (represented by the Governor-General) and the House of Representatives (the House).[16] In practice the House is the key operational institution within the legislature and undertakes a range of functions. These include: debating and enacting legislation; providing a Government that holds the confidence (majority support) of the House; and scrutiny of the executive Government.

[15] The principles under which the public service must act are set out in the Cabinet Manual para 3.50-3.56 (Cabinet Office, 2008).

[16] The term 'Parliament' is commonly used to refer to sittings of the House of Representatives without the participation of the Sovereign.

The judiciary exercises the power to resolve disputes in accordance with the laws laid down by Parliament and common law principles developed by the courts themselves (through legal precedence). The judiciary exercises power to assign meaning to language used in statutes.[17,18]

The framework within which the branches of government operate is deeply intertwined with New Zealand's constitution. The constitution provides the fundamental basis for legitimate government. It establishes many of the key institutions of government, the powers of these institutions and (importantly) the principles and processes through which these powers can be exercised to make regulations. In doing so the constitution provides checks and balances to protect individual freedoms and liberties from undue interference by the State. As the Legislative Advisory Committee (LAC) notes:

> ... parliamentary democracy should be understood, as it is by the Courts, to be a system of equilibrium between the right of the majority, through Parliament, to make law binding on individuals, and yet a respect for individuals' rights, whether old or new. Parliamentary democracy is not simply the proposition that anything a majority decides must be always right and good. Rather it proceeds upon a presumption that when the majority vote for a law which constrains individuals or takes away any of their freedom of person or property it will only be for a good reason. That good reason may be a judgement that the price of constraining some individuals' liberty and perhaps taxing some of their property or otherwise interfering with their property and goods is a cost which is outweighed by the benefit to the community as a whole. (LAC, 2001, p.46)

New Zealand's constitution is not contained in a single document; rather it is drawn from a number of key statutes, common law principles and constitutional conventions.[19] Key written elements of the New Zealand constitution include: the Constitution Act 1986, The New Zealand Bill of Rights Act 1990, the Electoral Act 1993, the Treaty of Waitangi, and the Standing Orders of the House of Parliament.

More broadly, New Zealand has inherited many of the traditions of government brought by the British – most notably the Westminster system of representative government and parliamentary sovereignty. These traditions are encompassed in many of the parliamentary conventions that guide our system of government.

New Zealand has also adopted centuries of British common law rights dating back to the 13th century and the Magna Carta. These fundamental common law rights protecting liberty and property are preserved through the Imperial Laws Application Act 1988 and the New Zealand Bill of Rights Act 1988 (LAC, 2001).

Together these constitutional documents and conventions provide the foundations upon which all regulations are created in New Zealand.

6.2 The architecture of New Zealand's regulatory system

The process through which central government forms legislations can notionally be divided into seven phases or sub-processes:

- the policy development process;
- the Cabinet process (and Executive Council);
- the Parliamentary process;
- implementation, monitoring and enforcement;
- judicial interpretation and review; and

[17] The Judicial system in New Zealand consists of District Courts, the High Court, the Court of Appeal and the Supreme Court. There are also several 'inferior courts' that exercise specialist statutory jurisdiction (e.g. The Environment Court, the Family Court and the Employment Court).

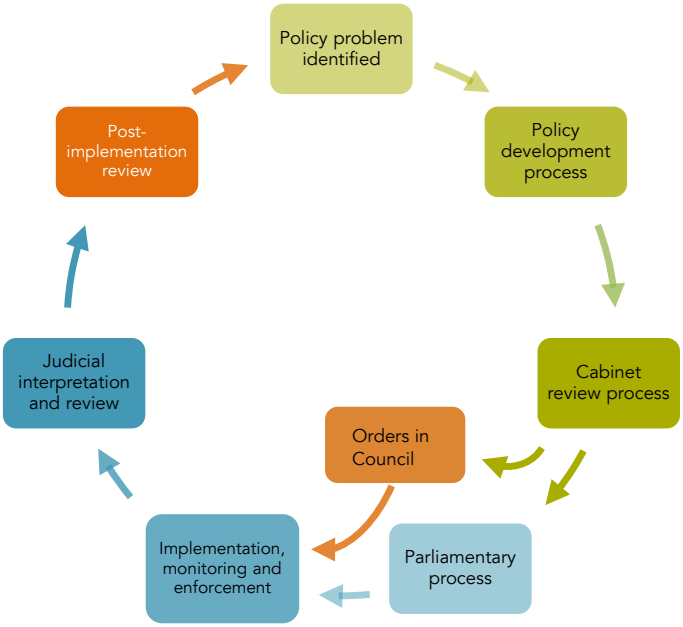
[18] The independence of the courts is a key constitutional principle upon which the New Zealand legal system rests. Constitutional convention prevents members of the House from questioning a judge's impartiality or competence and (in general) matters cannot be debated within the House if they are under consideration by the courts (See SO 112 and 113). Such measures remove the danger of a trial being prejudiced by members of the House. Similarly, judges must refrain from acting in a politically biased manner.

[19] Constitutional conventions are rules that have become established via frequent use and custom. While some constitutional conventions have been put into statutes, the majority are not enforceable under the law and adherence to them is reliant on people respecting and obeying them (for example, the convention that the Governor-General acts on the advice of his or her ministers).

- post-implementation review.

Each of these is summarised below.

Figure 6.1 Process for making legislation and regulations (the regulatory cycle)



Policy development process

All regulations have their genesis in the identification of a policy problem – usually by the Executive. An accurate definition of the policy problem is crucial to the legislative processes as it allows the objectives of Government action to be clearly stated.

For any given policy objective there are likely to be a number of potential courses of Government action – each with their own advantages and disadvantages. It is during the policy development process that these options are identified and the relative merits of each assessed against the efficiency and effectiveness with which they are able to achieve the desired policy objective. This assessment should include the identification of the costs and benefits of each option and an analysis of how the costs and benefits are distributed throughout society.

Consideration also needs to be given to how each option will be implemented and the process for monitoring, evaluating and reviewing the success of Government action once it has been implemented.

It is also during the policy process that stakeholders should be consulted. This includes other government departments as well as groups outside the public sector. As noted in the Cabinet Manual, "Effective and appropriate consultation is a key factor in good decision making, good policy, and good legislation" (Cabinet Office (2008) para 7.24). It is also vital for the accurate definition of a policy problem and to identifying and critiquing the available policy responses.

To encourage high quality policy analysis and informed decision making, Cabinet requires that Regulatory Impact Assessments (RIA) are conducted on all policy initiatives that could potentially create or change legislation or regulations (Cabinet Manual para 5.71).[20] Cabinet also requires that the process and findings of the RIA be summarised in a RIS and that the RIS is attached to the relevant Cabinet papers when submitted to Cabinet for deliberation.

Importantly, whereas a Cabinet paper is a minister's document, a RIS is a government department document. As explained in Treasury's RIA Handbook:

[20] RIAs are also required if a policy initiative is expected to result in a paper being submitted to Cabinet. Exceptions to this requirement exist where the impact of the changes are believed to be small.

> The RIS provides a summary of the agency's best advice to their minister and to Cabinet on the problem definition, objectives, identification and analysis of the full range of practical options, and information on implementation arrangements. By contrast, the Cabinet paper presents the minister's advice or recommendation to Cabinet. (Treasury, 2009a)

If a proposed policy is likely to have a significant impact on New Zealand society, the economy or the environment, or if there is significant policy risk, implementation risk or uncertainty, Cabinet requires that the RIS must be reviewed by the RIAT. The RIAT is an independent unit situated within Treasury that provides advice and quality assurance on RISs. The RIAT team works with the responsible government agency in an effort to ensure the RIS meets Cabinet's expected level of quality. They are responsible for providing feedback to Cabinet on whether the RIS meets requirements, partially meets requirements or does not meet requirements (see Box 6.1).

Box 6.1 **RIS Quality Assurance Criteria**

Complete

Is all the required information (including the disclosure statement) included in the RIS?

Are all substantive elements of each fully-developed option included (or does the RIS identify the nature of the additional policy work required)?

Have all substantive economic, social and environmental impacts been identified (and quantified where feasible)?

Convincing

Are the status quo, problem definition and any cited evidence presented in an accurate and balanced way?

Do the objectives relate logically to, and fully cover, the problem definition?

Do the options offer a proportionate, well-targeted response to the problem?

Is the level and type of analysis provided commensurate with the size and complexity of the problem and the magnitude of the impacts and risks of the policy options?

Is the nature and robustness of the cited evidence commensurate with the size and complexity of the problem and the magnitude of the impacts and risks of the policy options?

Do the conclusions relate logically and consistently to the analysis of the options?

Consulted

Does the RIS show evidence of efficient and effective consultation with all relevant stakeholders, key affected parties, government agencies and relevant experts?

Does the RIS show how any issues raised in consultation have been addressed or dealt with?

Clear and concise

Is the material communicated in plain English, with minimal use of jargon and any technical terms explained?

Is the material structured in a way that is helpful to the reader?

Is the material concisely presented, with minimal duplication, appropriate use of tables and diagrams, and references to more detailed source material, to help manage the length?

Source: New Zealand Treasury (2009a)

The RIAT has discretion to allow agencies to manage their own quality control of the RIA process. The RIA Handbook states that this may occur under the following circumstances (p.20):

- where they are confident the policy process undertaken is robust and has not been rushed;
- where there is prior agreement between RIAT and the department on the policy frameworks, standards of evidence and types of impacts to be used;
- where other relevant departments, agencies, groups or individuals who have expertise in the subject matter have been appropriately involved and consulted; or
- where the agency has demonstrated that it has robust in-house quality assurance arrangements.

Cabinet process

Once a policy has been developed the responsible minister will raise the proposal for legislation or regulations with Cabinet for consideration. Most matters that go to the Cabinet for a decision are first considered by one or more Cabinet Committees.

Ministers submit Cabinet papers to Cabinet outlining the proposed legislation or regulation, the policy issues that it is addressing and the likely implications of the policy for Government finances and the community. These papers are accompanied by a RIS.

The majority of bills and regulations are drafted by the Parliamentary Council Office (PCO). Policy officers are responsible for providing the PCO with drafting instructions that will form the basis on which the bill or regulation is drafted. Drafting instructions are essentially a narrative that allows a policy action to be translated into law (PCO, 2012).

The Cabinet Legislation Committee examines all draft bills and regulations before they are approved for introduction to the House or passed to Cabinet for approval, to ensure that their policy content has been approved by the appropriate Cabinet Committee and that the relevant requirements (such as those set out in the Cabinet Manual and the CabGuide) have been satisfied.

Once a bill has been approved by Cabinet it is introduced to the House.

Regulations approved by Cabinet are submitted to the Executive Council. All regulations made by Order in Council are notified in the *New Zealand Gazette* and come into force 28 days after notification.

Under SO 309(1) [21] the regulation is then examined by the House's Regulatory Review Committee. This committee does not review the policy content of regulations, rather it provides technical scrutiny to ensure that the regulation is consistent with legal requirements (see discussion above). The Regulatory Review Committee may draw any anomalies in the regulation to the attention of the House.

Parliamentary processes

The passage of a bill through Parliament consists of three 'readings' and the examination and report by the appropriate subject select committee.

A bill is first 'Introduced' to the House. This is an administrative step whereby the bill is announced to the House and made publicly available. The bill is then debated in the House for the first time (the first reading). At the end of the debate the House votes on whether the bill should proceed. If the House agrees the bill should proceed, it is referred to the appropriate select committee.

Select Committees enable members of Parliament to examine issues in greater detail than would be possible within the context of debates within the House. They can also provide the public with an opportunity to comment on proposed legislation and to participate in committee inquiries. Select committees may carry out public scrutiny of Government spending plans and of the performance of New

[21] The House is bound by Standing Orders (SO) governing its proceedings and the execution of its powers. The SO also establish a number of select committees such as the Regulations Review Committee (SO181) and the Local Government and Environment Committee (SO 185).

Zealand's Government departments, Crown entities and State enterprises (Office of the Clerk of the House of Representatives, 2010).

Once a bill is referred to a select committee it usually has six months to make its assessment and provide a report to the House. The report will include recommended amendments to the bill and a commentary explaining the recommended changes and the issues it has considered (Office of the Clerk of the House of Representatives, 2006).

The bill is then debated in the House for the second time (no sooner than three days after the select committee has provided their report to the House). If all members of the select committee agree to the amendments, they are automatically included in the bill if the House votes to progress the Bill to the Committee of the Whole House.[22]

At this stage the bill is debated by all members of the House that wish to participate (Committee of the Whole House). Members have the chance to make a short speech and propose changes to the bill. These changes are generally published in supplementary order papers. There is no time limit on these debates. Once the final form of the bill is agreed it proceeds to the third reading.

Third reading: This is the final debate on the bill (in its revised form). At the end of the debate the House decides whether to pass the bill or reject it. If it is passed it is sent for Royal Assent.

Royal Assent: At this stage the bill is signed by the Sovereign (or their representative the Governor-General) and the bill is passed into law.

Implementation

The implementation phase of the regulatory cycle is when monitoring and enforcement beings. Prior to this it is important to ensure the new regulations are widely understood both by those being regulated and the administrators of the regulation.

A good policy process which includes the analysis and consideration of an implementation plan will aid the smooth transition to a new regulatory regime and reduce uncertainty for businesses and councils. It will also assist in identifying the resources, training and other elements that administrators of the regulation require to successfully monitor and enforce regulations.

Judicial interpretation and review

The court system is the main avenue through which disputes over breaches of regulations are resolved. As noted previously, in fulfilling this function the courts assign meaning to language used in statutes and regulations. Where ambiguity in the wording of a statute exists the courts will interpret the law in accordance with precedent and their interpretation of the 'intent of Parliament.' (LexisNexis New Zealand, 2012)

The courts also play an important role in supervising the exercise of power by the executive. When a minister, public servant, local authority or tribunal acts in a manner that is outside their powers or in a manner that is not consistent with a fair process, their decision can be reviewed by the court (Palmer, 2004).[23] This is commonly referred to as 'judicial review' of a decision.[24]

Post-implementation review

Leading practice requires that the stock of regulation is systematically reviewed to ensure that regulations remain up-to-date, cost-justified, cost-effective and consistent, and that they deliver the intended policy

[22] Amendments to the Bill that are not supported by every member are subject to a vote at the end of the debate.

[23] The grounds for judicial review exist within the complex area of Administrative Law. A detailed summary of these grounds is beyond the scope of this inquiry. Interested readers should see Palmer and Palmer (2004), Joseph (2001).

[24] It is important to distinguish between 'judicial review' and the hearing of an 'appeal'. Whereas an appeal deals with the merits of a previous decision, a judicial review deals with the legality of the decision. Palmer and Palmer (2004) notes that in recent years the court have become more willing to investigate the reasonableness of a decision and argues that this is exposing the merits of a decision to more scrutiny by the courts (See Palmer and Palmer, 2004, p.290 -291 for a fuller discussion of this point).

objectives (OECD, 2012a). Priority should be given to identifying inefficient and ineffective regulation. The systematic review of existing regulation helps to ensure that the regulatory objective is achieved and unnecessary regulatory costs for the community and businesses are avoided (Box 6.2).

Box 6.2 **Regulatory review strategies**

Four common strategies for regulatory review are as follows.

- *Scrap and build* – this consists of a comprehensive review and rebuilding of an entire regulatory regime.
- *Ad hoc reviews* – are limited in scope. They may be targeted at particular sectors (eg, the Building Code), kinds of regulations (e.g. permits and licences) or may cover the entire stock of rules with certain effects (e.g. business impacts). They may also be targeted at identified problem areas.
- *Sunset clauses* – this technique consists of setting an automatic expiry date for new laws and regulations upon adoption. Regulations subject to sunset clauses can only be extended if they are remade through standard rule-making procedures.
- *Review clauses* – are requirements in regulations for reviews to be conducted within a certain period, and can be seen as a weaker form of sunsetting. However, in this case, regulations continue unless actions are taken to eliminate them.

Source: OECD (2002); OECD (1997)

6.3 In summary

The quality of regulatory intervention is heavily influenced by the institutions, principles and processes through which they are made. These three elements of the regulatory system are influenced by number of key statutes, common law principles and conventions that together comprise New Zealand's constitution.

A number of review processes are built into the architecture of the regulatory system. Several of these processes provide checks and balances to protect individual freedoms and liberties from undue interference by the State. For example, Parliamentary Standing Order (309(1)) mandates that regulations are examined by the House's Regulatory Review Committee to ensure that they are consistent with legal and constitutional requirements.

Other processes are aimed at promoting regulatory quality. For example, to encourage rigorous analysis, Cabinet requires that a RIS accompany all proposals sent to Cabinet and that (most) proposals are reviewed by one or more Cabinet Committees.

The general standard of regulations produced in New Zealand is therefore inherently linked to the effectiveness of these review processes and the institutions through which they operate.

7 Regulation making by central government

Key points

- The majority of regulatory functions undertaken by councils arise from statutes emerging from central government. Therefore, the ability of councils to deliver the intended regulatory outcomes is inherently linked to the quality of regulations produced at the central level. For this reason it is important to take a step back and look at the regulatory system in its entirety.
- Effective regulatory governance requires active management of the entire 'regulatory cycle' – from the decision to use a regulatory instrument, to its design, implementation, monitoring, enforcement and review. Good governance relates to both the stock and flow of regulations.
- Poor regulatory governance, particularly during the design phase, can result in regulatory failure. However, regulatory failure can be difficult to detect when costs are disbursed widely throughout society, when the effects of regulations take time to materialise, and when 'feedback loops' are not in place to prompt remedial action and/or reform.
- The Commission has identified several areas where regulatory governance within central government agencies is below leading practice. While deficiencies in these areas are not universal across all agencies, they can be important for the quality of regulations devolved or delegated to councils.
- The current shortfalls in regulatory governance are, to varying degrees, perpetuated by the difficulties in assigning responsibility for regulatory outcomes when regulations are designed at the central level and implemented at the local level.
- Current institutional arrangements seem to shield central government agencies from the full fiscal and political cost of decentralising regulatory functions. This appears to be reducing the incentive on central government agencies to undertake thorough analysis of regulations before passing them to local government to implement. It may also be reducing investment in the skills needed to undertake detailed implementation analysis at the local level.
- There is no single policy solution that will strengthen regulatory governance and improve the quality of decentralised regulations. Rather, a portfolio of measures will be needed to bolster the architecture of regulation making. These measures should focus on four key themes:
    1. Aligned incentives – strengthening accountability of ministers and public servants for the quality of regulations devolved or delegated to local government
    2. Improving capability – lifting the quality of analysis in central government of local government regulation
    3. Meaningful consultation – improving the quality of engagement between central and local government on regulatory issues
    4. Changing cultures – recognising local government as policy partners and co-regulators
- Pragmatic approaches to building better relationships between central and local government are needed. These approaches must be based on a mutual understanding that both levels of government ultimately exist to create public value and that their ability to create public value is tied, at least in part, to the actions of the other.

7.1 The importance of central government regulatory governance

The majority of regulatory functions undertaken by councils are statutory requirements of central government. As such, when considering how effective councils have been in delivering regulatory outcomes, and where improvements can be made, it is important to take a step back and look at the regulatory system in its entirety – in particular, the regulatory governance arrangements that influence the overall quality of the regulations that local government are tasked with implementing. This point was raised in several submissions to the inquiry – for example, the Society of Local Government Managers (SOLGM) notes:

> It seems to us that your terms of reference risk over stating the extent to which it is valid to evaluate the "performance" of one actor in such a system, separately from an evaluation of the "performance" of the system as a whole. And this implicitly requires some consideration of the quality of the design of the system and the policy advice that underpinned it. (SOLGM, sub. 48, p.4)

The need to take a broader perspective was also highlighted by the Local Government Forum:

> A critical issue is the quality of the regulatory regimes that local authorities are required to apply. Governance at central government level is of vital importance in this regard. (Local Government Forum, sub. 15, p.25)

Regulatory governance is primarily about managing the way regulatory decisions are made and implemented. Central to this concept is the design of the institutions, principles and processes used to develop, implement and review regulations (Box 7.1 provides a more detailed definition of regulatory governance).

Box 7.1 **Definition of 'regulatory governance'**

The term regulatory governance is used in this chapter to refer to the management of decisions making processes through which regulatory decisions are made. Central to the concept of regulatory governance is decisions around the design and form of the:

- institutions that make, implement, monitoring, enforcing and reviewing regulations;
- principle that guide these institutions; and
- processes that institutions are required to follow.

Effective regulatory governance requires active management of the entire 'regulatory cycle' – from the decision to use a regulatory instrument, to its design, implementation, enforcement and review. Regulatory governance therefore relates to both existing regulatory regimes (the stock of regulations) and the manner in which new regulations are created (the flow of regulations).

While it is difficult to empirically measure, some important characteristics of good regulatory governance include:

- the development of explicit standards for good regulation making and the effective integration of these standards into the policy development process;
- the direction of regulatory resources to areas where they have the greatest benefits to society, such as the use of risk assessments to guide monitoring decisions;
- systematic review and updating of the existing stock of regulations to ensure regulations are achieving their objectives and that these objectives are still relevant;
- appropriate accountability arrangements that impose a discipline on decision making;

- ensuring regulatory agencies have adequate resources to administer the regulation in an efficient and effective manner (that is, the resources needed to achieve the behaviour changes intended by the regulation);
- transparent process for developing regulations that include public consultation procedures; and
- effective mechanisms for managing the coordination of regulations administered by different government departments or agencies.

Poor regulatory governance, particularly during the design phase, can result in regulatory failure – that is, society as a whole is worse off after the implementation of the regulation than it was prior to its implementation. Regulatory failure, however, can be difficult to detect when:

- costs are diffused and disbursed widely throughout society;
- compliance costs make up a relatively small component of overall business cost or household expenditure;
- unintended consequences take some time to materialise; and
- central government decision makers are insulated from public reaction to regulation – that is, feedback loops are not in place to provide the information needed to trigger remedial action and reform.

In the context of the regulations administered by local government, regulatory governance is further complicated by:

- the myriad of different local conditions under which regulations are administered;
- the number of organisations responsible for implementing and enforcing regulations;
- the physical distance between central government agencies and local communities throughout the country (and therefore their knowledge of these communities); and
- the number of regulatory functions undertaken by councils.

These factors add to the risk that regulations devolved or delegated to local government may have unintended consequences or fail to achieve their intended regulatory outcomes. Under such conditions, the need for effective regulatory governance is amplified.

7.2 Shortfalls in regulatory governance

Regulation making at the central level is below leading practice in several areas. This is having a material impact on the quality of regulations devolved or delegated to the local government sector. While deficiencies are not universal across all agencies (or even within agencies), they are common enough to be of concern.

Problems with the current regulation-making system include:

- weak incentives for rigorous *ex ante* analysis of regulations – particularly implementation analysis;
- insufficient accountability on central government for the performance of decentralised regulations (*ex post*);
- weak incentives for a 'whole of government' approach to decentralised regulations;
- quality assurance processes that are only partially meeting their intended purpose;
- an absence of adequate consultation with the local government sector on regulatory proposals;
- performance monitoring that offers little 'feedback' for improving performance; and
- limited use of post-implementation reviews.

These problems are discussed below.

F7.1 Regulation making at the central level is below leading practice. This is having a material impact on the quality of regulations devolved or delegated to the local government sector.

Weak incentives for rigorous analysis

Regulatory outcomes are heavily influenced by their design. As such it is important that the incentives faced by those developing regulatory regimes are aligned with the broader public interest. There are instances within the current regulation-making system where this alignment appears weak.

Local government as an 'accountability buffer'

Accountability is important for aligning incentives as it helps to ensure decision makers bear the cost and benefits of their decisions. However, the lines of accountability can become blurred when regulations are developed centrally and implemented locally – particularly when communities view councils as the 'source' of the regulation (regardless of their lack of involvement in its formation). This point is also noted by SOLGM in its submission:

> We would suggest that much of the debate about the performance of local authorities in their regulatory roles in New Zealand hinges on this accountability disconnect around the design of the regulatory frameworks. The incentives for central government to ensure that the legislated regulatory processes it designs are cost effective and proportionate, are significantly weakened where it knows that the costs of administering the system will be collected through a fee levied by a local authority or through local rates because it knows that the public will see the local authority as the agency responsible for the level of those costs. (SOLGM, sub. 48, p.7)

Accountability is further complicated when councils are unable to fully recover the cost of administering a regulatory function (through user charges). In such cases councils often fund implementation through council rates – a revenue source under the constant scrutiny of ratepayers and (increasingly) central government.

The disconnect between regulation making and regulation implementation can act like a buffer for central government decision makers. This means that because councils bear some of the financial and political cost of regulations, central government can be shielded from being held fully accountable for the design of regulations.

The incentives created by this situation can impact regulatory decisions. For example, Ministers may be more inclined to allocate regulatory functions to councils when they know that some of the political risk is borne by local politicians. This is particularly relevant in cases where there is public pressure on the Government to 'do something' about a perceived problem.

Similarly, if Ministers are insulated from the full political and fiscal cost of their policy choices, they may be more inclined to make quick decisions without first considering all possible policy options. Some stakeholders have suggested that the National Dog Registry is an example of where this has occurred.

The 'accountability buffer' may also impact the decisions made by central government agencies. For example, officials may be more inclined to recommend that difficult regulatory functions be undertaken locally – thus reducing the performance risk faced by the central agency. Furthermore, agency chief executives may be less inclined to invest resources into the policy development process, or into developing capability within the agency to fully analyse issues relating to the local government sector.

F7.2 Current institutional arrangements can shield central government agencies from the full fiscal and political cost of decentralising regulatory functions.

The blurring of accountability has broader implications for New Zealand's system of government. By diminishing the transparency and accountability of central decision makers, it not only reduces incentives for

'good' regulation, but, more fundamentally, it reduces the ability of the public and Parliament to scrutinise the performance of the executive branch of government. The accountability buffer is therefore an issue of constitutional importance as it may in fact weaken the democratic foundations of government.

Of course, it is also important to assess the efficiency with which councils implement regulations. In this regard, care needs to be taken to ensure that underlying problems within regulatory regimes are accurately diagnosed so that inadequacies in implementation are not confused with inadequacies in the underlying design of regulations. This requires careful analysis of the regime in question during post-implementation performance monitoring and reviews (see Chapter 14).

F7.3 When regulations are developed centrally and implemented locally the incentives faced by central government to undertake rigorous policy analysis are reduced. However, care needs to be taken not to confuse implementation problems with inadequacies in the underlying design of regulations – this requires careful post-implementation analysis.

Organisational incentives within agencies

The quality of regulations devolved or delegated to local government can be affected by the incentives created by the organisational culture within agencies.

Public servants are, by convention and law, bound to promote the public interest by providing Ministers with the best possible advice. Once a decision is made, they are equally bound to implement the Minister's decision to the best of their ability. However, public servants also have private interests. These interests can, on occasion, conflict with the public interest, particularly when the culture of an organisation is to legitimise and reward this behaviour. For example where the organisational culture:

- places heavy emphasis on meeting a Minister's needs expediently, and insufficient emphasis on providing the Minister with high-quality advice;
- rewards officials who tailor advice to match the preferences of Ministers (and avoid analysis that may paint the Minister's preferred option in a bad light);
- rewards officials for policies and initiatives that increase the size and responsibility of the Ministry (as opposed to those that create public value); or
- is heavily risk averse, thereby stifling innovation and rewarding policies that minimise risk (rather than maximise value).

The challenge for government agencies is to develop institutions, principles and processes that align the interests of public servants with the broader public interest. In the context of regulations implemented at the local level, this means aligning the incentives of all players in the policy network to produce good-quality regulations and to implement these regulations efficiently.

Ministers are critical to meeting this challenge. As the principal 'consumer' of policy advice, Ministerial approval of officials' advice is a strong influence on their behaviour. Thus, it is important that Ministers have strong incentives to ensure that the advice they receive is of a high quality and that it is the product of a rigorous policy process.

The key point is that if the incentives are aligned, then improvements in the quality of regulatory governance and decisions are likely to follow.

F7.4 The degree of Ministerial pressure on the public service to provide quality advice on local government regulatory issues is a key influence on behaviour. It is therefore important that Ministers have strong incentives to ensure that the advice they receive on these issues is of high quality and the product of a rigorous policy process.

Multi-agency coordination of local regulations

As noted, organisational cultures and structures in the public service can legitimise and reward behaviour that promotes the interests of an agency over the creation of public value. One result of this is policy (in this case regulatory policy) that is developed largely in agency 'silos' – an issue raised in the 'Better Public Service Advisory Group Report':

> …one of the main obstacles to the state services responding more effectively to cross-agency results is the inflexibility in current organisational arrangements… Multi-agency work is on occasion characterised by individual agencies protecting their own patch rather than focusing on solving the common problem. (Better Public Service Advisory Group, 2011, p.28)

The tendency of central government agencies to operate independently has resulted in regulatory functions being conferred on local government without sufficient consideration of central agency interdependencies and the cumulative impact on the sector's ability to undertake the additional functions. More specifically, new regulatory functions are conferred without considering the impact they will have on councils' ability to undertake existing regulatory functions. For the local government sector, a lack of inter-agency coordination can mean dealing with numerous regulatory changes simultaneously. This can stretch councils' ability to keep abreast of recent developments and can provide insufficient time for councils to prepare for regulatory changes. The outcome of this is that regulations may not be implemented as effectively or as quickly as they otherwise could have been.

The issue of inter-agency coordination is a key focus of the State Sector Reform (Public Finance) Bill (currently before Parliament). Among other things, this Bill reinforces the need for agency chief executives to think in the collective interests of government. As explained in the Pre-Introduction Parliamentary Briefing to the Bill:

> Chief executives must be aware of the system-wide influences on their departments, the system-wide opportunities and connections that departments should make, and the reciprocal system-wide impacts and implications of departmental policies and activities and those of related agencies. (SSC, 2012, p.5)

It is important that the renewed emphasis on systems-wide connections acknowledges local governments as part of 'the system'. If this occurs then the Better Public Service Initiative presents a real opportunity to improve the coherency with which regulatory functions are allocated to councils.

F7.5 The tendency of central government agencies to operate independently has resulted in regulatory functions being conferred on local government without considering their interaction and impact on existing regulatory functions administered by local authorities.

F7.6 An opportunity exists to use the Better Public Service Initiative to promote a more joined up, whole of government approach to regulatory policy involving the local government sector.

Quality assurance processes need strengthening

By the time a new regulatory function is conferred on councils, it has gone through several formal and informal quality assurance checks. At the most basic level, policy managers within central government agencies are responsible for providing both procedural and intellectual leadership of the policy development processes. Further, most agencies have internal 'regulatory quality groups' that scrutinise regulatory proposals before they are put up for Cabinet consideration.

More formal processes exist at the Cabinet level, the most obvious being the requirement for Regulatory Impact Statements (RIS) to accompany all regulatory proposals sent to Cabinet. Unlike Cabinet papers (which are 'owned' by Ministers), RISs are 'owned' by the departments and are designed to represent an agency's best advice on an issue. Cabinet committees and officials committees also provide an important source of scrutiny, as do Parliamentary debates and select committee reviews. (These processes were explained in more detail in Chapter 4.)

Ministerial approval of the quality of advice is a powerful motivator for government agencies. As such, Cabinet quality assurance processes can have a major impact on the standard of regulations. Perhaps the most direct way this can occur is by Ministers (particularly the Prime Minister) setting high expectations for the quality of RISs that accompany Cabinet proposals.

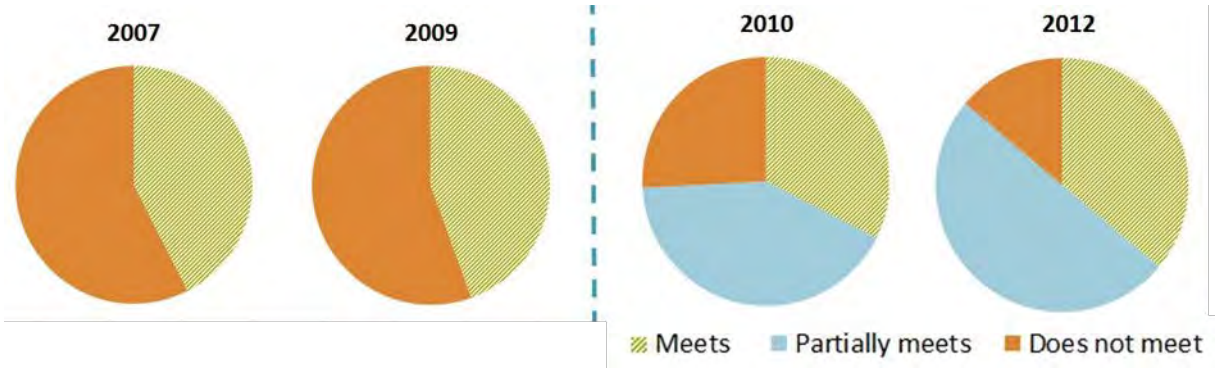
There is evidence to suggest that demand for good-quality RISs has been growing over the past few years. A number of measures have been introduced that increase the pressure on officials to prepare RISs that meet Treasury's quality assurance requirements. These measures include:

- the creation of the Regulatory Impact Assessment Team (RIAT) within Treasury;
- the implementation of mandatory post-implementation reviews (PIRs) for policies where the RIAT teams deem the RIS not to meet requirements (the PIR involves, among others, the Minister for Regulatory Reform); and
- meetings between the Minister for Regulatory Reform and other Ministers to discuss their officials' performance under the Regulatory Impact Assessment regime.

Despite these initiatives, external reviews conducted for Treasury illustrate that the general standard of RISs remains low. The most recent review, conducted in 2012, concluded only 36% of the 42 RISs reviewed fully met Cabinet's quality requirements (Castalia Strategic Advisors, 2012). A further 50% partially met the criteria, and 14% did not meet the criteria.

These results were consistent with, but slightly better than, the previous review (NZIER, 2010), which found 32% of RISs reviewed fully met Treasury's quality assurance criteria, 42% partially met the criteria, and 26% did not meet the criteria. Figure 7.1 shows the results of four external RIS evaluations conducted since 2007.

Figure 7.1 Results from external RIS reviews



Source: Castalia (2012)

Notes:

1. The line indicates when the evaluation criterion changed from 'adequate/inadequate' to 'meets/partially meets/does not meet' requirements.

The Commission undertook its own review of six RISs relating to local government regulations introduced since 2009. The review found that none of the six RISs fully met Treasury's quality assurance criteria, two partially met the criteria, and four did not meet the RIA requirements.[25] Further:

- None of the RISs reviewed provide a robust discussion of the trade-offs involved in deciding whether a regulatory function is better undertaken at a central government or local government level.
- The two self-assessed RISs that were evaluated by the responsible agency as 'meeting' the RIA requirements, were judged by the Commission to be considerably below this standard.

[25] The RISs chosen for evaluation were all prepared in 2009 or after. The Commission notes the limited sample size means there is a risk that the RISs chosen for evaluation may not have been representative of the quality of advice given to Ministers on all matters relating to local government.

- Four of the six RISs illustrated a lack of public consultation (in three of the four cases this is likely to be the result of tight timelines imposed on officials).

While there has been a general improvement in the quality of RISs in recent years, it is concerning that some 15 years after RIS requirements were introduced, about two-thirds of RISs still fail to fully meet Treasury's quality assurance requirements.

It is apparent that on occasions central government agencies and Ministers approach RIS requirements as an 'administrative hurdle' rather than an important source of information for Cabinet. This view undermines the value of the RIS system. It also risks undermining public confidence that Cabinet is acting in a transparent, rigorous and accountable manner.

While poor RISs could be indicative of the overall standard of policy formulation in central government, it seems equally likely that they are a symptom of one or more of the following:

- weak incentives facing agencies to follow Treasury guidelines;
- inadequate time provided to officials to complete rigorous analysis; and
- implicit pressure on officials to curb the 'frankness' of the policy advice provided to Ministers.

F7.7 The RIS process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present this value is not being fully realised and improvements to the process are required.

Engagement with local government needs improving

Consultation with 78 different councils, each with its own set of circumstances, is a challenging task for central government agencies. Yet effective consultation is vital for achieving regulatory outcomes. Specifically, where local governments are administering regulations, effective consultation can:

- provide 'local information' to inform the development of sound policy advice – from problem definition through to option selection, identification and assessment of likely impacts, implementation and on-going monitoring and review. Such 'local information' is not only an important 'reality check' on policy proposals, but can be vital for ensuring that regulatory outcomes are achieved at least cost;
- improve the accountability of central government agencies by exposing proposals to external scrutiny prior to reaching Cabinet. Ultimately, this will improve the quality of advice to Ministers;
- promote local government buy-in to policy reforms, thereby promoting the achievement of the regulatory objectives; and
- aid legitimacy by ensuring that the Government follows appropriate due process in the exercise of its regulatory powers. Consultation aids legitimacy for both the specific regulation and the regulatory system overall.

Of course consultation is not costless and the potential benefits need to be carefully weighed against these costs. Costs include both the physical resources deployed during consultation and the time that needs to be invested. These costs (and benefits) will vary from case to case and will be influenced by factors such as:

- the availability of information from other sources (eg, existing datasets);
- the level of public/local government acceptability of possible policy options; and
- the complexity of the policy problem being considered.

For most substantive regulatory issues there are likely to be net benefits from engaging with councils early in the policy process. However, insufficient central government consultation has been a major theme

emerging from the inquiry consultation and submission processes. For example, the SOLGM submission notes:

> Our experience is that Government agencies typically consult local government at the political level (usually through Local Government New Zealand) at an early stage at the level of – "do you think the headline policy intent a good idea?" We see this as appropriate. However we believe that there is a lot of scope for improvement of the more detailed design of legislation by a greater willingness to include managers and staff of local authorities in the more detailed development process. (SOLGM, sub. 48, p.11)

Similar comments are made in several other submissions, including that provided by the Waitomo District Council:

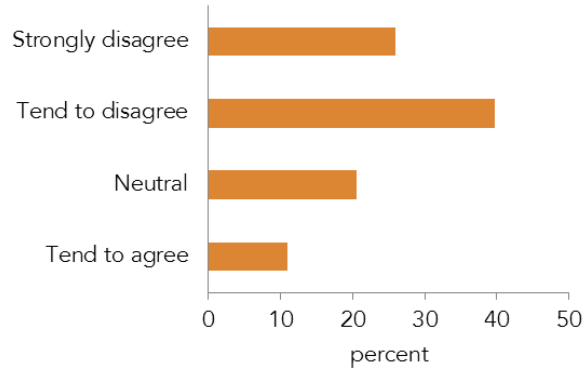
> For an effective regulatory regime, it is important that appropriate consultation be carried out at the early stages of development with all of the affected parties. In the case of regulations developed by Central government, it is often the case that no substantive consultation is carried out with local authorities even when the responsibilities of monitoring and enforcement are intended to be devolved to this tier of government. In a lot of instances, the first consultation starts only after a Bill has been introduced in Parliament when what is clearly required is a close liaison with local government and sectoral representative bodies like Local Government New Zealand right at the outset in order to get the complete picture of problem definition, intended or unintended consequences and overall impacts. (Waitomo District Council, sub. 9, p.6)

These sentiments are supported by the results of the Commission's survey of local governments, which found (Figure 7.2):

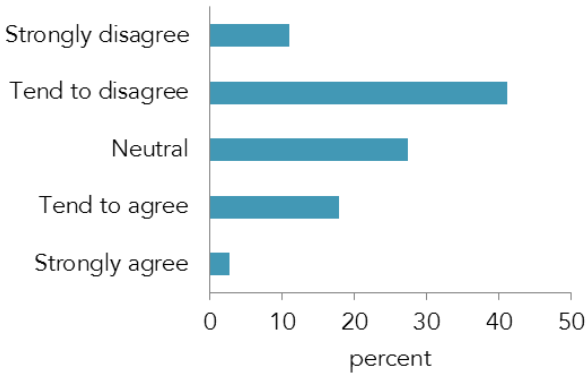
- 68% of local governments 'tended to disagree' or 'strongly disagreed' with the statement that 'local government feedback during the engagement process was taken into account when drafting new regulations;
- only 21% of councils 'agreed' or 'strongly agreed' that central government engagement was 'positive and constructive';
- 63% of councils 'tended to disagree' or 'strongly disagreed' with the statement that engagement with central government was 'seen by my council as genuine and engendering a sense of trust'; and
- 63% of councils 'tended to disagree' or 'strongly disagreed' with the statement that engagement with central government was 'viewed by my council as having a positive impact on the quality of central government regulation'.

Figure 7.2 Central government engagement – results from council survey

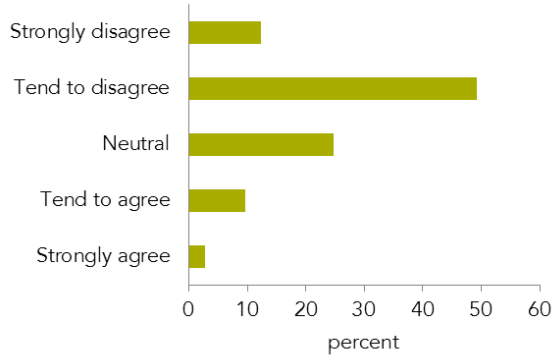
a) Local government feedback is taken into account when drafting new regulations



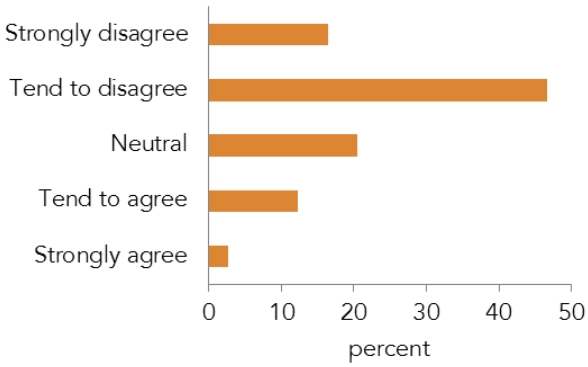
b) Engagement is positive and constructive



c) Engagement is genuine and creates a sense of trust



d) Engagement has a positive impact on the quality of central government regulations



The Commission's own review of six RIAs since 2009 found that consultation with local government was limited in all cases (and in one case completely absent).

A low level of substantive engagement with local government in the development of regulations appears to be a real issue. However, there are some notable examples of leading practice.

During the inquiry engagement process, several councils drew attention to the engagement process that has been taken in developing the Food Bill. A summary of this process is provided in Box 7.2. The approach taken in developing the Food Bill illustrates a number of important points, notably:

- Despite there being 78 different councils, each with its own set of circumstances, meaningful consultation with the sector is achievable.
- Consultation with local government should be approached with the mindset that councils are 'co-regulators' or 'policy partners' (rather than 'agents' of central government).
- It is possible to manage any political risks associated with sharing draft bills.
- Ministerial leadership is important for the development of 'co-regulator' relationships.
- Local Government New Zealand (LGNZ) is an important conduit for tapping into the local government sector.

Box 7.2 **Food Bill – engagement between the Ministry for Primary Industries and Territorial Authorities**

The Domestic Food Review (DFR) began in 2003 with the key objectives of reducing the incidence of food borne illness and addressing duplication and inconsistency in how food business operators were regulated.

As part of the review, the New Zealand Food Safety Authority (now part of the Ministry for Primary Industries (MPI))[26] set up forums with key regulators and industry representatives to discuss the future of food safety in New Zealand. One was a combined forum of Territorial Authorities (TAs) and Public Health Unit representatives.

Initially, this forum was used to discuss proposed policy that would shape the DFR including regulatory roles, responsibilities and structures. Discussions were free and frank, and provided opportunity for all parties to set out any concerns or issues they may have had with proposals.

Following Cabinet approval for the development of a new Food Bill in 2006, a smaller working group, the TA Steering Group (TASG), was established in 2007. This was jointly convened by MPI and LGNZ. The purpose of the TASG is to work with MPI to implement decisions within the DFR Portfolio. Representation on the TASG was arranged by LGNZ, who sought to include a mix of large/small and rural/urban TAs. TASG members report, and as required, assist with the implementation of these decisions within their areas/regions. The members also bring the views of those areas/regions/colleagues back to the TASG as appropriate.

The TASG usually meets three times per year with additional meetings scheduled if required.[27] These meetings have been held continuous since 2007. In addition to formal meeting MPI and TAs also shared information and ideas via informal meetings. For example, MPI has attended Local Government Zone meetings to present on the intent of the Bill.

Summaries of each TASG meeting are made available to all TAs via the TA password protected webpage on the MPI website. The web page is a repository for all information about the Bill and TA involvement, including upcoming training, implementation matters, and guidance material.

In 2008, MPI established a specific local government liaison team to oversee on-going engagement with TAs around the implementation of the Food Bill. This team is the central contact point between TAs and MPI. They attend TA cluster meetings, provide advice on implementation matters, work with TAs on any concerns or issues they may have; and collect information that will assist with the future implementation of the Bill once it is enacted. They provide direct support to TAs via coaching and delivering seminars to food business operators, including promoting the use of 'champions' to promote the Bill.

Additionally, in 2008 MPI introduced the *Voluntary Implementation Programme* (VIP). The key objective of the VIP was to provide an opportunity to trial aspects of the new proposed regime for the food service sector, with a view to incorporating lessons learnt when the proposed new Food Act is implemented. TAs were identified as critical to the success of the VIP which enabled MPI and TAs to trial aspects of the future food safety system under the Bill.[28]

A number of workshops were held by MPI across New Zealand as part of VIP. These workshops were to prepare TAs for the shift from a model of 'inspection' to 'verification', and included training

[26] The New Zealand Food Safety Authority (NZFSA) merged with the Ministry for Primary Industries (formerly Ministry of Agriculture and Forestry) in February 2011. However, for this inquiry reference will be made to MPI (rather than NZFSA) to avoid confusion.

[27] Initially MPI funded flights for participants to these meetings and TAs donated participants' time. However, in 2011 this arrangement changed due to MPI budget constraints and TAs now fund both their representatives' flights and time.

[28] Targets set by MPI in August 2008 were to have 10 TAs involved and 250 food business operators registered under VIP. With the delay in progressing the Bill, this target has been greatly exceeded with 67 of 68 TAs participating and more than 2,500 food business operators involved in VIP as at November 2012.

workshops to up skill Environmental Health Officers (EHOs) on their future role as Food Act Officers and verifiers of template Food Control Plans. These workshops are still provided on an as needs basis.

A contestable TA Initiative Fund was established in 2008 to provide funding to TAs for initiatives that contributed to the objectives of the VIP. Two rounds of funding were held, with a total pool of $500,000. It was set up to enable TAs to apply to MPI for funding to trial an aspect of the new regime within their district. Criteria and reporting requirements were set up around the funds to ensure that the proposals met the goals of learning for the DFR. Fourteen TAs received funding to undertake a range of activities from specific workshops for business operators with English as a second language; to encouraging the use of TA cluster models to work collaboratively in the food safety area.

The TASG has provided significant input into the development and drafting of the Food Bill (the Bill). This was made possible by the then Minister for Food Safety who agreed that the draft of the Bill could be shared with the TASG prior to it being introduced to the House. This allowed for discussion on the workability of the Bill, and the role and duties of TAs as a co-regulator in the food safety area to be clearly established. Input was, and is (they will have input into a draft Supplementary Order Paper to the Bill), considered essential by MPI as TAs have a co-regulatory role in implementing the Bill so the policy and drafting to reflect this policy must be practical and workable.

TAs have had the opportunity to discuss with central government the pros and cons of proposals around the Bill as they are developed. The TASG has provided opportunity for MPI to seek guidance and feedback from TAs on specific implementation matters because of their experience dealing with food business operators under the current Food Act 1981 and Food Hygiene Regulations 1974. This has been very valuable in planning for implementation and ensuring proposals will be practical and workable.

The establishment of the TASG has allowed MPI to develop an on-going relationship with TAs and this has been the platform for engagement in other ways and on issues other than the Food Bill. Importantly it has been a forum that has permitted both local and central government to influence the policy direction and improve the quality of the Bill and how it will be implemented. This work will continue as MPI moves towards the further consideration of the Bill by Parliament and subsequently its implementation once the Bill is passed.

Source: Case study provided by MPI

F7.8 While there are some examples of leading practice, consultation with local government on the design of new regulations is generally poor.

Implementation challenges are poorly understood

Problems arising during implementation can severely limit the effectiveness of a regulatory regime, and may have a negative impact on the morale and external reputation of the implementing agency (Weaver, 2010). The challenges and risks to implementation therefore need to be fully considered during the policy development process.

There are a number of factors that need to be considered when assessing local implementation of regulations. These include the presence of any conflicting local priorities, and financial, capability or capacity constraints that may limit the effectiveness of local implementation. Spatial variations in the cost of administering the regulation also need to be considered. These variations can arise, for example, due to size, demographic makeup or economic structure within an area (DIA, 2006).

There is evidence to suggest that implementation analysis is a generic weakness of policy analysis in New Zealand. For example, an independent analysis of RISs conducted by NZIER (2011, p.6) noted: "…the sections on implementation, review and monitoring were sometimes seemingly tacked on as an

afterthought". A similar review conducted by Castalia in 2012 (p.10) commented: "The implementation and monitoring, evaluation and review sections were the weakest components of many RISs."

While it may be a generic problem, poor implementation analysis disproportionately impacts local government because local governments are disproportionately involved as implementers of government policy. This point has been acknowledged for some time. For example, in 2004 a joint officials group delivered a report to the Central Government/Local Government Forum concluding:[29]

> …there appears to be some justification for central government policy-making to better incorporate into its analysis the effect of changes to regulatory responsibilities on local government … there are currently a number of initiatives that offer the opportunity to incorporate into policy-making, consideration of the effect of proposals on local government. (DIA, 2006)

The Commission's research suggests that this statement is equally valid today. Results from the council survey indicate that 53% of councils 'strongly disagreed' with the statement 'Central government agencies have a good understanding of the local costs and impacts of new regulations devolved or delegated to local government'. A further 38% 'tended to disagree' (8% were 'neutral'). These results were consistent with information obtained during consultation meetings and with many of the submissions to the inquiry – a selection of which is provided in Box 7.3.

It is important to note that there is an inherent link between the level of consultation undertaken by central government agencies and their ability to undertake accurate implementation analysis. Good analysis requires good information, and this can be difficult, if not impossible, for agencies to obtain in the absence of a comprehensive engagement programme.

Analysis of implementation issues is further hindered by the absence of a 'whole of government' approach to local government regulations. This can result in agencies assigning new regulatory tasks to councils without considering the impact on other regulatory functions already conferred on councils by other agencies.

Box 7.3 **Stakeholder views on implementation analysis**

Waitomo District Council

> …there is real and appropriate concern that central government agencies do not fully consider the impact of new regulations on local government especially in relation to on-going costs. This incomplete assessment of impact can be in the appropriateness of regulations or standards themselves, or in fully understanding the impact of compliance monitoring or in the enforcement of regulations. (sub. 9, p.5)

Whangarei District Council

> Capability is a substantive issue for local government, especially smaller councils with reduced resources, especially when dealing with the 'one size fits all' legislation that conflicts very strongly with local preferences. (sub. 10, p.6)

The Manawatu Chamber of Commerce

> The "Chamber" would question whether local government have the appropriate mechanisms to fund the cost of administration, monitoring and compliance for many of their regulatory functions and that central government in consultation with local government must look at how this can be improved. (sub. 31, p.4)

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> …a number of the changes coming through from central government are processed in very tight timeframes, without thorough consideration of the implications. Ensuring thorough consideration of regulations is crucial to ensuring they achieve the intended outcome efficiently. (sub. 17, p.5)

[29] The officials group comprised representatives from central and local government.

F7.9 There is evidence to suggest that implementation analysis is a generic weakness of regulatory policy analysis in New Zealand. This weakness impacts on local government because local government is often the implementer of government policy.

F7.10 The financial, capability, capacity and risk management challenges faced by local government in implementing regulations appear to be poorly understood within central government. There is little analysis of how these challenges will impact the successful achievement of regulatory outcomes.

Outcomes of regulation are poorly monitored

For many areas of regulation, performance assessment is largely through community scrutiny of local authority performance using information that the local authority reports. Other areas of regulation are subject to periodic monitoring by central government agencies. For example, the Department of Building and Housing undertakes Technical Reviews of local authority performance under the Building Act 2004.

The Commission notes that while there is a substantial amount of performance reporting being undertaken, this often does not provide strong feedback loops to councils and other parts of the regulatory system on how to improve regulatory performance. Furthermore, performance monitoring arrangements lack a 'systems-wide' approach that views implementation as one element in a broader regulatory cycle.

Chapter 14 discusses these issues and the Commission's recommendations for improving performance monitoring.

7.3 Towards stronger regulatory governance

There is no one policy panacea to strengthen regulatory governance at the central level; rather a portfolio of measures will be needed. The Commission believes that these measures should focus on four separate, yet related, themes:

- Aligned incentives – strengthening accountability of Ministers and public servants for the quality of regulations devolved or delegated to local government.
- Improving capability – lifting the quality of analysis in central government on local government regulation.
- Meaningful consultation – improving the quality of engagement between central and local government on regulatory issues.
- Changing cultures – recognising local government as policy partners and co-regulators.

Within each of these themes there exists a spectrum of potential changes – ranging from improved data and information, through to legislation aimed at codifying the principles of good regulatory design and governance. Effective implementation of these measures will require cultural changes within central government agencies. These cultural changes will in part be driven over time as a result of the measures and in part by proactive leadership of chief executives and senior managers. These issues are discussed in Section 7.4.

The Commission's focus has been on issues of regulatory governance as they pertain to the functions and performance of the local government sector. Nevertheless, some of the measures outlined in this section have broader implications for central government regulation making. A detailed analysis of these wider implications is beyond the scope of this inquiry. However, the terms of reference also call for an indication

of the costs and benefits of the Commission's recommendation. To the extent that these wider implications have a bearing on these costs and benefits, they are mentioned in the analysis.

F7.11 A spectrum of measures exist that would help improve the quality of regulation delegated or devolved to local government. Many of these would have broader benefits for the overall standard of central government regulation making.

Aligning incentives – strengthening quality and accountability

Good regulatory policy requires thorough analysis by well-trained and well-resourced officials working within a regulatory system that rewards rigour, and discourages hasty responses to 'hot' policy issues. Such a regulatory system requires clear lines of accountability, transparent decision making, and processes for ensuring that high standards of regulation are upheld.

There are a range of potential measures that could help improve the quality of regulations devolved or delegated to LAs (see Table 7.1). Before reaching its final recommendations on these measures, the Commission is interested in hearing stakeholders' views on which measures, or combination of measures, would best meet this objective.

Q7.1 What measures, or combination of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government?

Table 7.1 Options for strengthen the quality of analysis underpinning local government regulations

No.	Option	Pros	Cons
1	**Require the RIAT to assess all RISs impacting local government's regulatory responsibilities** Currently only 'significant' RISs are assessed by RIAT. This measure would see all RISs relating to local government reviewed by the RIAT. Agency comparisons could be published every 12 months.	Removes the risk of 'self-review bias' posed by self-assessments. Strengthens transparency and public scrutiny of agency performance around RISs relating to local government regulatory functions. Allows agencies themselves to benchmark their performance against that of other agencies. Strengthens incentives on Ministers to ensure policies are of a high quality (may reduce benefits of 'reactionary regulation'). This could translate to strengthening incentives for chief executives (CEs) to produce quality policy advice and invest in training etc. Could be expanded to all RISs, not just those relevant to local government.	Some agencies do effective assessments of their own RISs because of their greater familiarity with the subject. This could reduce.
2	**Focus RIS assessments by RIAT on the performance of officials** RIS assessments by the RIAT unit could be calibrated to focus more explicitly on the standard of advice provided by officials (in addition to the current focus on the confidence that Ministers can have in the information presented). The performance of agencies could then be more explicitly tied to the RIS assessments performed by the RIAT unit. (This measure would have wider application than local government regulations.)	By more explicitly tying the RIS assessments to agency performance, incentives from the RIA regime will be further strengthened. For example, stakeholders and commentators will likely take a greater interest in the assessments, and CEs will benchmark their performance against the performance of other CEs. It also makes it easier to take assessments to the next level – incorporating RIS assessments more directly to a CE's performance agreement.	CEs may take greater efforts to resist any negative assessments. The latter will place greater pressure on the RIS assessors, and on the RIA regime.
3	**Refuse a place on the Cabinet agenda for proposals without a RIS that fully meets Treasury requirements** Alter Cabinet requirements to make the inclusion of a satisfactory RIS a prerequisite for having issues placed on the Cabinet agenda (ie, where the issue would change the regulatory functions of councils). Exclusions would only be granted by the Prime Minister and would be the trigger for a post-implementation review. (This measure would have wider application than local government regulations.)	Creates a strong incentive on Ministers to demand good-quality analysis (if combined with the introduction of an independent review body, the measure would provide an even stronger incentive on Ministers). Cabinet members would have additional confidence in the information they are provided by agencies. **(Note: This system is currently operating at the Commonwealth level in Australia. The Cabinet Secretariat will not circulate final Cabinet submissions or memoranda, or other Cabinet papers, without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply.)**	Exemptions may be needed for 'emergency' issues. Likely to be unpopular with Ministers and thus meet with resistance. Likely to involve additional costs and delays in getting matters onto the Cabinet agenda.

No.	Option	Pros	Cons
4	**Strengthen the component of CE performance review that is linked to external reviews of RISs involving changes to the regulatory responsibility of local governments** This could involve stronger links between external evaluation of RISs and the performance reviews of CEs (and agency leadership teams). Letter of expectations and statement of intent of agencies could also include reference to regulatory standards . (Could be expanded beyond local government regulations.)	Strengthening the accountability of CEs for the standard of regulatory governance within their sphere of responsibility. Ensures commitment from 'the top'. Strengthen CE incentives to invest in developing the capability to necessary to analyse local government regulatory issues. (Could be applied to regulations more generally.)	Risk that local government regulatory issues could be given more attention than they warrant if they carry too much weight in CE's performance reviews. (ie, distorting resource allocation decisions).
5	**Post-implementation reviews conducted (by external body)** Central government could undertake post-implementation reviews of all significant regulations implemented by local government (say one to two years after coming into force). These reviews would be based around the impact assessment outlined in the RIS, and would involve independent oversight of the reviews.	The knowledge that *ex post* reviews will be undertaken would increase the incentive on agencies to provide good advice prior to implementation. The review could be a useful 'learning tool' for agencies and officers (eg, identifying weaknesses in policy processes or analysis). Would allow for the early identification and correction of problems within the regulatory system thereby increasing the likelihood of achieving desired regulatory outcomes and minimising costs.	The timing of reviews would need to be carefully considered to avoid 'false positives and negatives'. Need for review is likely to vary between projects; therefore, clear but flexible criteria would be needed to ensure that resources were not wasted on unnecessary reviews. Would likely be a moderate fiscal cost.
6	**Independent audit of RIS self-assessments** A structured programme of random audits of RIS self-assessments could be undertaken by an independent body/ contractor with a report to CE, Minister, Treasury and SSC. (This measure would have wider application than local government regulations.)	Increases the accountability on agencies that conduct self-assessments. Reduces the risk that low-quality self-assessments go unnoticed. Provides an additional incentive for quality analysis as reviews could be linked to CE/agency performance reviews.	Could be resource-intensive for central government to implement. (Note: Some ad hoc audits have already been conducted by Treasury.)

No.	Option	Pros	Cons
7	**Legislation codifying the need for RIS to be conducted on all new regulations** At present the preparation of RISs is a procedural requirement. Legislation could be passed to make conducting a RIS a legal requirement. (This measure would have wider application than local government regulations.)	Statute-based obligations (above administrative obligations) are much harder for a future government to change. In addition, statute-based obligations would likely carry greater weight with officials, Ministers, stakeholders and the public, thereby more strongly promoting awareness, accountability and compliance.	Reduces flexibility of Cabinet to alter the RIS procedures if a change is necessary to improve the process in the future (note: this could be both a pro and con). An Act is a significant change. It is difficult to anticipate what the impact will be, including perverse outcomes, gaming etc. Also, significant changes will likely garner a greater level of opposition, in particular in this case from people and groups opposed to the underlying economic approach that forms the basis of the RIA regime. It may also be seen as compromising the democratic process.
8	**Independent statutory body responsible for RIS reviews** Legislation establishing an independent body (or empowering an existing body) to undertake quality control reviews of RIS (in the same vein as those undertaken by the RIAT unit). Performance of the independent RIS review body could itself be reviewed by an external body. (This measure would have wider application than local government regulations.)	Acts as a circuit breaker between the Minister and the agency preparing the RIS. (ie, the agency/CE may be more willing to provide frank and fearless advice, especially if RISs are linked to performance of agencies and CE). Provides Cabinet with additional assurance that the RIS is the best available advice. Provides greater security against having independent reviews discontinued as functions of the body are set in statute (as opposed to procedure).	Possible loss of leverage gained by having RIS assessments undertaken by a central government agency.
9	**Creation of a departmental agency responsible for regulatory quality assurance** Similar to the above only the external unit would operate as a departmental agency (as opposed to an independent statutory body). The agency could be hosted out of Treasury or the Department of Prime Minister and Cabinet, and would report directly to the Prime Minister, Treasurer or Minister for Regulatory Reform. (Note: This measure would require passing amendments to the State Sector Act 1998 as envisaged in the State Sector Reform (Public Finance) Bill.) (This measure would have wider application than local government regulations.)	This option would have many of the advantages of an independent statutory body without the need for legislation. As the body would remain 'inside' government, it is less likely to suffer from a loss of leverage with other government departments.	While the agency would have an element of independence, it may still be subject to the allocation of appropriations by the host department. This could add to the scope for political pressure on the agency.

No.	Option	Pros	Cons
10	**Single select committee to consider issues concerning local government regulation** At present, local government issues are covered by the Environment and Local Government Select Committee. This measure would see the formulation of an additional committee focused solely on issues that have regulatory implications for local government. The Committee would provide its own report to Parliament.	Raise the status of local government regulatory issues within the Parliament agenda. Allow for the development of specific skills and experiences within Parliament select committees in dealing with local government regulatory issues.	Select Committees are very late in the policy development process as the bill has already obtained broad Ministerial, Cabinet and Parliamentary support. Will be times when the policy would more appropriately be dealt with using sector specific skills (eg, environment, health, labour) rather than local government.
11	**Public regulatory plans**[2] Government agencies could produce regulatory plans and make these available to the public, and even expose the plans to the public for their input. (As per requirements on Federal agencies in Australia). (This measure would have wider application than local government regulations).	Local governments would be able to better prepare for potential changes (particularly when these would require a substantive change from current practice). Local government would be in a better position to prepare for active participation in policy discussions. This could include collecting data, conducting original research, contracting in expertise, and researching practices in overseas jurisdictions.	Risk that worthwhile regulatory reforms could meet political resistance (or be shelved) before their form is known. Agency's draft regulatory plan will, appropriately, change as priorities change and new information comes to hand. It is possible stakeholders could on occasion waste resources preparing for regulatory reform that does not materialise. However, appropriately caveated, the draft plan should prove a useful aid to effective stakeholder engagement in policy development.

Notes:

1. Treasury has been centrally coordinating and driving a 'scans and plans' exercise across all government agencies. As well as building a picture of the stock of existing regulation, it also provided a whole of government view of the draft regulation coming 'down the pipe'.

Improving capability

The measures listed in Table 7.1 would increase 'demand' for better analysis of local government regulations. However, additional measures would help to ensure agencies have the skills to meet this demand.

General guidance material and training on what constitutes good policy analysis is readily available to government agencies. Such material plays an important role in lifting the overall policy proficiency of officers. However, there appears to be little emphasis within agencies on the specific training needed to analyse policy issues involving the local government sector. As a result, few agencies have these capabilities. Given the extent of regulatory activities undertaken by local governments, this absence of training is concerning.

Of course, simply making training more accessible will not address the underlying incentives facing agencies. Institutional arrangements such as those outlined in Table 7.1 may be needed to strengthen the incentive on agencies to actually train their staff and utilise available material. A notable example of why such changes may be necessary is the limited traction obtained by DIA's 'policy guidelines for regulatory issues involving local government' (Box 7.4). While these guidelines have been available for some time, they are seldom used by central government agencies – a fact made apparent to the Commission during engagement meetings.

Although training is an obvious way to obtain skills, it is by no means the only way to inject local analysis into the policy development process. For example, secondments from organisations with the desired skills (be they central or local) may allow access to relevant skills when the internal demand for this knowledge is sporadic (and therefore internal capabilities cannot be justified). Stronger linkages with universities and international 'thought leaders' may also have a role to play in building the capability base of agencies.

Training need not be confined to improving the skills of public servants. There may be value in increasing politicians' awareness of the challenges of local implementation – particularly those new to Parliament. This may assist Parliamentary scrutiny of proposed legislation where changes to local government regulatory functions are envisaged.

A range of possible options for improving policy capability is presented in Table 7.2. Before reaching its conclusions on these measures, the Commission is interested in receiving feedback on the options, or combination of options, that may be most effective in lifting capability.

Box 7.4 **DIA policy guidelines for regulatory issues involving local government**

In 2006 the Department of Internal Affairs and Local Government New Zealand released guidelines designed to assist central government agencies to identify and consider important issues that may arise where local authorities are, or are proposed to be, involved in the implementation of regulations. The objectives of these guidelines are to:

- identify and discuss key issues to consider in developing regulatory policy, and/or formulating an implementation programme; and
- outline how local government sector representatives can be involved in policy development processes, to provide first-hand, practical and contextual information and perspectives in considering these matters.

The guidelines are designed to improve the quality of policy development when councils will (or may be) involved in the administration or implementation of a proposed regulatory framework, or where a change or removal of an existing regulatory function of councils is being considered. They note that higher-quality regulations are more likely to arise when central government has an understanding of the context within which councils operate. Specifically, when consideration is given to:

- diversity of geography, communities and issues;
- local autonomy and accountability;
- national outcomes and local autonomy;
- statutory decision making, consultation and accountability requirements;
- the different roles of territorial authorities and regional councils; and
- funding impacts on local authorities.

Source: DIA (2006)

Q7.2 What measures, or combination of measures, would be most effective in lifting the capability of central government agencies to analyse regulations impacting on local government?

F7.12 While guidance and training material on good policy practices are available, the incentives on agencies to ensure they utilise this material are weak. Perhaps the most relevant example of this is the limited traction obtained by DIA's policy guidelines for regulatory issues involving local government.

Table 7.2 Options for improving capability

No.	Option	Pros	Cons
1	**Seconding/contracting staff with local government expertise when agencies are undertaking policy development** Some government agencies are much more heavily involved in local government issues than others. There may be merit in these agencies seconding or contracting in expertise from local authorities or other agencies to work with them on relevant reforms.	May assist in identifying obstacles to the effective implementation of regulations early in the policy process. May allow for a greater level of understanding of the impact that local variation would have on the regulatory outcomes being pursued.	A number of risks would need to be managed, including: • excessive influence of local authority views in the policy development process; • the views may not be representative of the views of local authorities overall – this is quite likely given the wide range of local authorities.
2	**Training for local government (councillors and officers) when new regulatory responsibilities are passed to LG** Central government could ensure training programmes were available for councillors and staff when new regulatory requirements are placed on local governments. The level of training would be commensurate with the complexity of the new arrangements, and could be included as a cost when assessing regulatory/policy alternatives.	Likely to improve the effectiveness of local implementation of regulations originating from central government. Likely to reduce resistance to change at the local level. May be more efficient to have one centrally run training programme than each council seeking training individually (similar model to that of the Food Bill).	Could be expensive for central government to implement. Will set a precedent for providing free training to other groups (district health boards etc.).
3	**Formal (and informal) partnerships between government agencies and external experts in regulatory and local government policy** To build a culture of quality policy advice, officers should be exposed to external thought leaders in the area of regulatory policy and local government. This could include universities (both in New Zealand and overseas), leading government agencies overseas or public policy think tanks.	Partnerships could be used to provide a greater level of rigour and external peer review of new regulations.	Identifying a willing and appropriate partner could be difficult. Minimal cost.

No.	Option	Pros	Cons
4	**Best practice guidance material and training for policy officers on key areas of policy analysis and RIA** There is plenty of guidance material on the Treasury website on the RIS requirements. What is needed now is training on **how** best to meet those requirements. Key modules could include problem definition, planning and implementing the role out of new policy, implementation analysis, performance monitoring and post-implementation review. A good cost-benefit analysis primer is already available on the Treasury website. (Would have wider implications than local government regulation.)	Would help to overcome existing problems in the RIS process where these are caused by insufficient knowledge/skill. Process of developing the guidance (across government) would promote a shared understanding and culture around good practice policy development. The guidance could be used by stakeholders to benchmark officials' performance in developing policy advice.	Cost of developing and delivering training. Would not address underlying incentives.
5	**Strengthen DIA's mandate to ensure that local government issues are appropriately taken into account in policy making, including appearing before officials committees** Relevant officials committees used to support Cabinet committee chairs could be required to invite a DIA official to attend meetings when dealing with issues with significant implications for local government.	DIA could provide a useful 'reality check' on policy initiatives, which may allow practical issues to be identified more readily than the standard engagement process. Would allow Cabinet to tap into the experience of people familiar with local government challenges, strengths and limitations. Would assist in identifying the fiscal implications for local government of new policies or regulations and ensure that these are included in RISs.	DIA officials would come with a particular bias, but would be expected to operate within a public interest framework (ie, they would not be lobbyists for local government). There would be some cost in ensuring the DIA representatives were up to speed with the wide range of issues across local government.
6	**Training programmes designed for new MPs (but available more widely)** Training for new MPs on regulatory quality to enhance their ability to critically evaluate policy advice. (Would have wider implications than local government regulation.)	By assisting MPs to be 'informed consumers' of policy advice, the demand for quality material is lifted (in particular when they become Ministers) and regulatory decisions are improved. Assist the sophistication of parliamentary debate and thereby strengthen the democratic process.	Very small fiscal cost. MPs may be unwilling to devote time to training or may feel that it is of little value. May be some resistance from some MPs and stakeholders to the economic approach underpinning good regulatory design practice.

No.	Option	Pros	Cons
7	**A local government sector-specific RIA requirement** Currently the RIA regime sits above sector-specific issues. That is, there are no special requirements or guidance for the development of RISs that involve local government (or any other policy area). Sector-specific requirements could be developed with RISs being reviewed against these requirements. (This approach could be extended to other sectors with unique characteristics.)	Reduce the need to reinvent the 'policy wheel' (as the requirements would contain 'embedded knowledge' of the local government sector). Promote useful inter-agency dialogue on the appropriateness of policy approaches within sectors (small cost), making policy development in the medium term easier (larger benefit) and hopefully of higher quality. Promote great consistency between agencies dealing with local government regulations. Promote greater understanding and awareness of the Government's policy approaches to stakeholders, thereby promoting more effective engagement.	May be difficult to develop sector specifications that are broad enough to cover the range of issues that will impact local government.
8	**Improve availability of regional/ local level economic, social and environmental data** Aimed at assisting more informed analysis on the local aspects of regulatory implementation and the design of change management programmes, assistance packages etc.	Better information would assist agencies in identifying the incidence of costs when a new regulation is introduced. It could also help identify the magnitude of the policy problem. Might simply be a matter of conducting more thorough analysis of existing data (therefore relatively inexpensive).	Requires commitment (political and financial) to ensure continuity of time series data. Requires high level of skills in specialised areas such as statistics and econometrics. Some fiscal cost.

Meaningful consultation – improving engagement on regulatory issues

Councils often lament the limited quality and extent of central government consultation on regulatory proposals. Similarly, although the importance of consultation is generally well understood by officials, in practice it is too often found wanting.

Effective consultation is potentially part of the cure for much that ails poor policy advice. It provides vital information to inform the development of policy advice, aids accountability by exposing proposals to external scrutiny, and can promote awareness of pending changes to council regulatory functions (thereby allowing councils sufficient time to prepare for the changes).

There are many possible options available to elicit improvements in the quality of consultation undertaken by central government agencies. These range from training officers to recognise what good consultation is (and what it is not), through to statutory requirements to consult with local government on significant regulatory issues.

Table 7.3 provides a range of possible options for improving engagement with local government. To assist in developing its final recommendations, the Commission is seeking feedback on the options, or combination of options, that stakeholders believe would be most effective in improving the level of consultation between central and local governments.

Table 7.3 Options for improve consultation

No.	Options	Pros	Cons
1	**Establish Leaders Forums for key areas of local government regulation** Similar to the Environment and Natural Resource Forum chaired by Ministry for the Environment. The forums could focus on the top four regulatory areas for local government (other than those covered by the existing forum) – eg, building and construction, dog control, food safety, liquor licensing.	Forums can provide for a level of discussion and debate that transcends that possible through bi-party discussions. Better level of debate and deeper relationships should ultimately translate to better policy development (including some savings) and decision making.	Local government is only one party with an intimate interest in the delegation of functions from central to local government. Others will include those being regulated, those in whose name the regulation is being put in place, those who pay for it (including ratepayers) and expert/academic interests. They must be involved intimately to counter local government biases, systemic weaknesses and blind spots. Some fiscal cost. Local government expectations may need to be managed. Large number of councils means the process may be difficult or costly to manage (this could be circumvented to some degree by rolling representation from local governments, allowing LGNZ to determine the appropriate representation or having multiple regional forums).
2	**Greater use of LGNZ by central government agencies** Local Government New Zealand is well placed to take an active role in ensuring central government policy development appropriately takes into account the issues and interests of local government.	Appropriately resourced, central government agencies could use LGNZ to: • identify whether policy proposals have a local government angle; • advise on appropriate methods of consultation; • engage with confidentially when highly sensitive issues arise; • provide a local government perspective when extreme urgency is required; • coordinate input from its members – for example, ensuring a cross-section of views are represented, and reducing the duplication and waste that can occur with multiple submissions on the same issue.	The perspective of local government is only one of many that will be important. It is important that other perspectives are similarly sought by central government officials to ensure that policies are not developed that are local government-centric.

No.	Options	Pros	Cons
3	**Mandate that officials undertake 'select committee type' consultation** Select committees have robust consultation procedures. It may be possible to mandate that a similar process (as a minimum) be undertaken by officials prior to taking policy proposals to Cabinet for consideration. (This measure would have wider application than local government regulations.)	Would ensure consultation took place that met a minimum standard.	It does not capture a lot of tertiary regulation (for example, rules and codes of practice). It may become the default consultation standard, whereas it is often appropriate to exceed this standard of consultation. In other cases it is likely to be excessive for what is needed.
4	**Additional training for officers on effective consultation processes and techniques** Training to assist officers to understand the value of consulting at different stages of the policy development cycle, and the strengths and weaknesses of different consultation options (test panels, focus groups, public meetings, workshops, full public consultation etc.). (This measure would have wider application than local government regulations.)	Training would teach officials how to get the most value out of their consultation when dealing with local government (efficiency gains). Written material to this purpose could be made available on the Treasury website, thus increasing the transparency of Cabinet's expectations around consultation.	Small fiscal impact. Only useful if learnings are implemented in practice.
5	**Require the Minister of Local Government to sign off on the adequacy of consultation with local government when proposal involves changing the regulatory functions undertaken by local government** The Minister of Local Government could be required to certify that a rigorous consultation processes has been undertaken and that the views of local government are adequately reflected in the RIS.	Increase the incentive on Ministers and government agencies to undertake meaningful engagement with local government (with the view to improving the quality of regulatory policy). Increase the accountability of the Minister of Local Government for regulations impacting his/her portfolio. Expose proposed regulations to a greater level of Cabinet scrutiny.	It may be difficult for the Minister to judge the level of engagement that has been undertaken. Without specific guidelines around the adequacy of consultation, it may be difficult for the Minister to make an informed judgement.

No.	Options	Pros	Cons
6	**Statutory consultation requirements for all policy issues involving local government regulations** Mandate consultation for all central government policy advice where local government is involved. The courts would then be responsible for deciding whether consultation had been carried out appropriately. This option could be softened by allowing the Prime Minister, for example, to exempt certain proposals from the consultation requirement.	The courts are well placed for deciding whether consultation has been undertaken appropriately, based on well-established principles that can accommodate the myriad of consultation circumstances that will arise. This in turn will provide strong incentives for officials to ensure they undertake appropriate consultation.	A significant increase in the cost of developing policy advice. If additional resources are not forthcoming to match these costs, unintended consequences could include an overall reduction in the quality of advice as government agencies seek savings elsewhere in the policy development process. Opportunism by vested interests, for example, taking court action to slow reforms for as long as possible in the expectation that a new government will take a different policy stance. Taking court action is easier for well organised and resourced interests. A court-based mechanism will likely see a stronger bias in favour of these groups.
7	**Agency level 'Local Government Communication Strategies'** Agencies with substantive dealings with local government could be required to develop local government communication strategies. These strategies could set out the issues on the agency's policy agenda that are likely to impact local government and the steps that they are planning to engage local government on each issue. The strategies could then be reviewed by the State Services Commission and provided to the Minister of Local Government for comment.	Allows local government greater scope to plan its engagement with central government. By pulling the engagement plans together, a picture will form of the demands being placed on local government by central government, leading to better decisions by central government on the appropriateness of those demands. The requirement for a strategy may act to stimulate deeper thinking about effective forms of engagement with local government. Could serve to raise the profile of engagement with local government therefore facilitating cultural change.	Additional 'procedural requirement' that may be viewed as a 'hoop to jump through' rather than a useful tool. As circumstances change, engagement strategies will also change. Local government could end up sharing in the resulting sunk costs. Fiscal cost to departments of developing the strategy.

7.4 Changing culture – recognising councils as policy partners

The place of local government in New Zealand's constitutional framework, and indeed system of government, is muddled and not well understood. As discussed in Chapter 2, there is a tendency for central government departments to view local government as an 'agent' responsible for undertaking regulatory actions on behalf of Ministers. This view does not align well with the Local Government Act 2002 and the role of local government as a catalyst of local democratic decision making. The result is a strained relationship between the two tiers of government.

To improve regulatory outcomes, better relationships are needed. These relationships must be based on a mutual understanding that both levels of government ultimately exist to create public value (and that their ability to create public value is tied, at least in part, to the actions of the other).

This means that cultural changes are required in many central government agencies. These cultural changes need to focus on:

- developing a greater appreciation of the role and functions of local government;
- a greater recognition of the place and importance of local government in the policy system;
- developing a 'quality culture' that places value on 'deep thinking' about local regulatory issues (and provides public servants the time and space to do this); and
- shifting towards a more collegial and less hierarchical relationship with the local government sector.

Without changes to the organisational culture of central government agencies, the measures outlined in the previous section are likely to be met with resistance and fail to deliver their full value.

At the same time, local government too needs to alter the manner in which it views central government. Through the engagement meetings the Commission has observed a high level of distrust and disenchantment with central government agencies. A shift towards a more inclusive and cooperative approach by central government agencies will be of limited value unless local authorities are equally willing to embrace the role of 'policy partner'.

Shifting organisational cultures is inherently difficult. Strong leadership will be required to break down current assumptions and beliefs that act as a barrier to closer, more cooperative relationships between central and local government. Chief executives and senior management teams will be crucial agents of change, and, as such, it will be important that they see value in working more closely with the local government sector.

There is a concerted push under the Better Public Service reforms for a stronger 'whole of government' approach to policy. The opportunity exists to use the momentum of these reforms as a catalyst for a more holistic view of 'government' in which councils are seen as regulatory partners (rather than agents or 'service providers'). That is, a view where 'whole of government' means 'whole of government' rather than 'whole of central government'.

F7.13 Pragmatic approaches to building better relationships between central and local government are needed. These relationships must be based on a mutual understanding that both levels of government ultimately exist to create public value and that their ability to create public value is tied, at least in part, to the actions of the other.

8 Local government cooperation

Key points

- Local government cooperation is an effective way of overcoming some of the 'gaps' identified in Chapter 1. It is part of a strategy for reducing capacity, information, administrative and policy gaps. As such, there is a sound conceptual basis for cooperation across councils.
- Reflecting the potential benefits, there is a great deal of cooperation, coordination, and sharing of resources occurring across local authorities. Cooperation around consents for building and construction, followed by planning, land use and water consents, and food safety are the main areas of regulatory cooperation. Councils are generally satisfied with the outcomes of cooperation and open to it across the range of their regulatory functions.
- A shared vision of regulatory outcomes and the buy-in of council management and councillors are important prerequisites for cooperation. Cooperation can be both informal (sharing information and best practice) and formal (sharing staff, contracting regulatory services to another council, joint procurement of professional services and better alignment of regulations).
- Cooperation can yield significant benefits but also involves considerable time and resource. As such, decisions to cooperate should be based on careful consideration and analysis.
- The actions of central government can significantly impact on the extent of horizontal cooperation across councils. If local authorities must respond too quickly to a new duty, they are more likely to establish and entrench their own in-house solution, reducing the likelihood of cooperation. Also, well-developed guidance material from central government can help facilitate cooperation.
- Information on the similarities and differences across local authorities, especially territorial local authorities, can be used to highlight potential collaboration opportunities to alleviate 'capacity gaps'. Likewise, the relationship between administrative areas and local economic areas (as proxied by labour markets) can also highlight potentially beneficial cooperation opportunities.

This chapter explores the issue of cooperation between local councils. Although the focus is primarily on horizontal cooperation across councils, consideration is also given to the impact of central government on the incentives for local government to cooperate. The chapter reviews the legal and administrative provisions that support cooperation between local authorities, and outlines the extent to which collaboration is occurring. The costs and benefits of cooperation are also briefly considered. The chapter ends by outlining a framework that is potentially useful in identifying possible cooperation opportunities across councils.

8.1 Why cooperate?

Chapter 1 described how multiple actors at different levels of government and across the same level of government can lead to a number of 'gaps' that need to be managed. These gaps included: information, capacity, fiscal, administrative, and policy (Box 1.6). Cooperation across multiple local authorities can be an effective way of managing some of these gaps:[30]

> Promoting co-ordination and capacity-building at both the national and sub-national levels is a large and critical step toward bridging these gaps and overcoming the obstacles they present. Co-ordination is essential for effectively providing public services. (OECD, 2009c, p.3)

[30] The terms 'cooperation', 'collaboration' and 'coordination' are used interchangeably throughout this chapter.

For example, as discussed in Chapter 1, a capacity gap arises when there is a lack of human, knowledge (skill-based), or infrastructure resources available to carry out tasks. To manage this gap, local authorities can share employees and/or infrastructure. The international experience is that this is one of the strongest drivers of local authority cooperation (OECD, 2009c).

Likewise, an administrative gap arises when administrative borders do not correspond to functional economic areas at the local level (OECD, 2009c). For example, if two local authorities regulate different parts of the same local economic agglomeration, then this can limit administrative and negotiating power with central government, create externalities (or spillovers), and potentially contribute to territorial fragmentation. In this case, cooperation can strengthen bargaining capacity and internalise spillovers, leading to more efficient outcomes.

Improving processes and relationships (such as engagement between different levels of government) to facilitate cooperation may potentially be more important than structural change. Indeed, in some cases cooperation can be a substitute for the reallocation of regulatory responsibility and amalgamation. For example, building consents for dams would seem to have national provision characteristics – low frequency, high risk, and high technical expertise. However regional councils, most of which are not registered building consent authorities, are responsible for implementing the relevant regulation. As outlined below, this situation has led to regional councils working together.

A cooperative solution may, in some cases, be second best. However, the work of Elinor Ostrom on polycentric arrangements has showed this need not be the case.[31] Cooperation gives councils the flexibility of only working together in areas where there are advantages: for example, councils can choose to work together in areas where there are economies of scale, and choose to work alone in areas where there are diseconomies of scale. Cooperation also gives councils the flexibility to work with the best suited partner in each regulatory area. This may lead to better outcomes than amalgamation where the partner is fixed across all regulatory areas. Furthermore, amalgamations are typically contemplated or raised with respect to neighbouring authorities, which is a natural limitation on the set of possible partners. As such, horizontal cooperation across local authorities is a key mechanism for achieving good regulatory outcomes.

8.2 The basis for local government cooperation

This chapter deals with local government cooperation in the provision of regulatory services, as opposed to the other non-regulatory services local government provides. For example, building consents, food safety and dog control are covered in this chapter because they involve the provision of regulatory services. On the other hand, the provision of swimming pools, libraries, rubbish collection, and civil defence are non-regulatory services and are not discussed here. The chapter also focuses on the frontline provision of regulatory functions rather than transaction processes (payroll, finance) and professional support services (human resources) and procurement.[32]

Local authorities are required to exercise their powers wholly or principally for the benefit of those within their geographic jurisdiction (S12(4&5)). Consistent with this, the Local Government Act also provides explicit legal provisions for local authorities to work together, as detailed in Box 8.1. This recognises that working together with other authorities can be consistent with, and even necessary to, achieving the best long-term outcomes for a community. The Local Government Act also requires local authorities to agree protocols for communication and coordination among them (S15(1-4)) (also detailed in Box 8.1. It is, however, important to note that:

> Section 12 (6) notes where there may be exceptions, especially related to the activities of council-controlled organizations and the transfer of responsibility, for example. Generally, councils cannot contract out of regulatory responsibilities, so the nature of government structures or shared services models needs to be mindful of provisions in the LGA. (LGNZ, 2011c, p.11)

[31] Some of her famous articles look at how police forces are arranged. For example, see Ostrom, Parks, and Whitaker (1973).

[32] The latter have been covered in other publications, such as OAG (2004) and LGNZ (2011c).

There are a number of ways to conceptualise the range of mechanisms through which local councils may choose to cooperate in the provision of regulatory services. Figure 8.1 sets out one way of thinking about the range of available options.

Figure 8.1 Spectrum of cooperative approaches

Source: Adapted from LGNZ (2011c)

For each of the approaches to cooperation depicted in Figure 8.1, there is a range of possible joint venture structures. LGNZ (2011c) identifies: partnership agreements, joint venture agreements, staffing agreements and service delivery agreements. OAG (2004) also gives examples of the types of coordination possible or that were occurring in 2004 (Box 8.2). Under the right circumstances, each of these options has merit and, with the exception of commercialisation across local authority boundaries, the Commission saw and heard of many successful examples of each form of cooperation over the course of its engagements. A few of these are profiled later in this chapter.

Box 8.1 Local Government Act 2002

12 (6) Subsections (4) and (5) do not—

(a) prevent 2 or more local authorities engaging in a joint undertaking, a joint activity, or a cooperative activity; or

(b) prevent a transfer of responsibility from one local authority to another in accordance with this Act; or

(c) restrict the activities of a council-controlled organisation;

14 (1) (e) a local authority should collaborate and cooperate with other local authorities and bodies as it considers appropriate to promote or achieve its priorities and desired outcomes, and make efficient use of resources;

15 Triennial agreements

(1) Not later than 1 March after each triennial general election of members, all local authorities within each region must enter into an agreement containing protocols for communication and co-ordination among them during the period until the next triennial general election of members.

(2) Each agreement must include a statement of the process for consultation on proposals for new regional council activities.

(3) After the date specified in subsection (1), but before the next triennial general election of members, all local authorities within each region may meet and agree to amendments to the protocols.

(4) An agreement remains in force until replaced by another agreement.

Source: Local Government Act 2002

Box 8.2 **Examples of cooperation from the OAG's 2004 report *Local Authorities Working Together***

- Providing services that cross territorial boundaries
- Jointly contracting for goods and services
- Establishing common standards and guidelines
- Sharing resources such as staff
- Forming a separate body to carry out common functions on their behalf
- Forming a consortium to share the costs of products or services
- Acting jointly
- Establishing a Council-Controlled Organisation together
- Transferring or delegating some of their functions or powers to another local authority in prescribed circumstances

Source: OAG (2004)

8.3 Survey responses on local authority cooperation

Local authorities are cooperating

The Commission's survey of local government reveals that the majority of councils undertake some form of cooperation – 89% of councils responded that they coordinate/collaborate with other councils on regulatory functions in some way. Although cooperation occurs across a range of regulatory areas, the issuing of building and planning consents is the most common regulatory area for council cooperation (Figure 8.2). As discussed elsewhere in the report, these areas are also the functions that councils spend most of their time and resources on, and that businesses have identified as being most important in terms of their interactions with councils.

Figure 8.2 Areas of regulatory cooperation

The survey results indicate that councils cooperate across a range of regulatory activities including policy making, regulatory enforcement and monitoring. The most common motivations for collaboration are to share best practice knowledge and to align regulation (Figure 8.3). The most common form of cooperation involves sharing staff and contracting out regulatory services to another council (Figure 8.4). On the other hand, the mutual recognition of accreditation by another council is relatively rare across local authorities. As well as these formal forms of cooperation, around 75% of councils indicated that they also engage in less formal cooperation. Examples of successful informal cooperation include regular meetings on best practice/common issues and resource sharing (Figure 8.4).

Figure 8.3 Motivation for cooperation

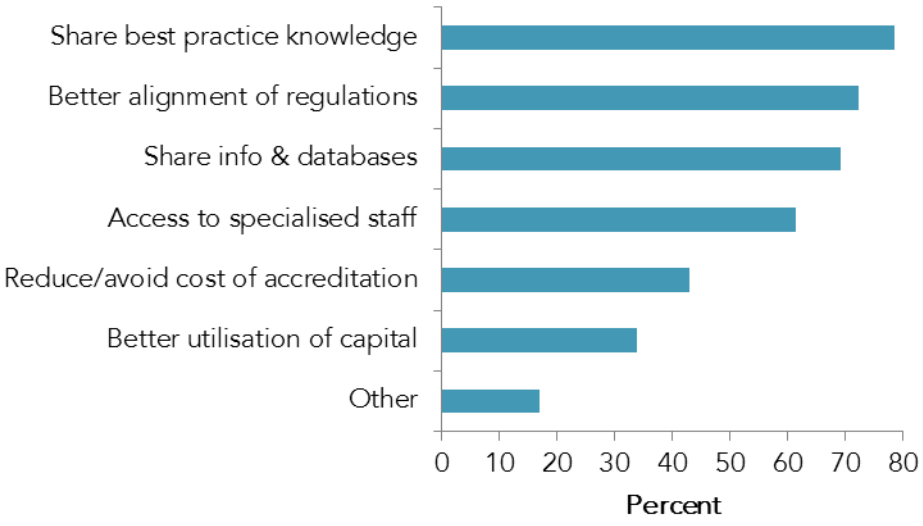
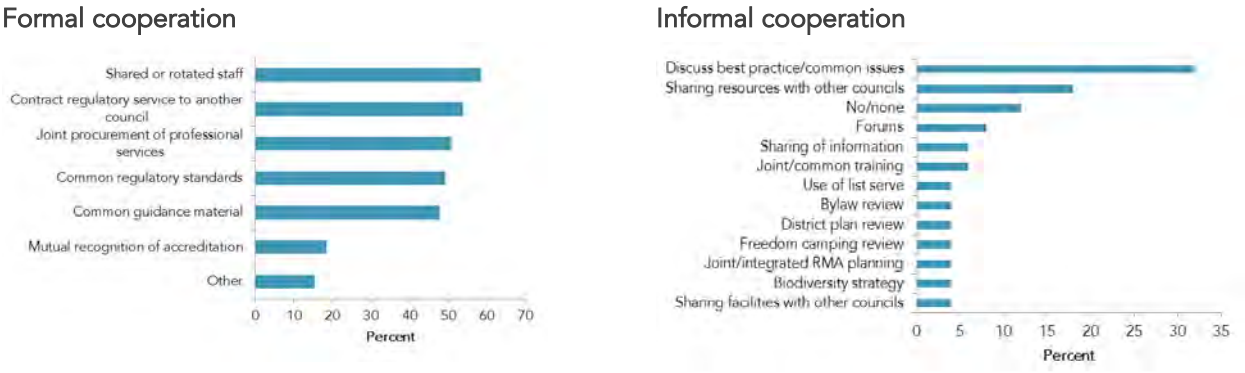
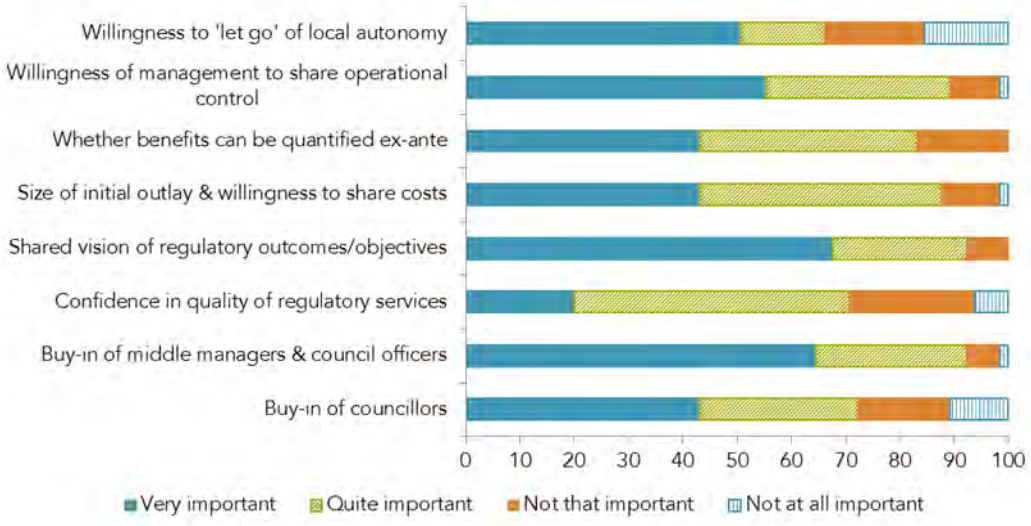


Figure 8.4 The form of cooperation across councils



The survey results reveal that councils have generally had good experiences with collaboration – 36% and 60% of councils responded that cooperation was 'very successful' and 'quite successful' respectively, whereas only 4% responded that cooperation was 'not successful'. Perhaps reflecting the widespread use of cooperative arrangements and generally positive outcomes, councils expressed a high willingness to cooperate across the range of regulatory functions that they undertake. Indeed, 85% of councils responded that there are no regulatory areas in which they would not be open to some form of cooperation. When considering cooperation with another council, a shared vision of regulatory outcomes and objectives and the buy-in of middle management and council officers are typically very important in deciding whether or not to proceed (Figure 8.5).

Figure 8.5 The importance of different factors in deciding whether or not to proceed with cooperation



F8.1 There is significantly more cooperation, coordination, and sharing of resources occurring amongst local authorities than is commonly known.

8.4 The benefits and costs of cooperation

Entering into cooperative arrangements involves the commitment of council time and resources. As such, new arrangements need to be supported by a clear business case (OAG, 2004). However, despite the wide use of cooperative arrangements, very few domestic or international studies have been undertaken to quantify the benefits and costs of cooperation (Dollery, Akimov & Byrnes, 2009). The studies that have been undertaken broadly tend to focus on 'shared services' rather than on 'regulatory services' per se (Dollery & Akimov, 2007).

While these existing studies provide useful insights into the general gains from cooperation, care needs to be taken when using them as a benchmark for new collaborative agreements. Local authorities are complex organisations, each with their own unique cost structures, capabilities, priorities and management challenges. This variability means the net benefits of cooperation are likely to be highly situation-specific, and any attempt to anchor a business case around the experiences of other jurisdictions risks serious inaccuracies.[33] Furthermore, caution needs to be taken not to subsume the methodological inaccuracies of the 'source study' into the business case for a new cooperative arrangement (see Box 8.3).

The Commission would be interested in obtaining New Zealand examples of the benefits and costs of a cooperative arrangement – particularly where these are directly related to the execution of regulatory functions.

F8.2 Despite the wide use of cooperative arrangements, very few empirical studies have been undertaken (either domestically or internationally) to quantify the benefits and costs of council cooperation on regulatory functions.

F8.3 Because local authorities operate within a highly diverse set of circumstances, the returns from cooperation are likely to be highly situation-specific. As a result, significant care must be taken in applying or interpreting business cases from one jurisdiction in another.

Q8.1 What are the benefits and costs of cooperation? Are there any studies that quantify these benefits and costs?

Box 8.3 **Estimates of cost savings from cooperation – use with caution**

One commonly cited study was undertaken by the consulting firm AT Kearney in 2008. This study involved interviews with 25 senior government staff from nine countries. Among other things, the study aimed to gain an understanding of the perceived magnitude of benefits from shared services. It concluded that the *target* benefits for shared services are "in the 15-25% range" (p.1). Importantly, AT Kearney clearly states that the "analysis is not statistically representative" (p.3), and expresses doubts over the accuracy of the survey results, saying:

> So, this is significantly better than originally anticipated. Or is it? Although comfortable in declaring approximations, these were rarely backed up with hard evidence. Indeed some interviewees openly stated that benefits were not measured. (p.19)

These crucial caveats should accompany any reference to these figures.

An earlier study conducted by AT Kearney in 2005 suffered from similar methodological shortfalls, yet the results (15–20% cost reduction) have found their way into several studies in Australia (eg, KPMG (2007), KMMC (2005)). If cited frequently enough, such figures can take on an artificial sense of rigour. New Zealand local authorities therefore need to be cautious to avoid falling into the trap of such 'folklore economics'.

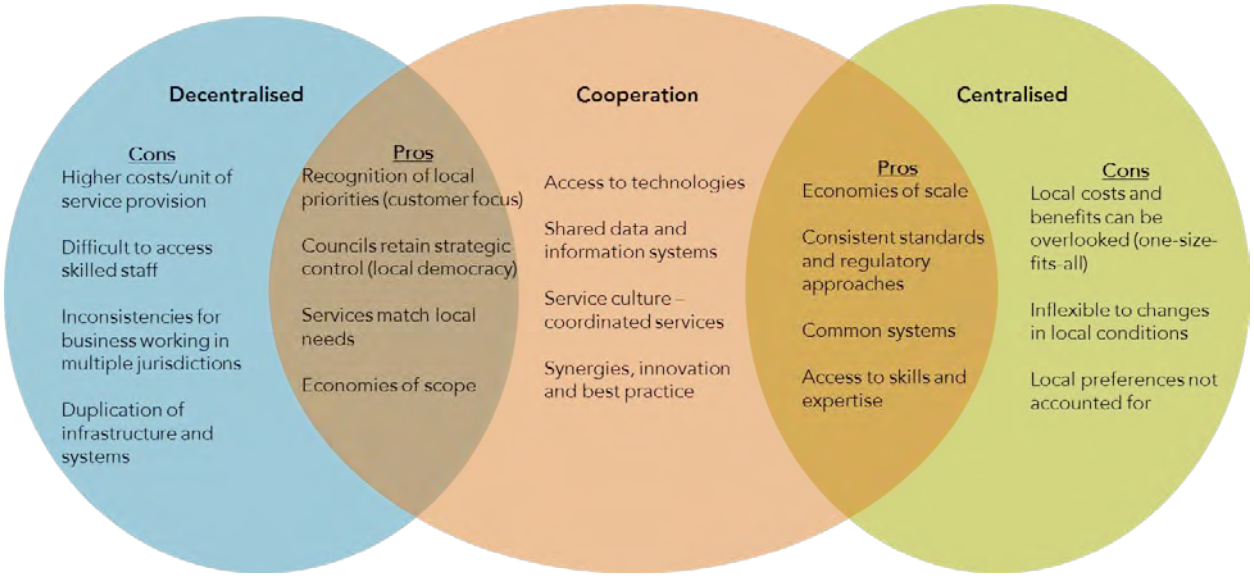
[33] The exception to this would be where the councils involved in the study closely resemble those considering entering into a cooperative agreement and where the agreement itself closely matches that being evaluated. However, such a situation is highly unlikely.

Benefits from cooperation

A key rationale for cooperation is that it can capture many of the benefits of centralisation while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences). As illustrated in Figure 8.6, cooperation between local authorities may also avoid some of the perceived negatives associated with having a solely centralised, or decentralised, regulatory system.

F8.4 Cooperation can capture many of the benefits of centralisation while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences).

Figure 8.6 Benefits of collaboration



While the precise gains from cooperation are unique to each circumstance, studies in New Zealand and overseas (and submissions to the inquiry) tended to emphasise the following benefits:

Cost savings associated with economies of scale

Cost savings can arise through the more efficient use of capital, greater purchasing power, and through councils specialising in the provision of a particular regulatory service. An example of scale was provided by Palmerston North City Council:

> The agreement with Manawatu has many advantages, including administrative economies of scale - e.g. only our Council needs to be an accredited Building Consent Authority and there is a single certification process for clients of both Councils. (sub. 34. p.2)

Access to skills and expertise

Cooperation on regulatory functions can assist councils to access specialist skills. For example, by pooling resources, councils may develop the volume of service delivery necessary to warrant employing a full-time specialist. This can avoid the additional costs associated with contracting consultants. This point was highlighted by Rangitikei District Council:

> Capability is a critical issue, particularly for smaller councils where expertise typically lies in a small number of staff. This can easily lead to dependency on external advisers, resulting in higher costs and no development of internal capacity… Shared services can assist in this issue, evidenced by the shared service for animal control between Manawatu and Rangitikei District councils… (sub. 35, p.4)

Exchange and adoption of best practice

The Commission's survey results reveal that sharing best practice knowledge is a key driver of cooperation between councils in New Zealand. Cooperation can act as a catalyst for exploring new ways of doing business previously not considered by either party. Similarly, cooperation can provide opportunities for councils to learn from 'thought leaders' within the sector.

> Shared services have demonstrated the ability to support a learning environment by sharing ideas and promoting good practice across councils involved. Such a learning environment of constant improvement is reported to result in innovations and processes being developed that may otherwise take longer to emerge. (LGNZ, 2011c, p.28)

Improved service delivery

Depending on the circumstance, cooperation can improve service delivery in a number of ways. For example, cooperation can aid regulatory consistency between councils, improve customer focus and reduce processing times. The role of cooperation in promoting consistent regulatory approaches was raised by Waitomo District Council in its submission to the inquiry:

> Increasingly, local authorities have started to work together to achieve regulatory goals. Some examples include- development of the Waikato Building cluster and the Waikato Food Safety Cluster Group. This Cluster approach allows consistency in interpretation of standards across the region, provides peer support for staff who work in professional isolation and encourages best practice in regulatory administration. The Waikato Local Government Forum is also currently working on improving regulatory performance in the region. (sub. 9, p.6)

Improved compliance with legislative standards

Cooperation between councils can have broader implications for society. By improving the efficiency and effectiveness with which regulations are administered, cooperation can raise the level of regulatory compliance. For example, by sharing information, councils may be able to better target their monitoring efforts and detect non-compliance (LNGZ, 2011c). Similarly, by improving the standard of service delivery, cooperation can make it easier for people to comply with regulations – thus improving the likelihood of voluntary compliance (see discussion on compliance in Chapter 10).

Box 8.4 provides a broad overview of the benefits of cooperation that have been highlighted in New Zealand and international studies.

Box 8.4 **The benefits of cooperation from selected studies**

Local Government New Zealand (2011c):

A study into shared services undertaken by LGNZ highlights seven common benefits of these arrangements. These are: cost savings, access to skills and expertise, exchange of best practices, procurement savings and practices, improved community outcomes, improved service delivery, improved compliance with legislation and standards.

Office of the Auditor-General (2004):

Identifies financial and non-financial benefits of councils working together. These are: avoided staff costs; access to skills and expertise; exchange of best practice; procurement savings from economies of scale; better community outcomes; coordinated services; and improved compliance with legislation and standards.

New Zealand Commerce Commission (1997):

Identifies a number of areas through which collaboration and cooperation can lead to efficiency gains. These are: economies of scale; economies of scope; better utilisation of existing capacity; cost reductions (due to reduced labour costs); greater specialisation of production; lower working capital; reduced transaction costs.

Australian Productivity Commission (2012):

In relation to the benefits of cooperation for businesses, the APC has noted: "Resource sharing among local government can address deficiencies in the capacity of individual local government to discharge their regulatory functions. In particular, sharing staff resources provides individual local government with access to additional skills and resources which is likely to assist in reducing the delays on business in obtaining local government approvals and permits." (p.204)

South Australian Financial Sustainability Review Board (2005):

Rising to the Challenge identified seven financial and non-financial benefits for councils. These were: lower staff costs; access to skills and expertise; exchange of best practice; procurement savings from scale economies; improved community outcomes; coordinated services; improved compliance with legislation and standards.

KM Management Consulting (2005):

Suggested five major benefits could flow from a shared service arrangement: scale economies; leveraging of technology investments to achieve cost savings and improved service delivery; improved service provision; achievement of a customer service focus; greater concentration on strategic outcomes.

Costs of cooperation

While cooperation can bring many benefits, these can come with associated risks and costs. As with the benefits of cooperation, the nature of these risks and costs will be situation-specific and often difficult to quantify. Nevertheless, the clear articulation of these risks and costs is vital for judging whether or not there are efficiency or operation advantages to cooperation.

Four key risks and costs associated with cooperation are introduced below.

Political risk

Like most public agencies, councils operate in a political and media environment that rewards pointing out examples of failures and is intolerant of the perceived 'waste' that can come when an innovation is unsuccessful. In discussing the political risk to councils in the UK from shared service, Deloitte (2009) notes:

> Failures are often drawn out in the public domain. If the consequences of failure include reputational damage, as well as a loss of organisational autonomy, shared services tend to face significant political scrutiny. (p.8)

Such an environment can make councils risk averse to cooperating – or, when they do, favour cooperation at the lesser end of the continuum. This is particularly relevant in cases where the benefits from cooperation are uncertain or difficult to quantify (eg, improved customer service).

Establishment costs

Cooperative arrangements can in themselves be costly to establish. These costs can come in many forms, including:

- the commitment of internal resources to negotiations with potential partners (ie, managerial time and attention);
- possible service disruptions while in transition to a new cooperative arrangement;
- legal and consulting fees associated with establishing new governance structures and training to familiarise staff with new systems or processes; and
- reduced local employment if a service is provided by another council (in several areas councils are a major employer of local residents).

Compromises in the delivery of local service

Each party to a cooperative arrangement brings with it its own set of priorities and community expectations. However, cooperative arrangements can involve councils compromising in one area in order to access the (presumably larger) gains from cooperation. For example, a local authority may need to trade off application processing times for lower processing fees.

> For shared services to operate cost effectively, the processes and the policies that drive them need to be standardised. Many organisations sign up to shared services and the principle of standardisation without understanding the consequences. Standardisation involves compromise. The more standardised a process can be, the easier it is to reduce management costs, deploy technology to automate the process, and implement self-service to reduce process duplication, which in turn drives down unit cost. However, when bringing together multiple organisations the view is often that "standardisation is fine, if everyone uses my processes as they work fine for me." (Deloitte, 2009, p.10)

Compromises are likely to be lowest where local authorities share a common understanding of the regulatory objectives and where their priorities align – a point borne out in the Commission's survey of councils.

Loss of local autonomy

Entering into cooperative arrangements can mean relinquishing some level of local autonomy – at least in the short run. This may hinder a council's ability to react quickly to changes in community preferences or in the demand for a particular council service. In a political context, anticipation of this hindrance, or at least a significant prospect of hindrance, may act as a barrier to cooperation.

8.5 Regulatory functions suited to collaboration

Based on the above discussion, it is possible to draw some broad conclusions about the characteristics of regulatory functions that lend themselves to cooperation across councils. These are often, but not always, indicators that economies of scale may be present. While suitable regulatory functions may not exhibit all of the characteristics, they will typically exhibit several.

Regulatory functions that lend themselves to cooperation are often those where:

- service provision can be tailored to account for local preferences in each local authority, or the enabling legislation provides little scope for local autonomy;
- fixed costs are a significant proportion of total costs, and marginal costs of providing additional regulatory services are low (this allows for greater utilisation of capital and hence low costs per unit);
- the bulk purchasing of inputs occurs (and the price paid for inputs is inversely related to the quantity purchased);
- the businesses being regulated operate across local authority boundaries (and regulatory consistency is valued by the wider community);
- specialist skills and expertise are required, and a critical mass of service provision is needed to justify developing an internal capability in these areas; and/or
- technology has enabled the task to be undertaken remotely or in a different geographic location. (Valle de Souza & Dollery, 2011)

A number of other studies have identified the characteristic of processes/functions that are most suitable for shared services more generally. For example, KPMG (2007) lists the following characteristics:

- high volume
- efficiency focused
- repetitive activity
- easily measured performance
- consistent customer requirements
- transaction/service-oriented skill sets

Allan (2001), on the other hand, identifies the characteristics of services that lend themselves to shared services as being functions with:

- Non-core functions: Allan (2001) contends that shared services arrangements are not appropriate for core functions of councils – such as policy, planning, general governance and community consultation.
- Low supplier availability: Allan (2001) argues that if councils are able to purchase services from highly competitive markets (through outsourcing) then a shared service arrangement with another council is unlikely to succeed. However, in areas where local suppliers of services are scarce (such as remote rural areas) then sharing of resources may represent an efficient way for councils to gain access to experience, skills and equipment.
- Low task complexity: Allan (2001) contends that complex tasks are difficult to monitor and therefore unsuitable for shared service arrangements.
- Substantial economies of scale: Characterised as services that are mass produced and highly standardised where cost per unit falls as volume increases.
- Specialised technology: This enables sharing of high capital costs and better utilisation of large capital items.
- Low asset specificity: Allan (2001) argues that where a function involves expensive and specific assets, it may be more efficient for these assets to be owned by a council than provided by an external provider (rather than have a contractor invest in an asset that will outlive the life of the contract).

8.6 Selected case studies of cooperation

Submissions to the inquiry contained a large number of examples to support the survey results of extensive collaboration across local authorities. As foreshadowed in the survey results, a number of these collaborative arrangements are focused on various aspects of issuing of building consents. There are, however, numerous examples of collaboration across a range of areas where TAs work together with the aim of promoting consistency, best practice and regulatory efficiency. This section briefly summarises a few of these collaborative arrangements.

Examples of collaboration

Lakes Coast Cluster Group of Building Consent Authorities

This group began operating in 2006 under a memorandum of understanding. It involves eight TAs that collectively serve a population of over 330,000 people.[34] In broad terms, the objective of the group is to provide a consistent approach to decision making around the issuing of building consents. In turn, this should deliver more certainty to consumers and give the constituent TAs greater strategic influence at the national level. In addition, by pooling resources the group aims to increase regulatory efficiency, leading to cost savings for the sector and communities.

With greater scale, this group of TAs has engaged specialist consultants to work across the cluster and undertaken a number of regional training initiatives. It has also participated in national pilot trials and workshops and has successfully accredited its member TAs. The cluster is a good example of regulatory authorities working together for the benefit of the public, customers and applicants, and is recognised by the Department of Building and Housing (now the Ministry of Business, Innovation and Employment) as an effective group.

The positive impact of this collaboration on consistency and regulatory capacity is apparent from the Western Bay of Plenty District Council:

[34] Members of the group are Taupo District Council, South Waikato District Council, Rotorua District Council, Kawerau District Council, Opotiki District Council, Whakatane District Council, Tauranga City Council, and Western Bay of Plenty District Council.

> The number of staff involved in the building and resource consent activities has reduced significantly over the last three years as a result of the slow-down in applications as the economic recession took hold. This was a necessary measure taken in response to reduced fee income from fewer applications. At the height of the development boom during 2003–2008, resource and building consent staff peaked at 13 FTEs, compared to 8 currently.
>
> At these low staffing levels it is a challenge for Council to retain the capacity to meet statutory consent processing timeframes and maintain sufficient technical expertise to enable appropriate service response once growth across the District increases. This has been part of the motivation for collaborating with neighbouring councils in the region through the Lakes Coast Cluster Group of building consent authorities. (Western Bay of Plenty District Council, sub. 33, pp.2-3)

Other examples of building consent collaboration

There are numerous other examples of collaboration across TAs in the issuing of building consents. For instance, Palmerston North City Council provides a full range of building consent services to Manawatu District Council and other surrounding councils, and sees considerable benefit in these arrangements:

> The agreement with Manawatu has many advantages, including administrative economies of scale - e.g. only our Council needs to be an accredited Building Consent Authority and there is a single certification process for clients of both Councils. It also allows for a better management of workload between the two Councils and makes it easier for PNCC to recruit and train staff across both Councils. However, because we do not run a central processing team, people in Manawatu can still lodge consent applications in Feilding and can still talk to local building officers. This is an important part of providing local services.
>
> PNCC has also worked with some of our wider neighbours to offer level three building inspection services (for complex commercial and industrial consents). These are infrequent consents and working with our neighbours in this way means that expertise can be shared amongst us, instead of each Council trying to maintain its own expertise. (Palmerston North City Council, sub. 34, p.3)

By way of another example, in response to the Canterbury earthquakes, Hastings District Council began processing building consents on behalf of Christchurch City Council. This collaboration has been positive for regulatory efficiency, avoiding the need to reduce resources devoted to this regulatory function in Hastings and increasing them in Christchurch. As a result, Hastings District Council has been able to keep its consent processing teams intact and improve revenue, while Christchurch City Council has been able to focus more on critical inspection work. This example also underscores the point that TAs that cooperate on the delivery of regulatory services do not have to be neighbours.

Dam safety

A number of submissions cited building consents for dams (assessing applications and the inspection and certification process)[35] and dam safety[36] as examples of councils cooperating successfully. These functions require specialist technical skills. Furthermore most regional councils are not registered building consent authorities. This has seen councils work together. In the North Island, Waikato Regional Council acts on behalf of all the North Island's regional councils. In the lower South Island, Otago Regional Council is responsible for building control for dams and their associated structures in the West Coast and Southland regions.

> The issues paper asks for examples of regulatory innovation and regulatory cooperation and coordination by local government that presents opportunities for wider adoption. Section 161 of the Building Act makes regional councils responsible for identifying, consenting and certifying dangerous dams (as defined by s153 of the Building Act 2004). This is a much specialised area of building and engineering certification. Because Greater Wellington and other regional councils are not registered

[35] For example,Waikato Regional Council, 2012a and 2012b.

[36] "The [Dam Safety Scheme] Regulations became law in July 2008 and took effect on 1 July 2010. From this date, owners of large dams had three months to submit a classification of their dam to the regional authority (DBH, 2010).

"The start date of the Dam Safety Scheme has been deferred by two years. The Dam Safety Scheme will now start on 1 July 2014.

An independent review of the Dam Safety Scheme in 2010 recommended that the Scheme should be retained and a number of improvements made. These are contained in the Building Amendment Bill No 4. This Bill is currently before Parliament.

Rather than bringing the Dam Safety Scheme into effect, while at the same time proposing significant changes, Cabinet recently agreed to the deferral of the Dam Safety Scheme from 1 July 2012 to 1 July 2014. The Building (Dam Safety) Regulations 2008 have been amended to reflect this deferral." (DBH, 2010)

> building consent authorities and do not possess the technical expertise to assess and issue code compliance certificates for such structures, regional councils have worked together on this matter. Several regional councils have become accredited Building Consent Authorities and they process building consents on behalf of all regional councils. While we retain administrative functions and overall responsibility for the building permit process, Greater Wellington has transferred these specific powers to Environment Waikato. (Greater Wellington Regional Council, sub. 37, p.7)

From 1 July 2008, Otago Regional Council has been responsible for building control for dams and their associated structures in the West Coast and Southland regions, along with certain dam safety management functions. The West Coast Regional Council and Environment Southland retain some functions in their regions, such as the issuing of Project Information Memoranda for dams and maintaining a register of dams. They are also responsible for resource consents for dams in their region.

> The Management of Dams under the Building Act operates as a shared service in Otago, West Coast and Southland. Otago is the lead agency. This has worked well for the three regions as West Coast and Southland do not need to employ specialist staff. Otago becomes the 'centre of excellence' for dam safety and all three regions benefit from that. (West Coast Regional Council, sub. 50, p.1)

'Dogs Online' (aggregation)

Hamilton City Council and Rotorua District Council have jointly established a shared services initiative, called 'Dogs Online'. Dogs Online is the first fully featured online dog registration service in New Zealand. In their combined entry to the 2012 SOLGM Local Government Excellence Awards (Building Organisational Capability) they stated that "significant cost savings have been achieved by each council as a result of the collaboration."

Other key outcomes they listed were:

> - Being able get more from financial investment in a package of services than each council could achieve individually
>
> - A rationalised core business process resulting from challenging differences between the councils' improved approaches to project management, change management and business process analysis
>
> - 40/60% split of costs of development between two councils. Definitely something RDC could not have afforded on its own
>
> - Both councils had opportunity to learn from each other's processes and approaches and to identify future opportunities through a 'Lean Thinking' event
>
> - Number of steps to standardise the processes and policies for each council
>
> - Opportunity to extend the solution to a wider number of councils as a cloud based service
>
> - Opportunity to look at shared back-office in the future
>
> - Demonstrated that the shared service and cloud based service could work successfully
>
> (Hamilton City Council & Rotorua District Council, 2012)

The Waikato Food Safety Cluster (collaboration)

The Waikato Food Safety Cluster Group is a collaboration between five Waikato TAs: Otorohanga District Council, Matamata-Piako District Council, Waikato District Council, Waipa District Council, Hamilton City Council. The cluster was started as part of a New Zealand Food Safety Authority (NZSFA) trial to explore the opportunities presented by TAs working in a 'cluster' to deliver a food regulatory service. The five TAs had already been working together to deliver a building consents process (Waikato Building Consent Group).

> The five TA General Managers were enthusiastic to support a food-based trial and NZFSA wished to utilise their experiences of cluster working to identify how it might assist in delivering new food safety regulation. (New Zealand Food Safety Authority, 2008)

The trial also identified that NZFSA encouragement of a cluster approach would tend to:

- Help attain the desired degree of delivery consistency at regional and national level;
- facilitate cooperation between NZFSA, individual TAs and relevant regional providers;
- identify duplication of regulatory activities;

- help to remove conflict in the delivery of food safety systems;
- present opportunity to enhance professional roles;
- reinforce the credibility of organisations, systems and regulation…

(New Zealand Food Safety Authority, 2008)

In its submission Waitomo District Council commented on the success of the cluster approach:

> This Cluster approach allows consistency in interpretation of standards across the region, provides peer support for staff who work in professional isolation and encourages best practice in regulatory administration. (Waitomo District Council, sub. 9, p.6)

8.7 The role of central government in local authority cooperation

Central government plays a critical role in setting the framework for local government regulatory responsibilities. Horizontal cooperation can arise in response to deficiencies in structures for vertical cooperation. For example, local government may look to cooperate in response to the lack of technical or policy support from central government.

> It would also be helpful if guidelines were developed prior to the introduction of new legislation. The new National Environmental Standard on Contaminated Land referred to in Question 28 is an example. Chaos reigned as Councils scrambled to work out how to implement the new Standard. Joint meetings were set up by Mid and South Canterbury Councils together with the Regional Council to try and decipher the requirements and develop a consistent approach. Concerns about the legislation were then referred back to the MfE Taskforce for review. It would have been more efficient to have sorted these issues out before the legislation was introduced. (Ashburton District Council, sub. 40, pp.6-7)

This is clearly an inefficient method of encouraging cooperation across councils. As Ashburton District Council notes, this kind of cooperation is a less efficient response to additional regulatory duties than working through the issues prior to implementation.

Positive forms of cooperation that encourage innovation, rather than stop-gap measures, require sufficient time to develop. Indeed, a consistent message from local authorities during engagement meetings was that the speed with which central government seeks to implement a regulation and the consultation process it uses can have an important impact on the possibilities and incentives for local cooperation and coordination. For example:

> The short timeframes for response to government bills introducing new regulatory functions for local authorities is a key limitation reducing opportunities for coordination. (Waimakariri District Council, sub. 30, p.14)

If local authorities have to respond quickly to a new duty then they are more likely to establish their own in-house procedures as being the quickest and most easily controlled development process. Once there is time to come together and discuss as a region or cluster how local authorities might cooperate together or coordinate with one another to carry out the new regulatory function, these individual approaches are already entrenched. Changing these processes within a short period of their establishment is controversial as it looks like the original policy effort was wasted. There are disincentives to change or coordinate approaches for a greater length of time – likely to be measured in years rather than months – and the opportunity to coordinate is missed. So for best outcomes in terms of resource efficiency and consistency, the timeline for introduction of a new regulation should allow time for cooperation between local authorities to get off the ground.

F8.5 The speed with which central government seeks to implement new regulatory initiatives may materially affect the likelihood of local cooperation. Central government consultation processes, done well, can lay the foundation for local authorities working together.

As well as allowing councils sufficient time to explore cooperation opportunities, clear guidance from central government can also help align local authority interpretations of new regulatory duties, reduce duplication of work on regulatory implementation, and increase the likelihood of successful cooperation:

> Successful cooperation is possible where there are… clear simple definitions in the regulation (for example in the definition of standards). This would aid consistent interpretation between regulating authorities. (Western Bay of Plenty District Council, sub. 33, p.10)

In addition, the consultation process that central government uses can lay the foundation for further work by local authorities on how they might work together. For example, the Commission was told how the process used by the Ministry of Primary Industries to draw together local authority officers working in food safety within area groupings laid a foundation for further conversations about how the Food Bill could be implemented in a coordinated way across their areas.

> Local authorities may have a lot in common in terms of functions, responsibilities, and challenges, but they can also differ in many respects, such as size, culture, resources, systems, and service standards… Through regional forums, local authorities were able to better understand their different circumstances and priorities, and reach a common view on the best approach to working together. (OAG, 2004, p.9)

In general, central government consultation processes need to improve to allow local authorities sufficient time to coordinate implementation of new regulatory functions. This is also apparent from the survey of local government, which consistently painted a bleak picture of vertical coordination between central and central government (Table 8.1). Chapter 7 looks in detail at potential measures for improving consultation between central and local government.

Table 8.1 Survey results on vertical cooperation between central and local government

% of total responses	Strongly disagree	Tend to disagree	Neither agree nor disagree	Tend to agree	Strongly agree
The guidance material provided by central government agencies (online or on request) is helpful when implementing delegated regulations.	18	41	26	15	0
Central government agencies regularly incorporate feedback from local government when drafting new regulations.	27	41	21	11	0
Central government agencies have a good understanding of the local costs and impacts of new regulations devolved or delegated to local government.	53	38	8	0	0
Central government agencies provide enough guidance material (online or on request) to allow us to perform our regulatory functions.	10	33	30	26	1
The local government sector is generally well consulted prior to being asked to implement new regulatory functions.	19	52	19	10	0

Source: Productivity Commission

8.8 Opportunities for working together

The motivation for local governments to work together stems from the "gaps" identified in the "minding the gaps" framework outlined in OECD (2009) and discussed in Chapter 1. In particular, cooperation between local authorities is a means of bridging "capacity gaps", which exist when there is a lack of resources (professional or informational) to carry out a particular specialised task. A common theme in this chapter is that local authorities collaborate in response to capability issues, and that the provision of shared regulatory services can be a good solution to this issue (Box 8.5).

From this perspective, the decision to cooperate to alleviate capacity gaps will reflect the similarity of the issues faced by two or more councils, and the capability of each council to deliver the associated regulatory service. Local authorities are more likely to cooperate when the relevant characteristics of their jurisdictions are relatively similar. In this case, regulatory efficiencies could be enhanced by the sharing of experience and strategies, or by having only one set of regulations, or the delivery of one service across similar jurisdictions.

As well as cooperating to exploit scale effects and bridge capacity gaps, cooperation can also be an effective means by which councils can mitigate administrative gaps. As discussed in Chapter 1, these gaps potentially arise as a result of a mismatch between administrative and functional economic areas. Administrative gaps can result in cost inefficiencies and undesirable effects on the distribution of residential and industrial land use. Cooperation to resolve these inconsistencies is already a major driver of councils working together on relevant regulatory issues in main urban areas, which typically encapsulate multiple local authorities sharing the same labour market catchment (LMC).

Against this background, it is likely that information on the similarities and differences across local authorities and the relationships between administrative and functional economic areas may be a useful resource for understanding and identifying opportunities for cooperation between local authorities. With this in mind, the rest of this section presents some indicative analysis of how this could potentially be done.

Box 8.5 **Sample of submissions that mention capacity issues**

> Yes, capability issues vary between areas of regulation and also size and location of council. Some specialist skills can be difficult to recruit to remote/smaller councils i.e. Environmental Health Officers and Building Control Officers. This difficulty can add cost to service delivery. (South Taranaki District Council, sub. 39, p.5)
>
> An example is the difficulty that rural local authorities are facing in attracting and employing suitably qualified building control officers to implement the new regulations that have come into effect. Often, new regulations impose extensive training requirements to improve the capability of the organisation in the new area, which then leads to added costs which subsequently get passed on to either ratepayers or businesses. (Waitomo District Council, sub. 9, p.6)
>
> Capability is a critical issue, particularly for smaller councils where expertise typically lies in a small number of staff. This can easily lead to dependency on external advisers, resulting in higher costs and no development of internal capacity… Shared services can assist in this issue, evidenced by the shared service for animal control between Manawatu and Rangitikei District councils… (Rangitikei District Council, sub. 35, p.4)
>
> It is likely that some smaller rural authorities will experience difficulties from time to time in recruiting and retaining appropriately experienced staff to perform their regulatory functions…There is not necessarily a correlation between the size of Local Government and its capacity. In the case of smaller Councils, there is often recognition of the value of co-operation between Councils which tends to off-set the lack of scale. (Waimakariri District Council, sub. 30, p.13)

Assessing similarities across TLAs

Opportunities for cooperation between local authorities to address capacity gaps will be more likely when they have similar regulatory requirements which, in turn, reflect the characteristics of the local authorities.

Grouping TLAs[37] on the basis of common characteristics provides an indicative guide to the types of procedures, systems, institutional knowledge and professional staff that are likely to be required by a given council. In turn, this gives insight into which councils might usefully cooperate on the basis of shared specialised regulatory requirements. TLAs in the same 'cluster' are more likely to have similar regulatory requirements and therefore be more likely to benefit from cooperation.

[37] Based on Statistics NZ classifications.

Grouping TLAs on the basis of common characteristics can be done using 'cluster analysis' (Box 8.6). By way of illustration, the Commission has used this technique to group TLAs on the basis of similarities in industry composition as measured by employment shares. The result of this analysis reveals 12 distinct 'types' of TLAs (Figure 8.7). A summary of the population and employment density and growth characteristics of each of these clusters is given in Table 8.2.

The main urban and provincial hub clusters – 'other main urban areas' and 'provincial urban hubs' – have high populations and employment densities, and face important issues around urban land use. So the regulation of residential land use on the urban fringe and building regulations etc. are likely to be a major part of the regulatory load for councils in these TLA groupings.

Three of the identified clusters are highly focused on tourism related industries – 'Queenstown Lakes Tourism', 'Westland Kaikoura Tourism' and 'Mackenzie'. These clusters each have around 20% of local jobs in the 'accommodation, cafes and restaurants' industry group. The corresponding four local authorities face some common challenges in managing and regulating industrial land uses, although the scale and intensity of tourism in the Queenstown Lakes District is in a class of its own. The Queenstown Lakes District is also very different from the other three in terms of its demographics in that it has a very low proportion of young children and a high proportion of young adults. In contrast, the other three TLAs all have an above average proportion of children and a high proportion of late-middle-age and retirement age residents.

Three of the TLA clusters – 'high agricultural districts', 'medium agricultural districts' and 'other agricultural districts' – are highly reliant on agriculture and have very low population densities. For the TLAs in these clusters, regulatory capability will tend to focus on agricultural land use, water and conservation issues. In contrast, issues such as parking, which features highly as a regulatory issue in the overall submissions and survey results, are unlikely to be a major regulatory challenge.

The rest of the clusters – Mackenzie, Ruapehu, Wellington and Kawerau – are each composed of a single TLA, reflecting their distinctive industry makeup and degree of difference from other local authorities (as discussed in Chapter 3).

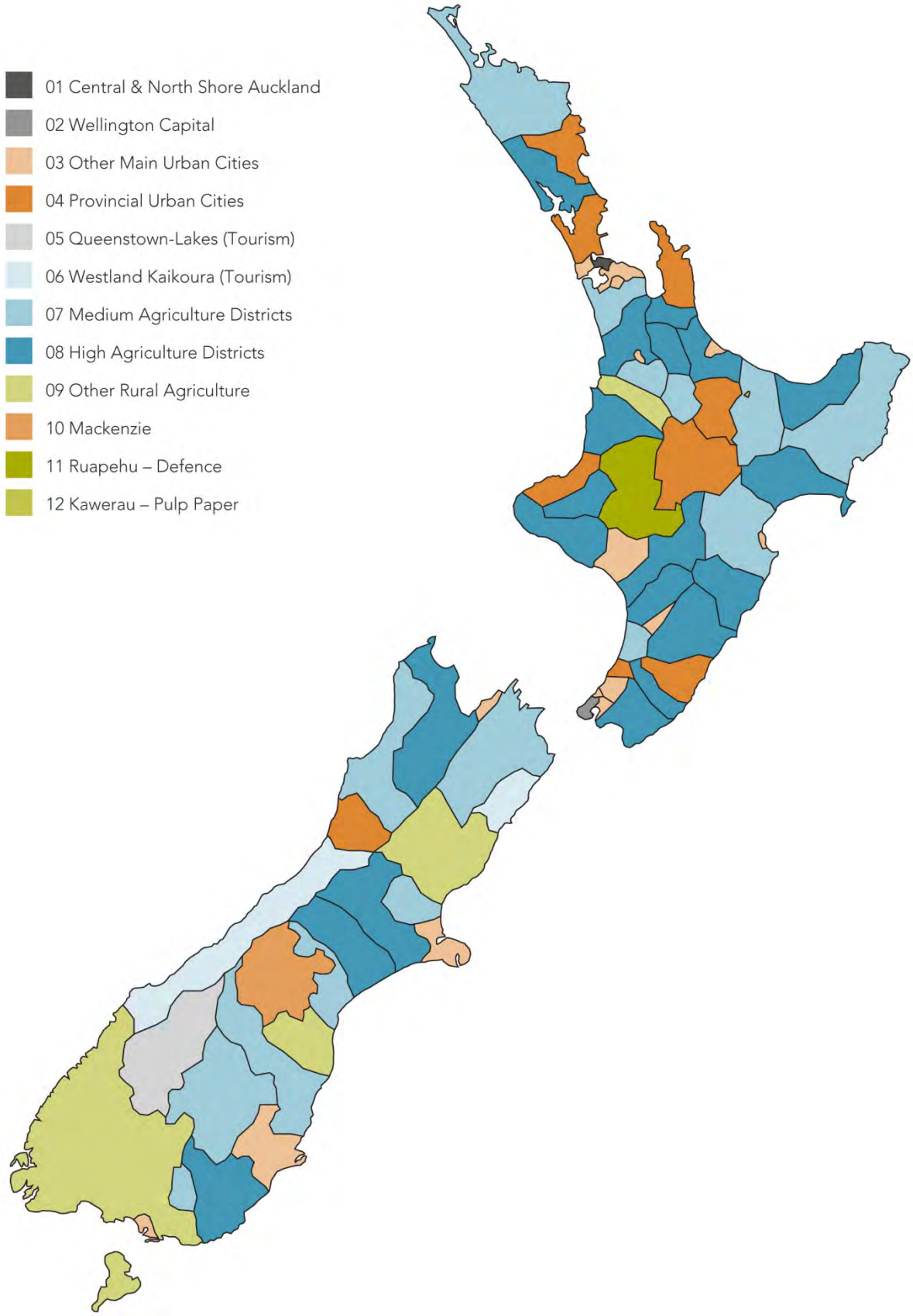
Box 8.6 **The cluster analysis approach to grouping TLAs**

Cluster analysis is a technique commonly used to group elements on the basis of the extent of similarity across a common characteristics or set of characteristics. In the context of this chapter, cluster analysis has been used to group TLAs on the basis of their industry structure, as measured by industry employment shares.

Territorial local authorities (2006 boundaries) are separately analysed using an 'average linkage' cluster analysis based on 2006 industry composition (ANZSIC93 level 1). The clusters were isolated and refined using a 'Manhattan distance' criterion to isolate and resolve inconsistencies by reallocation within the groupings of individual local authorities or catchments.

Although the focus here is on industry structure, the same technique can be used to group TLAs on the basis of any characteristics for which data exists. For example, in work not reported here, the Commission has done a similar analysis on the basis of population age composition data.

Figure 8.7 'Clusters' of TLAs based on industry composition



Source: Productivity Commission

Table 8.2 TLA clusters on industry composition (2006): summary statistics

TLA industry composition cluster name		2006 Census-based statistics			
	Constituent TLAs	Population	Workplace jobs	Population density (per km2)	Job density (per km2)
Central & North Shore Auckland	North Shore City, Auckland City	610,266	323,724	803.5	426.2
Wellington Capital	Wellington City	179,472	107,424	618.8	370.4
Other Main Urban Cities	Waitakere City, Manukau City, Papakura District, Hamilton City, Tauranga City, Napier City, Wanganui District, Palmerston North City, Porirua City, Upper Hutt City, Lower Hutt City, Nelson City, Christchurch City, Dunedin City, Invercargill City	1,711,959	622,521	160.1	58.2
Provincial Urban Hubs	Whangarei District, Rodney District, Thames-Coromandel District, Taupō District, Rotorua District, New Plymouth District, Kāpiti Coast District, Masterton District, Grey District	439,239	148,329	17.6	5.9
Queenstown Lakes (Tourism)	Queenstown Lakes District	22,962	11,445	2.6	1.3
Westland Kaikoura (Tourism)	Kaikoura District, Westland District	12,033	5,151	0.9	0.4
Medium Agriculture Districts	Far North District, Franklin District, Waipa District, South Waikato District, Whakatane District, Gisborne District, Hastings District, Horowhenua District, Marlborough District, Buller District, Waimakariri District, Timaru District, Waitaki District, Central Otago District, Gore District	545,301	187,845	7.5	2.6
High Agriculture Districts	Kaipara District, Hauraki District, Waikato District, Matamata-Piako District, Waitomo District, Western Bay of Plenty District, Opotiki District, Wairoa District, Central Hawke's Bay District, Stratford	426,750	148,284	5.7	2.0

TLA industry composition cluster name		2006 Census-based statistics			
	Constituent TLAs	Population	Workplace jobs	Population density (per km2)	Job density (per km2)
	District, South Taranaki District, Rangitikei District, Manawatu District, Tararua District, Carterton District, South Wairarapa District, Tasman District, Selwyn District, Ashburton District, Chatham Islands Territory, Clutha District				
Other Rural Agriculture	Otorohanga District, Hurunui District, Waimate District, Southland District	55,191	22,653	1.2	0.5
Mackenzie	Mackenzie District	3,801	1,848	0.5	0.3
Ruapehu – Defence	Ruapehu District	13,575	5,424	2.0	0.8
Kawerau – Pulp Paper	Kawerau District	6,921	2,925	315.4	133.3
New Zealand TAs Sum		**4,027,470**	**1,587,573**	**15.1**	**6.0**

Source: Productivity Commission

Administrative and functional areas

In addition to addressing capacity issues, cooperation between local authorities may also be an appropriate way of addressing 'administrative gaps' where they exist.

> An administrative gap arises when administrative borders and functional economic areas at the sub-national level do not correspond to one another. This is clearly evidenced in metropolitan areas where there is an agglomeration effect arising from a set of municipalities that alone are much smaller than the metropolitan whole. (OECD, 2009c, p.3)

As a general proposition, if two or more councils are regulating the same local economy, there may be good grounds for them to work together given that the local economic area will, to some extent, behave as a single 'entity' in relation to some types of regulation. A second general situation is where a TLA encapsulates more than one structurally different functional economic area.

In the New Zealand context, the correspondence between 'local labour market catchments' and TLA boundaries provides a useful illustration of the potential for 'administrative gaps'. Labour market catchment areas are calculated on the basis of actual travel to work movements as recorded for all New Zealanders in the most recent population census and provide a useful measure of functional economic areas (Box 8.7). Applying this technique to New Zealand data reveals 103 local labour market catchment areas, as compared with 73 territorial local authorities (as at 2006). An overriding result from this analysis is that New Zealand's main urban areas typically comprise a number of TLAs within one or more large local labour market catchments whereas TLAs in rural areas are more often than not made up of more than one local labour market catchment.[38]

[38] Specifically, the three main urban TLA clusters described in Table 8.2 are made up of 18 local authority areas but only 14 local labour market catchments. In contrast, the 'medium', 'high' and 'other' agricultural TLA clusters together include 39 TLAs but 72 local labour market catchments.

Box 8.7 **Local labour market catchments**

New Zealand's local labour market catchments are derived from an analysis of residence to workplace travel relationships, as recorded in the Census of Population and Dwellings. This data is used to classify New Zealand into relatively self-contained 'commuting' catchments.

This travel-to-work behaviour implicitly reflects a wide variety of physical and infrastructural characteristics of the physical landscape, as well as the economic practicalities of time and cost associated with the separation of location of industry of employment and residential location and resulting aggregate settlement distribution.

This analysis was first carried out on the basis of 1991 Census data and is documented and explained in Newell and Papps (2001). It adapts the widely used method of Coombes, Green and Openshaw (1986). The method has subsequently been applied to the 2001 and 2006 New Zealand and 2006 Australian Census data.

Local authorities within extended labour market catchments – the urban norm

Extended labour market catchments are a distinguishing feature of major 'multi-hub urban centres. This is the common situation for main urban areas with large extended commuting zones and associated infrastructure, although council amalgamations are reducing the instances where this occurs. In these situations, it is important for local authorities to cooperate and align/synchronise certain types of regulations across the shared labour market catchment. If not, the risk is that residential, industrial and non-industrial activities will distribute themselves in order to exploit any regulatory inconsistencies between the constituent local authorities. This type of 'administrative gap' could undermine the effectiveness of regulations and most likely impose a range of additional costs and inefficiencies on land use and related activities.

As shown in Table 8.3, as of 2006, all of the main urban areas except for Dunedin City (which already encompasses a large extended labour market catchment) are made up of multiple TLAs across large labour market catchments.

Since 2006, the formation of the Auckland Council has incorporated most of the land area of the former Regional Council and its constituent local authorities, increasing the concordance between the administrative and local labour market boundaries. In other main urban areas, the functional relationships between the councils that share a common local labour market are often reflected in a range of formal arrangements for urban strategic planning of transport and other infrastructure. This can occur either through standalone bodies, such as the Greater Christchurch Urban Development Strategy partnership, or through collaborations under the auspices of the respective regional councils.

Table 8.3 **Extended main urban area labour market catchments and constituent local authorities**

Labour Market Catchment (LMC)	Local Authority	Jobs in TA and LMC[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
Central and North Auckland	Kaipara District	1,014	737,844	12,894	0.1%	7.9%
	Rodney District	50,676	737,844	50,766	6.9%	99.8%
	North Shore City	156,000	737,844	156,000	21.1%	100.0%
	Waitakere City	84,375	737,844	84,375	11.4%	100.0%
	Auckland City	445,779	737,844	492,330	60.4%	90.5%
Greater Manukau	Auckland City	40,809	294,162	492,330	13.9%	8.3%
	Manukau City	191,106	294,162	191,304	65.0%	99.9%

Labour Market Catchment (LMC)	Local Authority	Jobs in TA and LMC[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
	Papakura District	26,031	294,162	26,031	8.8%	100.0%
	Franklin District	35,493	294,162	35,493	12.1%	100.0%
	Waikato District	723	294,162	22,695	0.2%	3.2%
Greater Hamilton	Waikato District	21,960	165,033	22,695	13.3%	96.8%
	Hamilton City	114,930	165,033	114,930	69.6%	100.0%
	Waipa District	28,143	165,033	28,143	17.1%	100.0%
Wellington	Kāpiti Coast District	22,872	353,088	22,878	6.5%	100.0%
	Porirua City	23,994	353,088	24,030	6.8%	99.9%
	Upper Hutt City	19,521	353,088	19,521	5.5%	100.0%
	Lower Hutt City	70,827	353,088	70,857	20.1%	100.0%
	Wellington City	215,043	353,088	215,097	60.9%	100.0%
	South Wairarapa District	831	353,088	6,207	0.2%	13.4%
Christchurch	Hurunui District	2,373	363,732	8,649	0.7%	27.4%
	Waimakariri District	20,946	363,732	20,946	5.8%	100.0%
	Christchurch City	319,197	363,732	320,586	87.8%	99.6%
	Selwyn District	21,216	363,732	21,219	5.8%	100.0%

Source: Productivity Commission

Notes:

1. The number of jobs located in the overlap of the TLA and LMC.
2. Jobs located in the LMC/TLA overlap as a share of total jobs in the LMC.
3. Jobs located in the LMC/TLA overlap as a share of total jobs in the TLA.

The analysis of local labour markets reveals a second group of smaller provincial urban TLAs with some overlap through common labour market catchments that include parts of surrounding rural districts (Table 8.4). Indeed, labour market catchments that encompass an urban hub TLA and their adjoining more rural TLAs are relatively common. This can create challenges, especially where controls on residential land use differ markedly between a major centre and its surrounding district. Urban land use controls and rating regimes can effectively undermine the potential for rural productivity. Over time, major centres often amend their boundaries to encompass parts of rural districts that have become highly urbanised. Land use speculation on urban boundaries can be an issue for housing affordability and rural land use alike.

Table 8.4 Extended smaller and emerging urban centres labour market catchments

Labour Market Catchments (LMC)	Local Authority	Jobs in TA and LMC[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
Tauranga	Western Bay of Plenty District	18,165	100,284	25,230	18.1%	72.0%
	Tauranga City	82,119	100,284	82,413	81.9%	99.6%
Palmerston North	Manawatu District	15,984	86,868	17,262	18.4%	92.6%

Labour Market Catchments (LMC)	Local Authority	Jobs in TA and LMC[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
	Palmerston North City	70,449	86,868	70,449	81.1%	100.0%
	Horowhenua District	435	86,868	17,547	0.5%	2.5%
Thames	Thames-Coromandel District	10,044	13,242	19,464	75.8%	51.6%
	Hauraki District	3,198	13,242	10,803	24.2%	29.6%
Tauranga	Western Bay of Plenty District	18,165	100,284	25,230	18.1%	72.0%
	Tauranga City	82,119	100,284	82,413	81.9%	99.6%
Masterton	Tararua District	9	24,192	13,446	0.0%	0.1%
	Masterton District	17,331	24,192	17,331	71.6%	100.0%
	Carterton District	5,196	24,192	5,196	21.5%	100.0%
	South Wairarapa District	1,656	24,192	6,207	6.8%	26.7%
Whakatane	Whakatane District	19,665	25,512	21,066	77.1%	93.3%
	Kawerau District	5,847	25,512	5,847	22.9%	100.0%
Invercargill	Southland District	10,392	50,406	24,621	20.6%	42.2%
	Invercargill City	40,014	50,406	40,320	79.4%	99.2%
Nelson	Tasman District	26,136	66,870	31,854	39.1%	82.0%
	Nelson City	40,734	66,870	40,821	60.9%	99.8%

Source: Productivity Commission

Notes:

1. The number of jobs located in the overlap of the TLA and LMC.
2. Jobs located in the LMC/TLA overlap as a share of total jobs in the LMC.
3. Jobs located in the LMC/TLA overlap as a share of total jobs in the TLA.

Rural local authorities with more than one internal labour market catchment

Rural TLAs often encompass more than one local labour market. A typical configuration in these TLAs is one rural labour market catchment, with its own distinctive local industrial and residential makeup, and another labour market catchment in the settlement hub or hubs with a very different industrial and residential character. Examples of local authorities encompassing more than one labour market catchment with different types of industrial makeup and population composition are shown in Table 8.5. Often these TLAs encompass one or more small towns and an adjacent extensive rural labour market sustained in whole or part by primary industries.

Where the constituent local labour market catchments of these TLAs have very different industry (and possibly demographic) composition, this can pose a challenge for the council in the exercise of its regulatory functions. For instance, regulations designed to govern land use and industrial activity in one labour market catchment may not be optimal for one or more of the others. A regulatory regime needs to reflect the reality of the local economic areas to which it is applied, suggesting that somewhat different regimes may be required for different types of local labour market catchments in the same rural TLA.

One way of addressing this challenge is through a system of wards. Although these were set up for the purposes of local government representation, they can also provide a means of nuancing regulations and rating regimes to the requirements of different types of communities and land units. However, rural TLAs

typically have low population densities and are limited in their capacity to sustain a diverse range of professional capacity on a lower rating base than the urban TLAs. So although wards may provide a means of delivering nuanced regulatory services, rural councils may still face capability constraints.

As with capacity gaps at the level of the TLA, one mitigation strategy for rural TLAs with diverse local labour catchments is to recognise the similarities with internal labour market catchments in different TLAs and share experience and regulatory strategies. Indeed, cooperative working relationships between rural TLAs are increasingly common. A good example is the cooperation between five central North Island rural-focused local authorities; however, cooperative relationships do not need to be geographically based.

Identifying similarities and clustering the constituent local labour market catchments of rural TLAs is one way in which cooperative relationships between councils can be facilitated and enhanced. The Commission intends to present work along these lines in the final version of this inquiry. By way of preview, Box 8.8 and Box 8.9 describe the local labour catchments at either end of the country in the Far North and Southland districts respectively.

Box 8.8 **The constituent local labour market catchment areas of the Far North**

The Far North District contains three different kinds of labour market catchment area based on industry composition, and three different types of labour market catchment on population composition (Figure 8.8). The Hokianga North labour market catchment has a very distinctive industry makeup dominated by agriculture, with a high proportion of children and a low proportion of youth and young adults. It has a very high proportion of local residents of Māori ethnicity and is one of the core heartland rural Māori communities of New Zealand. In contrast, Kerikeri is a major tourism hub with a high proportion of employment in the accommodation, cafes and restaurants sector and a relatively high pre-retirement late-middle-age population.

There are likely to be differences in the regulatory issues faced in these different areas and the most appropriate regulatory response. The North Hokianga labour market catchment is likely to share many characteristics of some of the other major Māori 'heartland' labour market areas, while cluster analysis reveals that Kaitaia is fairly similar to Taumarunui.

Figure 8.8 The Far North: Three distinctively different types of labour market catchments

Source: Productivity Commission

Box 8.9 **The constituent local labour market catchment areas of Southland**

The Southland District is made up of all or part of nine distinctive labour market catchments with a wide range of industry and demographic cluster types (Figure 8.9). At one extreme are Te Anau and Stewart Island, which both have high reliance on tourism and recreation, as reflected in a high employment share in accommodation, cafes and restaurants. At the other extreme is Te Waewae with a very high proportion of local jobs in agriculture. Gore has many features in common with Hawera in Taranaki – both probably in part 'retirement hubs' for local farmers. Invercargill is more urbanised with more manufacturing and lower, but still higher than average, reliance on agriculture, and has many features in common with Wanganui.

Figure 8.9 Southland: Nine labour market catchments

Table 8.5 Examples of TLAs that encompass more than one labour market catchment

Local Authority	Labour Market Catchments	Jobs in LMC and TA[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
Far North District	Kerikeri	14,121	14,121	34,797	100.0%	40.6%
	Kaitaia	10,416	10,416	34,797	100.0%	29.9%
	Kaikohe and South Hokianga	5,802	5,802	34,797	100.0%	16.7%
	Moerewa	3,435	3,435	34,797	100.0%	9.9%
	Hokianga North	831	831	34,797	100.0%	2.4%
Kaipara District	Dargaville	7,128	7,128	12,894	100.0%	55.3%
	Rehia-Oneriri	4,749	4,749	12,894	100.0%	36.8%
	Central and North Auckland	1,014	737,844	12,894	0.1%	7.9%
Thames-Coromandel District	Thames	10,044	13,242	19,464	75.8%	51.6%
	Te Rerenga	6,939	6,939	19,464	100.0%	35.7%
	Whangamata	2,436	2,436	19,464	100.0%	12.5%
Matamata-Piako District	Matamata-Piako	15,819	15,819	24,084	100.0%	65.7%
	Matamata	8,265	8,265	24,084	100.0%	34.3%
Otorohanga District	Otorohanga	4,044	4,044	7,245	100.0%	55.8%
	Kiokio-Korakonui	3,201	3,201	7,245	100.0%	44.2%
Taupō District	Taupō	21,513	21,513	24,234	100.0%	88.8%
	Turangi	2,685	2,685	24,234	100.0%	11.1%
	Taihape	24	4,188	24,234	0.6%	0.1%
Western Bay of Plenty District	Waihi	1,368	8,973	25,230	15.2%	5.4%
	Tauranga	18,165	100,284	25,230	18.1%	72.0%
	Katikati	5,607	5,607	25,230	100.0%	22.2%
Whakatane District	Whakatane	19,665	25,512	21,066	77.1%	93.3%
	Murupara	1,395	1,395	21,066	100.0%	6.6%
Gisborne District	Gisborne	27,807	27,807	29,562	100.0%	94.1%
	East Cape	1,755	1,755	29,562	100.0%	5.9%
Stratford District	Stratford	5,160	5,160	5,943	100.0%	86.8%
	Douglas	783	783	5,943	100.0%	13.2%
South Taranaki District	Hawera	16,338	16,338	21,690	100.0%	75.3%
	Kahui	3,177	3,177	21,690	100.0%	14.6%
	Whenuakura	768	768	21,690	100.0%	3.5%
	Wanganui	1,407	29,481	21,690	4.8%	6.5%
Ruapehu District	Taumarunui	5,172	5,172	10,848	100.0%	47.7%

Local Authority	Labour Market Catchments	Jobs in LMC and TA[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
	Waimarino-Waiouru	4,905	4,905	10,848	100.0%	45.2%
	Otangiwai-Heao	771	771	10,848	100.0%	7.1%
	Wanganui	39	29,481	9,954	0.1%	0.4%
	Marton	5,751	7,029	9,954	81.8%	57.8%
	Taihape	4,164	4,188	9,954	99.4%	41.8%
Tararua District	Dannevirke	8,868	8,868	13,446	100.0%	66.0%
	Pahiatua	3,411	3,411	13,446	100.0%	25.4%
	Nireaha-Tiraumea	1,158	1,158	13,446	100.0%	8.6%
	Masterton	9	24,192	13,446	0.0%	0.1%
Tasman District	Golden Bay	4,206	4,206	31,854	100.0%	13.2%
	Murchison	1,500	1,647	31,854	91.1%	4.7%
	Nelson	26,136	66,870	31,854	39.1%	82.0%
Marlborough District	Blenheim	29,913	29,913	36,057	100.0%	83.0%
	Picton	3,009	3,009	36,057	100.0%	8.3%
	Pelorus-Northern Marlborough Sound	3,006	3,006	36,057	100.0%	8.3%
Buller District	Grey	264	11,460	7,320	2.3%	3.6%
	Buller	5,826	5,826	7,320	100.0%	79.6%
	Inangahua	1,083	1,083	7,320	100.0%	14.8%
	Murchison	147	1,647	7,320	8.9%	2.0%
Westland District	Grey	201	11,460	7,068	1.8%	2.8%
	Hokitika	5,124	5,124	7,068	100.0%	72.5%
	Whataroa	1,743	1,743	7,068	100.0%	24.7%
Hurunui District	Christchurch	2,373	363,732	8,649	0.7%	27.4%
	Amuri	2,847	2,847	8,649	100.0%	32.9%
	Hurunui	2,301	2,301	8,649	100.0%	26.6%
	Cheviot	1,128	1,128	8,649	100.0%	13.0%
Ashburton District	Ashburton	17,301	17,301	24,366	100.0%	71.0%
	Hinds	3,726	3,726	24,366	100.0%	15.3%
	Mt Somers	3,339	3,339	24,366	100.0%	13.7%
Timaru District	Timaru	28,791	28,842	34,794	99.8%	82.7%
	Geraldine	5,727	5,727	34,794	100.0%	16.5%
Waitaki District	Waimate	240	5,106	15,621	4.7%	1.5%
	Aviemore	1,056	1,056	15,621	100.0%	6.8%
Central Otago District	Alexandra	10,995	10,995	14,463	100.0%	76.0%

Local Authority	Labour Market Catchments	Jobs in LMC and TA[1]	Total jobs in LMC	Total jobs in TA	% of LMC jobs[2]	% of TA jobs[3]
	Teviot	1,368	1,368	14,463	100.0%	9.5%
	Maniototo	1,395	1,395	14,463	100.0%	9.6%
	Ranfurly	705	705	14,463	100.0%	4.9%
Queenstown Lakes District	Queenstown	16,185	16,185	23,190	100.0%	69.8%
	Wanaka	6,750	6,750	23,190	100.0%	29.1%
Clutha District	Clutha	11,352	11,352	13,905	100.0%	81.6%
	Tuapeka	2,553	2,553	13,905	100.0%	18.4%
Southland District	Invercargill	10,392	50,406	24,621	20.6%	42.2%
	Gore	669	10,725	24,621	6.2%	2.7%
	Te Anau	3,987	3,987	24,621	100.0%	16.2%
	Waikaia	2,139	2,139	24,621	100.0%	8.7%
	Fairfax	2,760	2,760	24,621	100.0%	11.2%
	Toetoes	1,398	1,398	24,621	100.0%	5.7%
	Te Waewae	1,557	1,557	24,621	100.0%	6.3%
	Wairio	1,203	1,203	24,621	100.0%	4.9%
	Stewart Island	411	411	24,621	100.0%	1.7%

Source: Productivity Commission

Notes:

1. The number of jobs located in the overlap of the TLA and LMC.
2. Jobs located in the LMC/TLA overlap as a share of total jobs in the LMC.
3. Jobs located in the LMC/TLA overlap as a share of total jobs in the TLA.

9 Local authorities as regulators

Key points

- Local authorities do not appear to be using their powers of general competence to get into new areas of regulation. However, they will rigorously use existing regulatory tools to address community issues and concerns.
- Local authority Building Consent Authorities have taken a risk-averse stance to building consents due to the potential liabilities they face. Some local authorities will take a very cautious approach when they are required to regulate where a high level of technical expertise is required, reflecting capability constraints faced by councils.
- The involvement of elected councillors in regulatory decisions is most likely greater than previously understood. Political involvement sits on a spectrum, from clearly inappropriate practices such as deciding who should be prosecuted, through to less clear matters such as involvement on independent hearings panels, or making funding decisions at council level for potentially costly prosecutions.
- Inconsistency in the application of national regulatory standards at local government level more often than not occurs because of the different understandings of local officials working on the ground. Greater consistency would be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.
- Local authorities place a high premium on client satisfaction in measuring the performance of their regulatory services, but in practice results were mixed. Business survey respondents generally felt that local authority processing times had not improved over the last three years. Overall, 27% of respondents were actively dissatisfied with the regulatory services and approach of their local authorities.

When it comes to dealing with the local council over a regulatory matter the public often doesn't have a choice, so it's important that people are treated promptly, fairly and consistently and that councils are acting within the regulations and not "overstepping the mark". This chapter looks at local authorities as regulators.

9.1 Are councils overstepping the mark with regulation?

Submitters' views

There is a view in some quarters that local government is unconstrained in its use of regulation and that regulation is unnecessarily restrictive. Federated Farmers, for example, expressed the view that local authority choices within their powers under the RMA are resulting in excessive regulation (sub. 26, p.14), while the Local Government Forum commented on regulators having excessive discretion (sub. 15, p.3). The Grass Roots Institute of New Zealand submitted that local government managers have "no comprehension of the principles and obligations that should constrain the exercise of their regulatory conduct" and that there was a need to focus on discouraging "unnecessarily restrictive and economically damaging regulatory provisions" (sub. 14, pp.2-3).

Local Government New Zealand, however, argued that "councillors are elected in most cases to grow their local economy. Without growth the fiscal impost of infrastructure maintenance will place a major demand on future generations. The incentives appear more than adequate for elected members to ensure local regulatory frameworks do not impose unnecessary costs on business" (LGNZ, sub. 49, p.15).

Local authorities have told the Commission that there is little desire on their behalf to get into new areas of regulation, not least because of the funding implications and political risk. Regulation is seldom a popular

move. Local authorities could point to regulations that they made in response to new duties arising from recent Acts (such as the Freedom Camping Act 2011), but could not point to any regulation made explicitly with only the power of general competence as authority to do so.

Some submitters observed that the Local Government Act offers little in the way of checks and balances, other than through consultation processes, and that bylaw making powers are relatively unrestrained (Federated Farmers, sub. 26, p.9). However, the Commission has found that most bylaws are made under enabling statutes rather than under the more general provisions of the Local Government Act. For example, bylaws regarding stock movements on roads are typically made under section 72 of the Transport Act (1962).

While the Commission could not find evidence of councils using their powers to extend regulation into new areas, it did find local authorities rigorously using existing regulatory tools to address community issues and concerns.

Response to community concerns

Hastings District Council reported using all its powers to 'the letter of the law' in applying the Dog Control Act to deal with community concerns about dogs in the district (Box 9.1).

Box 9.1 **Hastings District Council's 'letter of the law' application of the Dog Control Act 1996**

In 2009, Politicians and Managers requested the Community Safety Manager at Hastings District Council to investigate the implementation of a targeted work programme focused on dangerous and menacing dogs. This was driven by a number of attacks that occurred in the District caused by roaming dogs, and, in particular, Pit Bull type dogs.

At the time there was a concern that owners of such dogs were not meeting their obligations under the Act, so the intent of the work programme was primarily to follow up with all known dangerous and menacing dogs to ensure that these obligations were being met on an on-going basis. However, it was also deemed important to increase the presence of the Animal Control Officers in the community through patrolling key areas, and including weekends and evenings in normal patrols.

Critically, it was also determined that Officers should work to the letter of the law with regards to retrieving fees and impounding dogs.

From the outset, the intention was for the programme to be proactive and focused. Non-compliance with the dangerous and menacing requirements resulted in the dogs being impounded immediately, and the dogs were not returned until the owners had met their obligations under the Act, including payment of all fees.

The increased focus on known dangerous and menacing dogs, plus an uncompromising approach to dog registration has decreased the number of uncontrolled dogs in the District. This in turn has led to a marked decrease in attacks of all kinds.

	2007/8	2008/9	2009/10	2010/11	2011/12 (YTD)
Attacks on people	63	70	38	43	17
Attacks on animals	105	81	92	55	40
Attacks on stock	33	38	15	14	6
Total	**201**	**189**	**145**	**112**	**63**

Source: Hastings District Council, sub. 41, Appendix 1

Other examples include Police encouragement of councils to adopt more stringent liquor ban bylaws, because these assist the Police to more effectively address liquor harm and alcohol-related crime. Kāpiti Coast District Council has recently enacted a temporary bylaw to ban the consumption of alcohol in public areas between 9pm and 6am over the summer months. This is a direct response to the deaths of two young men in alcohol-related incidents in the district (Kāpiti Coast District Council, November 30, 2012).

In some cases councils have sought a mandate from Parliament to regulate. For example, the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 enables Wanganui District Council to make bylaws restricting the wearing of gang patches in public places. There have also been two local bills seeking to give first Manukau City Council and now the Auckland Council powers to regulate street prostitution in South Auckland, recognising that the socio-economic conditions of that area mean that the national law regulating prostitution may not be adequate in the context of that locale.

Response to regulatory risk

Where risk and the potential for significant financial liability are apportioned to local authorities through their regulatory activities, it is not surprising to see councils managing the risk by introducing more requirements or applying regulation with increased rigour. Many submitters to the Commission's Housing Affordability inquiry, for example, commented on the response of local authority Building Consent Authorities in the face of potential liability – the requirement for more information, more time taken to process consents and an increase in the number of inspections (PC, 2012a, p.160).

The Society of Local Government Managers submitted to the Housing Affordability inquiry that:

> We are puzzled by the implication that it is somehow inappropriate for local authorities to be risk averse. Local authorities have a fiduciary obligation to their residents and ratepayers. Surely anything other than a risk averse approach would be open to the accusation of irresponsibility, especially when the local authority has often been left as 'the last man standing' for civil claims. (PC, 2012a, p.160)

While the local authorities' risk-averse stance leading to increased requirements for more information and more inspections may be unsurprising, a lack of capability in administering the new performance-based regulation and poor information diffusion were largely responsible for the leaky building problem (Mumford, 2011).

Response to a lack of knowledge or expertise

When local authorities are faced with a regulatory responsibility and where there is a lack of technical expertise or capability to manage the issue, local authorities are likely to adopt a very cautious approach.

For example, the practice of fracking is a discharge of water and other fluids to land and therefore an activity that comes under the Resource Management Act 1991. And once concern is expressed by a community that the activity may not comply with a district plan, or that the district plan should not enable it to comply, it can place a local authority in a difficult position given their regulatory responsibilities under the RMA. If local authorities have little expertise in the area, they may elect to take a precautionary approach until they receive guidance on the issue.[39] The Parliamentary Commissioner for the Environment's recent interim report *Evaluating the environmental impacts of fracking in New Zealand* has concluded that fracking is safe if it is properly regulated and managed, but if it is not done well it can have significant environmental impacts. The Parliamentary Commissioner has also said that the regulatory environment is fragmented and complicated. This may also be contributing to local authorities taking a risk averse approach.

Summing up

It appears that local authorities are not using their powers of general competence to get into new areas of regulation. However, local authorities will use the powers available to them to deal with the local issues they face and they will take a risk-averse approach when faced with potential liability or uncertainty about how to regulate a new activity. Most bylaws are made under enabling statutes rather than under the Local

[39] Some councils, such as Taranaki Regional Council, have greater expertise in the area. See for example the Regional Council's report Hydrogeologic Risk Assessment of Hydraulic Fracturing for Gas Recovery in the Taranaki Region (Taranaki Regional Council, 2012)

Government Act, and where local authorities have sought a special mandate to act they have done this through the Parliamentary process.

F9.1 Local authorities do not appear to be using their powers of general competence to get into new areas of regulation. However, local authorities are using the powers available to them to deal with the local issues they face. Some local authorities will take a very cautious approach with regulation that requires a high level of technical expertise, reflecting capability or risk issues.

9.2 Political involvement in regulatory matters

Councillors are elected to represent the electors of their constituency and may therefore act as their advocates in some circumstances. Councillors also have a governance role; they are required to act in the interest of their city, district or region as a whole and are required to uphold the policies, processes, and standards of good governance. The expectations of individuals for councillors to act as their advocate in a regulatory matter, such as a prosecution decision, can clash with a councillor's governance role.

People need to be assured that in regulatory matters there will not be inappropriate political interference. This section looks at local authority practice.

Political involvement in prosecution decisions

Submissions bore out that there was significant variability in the degree to which local elected officers were involved in decisions relating to the implementation of regulations.

> Southland District Council has a high level of delegation of regulatory functions to senior professional staff, to assist with timely and cost-effective processing. In situations where elected representatives are involved in decision-making, and one or more members has made comments or taken other action which could call into question their objectivity; then the Council ensures it uses an independent decision-maker/hearing commissioner in such instances. (Southland District Council, sub. 5, p.3)

> There is some Councillor involvement in administration and enforcement of regulations at WDC. Decisions to prosecute are vetted and sometimes vetoed by councillors. Decisions are not delegated to staff. (Whangarei District Council, sub.10, p.8)

> One ongoing consideration is the possibility of inappropriate political pressure from local politicians and within the council organisation itself. This latter tension is recognised in section 39(c) of the Local Government Act 2002. (Rangitikei District Council, sub 35, p.3)

Submissions indicate that the level of political involvement in regulatory decisions may have been greater than previously understood:

> The only examples that we are aware of involve a small number of regional councils where prosecutions are signed off by elected members. To our knowledge in almost all cases officers' recommendations are followed. Local Government New Zealand does not consider the former to be good practice. Other than the example given above, all councils have strict barriers between the political and enforcement roles of the authority.

> The LGNZ KnowHow programme is planning to develop courses for councillors on undertaking their regulatory responsibilities. (LGNZ, sub. 49, p.27)

However, the issue is not as straightforward as councillors deciding who should be prosecuted and who shouldn't. Some of the difficulty is that there are legitimate policy calls bound up in decisions that arise from or primarily affect individual business activities or cases. There is a spectrum spanning involvement in individual regulatory decisions, through to involvement in changing regulations on application from individuals and businesses, through to resourcing decisions allowing staff to proceed.

Involvement in individual regulatory decisions

The Auditor-General has noted that:

> The Crown Law Office's *Prosecution Guidelines* are clear that prosecution decisions should be free from political influence. The independence of the prosecutor is described as "the universally central tenet of a prosecution system under the rule of law in a democratic society."
>
> In central government, there is a strong convention that enforcement decisions are made by officials, independent of political influence, because it is seen as "undesirable for there to be even an appearance of political decision-making in relation to public prosecutions." This convention has been given statutory recognition in section 16 of the Policing Act 2008. We see no reason for different principles to apply when the enforcement agency is a local authority. At least one regional council has had legal advice to this effect, but has not acted on it. (OAG, 2011, para 5.47-5.48)

Involvement in prosecution decisions is a relatively straightforward example of political interference which should not occur. Nevertheless, submitters could fairly readily point to cases where this had occurred:

> An example I am directly familiar with involved the first two Trade Waste prosecutions which were carried out … in 2003 however it should have been three. The then Mayor interfered, even seeking the opinion of the Minister of Local Government (who tactfully declined to get involved) and the large third company got off with a warning – they had played the 'as a significant employer in the valley – we might close if you prosecute us' card. (Gordon George, sub. 13, p.8)

Views were mixed as to whether this was a problem:

> Councillors commonly make decisions on regulatory applications, for instance resource consents. Their involvement is not necessarily negative as implied in the question. They may have a better appreciation of local conditions and community preferences than their officers. (Local Government Forum, sub. 15, p.25)
>
> Our councillors are not involved in the administration of our regulations except the setting of policies and approving regulations. Councillors are involved in the enforcement of regulatory matters, for example, when there is an objection to the paying of a fine or decision made by council staff. Council meet and make a decision on whether or not the objection is valid. (Hurunui District Council, sub 43, p.10)

It is no surprise that some members of the community see value in councillors acting as their advocates when faced with an adverse prosecution decision. The need for suitable appeal mechanisms is obvious but there is a question about the appropriateness of political involvement in appeals. In the case of prosecution decisions, councillors' governance role is paramount.

F9.2 Elected council members involvement in individual regulatory decisions is most likely greater than previously understood.

Link to funding decisions

Even where there are the appropriate 'firewalls' between those administering regulations within councils and councillors, it is still possible that councillors will be required to make what amounts to a decision about whether or not prosecution should occur. It is uncommon for territorial authorities to have a sizable budget for prosecutions. For some smaller territorial authorities, $40,000+ in legal fees represents a percentage point or more of annual rates. Where the prosecutions budget is insufficient, staff must come to a council with a budget bid to amend the operating expenditure budget to enable them to proceed.

In this case there is a blurry line between policy and administration. On the one hand, deciding spending priorities across activities and to a degree the regulatory responsibilities that local authority wishes to place emphasis on is a legitimate policy role for elected councillors. On the other hand, when those decisions are prompted by a specific regulatory breach, and the consequences of the decision for those involved are relatively knowable, it is hard to escape at least the appearance that political motivations may influence whether or not the alleged offender is prosecuted.

In light of the challenges faced, especially by smaller councils in funding large prosecutions, there may be merit in exploring a pooled funding or insurance style model for funding prosecutions. Councillors would

still be able to set policy about the level of resourcing or annual subscription paid in, but would be able to set that policy in isolation to decisions about specific prosecutions.

Q9.1 Are there potential pooled funding or insurance style schemes that might create a better separation between councillors and decisions to proceed with major prosecutions?

Councillor involvement on independent hearings panels

Councils can delegate their role to hear RMA applications to independent hearings panels. These panels can be made up of commissioners from outside the local authority, or councillors can also sit on them. The council can delegate any powers to the panel except for the ability to give final approval to a plan or process. In practice, this usually means that the panel runs a hearings process and makes a recommendation to the council about what its decision should be. Since the 2009 'simplifying and streamlining' amendments to the RMA, applicants or submitters can request that councils delegate their deliberations to independent panels (of only independent commissioners). Councils must comply with these requests.

Submitters held conflicting views about what the balance of accountability and independence for elected representatives should be in these circumstances:

> There has been a temptation amongst central government officials to be suspicious of elected representatives – this has led to the appointment of so-called independent commissioners to stand in the stead of the elected representatives. The RMA and the proposed Alcohol Reform Bill have such provisions. Where a local authority chooses to use such agents for workload management or conflict of interest reasons is appropriate but to have a statutory presumption requiring their use often confuses the doctrine of accountability. Independent commissioners (who are nearly always paid more to do the same job) are not electorally responsible for decisions they might make whereas elected representatives are. Accordingly if a function is delegated or devolved to a local authority there needs to be a good understanding of the role of the decision maker. (Tasman District Council, sub. 6, p.10)

> There is also an issue with councillors being involved as "independent" Planning Commissioners. This is different to Councillors who are on a planning committee but where Councillors are attempting to act independently. Although there are accreditation processes in place to ensure Commissioners have the requisite skills, the fundamental issue is that Councillors are unable to be truly independent as they cannot realistically divorce themselves from their role as community representatives. An important element of independence is being seen to be independent. (IPENZ, sub. 16, p.5)

Two questions arise:

- Does the involvement of councillors on independent hearings panels undermine the purpose of having such panels?
- Is it possible for a councillor to be independent in such decision-making?

The answer to the first question depends entirely on who councillors are being asked to be independent from. If it is just the applicant and any counter-submitters, then in many cases independence may be possible. But, if that is the case, why is an independent hearings panel needed, rather than the issue being dealt with by the council? It could be because there is wider community concern about an application that a councillor may wish or need to be politically accountable to. In such cases, an independent hearings panel may be important for applicants or those opposing them to get a fair hearing.

This also largely answers the second question – councillors will find it harder to be independent for those contentious issues where they are most likely to want to be on the panel. The Commission agrees with IPENZ, that being seen to be independent is a fundamental part of independence.

Political involvement in plan change decisions

The issue of councillors' involvement becomes much more muddled where a change in a regulation is being sought to support a particular business activity. This commonly occurs where changes to district plans are sought to rezone land for housing development. The district plan is a matter of policy, and therefore a

matter for councillors. But at the same time a private plan change is also a quasi-judicial proceeding which pits an applicant against opponents and which needs to be adjudicated.[40]

In part, this problem arises from a resource management framework that makes it usual practice to seek changes to regulations to enable business to occur. This is not usual in other regulatory areas (reaction to the so-called 'Hobbit Bill' indicates how unusual the public would commonly find this practice) [41].

The Local Government Forum argues that the involvement of councillors in plan change decisions is not necessarily undesirable:

> Their involvement is not necessarily negative as implied in the question. They may have a better appreciation of local conditions and community preferences than their officers. (Local Government Forum, sub 15, p.25)

The independent hearings panel process, which leads to a recommendation to councillors, can be a good way to ensure that the views of interested parties are heard fairly, and act as a balance on potential political pressure. The Commission has not heard of any specific issues with councillors participating in the plan change process.

F9.3 The independent hearings panel process can be a good way of ensuring the views of interested parties are heard fairly and lead to recommendations being made to councils.

Summary

Political involvement in regulatory decisions sit on a spectrum, from clearly inappropriate practices such as deciding who should be prosecuted, through to more difficult matters such as involvement on independent hearings panels, or taking funding decisions in response to particular prosecution matters.

Where councillors are involved in regulatory decisions, it is important that it is for governance rather than management matters, and that the circumstances maintain an appropriate separation between the governance and advocacy roles of councillors.

9.3 Councils regulating services where they are also the provider

As a general principle it is undesirable for a regulator to also participate in an industry or activity that it regulates. Generally speaking this isn't the case with local government. However, there is a body of bylaws that regulate access to council services. It was submitted to the Commission that these bylaws were essential for managing demand for council infrastructure/services:

> Councils should have some discretion where local assets are protected by locally tailored bylaws – e.g. Trade wastes bylaws to manage inputs into local [waste water treatment plants]… local control of Trade Waste Bylaw management provides a direct cost benefit incentive for matching capability to need. Central control at the risk of central resourcing cuts could expose locally owned assets to financial and infrastructural risks… I believe it appropriate that the TLA controls the review as [trade waste] bylaws are intended to protect TLA assets, an independent bylaw may not ensure that the assets are adequately protected exposing the community to costs created by industrial dischargers (the greatest risk group to sewers). (Gordon George, sub.13, p.8)

The Commission is concerned that the use of this kind of regulation could result from, or be influenced by, incentives on councils to avoid incurring costs and this may not result in a net benefit to the community. There was some concern from submitters that councils might be acting as both players and regulators in some activities or industries:

> Local councils currently combine monopoly ownership, governance, management, pricing, customer representation and (some) regulation for water services. As a result accountability is weak and levels of

[40] It is worth noting that the Land and Water Forum has commented on the desirability of dealing with planning separately to the consenting process.

[41] Employment Relations (Film Production Work) Amendment Bill.

service are inconsistent. The relationship between supplier and customer is an administrative one, rather than being contractually based. (Water New Zealand, sub. 4, p.2)

Q9.2 Are bylaws that regulate access to council services being used to avoid incurring costs, such as the cost of new infrastructure? Is regulation therefore being used when the relationship between supplier and customer is more appropriately a contractual one?

9.4 Consistency in applying regulation

Submissions and engagement meetings

The biggest single issue organisations have in their dealings with councils is inconsistency of application in regulatory standards. Although there was some acceptance that there were good reasons for some standards to vary between councils, there was a deep resentment where that variation did not appear to reflect local preferences or conditions and arose from the "attitudes of councils". When the inconsistency occurs within the same council, this can be seen as very unfair "it's because of the council officer we got on the day" and it also creates uncertainty about "who to believe" and what the "real situation" is.

The sense of frustration about regulatory inconsistency comes through in the submission from Federated Farmers, whose members have experience with councils across New Zealand:

> One example of inconsistency in our experience is the administration of district council obligations under the Dog Control Act, which can be subject to major inconsistencies in fee structure and categorisation of dog types. Some district councils (Thames Coromandel for example) recognise working dogs in a particular category, with a registration fee level set to scale for dog teams from which nuisance and compliance issues do not arise. Many other district councils do not recognise working dogs and farmers are required to pay full fees on every dog, which can be a considerable expense. The variation in fee levels between district councils is also considerable, due in part to different policies on cost recovery. Federated Farmers also has experience with inconsistencies in bylaws, such as stock droving bylaws, where permit and fee structures are enforced by some councils and not others. (Federated Farmers, sub. 26 p.14)

Federated Farmers also commented on inconsistency in approach between regional councils with respect to dairy effluent:

> We would contend that different approaches to regulation are more often generated by the varying skill levels and professional attitudes of the governance and staff of councils, and the extent to which they are lobbied by individuals and stakeholder groups. For example the status of the discharge of dairy shed effluent to land can differ between regional councils, for example in the Waikato this is a permitted activity under certain parameters, whereas in the Bay of Plenty it is a restricted discretionary activity. Both councils are navigating toward the same objective, but have taken different tacks. (sub. 26, p.12)

The Commission heard about other examples of inconsistency or sources of variation in its engagement meetings (Box 9.2).

Box 9.2 **Variation in application**

The kinds of variation that the Commission heard about fell into several categories:

- *Variable application of the same standards between local authorities* – examples included whether a liquor outlet required food hygiene certification or not (ostensibly for the sale of such items as packaged chips, peanuts, and ice);
- *The views of staff influencing consent or licence conditions* – examples included resource consents contingent on supermarkets going plastic bag-free and having worm farms for waste minimisation (not strictly matters of whether or not the supermarket would be permissible under the district plan), or liquor inspectors seeking to restrict the sale of RTD single bottles, or RTDs with particular alcohol levels;

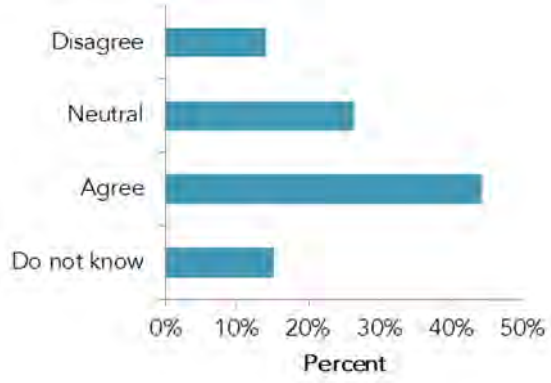
- *Variation in capability and capacity affecting fee levels* – One regional council offered an example where its specialist staff could process a water-related consent for around $3000, but the related earthworks consent cost in the order of $20,000 because the district council in question lacked the expertise, required consultants be used, and then passed on the charge. In the regional council's view, the land use consent did not add significant additional conditions to the consent.

Survey responses

Of the businesses surveyed, 30% had dealt with more than one council, 19% had dealt with two councils and 6% with three.

Of the 332 business survey respondents who answered the question "I found the regulations inconsistent between councils" 147 agreed with the statement, these were mainly in the agriculture, forestry and fishing industries (27 respondents); the construction industry (44 respondents) and in property and business services (34 respondents).

Figure 9.1 I found the regulations inconsistent between councils



Source: Productivity Commission

Of all those businesses reporting inconsistency between councils, the areas of highest inconsistency were in planning, land use or water consents; and building consents.

Building regulation is subject to nationally consistent standards. Yet respondents who said that councils were inconsistent, reported as much variability in building regulation as for land use planning, an area where high levels of variation would be expected, as a result of local policy-making.

Dealing with inconsistency

As outlined in Chapter 4, variation in local authorities' approach to regulation can reflect local preferences and be efficient. Where there are inconsistencies in approach to a nationally determined standard, there are sometimes calls for greater centralisation of regulation or the provision of more central guidance.

In practice, however, the challenge of regional variation is also one faced by central government departments with regional offices. Considerable time can be spent in central government debating the desirable degree of autonomy or consistency between departmental local offices, which usually results in an alternating trend between increased standardisation and giving more discretion. Given the need for local inspectors for many of the regulatory functions in question, it is not obvious that centralising responsibilities would reduce variation in the application of nationally consistent standards.

Another commonly suggested approach is to manage variation through greater 'guidance' or specification of how the standard should be applied. While specific guidance is potentially of greatest use with new regulations this approach can have drawbacks:

- it can merge a principles-based approach (where that has been chosen) with a rules-based one in a way that means neither approach is performed well;
- it can create more rules, processes and procedures to follow; and
- it is not a clean solution – there will always be more things to be specified and increasing specification in one area increases the likelihood that "workarounds" will be sought in another.

Guidance documents, or further standards on implementation, are as open to interpretation as any other standard. Simply writing more standards to be implemented is, in and of itself, unlikely to resolve the levels of variation in the current applications of national standards.

One possible solution to the problem of inconsistency in the application of regulatory standards is to create a better understanding of the objective to be achieved and how best to achieve it. This recognises that there may be good reasons for regulatory managers and staff to have discretion over the decisions they make (not least that it is a necessary part of being separate from political influence) and that gains are most likely to be made by stimulating thinking about different approaches to the same regulatory challenges, and how to assess the best available approaches. Greater coordination of approaches may also be possible and advantageous (as discussed in Chapter 8).

Ministries and departments who 'own' the legislation that local government administers can play a role in facilitating this kind of discussion, by drawing together the relevant people in local authorities to discuss different approaches, identify and share good practice, and foster opportunities for more cooperation between local authorities.

F9.4 Centralising functions or providing more national guidance is often seen as a solution to inconsistency. However, inconsistency more often than not occurs because of the different understandings or approaches of local officials working on the ground. Greater consistency is more likely to be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.

9.5 Client focus

The client-focus of a local authority can materially affect the experience of meeting one's regulatory obligations. The Commission found that local authorities place a high premium on "customer satisfaction" with regulatory processes but, in practice, the results are mixed.

Local authority approaches

Some councils, illustrated in the submission from Palmerston North City Council below, have adopted one-stop shop approaches for key clients to assist them through regulatory processes associated with their business:

> For example, when the local shopping mall (The Plaza) was redeveloped several years ago the Council set up a Major Projects team to work with Kiwi Income Property Trust (the Plaza's owners). Kiwi Income were given a single point of contact within the Council to cover all areas – health, building, planning, traffic, stormwater, wastewater, water, etc. We were aware of all of their needs and could work to ensure that the redeveloped Plaza was up and running as quickly as possible within the regulations. This led to a very positive relationship between the Council and the Trust. Chris Gudgeon, CEO of Kiwi Income, noted the $93m development was a significant undertaking for the Trust. He was very appreciative of the Council staff who processed 150 consents. (Palmerston North City Council, sub. 34, p.2)

Prominent amongst local authority performance measures are measures of customer satisfaction. Following the maxim that 'what gets measured gets managed', local authorities are placing quite some focus on the customer service dimension of their regulatory activities. As well, the other performance measures local authorities typically set in the regulatory services area are about the timeliness of consent processing, which

also creates a focus on customer service. If the priorities of local authorities are reflected in their performance measures, local authorities place a high premium on good customer service. Table 9.1 sets out a selection of performance measures from Long Term Plans in the liquor licensing area.

Table 9.1 Performance measures

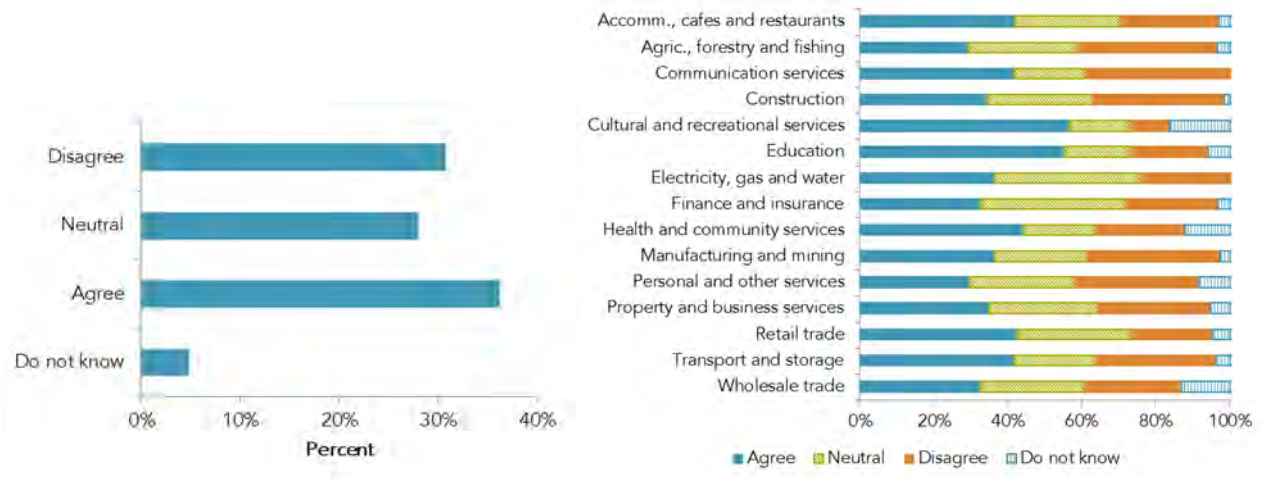
Council	Rationale	Performance measure
Western Bay of Plenty District Council	**Community Protection** – improve, protect and preserve the environment and public health and safety by minimising risks from nuisances and offensive behaviour	Percentage of building and health applications and plan checking processed within statutory timeframes.
Tauranga City Council	…work collectively with a number of key stakeholders to reduce the adverse effects of alcohol abuse…	All liquor licensed premises are inspected annually (twice a year for at risk premises). All licence and permit applications are processed within specified timeframes
Queenstown Lakes District Council	Legal compliance	N/A – activity measures focus on building consents
Westland District Council	The Council has a statutory requirement to undertake these activities	All licensed premises are inspected and registered at least annually. Work with Police and Community Public Health to reduce the negative impacts of alcohol abuse through collaborative meetings.
Otorohanga District Council	The Council will help to achieve safe and healthy communities through preventing bad behaviour as a result of liquor supply	A liquor licence is held in respect of all premises at which liquor is sold or supplied, and every premise licensed for the sale or supply of liquor is managed by an appropriately qualified person
Auckland Council	Protect public health in the areas of food premises and sale of liquor licensing	Percentage of customers satisfied with the food and liquor licensing service Percentage of liquor licensed premises inspected at least once annually
Dunedin City Council	To reduce alcohol-related harm by monitoring and enforcing standards within licensed premises, and to act as the District Licensing Agency for Dunedin City	Percentage of licensees dissatisfied with liquor licensing advice and inspections

Source: Local authority draft long-term plans.

The customer experience

Customer experiences with councils – for example, whether the council provided reliable and consistent advice, clear information and timely processing are presented below.

Figure 9.2 The council provided reliable and consistent advice

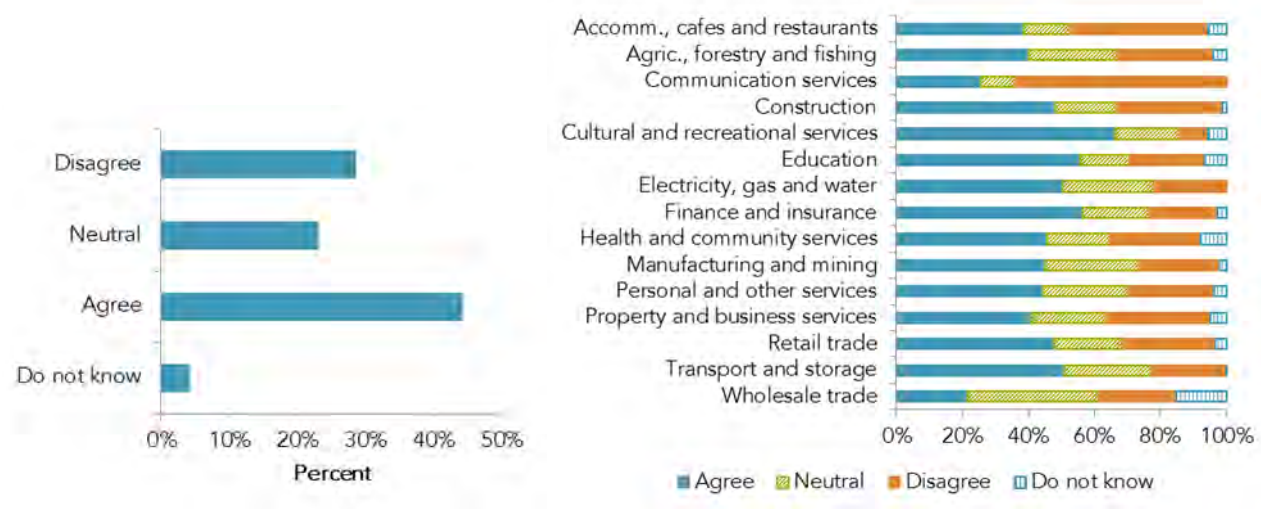


Source: Productivity Commission

Those who had an opinion on the consistency and reliability of local authority advice were fairly evenly split between those who agreed with the statement and those who did not. A significant number of responses were neutral on this matter. By industry, those working in the Agriculture, Manufacturing and Mining, and Transport and Storage industries were most likely to disagree. Notably these are areas where regulatory responsibilities between territorial authorities and regional councils can crossover, which may explain some of the problem with consistency.

Most businesses surveyed found the information they received from the council was clear, although a significant proportion disagreed (Figure 9.3).

Figure 9.3 The information provided by the council was clear

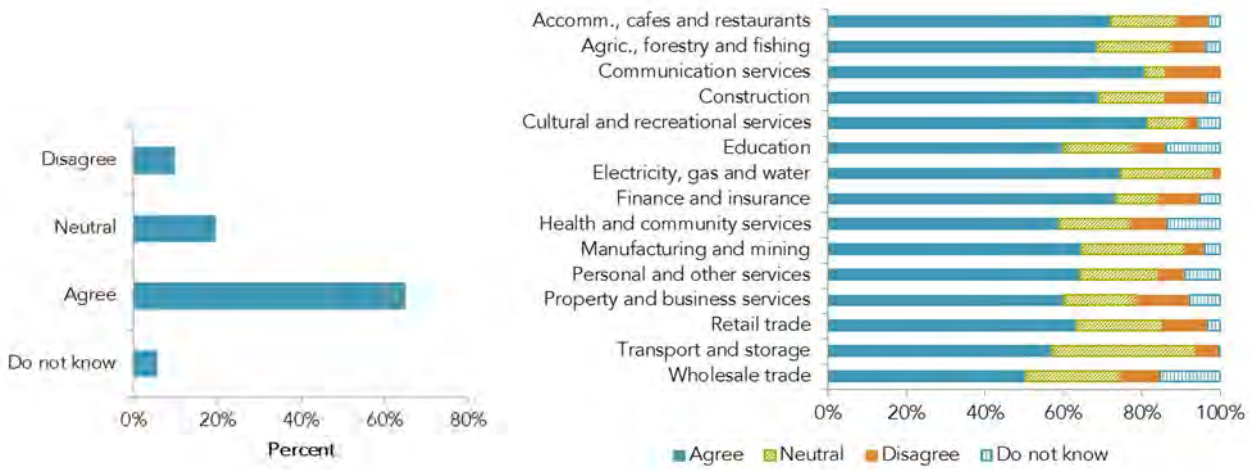


Source: Productivity Commission

Despite the mixed results about the provision of information, most respondents felt that they understood the requirements on their businesses. Positive responses were particularly noteworthy in the accommodation (including café and restaurant) and construction industries (both of which tend to have many small firms and multiple regulatory regimes to comply with).

The survey asked respondents if they understood the regulatory requirements of their business (Figure 9.4).

Figure 9.4 I understood the regulatory requirements of my business

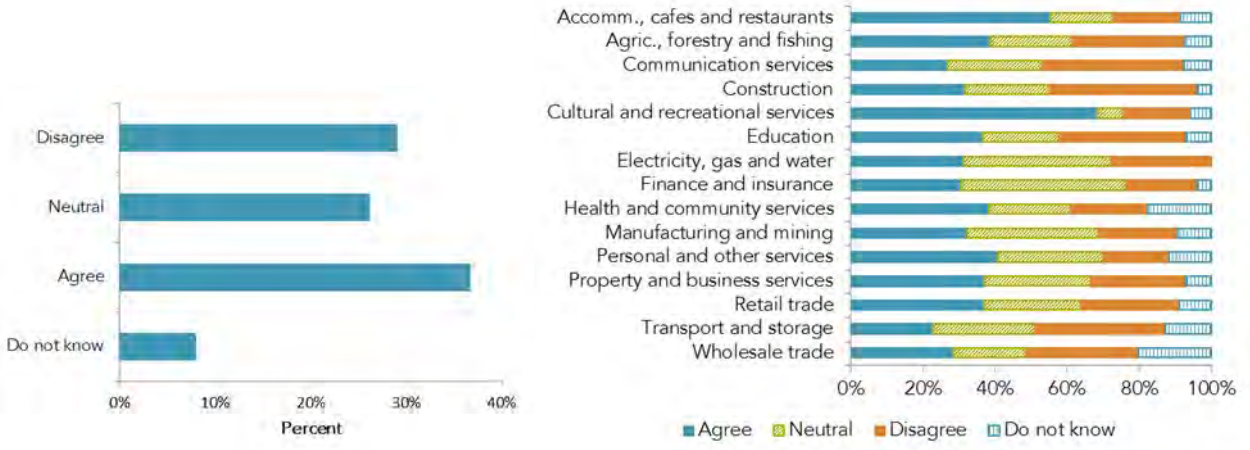


Source: Productivity Commission

Some caution needs to be used in interpreting these results. As this is a perception survey, it is possible that some respondents believed that they understood the requirements on them when perhaps they did not.

As well as providing quality advice, timely processing of applications is an important part of customer service. As discussed above, processing times are one of the prominent performance measures used by local authorities. The survey indicates that respondents were fairly evenly split between those that felt processing times were reasonable and those that did not. Those industries most affected by resource consenting tended to be less positive about processing times (Figure 9.5).

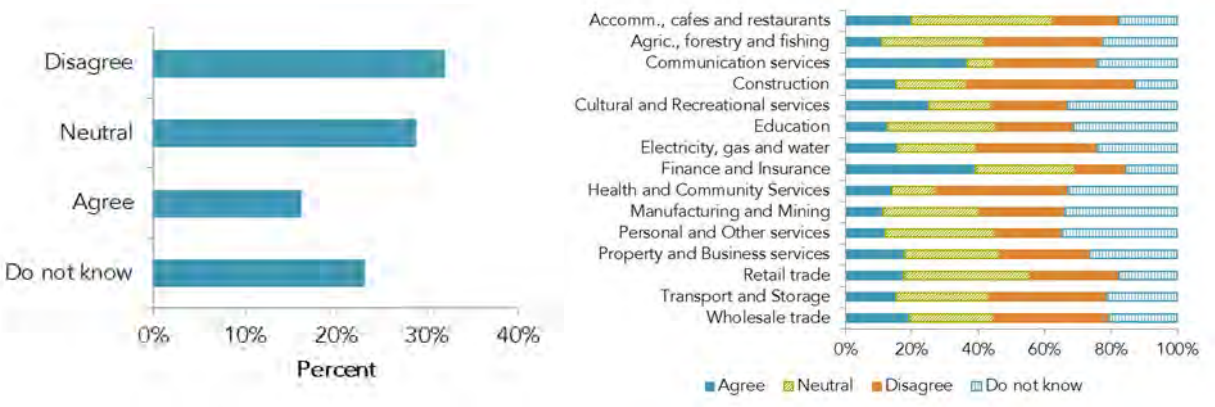
Figure 9.5 The time taken to process my application or respond to my information request was reasonable



Source: Productivity Commission

Survey respondents generally felt that local authority processing times had not improved over the last three years.

Figure 9.6 Local government approval processes are faster than three years ago

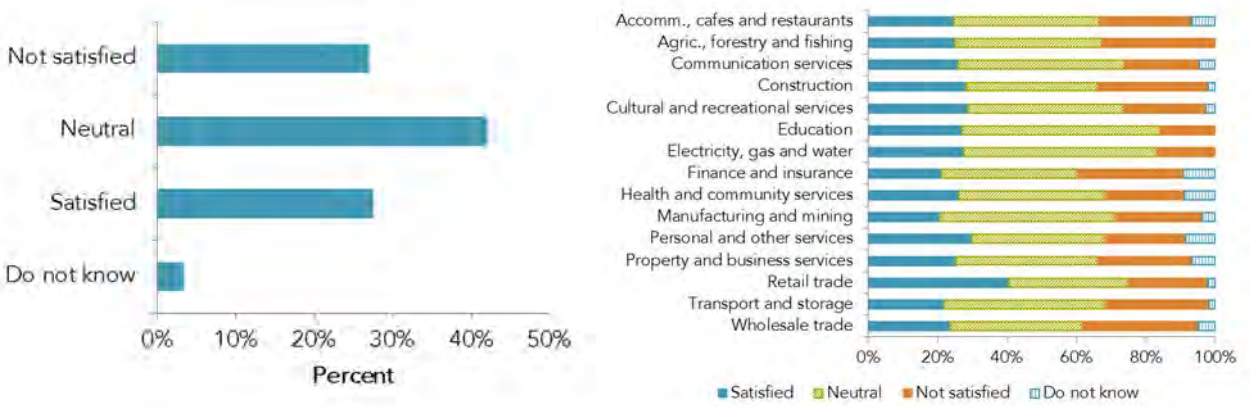


Source: Productivity Commission

The survey results need to be viewed in the context of businesses overall level of satisfaction with local authority regulation. Twenty seven per cent of the survey respondents were actively dissatisfied with the regulatory services and approach of their local authorities.

Figure 9.7 gives an indication of the distribution of responses by industry type. This in turn may indicate which regulatory regimes interact poorly with business in some circumstances. A major source of dissatisfaction among those dealing with more than one council is likely to be inconsistency in the regulatory requirements of councils.

Figure 9.7 How satisfied or dissatisfied are you with the way local councils administer regulations that are relevant to your business or organisation?



Source: Productivity Commission

F9.5 Twenty seven per cent of business survey respondents were actively dissatisfied with the regulatory services and approach of their local authorities, however there is considerable variation between industries.

Q9.3 What factors (other than the type of regulation most commonly experienced by different industry groupings and the size of businesses in these sectors) explain differences in the satisfaction reported by industry sectors with local authority administration of regulations?

10 Local monitoring and enforcement

Key points

- The ideal enforcement strategy is one that strikes the right balance between persuasion and coercion in securing regulatory compliance. This balance may differ between regulatory regimes. Similarly, the ideal balance may differ between local authorities (LAs) due to the different characteristics of regulated populations.
- General conclusions on the overall 'sufficiency' of compliance monitoring are difficult and must be treated with caution. Nevertheless, there is evidence to suggest that monitoring of local regulations is often under-resourced, and that in some cases this may be undermining the achievement of regulatory objectives.
- The presence of funding constraints within regulatory budgets does not in itself prove that insufficient monitoring is occurring. It does, however, highlight the importance of allocating available budgets in an efficient manner.
- Inquiry participants have suggested that statutory timeframes are resulting in LAs spending more on administrative tasks than they would otherwise consider to be 'optimal' for their community. The result is that other regulatory tasks (such as monitoring and enforcement) may receive less funding than necessary.
- While local authorities appear broadly happy with the enforcement tools at their disposal, there is a strong feeling within the sector that regulations would be considerably more effective if additional measures such as the use of infringement notices were made more readily available to LAs. A fuller understanding of the benefits and costs of this proposal are worth exploring.
- Data from the Ministry for the Environment suggest that monitoring levels of Resource Management Act 1991 (RMA) consents are higher than they were in the mid-2000s, with 68% of consents where monitoring was a condition of the consent being monitored in 2010/11.
- In 2010/11, some 14,380 RMA consents were monitored, with 72% found to be compliant with the conditions of their consent. This figure may conceal non-compliance among people who never apply for consent – ie, people who are not 'in the system' and whose non-compliance is therefore not included in the statistics.
- Enforcement of resource consents appears to be increasing through both formal and informal methods. [42] However, of the formal enforcement options used in 2010/11, 81% were Excessive Noise Directions (END).
- Fines imposed by the Environment Court have been increasing in recent years. Judges have noted that fines imposed in previous years have been insufficient to deter non-compliance.

10.1 Introduction

Monitoring and enforcement is a critical part of the regulatory process. Investment in good policy-making processes can be significantly undermined if monitoring and enforcement are done poorly or insufficiently. Regulation that is poorly enforced rarely fulfils its public policy objective (Gunningham, 2010): indeed, there

[42] Formal enforcement methods include infringement notices, abatement notices, directions or prosecutions. Informal enforcement methods include verbal warnings, letters and visits.

is strong evidence that inadequate attention to compliance issues often underlies regulatory failure (OECD, 2002).

However, regulators can face significant challenges when formulating enforcements strategies.[43] Resources can be thinly spread, non-compliance can be difficult to detect, legal powers can be limited, and enforcement functions distributed across a range of organisations (Baldwin & Black, 2008).

This chapter examines these challenges in the context of regulations administered by local authorities (LAs). It begins by exploring the factors that determine regulatory compliance and the impact of these factors on the ideal enforcement strategy.

The chapter then draws on available data to discuss the adequacy of compliance monitoring by LAs and whether LAs have a sufficient range of enforcement tools at their disposal. These issues are then discussed in greater detail within the context of the RMA and liquor licensing.

10.2 What determines compliance?

Compliance behaviour is motivated by a number of different factors that have a direct bearing on strategies for monitoring and enforcement of regulatory compliance. Through a more fine-tuned understanding of the motivations and drivers of compliance behaviour, enforcement can be better calibrated to improve regulatory compliance and outcomes.

Deterrence models largely see compliance behaviour determined by the deterrence effects of the penalty regime associated with a given regulation. People are motivated to comply through fear of detection and punishment (Becker, 1968; Stigler, 1970). This means that, according to the deterrence model, compliance is the outcome of an equation of the benefits of non-compliance versus the probability of being discovered and punished, and the severity of the penalty. The probability of being caught is in turn linked to the level of monitoring undertaken by the regulator. The individual will also weigh up the probability that once detected, the regulator will go through with applying the full penalties available to it. There is therefore a strong connection between the effectiveness of a regulatory regime and a) the level of monitoring by a council; b) the severity of penalties that can be imposed under the regulation and c) the council's willingness (or ability) to actually impose these penalties.

The enforcement literature concludes that, while important, simple models of deterrence are only part of the explanation of the underlying motivations of individuals and firms to comply with regulatory requirements. Drawing from a range of disciplines (such as psychology and sociology), more sophisticated compliance models incorporate the following factors:

- *Bounded rationality* – where it is acknowledged that those regulated have limited knowledge and capacities to process information and make rational decisions (Simon, 1982), and where simple 'decision rules' (such as 'intuition') are used to rationalise and deal with the complexity and uncertainty in formulating compliance decisions (Tversky & Kahneman, 1981).
- *Informal sanctions* that include negative publicity, public criticism, embarrassment and shame, loss of 'corporate prestige' and reputation (for example, Makkai & Braithwaite, 1994; Paternoster & Simpson,1996).
- *Cooperation and trust* between the regulator and those regulated (for example, Scholz, 1984; Axelrod, 1984).
- The need for *legitimacy* by firms in the eyes of the government, industry peers, and the public (Edelman & Suchman, 1997).

The important lesson from the compliance literature is that compliance behaviour is motivated by many factors, and that motivations will vary between different regulated actors in different situations. This means

[43] For the purpose of this chapter the term 'enforcement strategy' is used to refer to the physical checking (monitoring) of compliance and the approaches used to encourage compliance or deter non-compliance.

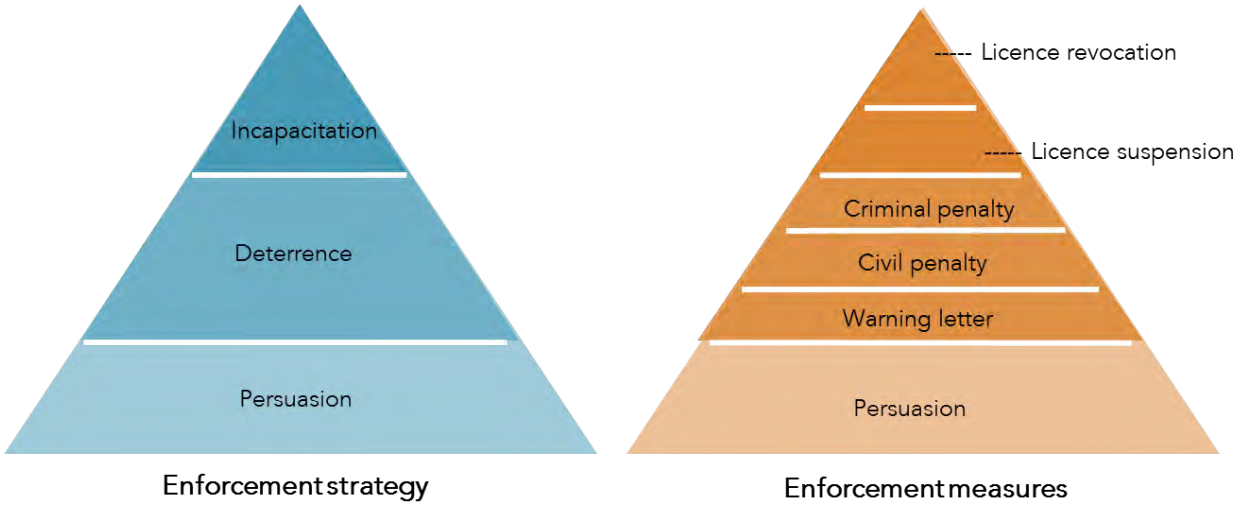
that a compliance strategy will have a different impact on differently motivated individuals and organisations (Gunningham, 2010). There is therefore no single enforcement tool that will maximise regulatory compliance. Rather, there is a range of strategies that, together, speak to the different motivating factors for compliance behaviour – with moral suasion, trust and persuasion on the one hand, and the threat of detection and punishment on the other. These are often referred to by theorists as compliance versus deterrence models of regulation (Reiss, 1984).

10.3 What does the ideal enforcement strategy look like?

Most contemporary regulatory specialists now argue, on the basis of considerable evidence, that a judicious mix of compliance promotion and deterrence is likely to be the optimal enforcement strategy (Gunningham, 2010). The enforcement challenge is striking the right balance between persuasion and coercion in securing regulatory compliance. This balance may differ between regulatory regimes. Similarly, the ideal balance of persuasion and coercion may differ between LAs due to variances in the populations being regulated.

The complexity of compliance behaviour has led to the idea, first put forward by Braithwaite (1982) that compliance is most likely – and most effective – when a regulator displays an explicit enforcement pyramid with a hierarchy of graduated responses to non-compliance (see Figure 10.1). Having a range of available responses allows regulators to tailor enforcement strategies to the behaviour of individual parties and use available monitoring resources most effectively.

Figure 10.1 Braithwaite's enforcement pyramid

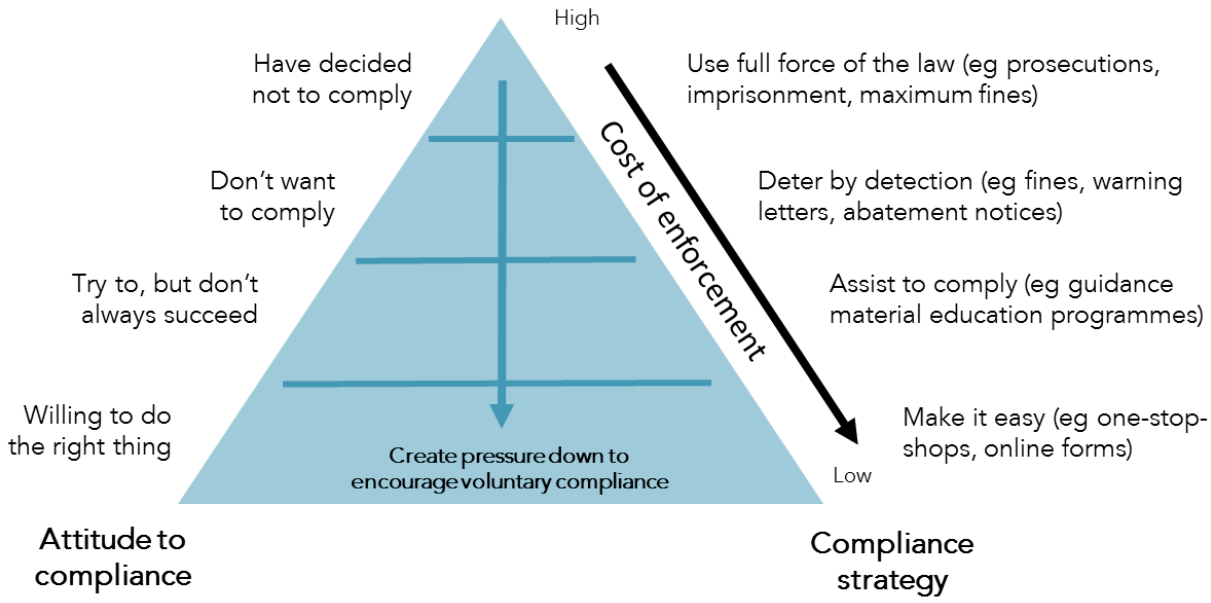


Source: Braithwaite (1982)

Figure 10.2 provides an application of the enforcement pyramid. At the base of the pyramid, compliance is encouraged by appealing to social responsibility of individuals and leveraging cooperative approaches. This level recognises that the majority of people want to 'do the right thing' by complying with regulations. For these people the ideal strategy is to make compliance as simple and easy as possible – for example, by implementing online application processes or having convenient opening hours for lodging paperwork.

Further up the pyramid are people who are willing to comply with regulations, but, for whatever reason, do not always succeed. These people need to be assisted to comply, for example, by providing guidance material or education programmes. Still further up the pyramid are those that do not want to comply. For these people the strategy escalates to a deterrent threat (warning letters, fines, publicity around successful prosecutions), thereby appealing to their rational self-interest. Finally, at the top of the pyramid there are a small number of individuals that decide not to comply. These people should face the full force of the law (Aryes & Braithwaite, 1992).

Figure 10.2 Application of the enforcement pyramid



Source: Adapted from New Zealand Inland Revenue (2007)

The key lesson from the enforcement pyramid is that coercive enforcement strategies should only be used after persuasive methods have maximised voluntary compliance (Aryes & Braithwaite, 1992). This approach acknowledges that most regulatory action occurs at the base of the pyramid, where compliance is sought through persuasion but escalated when compliance is not forthcoming.

> Regulatory agencies have maximum capacity to lever cooperation when they can escalate deterrence in a way that is responsive to the degree of uncooperativeness of the firm, and to the moral and political acceptability of the response. (Braithwaite, 1992, p.36)

But care is needed when applying this approach:

> Compliance is most likely when regulators: 1) have access to an armoury of deterrent and incapacitative weapons; and 2) when they avoid both the mistake of selecting a sledge hammer to swat a fly and selecting a flyswatter to stop a charging bull. Compliance is predicated by both the existence of an awesome armoury and by the avoidance of clumsy deployment of it. (Braithwaite, 1992, p.52)

This underlies the importance of ensuring adequate potency of the upper limits of sanctioning within the pyramid, and when such sanctioning kicks in. As noted, the enforcement pyramid, and balance of enforcement measures, could look different across different regulatory regimes. For example, high-risk regulatory activity may have tougher enforcement tools and sanctions compared with lower-risk regulatory activity.

Interest in the role of risk and risk-based approaches to enforcement has grown significantly in recent decades. Risk-based approaches are now a prominent feature of New Zealand's regulatory landscape, having found application in areas such as border security, financial services regulation and food safety.

The central feature of a risk-based approach is the targeting of inspection and enforcement resources based on an assessment of the risk that a person (or firm) poses to the regulatory outcome being sought. This involves a) evaluating the risk that a person will not comply with a regulation; and b) calculating the impact that non-compliance would have on regulatory outcomes (Baldwin & Black, 2008). Such an analysis allows scarce enforcement resources to be targeted at areas with the greatest benefit (ie, areas with the largest 'bang for your (enforcement) buck').

Risk-based approaches place assessment, quantification and monitoring of risk at the heart of regulatory design and implementation (Peterson, 2012). This differs from the 'pyramid approaches' in that the emphasis is on *targeting* enforcement efforts rather than a process of responsive *escalation* (Baldwin & Black, 2008).

Like all approaches to enforcement, risk-based strategies can pose challenges for regulators. For example:

- Public perceptions of risk (sometimes amplified by the media) can place pressure on regulators to increase monitoring above the level suggested by an objective risk assessment (Peterson, 2012).
- By focusing on more significant risks, smaller risks can be overlooked. Without careful management, these small risks can accumulate into a significant threat to achieving the desired regulatory outcome (Baldwin & Black, 2008).
- Because risk-based approaches tend to focus on known or familiar risks, regulators can fail to detect new and emerging risks that may be 'off the radar' (Baldwin & Black, 2008).
- In focusing on highest risk events, regulators can lose sight of the need to achieve the greatest risk reduction ***for the given level of enforcement expenditure***. That is, if the highest-risk-s areas are very costly to enforce, there may be greater net benefit from spending a limited enforcement budget on reducing numerous smaller risks (Baldwin & Black, 2008).
- There may be public resistance towards 'profiling' of potential non-compliers. The public may feel that the application of a risk-based approach violates the principle of natural justice and 'equity before the law'.

Despite these (and other) challenges, risk-based approaches can play a significant role in ensuring that monitoring and enforcement effort is allocated efficiently. The Commission would be interested in hearing from stakeholders the extent to which they believe risk-based approaches are being used by LAs. The Commission would also be interested in hearing of any perceived barriers to the use of risk-based monitoring strategies that are inherent in any existing regulatory regimes.

Q10.1 Are risk-based approaches to compliance monitoring widely used by LAs? If so, in which regulatory regimes is this approach most commonly applied? What barriers to the use of risk-based monitoring exist within LAs or the regulations they administer?

Box 10.1 **Summary of insights from the compliance literature**

The compliance research literature provides some important insights when examining the efficiency and effectiveness of monitoring and enforcement regimes.

- There is a complex set of economic, psychological, and sociological factors that underpin regulatory compliance decisions. Individuals and firms have different motivations based on values, social responsibility, economic rationality, and law-abidingness. These play out in different contexts and situations.
- Some individuals and firms will comply with the law if it is economically rational for them to do so. Most individuals and firms will comply with the law most of the time simply because it is the law.
- A strategy based totally on persuasion will be exploited when actors are motivated by economic rationality.
- A strategy based totally on punishment will undermine the goodwill of actors when they are motivated by a sense of responsibility.
- Punishment is expensive; persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion.
- A strategy based mostly on punishment fosters organised resistance to regulation by business and industry.

- Voluntary compliance is most likely when a regulator displays and applies an explicit enforcement pyramid with a hierarchy of graduated responses to non-compliance; therefore, using less coercive, more compliance, approaches to regulatory enforcement first, and moving to more coercive measures only when less coercive means fail.

Source: Aryes and Braithwaite (1992)

10.4 Monitoring and enforcement in practice

The insights provided by the compliance literature provide a sound conceptual framework for examining monitoring and enforcement of regulations by local government. More specifically it raised the following questions:

- Is the level of compliance monitoring undertaken by LAs sufficient?
- Do LAs have a sufficient range of enforcement tools to allow them to tailor enforcement strategies to the behaviour of individuals? For example, are current penalties sufficient to deter individuals that do not wish to comply with regulations?

This section first provides a general examination of these issues. Their application to the RMA and liquor licensing is then discussed in greater detail.

Is sufficient compliance monitoring taking place?

As noted, for any given regulatory regime the ideal enforcement strategy is likely to differ between LAs. This is because each council is enforcing regulations in the context of its own economic, social and environmental circumstances. These circumstances can have a large impact on the attitude to compliance of people within a council boundary. This in turn impacts the enforcement strategy that best fits the local conditions. Local circumstances will also have an impact on the benefits and costs of monitoring. This is not to say that a consistent *interpretation* of non-compliance is not important, only that the ideal strategies to manage non-compliance may differ.

Given this, general conclusions on the overall 'sufficiency' of compliance monitoring are difficult and must be treated with caution. Nevertheless, the Commission has heard from a range of inquiry participants that monitoring of local regulation is often under-resourced, and that this has undermined the achievement of regulatory objectives.

There are several explanations for why monitoring may be under-resourced. For example:

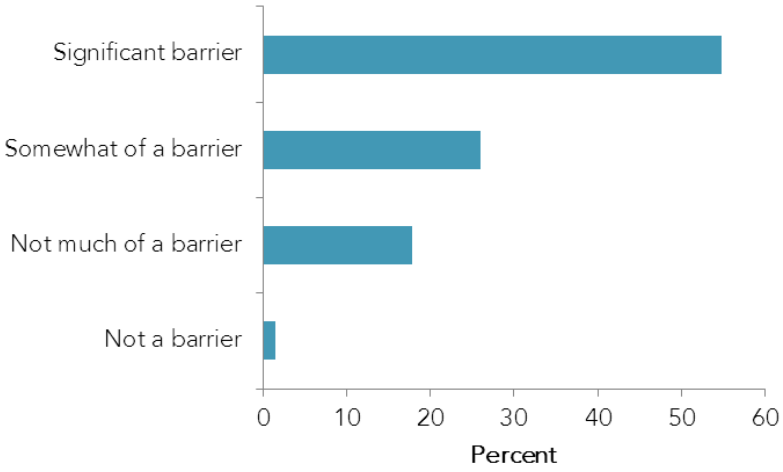
- LAs may lack sufficient funds to undertake monitoring activities. Further, legislative requirements on LAs, such as the need to meet statutory timeframes, may be drawing available budgets away from monitoring towards administrative or process-related regulatory tasks.
- LAs may face weak incentives to monitor compliance when the regulation produces national rather than local benefits. This issue is discussed in Chapter 4.
- LAs may not have the necessary skill set to design efficient monitoring programmes, or qualified staff to undertake these activities.
- LAs may be overestimating the deterrence presented by penalty regimes (ie, the threat of a 'big stick' may not be having the impact that councils believe it is).

While all of these reasons are plausible, there is evidence to suggest that funding pressures are a key driver behind the level of monitoring taking place. The views expressed by the Federated Farmers are indicative of the concerns expressed to the Commission:

> …we reiterate the concern across the board that local authorities lack the appropriate mechanisms to fund the cost of administration, monitoring and compliance for many of their regulatory functions. This in our view has a deleterious effect on regulatory performance. (sub. 26, p.17)

This view is consistent with results from the Commissions' survey of LAs, which indicated that 81% of respondents saw the inability to recover full costs of regulatory functions as a barrier to their implementation. Over half the LAs (55%) saw this as a significant barrier (Figure 10.3).

Figure 10.3 Barriers to successful implementation of regulations – ability to recover full costs of regulatory functions (% of councils)



Source: Productivity Commission

The presence of funding constraints does not in itself prove that insufficient monitoring is occurring. It does, however, highlight the importance of allocating available resources to the uses where they can have the most impact on achieving the desired regulatory outcomes. That is, the importance of allocating available resources efficiently.

Statutory timeframes are a tool used by central government to promote timely administrative processes within LAs. They are commonly, but not always, introduced as a way of reducing the holding costs faced by individuals and businesses. While they are often successful in achieving this aim, whether statutory timeframes result in net social benefits is less clear.

Inquiry participants have suggested that requirements to meet statutory timeframes are distorting the allocation of LAs' regulatory budgets. This occurs as LAs are forced to spend a disproportionate amount of their regulatory budgets on administrative processing in order to meet statutory deadlines. That is, LAs are incentivised to spend more on administrative tasks than they would consider efficient or 'optimal' for their community. The result is that other regulatory tasks (such as monitoring and enforcement) receive less funding than their value would imply. The Ashburton District Council submission notes:

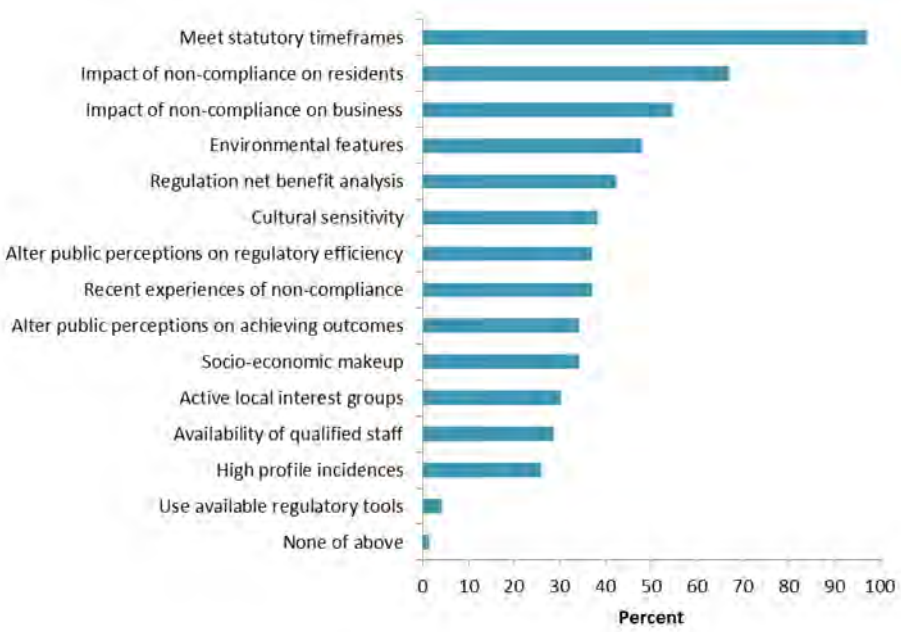
> …there is a risk that in diverting resources to fast track simple consents, statutory timeframes for larger consents may be exceeded. On balance it is difficult to see a compelling cost benefit argument for reducing the consent processing time for the likes of garages from ten days to five. (sub. 40, p.7)

The submission from Hutt City Council notes similar concerns:

> Systems based upon timeframe achievement will only result in timeframe improvements potentially at the expense of quality and effectiveness in achieving the aims of the regulation. (sub. 51, p.16)

Results from the Commission's survey of councils show that statutory timeframes are a key driver of regulatory resource allocation – in fact they were the most commonly cited driver, with over 97% of respondents identifying them as important (Figure 10.4). The effects of non-compliance on residents and businesses were also key drivers for tertiary authorities, while the presence of significant environmental features was an important consideration for regional and unitary authorities.

Figure 10.4 Drivers of resource allocation to regulatory functions



Source: Productivity Commission

It is inherently difficult to know the net impact that statutory timeframes have on the efficiency of a regulatory regime. Indeed, allocating resources in this manner may be an efficient way of encouraging voluntary compliance and avoiding costs to the community associated with workflow bottlenecks. In this regard the Commission notes that 95% of RMA consent applications are now processed within statutory time limits (MfE, 2011).

However, to the best of the Commission's knowledge, the statutory timeframes have been set as standards to drive 'administrative efficiency', without explicit consideration of how it might imbalance local authority regulatory effort away from monitoring and enforcement. This view is consistent with the general observation in Chapter 7 that implementation analysis is a generic weakness of policy analysis in New Zealand.

The Commission is interested in obtaining further information and comment on regulations where the level of monitoring is believed to be insufficient. Information and evidence on the drivers of monitoring shortfalls are also sought.

F10.1 Statutory timeframes for consent processing may have the unintended consequence of diverting resource away from other parts of the regulatory process, especially monitoring and enforcing regulatory compliance.

Q10.2 The Commission wishes to gather more evidence on the level of monitoring that LAs are undertaking. Which areas of regulation do stakeholders believe suffer from inadequate monitoring of compliance? What are the underlying causes of insufficient monitoring? What evidence is there to support these as the underlying causes?

Is there a sufficient range of enforcement tools?

The enforcement triangle highlighted the need for regulators to have a range of enforcement tools at their disposal. Having a range of enforcement options allows regulators to tailor their enforcement strategies to match individual circumstances. More generally, a range of tools is needed to ensure that sanctions are proportional to the offence.

Participants to the inquiry have indicated that local LAs are broadly happy with the enforcement tools they have, a notable exception being a lack of infringement notices (except for some regulations).

> Much of a local authority's regulatory functions are authorised by its bylaws. The Act under which bylaws are made may authorise the local authority to enforce certain provisions in bylaws by the use of infringement offence notices. If not, bylaws must be enforced under the Summary Proceedings Act 1957.
>
> I submit that the enforcement of local authorities' regulatory functions would be significantly more effective and efficient if the use of infringement offence provisions is more widely available than at present. (Richard Fisk, sub. 19, p.1)

Several Acts include a provision for infringement notices for the particular bylaws they authorise (prominent examples include road traffic offences, litter, and certain RMA breaches). There is also a general provision in section 259 of the Local Government Act, enabling the Governor-General to:

> By order in Council, made on the recommendation of the Minister, make regulations for 1 or more of the following purposes:
>
> Prescribing breaches of bylaws that are infringement offences under this Act:

To date no regulations have been made under these provisions. This creates a potential gap in the enforcement regimes of some regulations. That is a missing piece of the enforcement triangle. This point is noted by Civic Futures in its submission to the inquiry:

> The Litter Act 1979 and the Dog Control Act 1996 allow ready imposition of infringement notices (effectively, instant fines), which can be used as a practical enforcement tool for situations that do not warrant full court prosecution. These are not however generally available for bylaws, and this can create a "regulatory gap" between education / warnings (that are often but not always effective) and full prosecution (that may only be appropriate in extreme cases). (sub. 7, p.5)

A practical example of the regulatory gap was provided by Rotorua District Council:

> An example where costs do not meet the needs of enforcing bylaws is in the case of window washers at intersections in the Rotorua district. Currently to enforce this minor offence information must be laid with the Court for 'a minor offence with a fine not exceeding $20,000'. For a minor offence of this kind it would be more fitting and efficient for the ability to issue an on the spot infringement to the value of around $200. (sub. 11, p.17)

Infringement notices are a useful way of issuing an on the spot fine for minor offences. Where they are unavailable, the risk is that either the purpose of the regulation is undermined through non-enforcement, or a disproportionately costly response through prosecution may be undertaken. Both are concerning possibilities.

Submitters told us that:

> Central Government has examined the feasibility of making regulations under section 259 LGA 2002 that would enable bylaws made under that Act to be enforceable by Infringement Notice. It has concluded that it would be too costly to do so because of practical difficulties in drafting these regulations and the need to amend the regulations every time new infringement offence provisions were included in existing local authority bylaws, or in new bylaws made that included infringement offence provisions. (Richard Fisk, sub. 19, p.1)

Views from other submission are noted in Box 10.2.

Box 10.2 **Submitters' views on enforcement tools available to councils**

Whangarei District Council

> The RMA is more legally enforceable but bylaws can be faster to use. However, our council rarely uses bylaws as there is little flexibility contained within their enforcement capacity. There are significant costs in preparing bylaws but in many respects there is little enforcement capacity. Whilst there have been signals about improving tools for enforcement from central government over many years, these have not yet resulted in action. (sub. 10, p.3)

Christchurch City Council

> The Council is concerned that many of the regulatory issues it continually raises in submissions do not get addressed. An example Is the infringement offence provisions in the Local Government Act 2002, which have not yet been made operable. This is an enforcement tool that the Council should be able to use to make it easier to enforce a number of its bylaws, as well as offences under the Act...
>
> Another example of insufficient regulatory tools can be found in those Acts which do not provide for Council officers to require names and addresses of offenders, or if the Act does provide for officers to request names and addresses, then there is no easy way to enforce a situation when someone refuses, An example can be found in the Litter Act 1979. Although a refusal can, of itself, sometimes be an offence, how is the Council to enforce such an offence without a name or address? (sub. 57, p.2).

Gordon George

> Still awaiting drafting of infringement regulations in LGA2002 – been waiting for DIA to draft them since 2003. Essentially it is not high up on their workplan and I got told by DIA that unless enough CEO's said it was a problem then nothing would change – leaves us with either ignoring enforcement, finding alternative sanctions or full blown and costly prosecution. (sub 13, p.1)

In principle, the Commission supports ensuring that there is a suitable range of enforcement measures available to local authorities. It is therefore worthwhile exploring whether greater availability of infringement notices would improve regulatory outcomes. For this first stage of the inquiry the data for such analysis was not readily available. The issue may be examined further for the final report, provided that sufficient evidence and data can be located.

F10.2 Local authorities need a wider range of enforcement methods to ensure they can always take a proportional approach to enforcement.

Q10.3 Which specific regulatory regimes could be more efficiently enforced if infringement notices were made more widely available? What evidence and data are there to substantiate the benefits and costs of doing this?

10.5 Monitoring and enforcement examples

To look at these two issues in more detail (resourcing and the suitability of the range of available tools), the following sections considered two regulatory areas as examples. They are:

- RMA activities or related breaches; and
- liquor licence monitoring and enforcement.

These examples are discussed in turn below.

10.6 RMA monitoring and enforcement

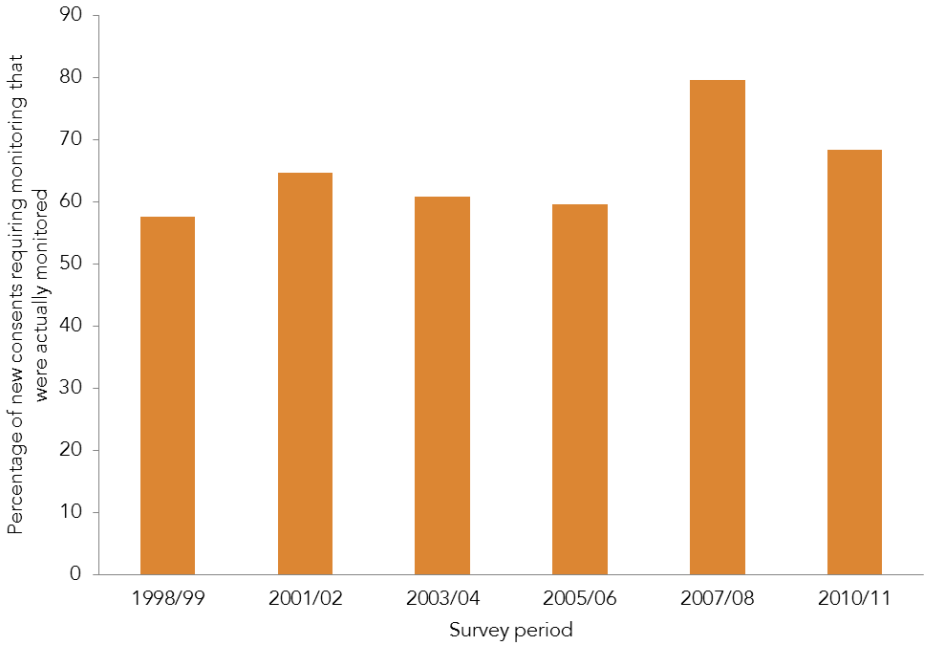
Available data on local authority monitoring levels for resource consents has been examined. The principal source of this data is the Resource Management Act Survey of Local Authorities (RMAS) – a biannual survey conducted by the Ministry for the Environment. The survey collects a considerable level of data on councils' implementation of the RMA – including the area of monitoring, compliance and enforcement.

Monitoring and compliance

The RMAS asks LAs for information on the number of new resource consents that required monitoring (as a condition of the consent), the number of these consents that were actually monitored, and the number for which monitoring showed that a consent holder had not complied with its conditions (MfE, 2011).

Figure 10.5 summarises the survey results for the level consents that requiring monitoring that were actually monitored. It illustrates that while monitoring levels are higher than they were in the mid-2000s, only 68% of consents where monitoring was a condition of the consent were in fact monitored.[44]

Figure 10.5 Percentage of new consents requiring monitoring that were actually monitored, 1998/99–2010/11



Source: 2010/11 RMA survey data and published survey reports for the periods indicated

Notes:

1. The result from the 1999/00 survey period is not provided because it was presented in a manner that did not allow direct comparison.

Table 10.1 provides the MRAS results for level of compliance with the consent condition. The table illustrates that in total 14,380 consents were monitored in the 2010/11 period. Of these, 72% were found to be compliant with the conditions of their consent. Table 10.1 also provides a breakdown of compliance by council type. It illustrates that 77% of consents monitored by regional councils were compliant, 74% monitored by unitary councils were compliant, and 67% of monitored by territorial authorities were compliant.

While a compliance rate around 70% seems like a good result, it may be that people that go through the consenting process are those most likely to comply with their consent conditions. These people act as a barometer for broader compliance. The figures may conceal non-compliance among people that never apply for a consent, that is, people that are not 'in the system' and whose non-compliance is therefore not included in the statistics.

The compliance gap could be explained by one of four things:

- Insufficient monitoring activity (unlikely to be caught)
- Insufficient enforcement activity to act as a deterrent (unlikely, if caught, for significant penalties to be pursued)

[44] Data on the monitoring of older consents was not available.

- Insufficient penalties to act as a deterrent (ie, the penalties are not high enough)
- Fee levels for a consent discouraging compliance, especially if taken with weak monitoring arrangements

Taking both the rates of monitoring of consent conditions, and the drivers for resourcing which would tend to point away from monitoring, it is likely that less than the optimal amount of monitoring is occurring. This may in part reflect the incentives placed on LAs from statutory timeframes, and monitoring being squeezed by other funding priorities such as infrastructure renewal and the need to keep rates down.

Enforcement activity and penalties are discussed below.

Table 10.1 Number and percentage of consents requiring monitoring, those monitored, and their compliance with consent conditions, 2010/11

Consents processed in 2010/11	Consents requiring monitoring	Consents monitored	Percentage monitored	Percentage compliant
Regional councils (n = 11)	6,411	3,538	55%	77%
Unitary authorities (n = 6)	7,659	5,854	76%	74%
Territorial authorities (n = 61)	6,981	4,989	71%	67%
All	21,051	14,381	68%	72%

Source: MfE (2012)

Is there insufficient enforcement activity?

The level of enforcement is closely related to the level of monitoring that occurs. If there is insufficient monitoring, then there is likely to be insufficient detection, and consequently, low levels of enforcement. The Office of the Auditor-General notes that:

> In recent years, local authorities have moved away from informal responses to non-compliance with resource consents towards using stronger and formal enforcement tools.
>
> Nationally, the number of infringement notices issued more than doubled between 2001 and 2008. There were about 600 infringement notices issued in 2001/02, and more than 1500 issued in 2007/08. The numbers of prosecutions taken by local authorities has also more than doubled in recent years – up from an average of 39 each year during the first 10 years of the RMA's implementation to an average of 82 prosecutions each year from 2005 until 2008. Since mid-2001, the largest proportion of prosecutions under the RMA involved discharges to water (or onto land where the discharge could enter water) by the agriculture sector. The size of the fines imposed by the Environment Court has also increased. (OAG, 2011, p.61)

As a preliminary observation, enforcement of resource consents appears increasing (through both formal and informal methods).[45] However, of the formal enforcement options in 2010/11, 81% were Excessive Noise Directions (END). These were almost entirely used in the course of responding to complaints (only one use of an END was for resolving a breach of consent conditions). Put differently, formal enforcement actions to address resource management issues other than noise pollution were less than a quarter of those used to resolving noise complaints.

Accepting that noise complaints, especially in built-up areas, are likely to be greater than other breaches of the RMA, this still intuitively seems like a fairly low ratio for non-noise enforcement.

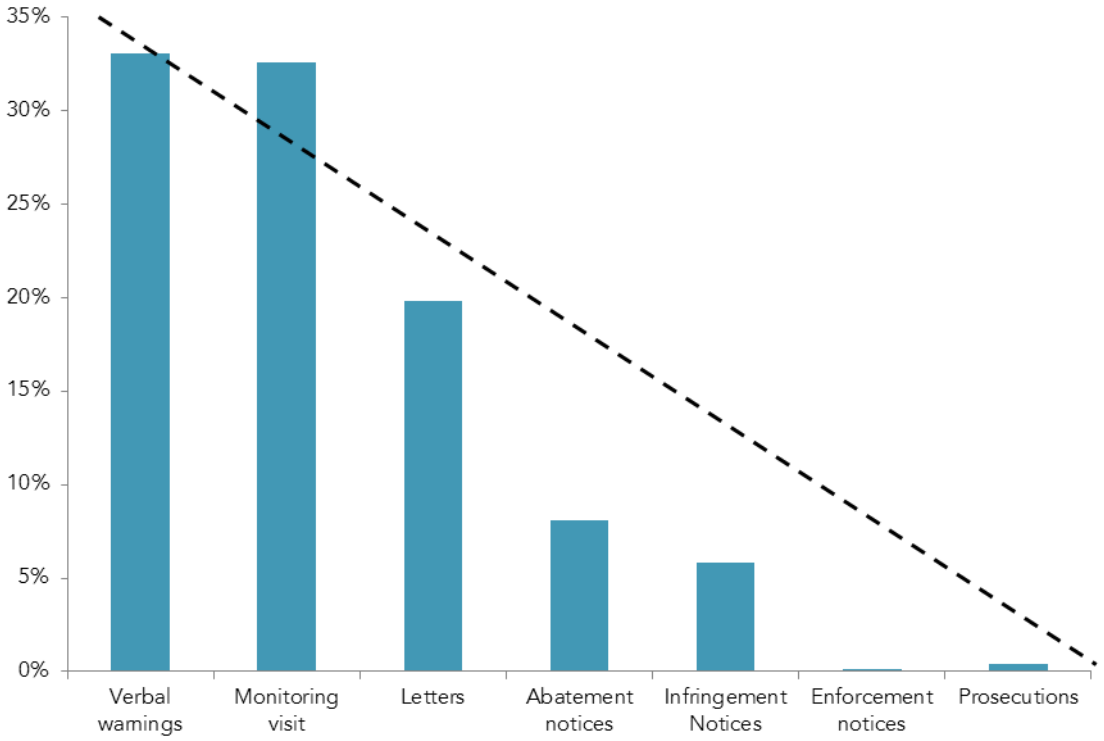
[45] Formal enforcement methods include infringement notices, abatement notices, directions or prosecutions. Informal enforcement methods include verbal warnings, letters and visits.

Q10.4 Is there sufficient enforcement activity occurring for breaches of the RMA, other than noise complaints? If not, what factors are limiting the level of enforcement that is occurring?

Is the range of enforcement actions 'well calibrated'?

Ordinarily the volumes of enforcement activity could be expected to be roughly proportionate to their place on the compliance triangle. That is, there would be a fairly steady gradient of less severe to severe penalties. Figure 10.6 sets out the volume of enforcement activity (informal and formal) that local authorities have used. Excessive Noise Directions were excluded, to show the trend across regulatory areas more clearly.

Figure 10.6 Volume of enforcement actions taken by local authorities in 2010/11, by action type



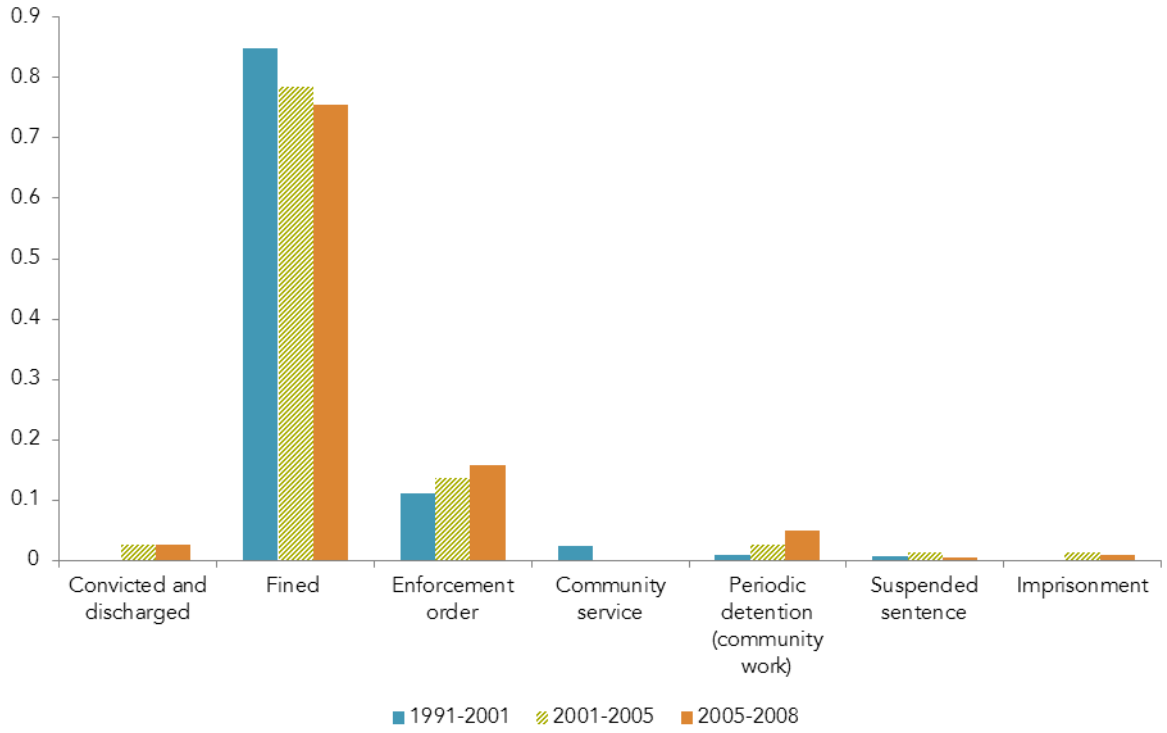
Source: Productivity Commission analysis of results in MfE (2012).

Broadly speaking, the distribution of enforcement actions looks like what would be expected under a compliance triangle model. That said, because of the relatively low number of 'heavier' enforcement actions, it is hard to know whether there are any missing options, or specific weaknesses.

Figure 10.7 provides data on the kinds of penalties resulting from prosecutions for breaches. Several observations can be made from this data.

Firstly, far and away the most common consequence of prosecution is a fine. Secondly, there has been a trend for 'fine only' penalties to decrease as the Court makes more use of enforcement orders and community work over time. This latter may reflect the introduction of restorative justice processes. The trend to make use of more penalties than just fining is also borne out in increased levels of fines.

Figure 10.7 Penalties imposed by the Environment Court, where a conviction has been obtained



Source: Productivity Commission analysis of data in MfE (2002), MfE (2006) and MfE (2009).

Environment Court judges have noted in their judgments the need for greater deterrence as the level of fines imposed in previous years had been insufficient to deter non-compliance. For example, in *Waikato Regional Council v Plateau Farms Ltd*, His Honour Judge Thompson in sentencing the defendant said:

> I have mentioned the issue of deterrence more than once before. What can be said with certainty in terms of sentencing levels is that of recent times, the Court has been expressing concern that the messages about environmentally responsible farming, and dairy farming in particular, do not seem to be being universally heard.
>
> The Court is well aware that there are substantial efforts at education of farmers to their responsibilities and the major dairy companies have been very much involved in that.
>
> The Court's response, particularly over the last two to three years I think it is fair to say, has been an attempt to drive that message across by increasing the general level of fines imposed for significant offences, particularly where they are committed by substantial farmers.

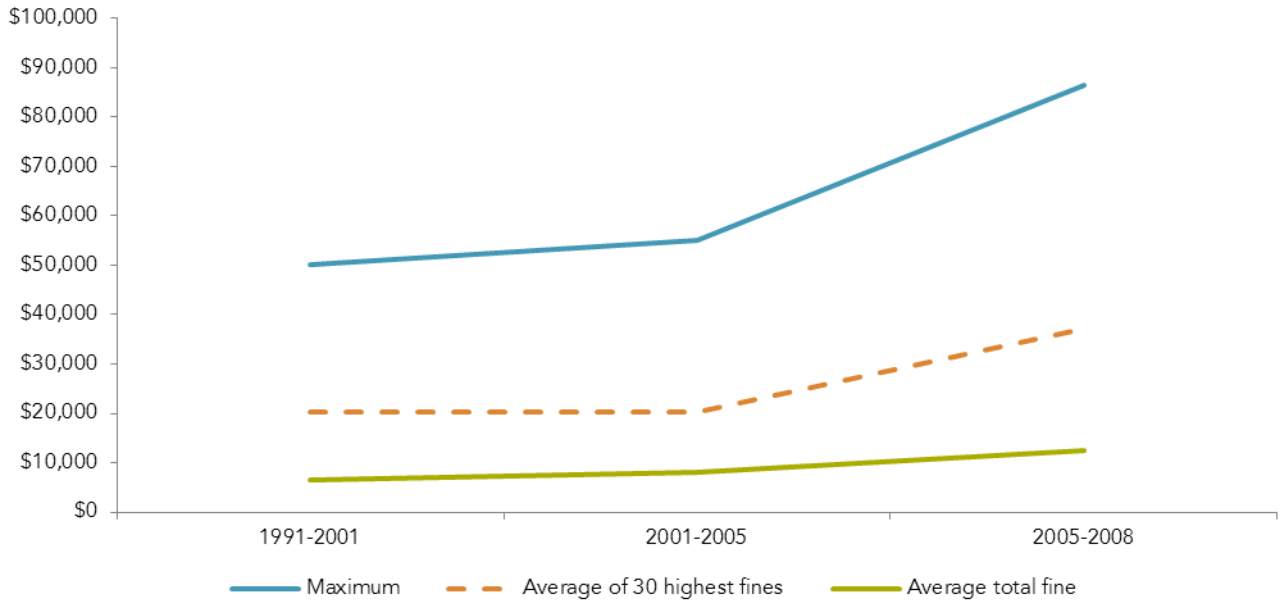
Similar observations were made by Judge McElrea in *Auckland City Council v Rakesh Kumar Sharma and AVR Enterprises Ltd*:

> The cases that are canvassed by council point in different directions. This is partly due to the fact that the cases relied upon by defence council tend to be older cases, often 10 years older or more, and several Environment Court Judges have commented, as have a number of High Court Judges, that the overall level of fines to be expected under the Resource Management Act has increased significantly in recent years.

This need for greater deterrence suggests either that there is indeed a necessity for heavier penalty options at the more severe end of the spectrum, or may suggest that early intervention or softer processes are proving ineffective at catching and disincentivising non-compliance before it becomes too severe.

Figure 10.8 shows this trend towards greater fines for the most significant non-compliance. The 'average total fine' line is much lower than the maximum. This suggests that there is a significant number of much smaller fines that make up the bulk of fines for breaches of the RMA.

Figure 10.8 Trends in the levels of fines imposed by the Environment Court upon conviction for breaches of the RMA



Source: Productivity Commission analysis of data in MfE (2002), MfE (2006) and MfE (2009).

Taken together, these factors may point to the need for a new enforcement mechanism for imposing low to moderate fines that can be applied more readily than prosecution. Concerns were raised with the Commission that the current infringement notices can be treated as a cost of business by some, because of the relatively low size of the fines involved. Given this, there may be merit in reviewing the size of the fines imposed by infringement notices.

This needs to be balanced by the desirability of higher fines being imposed administratively. As well, there may simply be a tipping point – the larger the infringement offence, the more likely that it will have to be defended in Court. In practice, there may be no real merit in increasing the fines imposed by infringement notices, for all that it looks intellectually neater.

When taken with potential under-monitoring, it is no surprise that the maximum penalties imposed by the Environment Court are going up, explicitly to increase the deterrent effect. The Commission is interested in whether an earlier intervention strategy, involving increased monitoring and the more readily available moderate penalty regimes, might not deliver better outcomes.

Q10.5 Should the size of fines imposed by infringement notices be reviewed with a view to making moderate penalties more readily available? What evidence is there to suggest that this would deliver better regulatory outcomes?

10.7 Liquor licensing monitoring and enforcement

Liquor licence monitoring

Monitoring of liquor licences is an issue that can generate significant community interest and debate. The Commission is currently compiling data in this area; however, further input, evidence and data are sought from stakeholders on the adequacy of liquor licence monitoring.

Q10.6 Is sufficient monitoring of liquor licences occurring? What evidence and data exists that would provide insights into the adequacy of current monitoring effort?

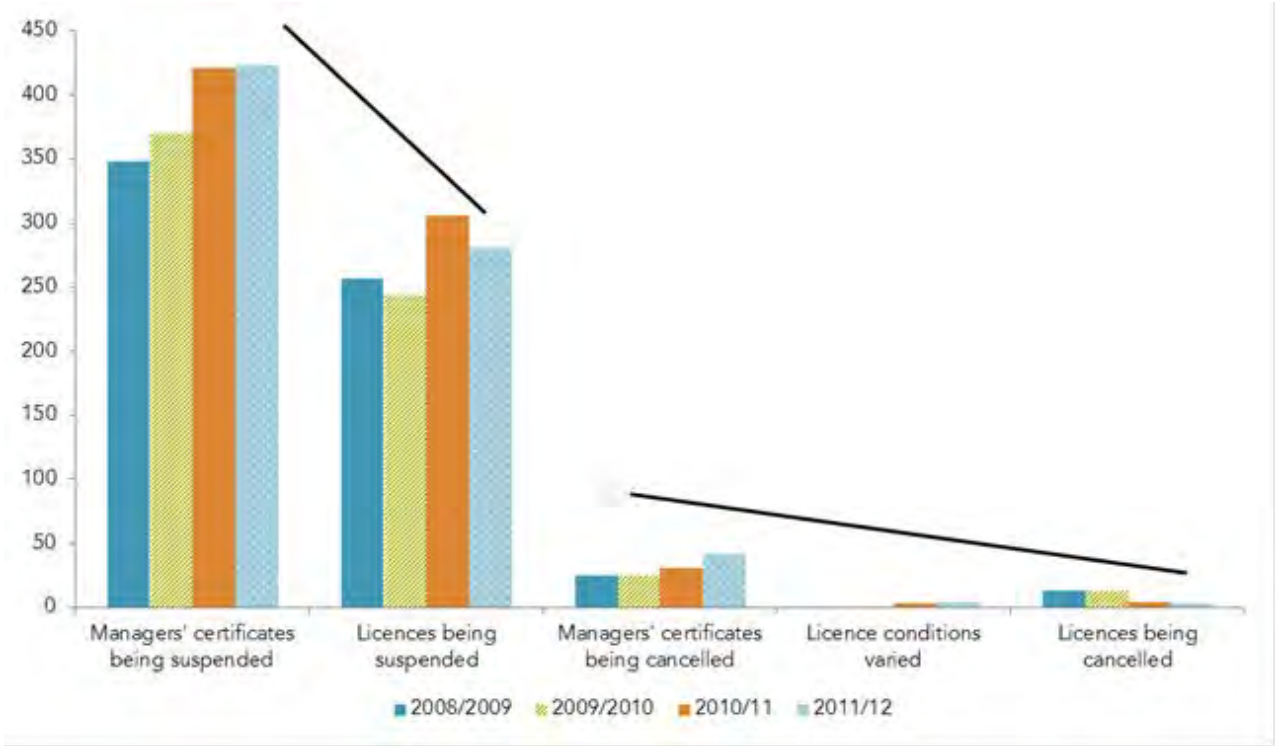
Liquor licence enforcement

As noted above, ordinarily the volumes of enforcement activity could be expected to be roughly proportionate to their place on the compliance triangle. That is, a fairly steady gradient of less severe to severe penalties is expected.

Figure 10.9 provides information on the results of applications for enforcement action (usually by local authorities or the police) to the Liquor Licence Authority. It illustrates that there is a significant reliance on the 'softer' penalty categories, and much less use of the more moderate and significant penalties. That said, the severity of licence suspensions can vary, depending on its duration and which days of the week the licence is suspended for. The distribution of enforcement actions is somewhat different to the kind of gradient we would usually expect, given compliance triangle theory.

The data by itself does not point to a particular problem of regulatory implementation. For example, it might be the case that local authorities undertake insufficient monitoring to build the evidence base for the stronger kinds of enforcement action. Or it might be that there are insufficient moderate options for enforcement, such that local authorities use the 'softer' options to try not to overstep proportionality. Alternatively, the softer penalties may act as sufficient deterrents for breaches of licence conditions such that significant non-compliance rarely occurs. The Commission welcomes observations from practitioners and business on the sufficiency of liquor licence monitoring and enforcement.

Figure 10.9 Results of applications to the Liquor Licensing Authority for enforcement actions



Source: Productivity Commission analysis of data in Liquor Licensing Authority annual reports to Parliament 2008/09–2011/12.

Q10.7 How high is the burden of proof for each kind of enforcement action? Is it proportional to the severity of the action?

Q10.8 Is the different 'gradient' in the use of compliance options because there are missing intermediate options?

Q10.9 Are the more severe penalties not being used because there is insufficient monitoring activity by local authorities to build sufficient proof for their use?

Q10.10 Why are relatively few licences varied?

11 The cost impact of local government regulation on businesses

Key points

- Regulation is important in achieving broader social, environmental and economic goals that underpin wellbeing. It is also part of doing business and can have a major impact on a business's productivity, profitability and growth. Poorly designed and inefficient regulation can lead to unnecessary and excessive regulatory costs that have wider impacts on productivity and wellbeing.
- The same regulations will affect businesses differently. For example, small businesses may not have the same capability as larger ones to monitor new regulatory requirements, identify how such requirements impact on them, and manage on-going compliance.
- Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business. Understanding the regulatory process from the customer's point of view is important in keeping compliance costs to a minimum and needs to be considered in administrative design.
- The regulatory impact and compliance costs arising from any regulation cannot be thought about in isolation. The cumulative effect of regulation – that is, the impact of an additional regulation to the existing stock of regulation of business – is an important consideration in regulatory design.
- The Commission's survey of businesses showed that almost three quarters of businesses had at least some contact with local government through the regulatory process. Of those that did:
  - 39% report that local government regulation places a significant financial burden on their business.
  - Nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large (and nearly half were neutral or disagreed), and 70% of respondents were dissatisfied with the fees charged.
  - 'Planning, Land Use or Water Consents' and 'Building and Construction Consents' have the greatest cost impact on businesses. Both of these local government regulatory areas are typically associated with new projects such as expanding or building something from scratch.
  - Around 40% of surveyed businesses had contact with the local council over four or more separate regulatory areas.
- The business survey also asked businesses to compare the overall compliance costs of local government regulation with other regulations administered at the central level. 64% of business reported that complying with local government regulation has a greater cost impact than complying with tax regulations (PAYE, GST and business income). Only 12% reported that it has a greater impact than complying with employee superannuation schemes.

Regulation is important in achieving broader social, environmental and economic goals that underpin wellbeing (Chapter 1). This chapter focuses solely on the costs of regulations. While regulations obviously seek to achieve some public interest objective, poorly designed and inefficient regulation can lead to unnecessary and excessive regulatory costs that have wider impacts on productivity and wellbeing (Nicoletti and Scarpetta, 2003). The purpose of this chapter is to examine more closely the regulatory costs that impact on business and provide insights into those regulations that impact most on businesses' cost

structures. This can help provide a guide for targeting efficiencies. This chapter does not undertake a cost-benefit analysis of regulations.

11.1 Understanding regulatory costs

Regulation is part of doing business and can have a major impact on a business's productivity, profitability and growth (see for example, Crafts, 2006; and OECD, 1997). It is therefore important to understand the impact of local government regulation on businesses. The results from the Commission's survey of businesses show that while some businesses have little or no contact with local government on regulatory matters, the businesses that do have contact can face significant regulatory costs. This underlines the importance of identifying efficiencies in local government regulations.

First, it is useful to be clear about what is meant by regulatory costs. Regulatory costs are typically thought about from three perspectives: administrative costs, compliance costs and wider economic costs.

Administrative costs

There are resource costs associated with administration – that is, the costs of running the regulatory regime. These include the cost of formulating standards, monitoring and enforcing compliance, adjudication and review. These costs are generally recovered through charges and fees, or through taxes or rates.

Compliance costs

These are the costs borne by individuals, businesses and industries in meeting regulatory obligations. They may be direct, comprising the various costs incurred in interacting with government – the so-called 'red tape' or paperwork costs. They are also the indirect costs that arise when individuals and businesses need to change the way they do things in order to comply. This may occur through buying in specialist technical services to satisfy regulatory obligations (for example, legal advice, engineering, laboratory and archaeology services, and urban design). Other examples include increasing liability through the establishment of new legal obligations (which may result in higher insurance premiums), holding costs associated with delays in regulatory processes, and changing production procedures generally. Most of these costs are borne by businesses and can ultimately be passed (at least in part) onto their customers.

It is important to note that businesses vary in their ability to discover, interpret and comply with regulation. Small businesses in particular may struggle to keep abreast of, and develop appropriate strategies for, complying with increasing or changing regulatory requirements. These differences will influence both the quantum and distribution of impacts that need to be taken into account during the design of regulation (MED, 2009).

Economic costs

The wider economic costs of regulation can detrimentally distort the behaviour of individuals and businesses. These effects are less tangible and can arise when regulation impairs competition (for example, by creating barriers to market entry or stifle innovation and entrepreneurship (for example, by placing constraints on the choice of production techniques) and generally restrains economic activity by, for example, increasing the risks and uncertainty associated with a particular investment or course of action. Such unpredictability associated with regulations and their enforcement can encourage businesses to be 'static' rather than 'dynamic' in their decision-making with a dampening effect on investment and innovation (see for example, Marcus,1981; Department for Business Enterprise and Regulatory Reform, 2008). These effects are often hidden as projects are not undertaken, or are undertaken at a smaller scale than they would have been.

11.2 Compliance costs are real for business

Through the inquiry submission process, and engagement meetings with business, the Commission heard that, for some, the compliance costs associated with local government regulatory requirements can be substantial:

> […Compliance] costs vary enormously from council to council, in some cases adding 50% to the cost of our process for an entire home making it unaffordable for many of our customers, increasing our overheads and stifling the growth we should be experiencing particularly within the current drive towards increasing the efficiency and quality of New Zealand's housing stock. For example, an installation of $50 worth of insulation into the exterior walls of a residential building in the Horowhenua region attracts a consent application fee of $750, with an additional inspection and processing fee. (Airfoam Wall Insulators, sub. 46, p.1)

The cost of regulatory compliance can also have an impact on the compliance behaviour of businesses:

> [The] cost of compliance is seen as a barrier to the consumer and therefore leads to activity being undertaken which is non-compliant. Affordability is a major factor which influences the ability of local government to maintain a high level of compliance in the regulatory environment. (LGNZ, sub. 49, p.7)

And lead to uncertainty:

> The time taken before new plans and plan changes become operative can be problematic, and can lead to uncertainty in applying for resource consents and designations. (Electricity Networks Association, sub. 12, p.2)

The cost of delay in regulatory processes, approvals, and formalities, along with the cumulative cost of regulation, were highlighted to the Commission as having a particular impact on business that, in some cases, can be substantial.

The costs of delay

The holding costs associated with delays in obtaining responses and decisions from local authorities were raised by business as an important issue. An example of holding costs is where a business purchases a piece of land for $1m to build a new factory, and the RMA process takes 2 years instead of 1 year, the business bears the cost of holding the land (for example, interest charges, opportunity cost, and lost potential revenue for an extra year). Holding costs can be much larger than council fees and other costs (Box 11.1).

Box 11.1 **RMA case study: The costs of delay**

The case study involved redeveloping a heritage building on a high-profile site in a small but busy service town with a growing and diversifying population. The outcome will be a mix of small retail and office activities. The previous occupant was a bank and a residential unit. The proposal is for a bank branch and shops with offices above.

Despite early consultation and negotiation for almost ten months prior to lodging the application, the final matters have not been resolved one year on. Much of the delay has been over matters of detail in response to a discretionary consent. To illustrate the time cost in monetary terms, an expectation for, say, a 7% gross return suggests $280,000 gross annual income from the redevelopment on an investment of $4m. A delay of a year in the development programme would, if discounted at 7%, effectively cost the project $262,000. This compares with the council fees associated with this project of $20,000.

When dealing with multiple regulations, sequencing costs can also be important. This is where a business may have to wait for one approval before it applies for another. For example, a bar may have to invest in a fit-out of their premises, in order to obtain a building consent, thereby enabling them to apply for a liquor licence (Box 11.2). If the liquor licence is declined they may have incurred costs they cannot be recovered (sometimes called 'sunk costs'). This can again result in holding costs (and the loss of options), and makes investing risky.

Box 11.2 **Compliance costs example – Calendar Girls Wellington venue**

During April and May 2012, media coverage was given to the Calendar Girls Wellington venue and the delays and difficulties faced in gaining several necessary council consents. The case illustrates several ways regulation can impose business costs:

- *Uncertainty and sequencing of regulations* – the club was required to gain building consent before it could be granted a liquor licence. This meant that fit-out cost had to be incurred before there was any certainty that the business could operate.
- *Holding costs* – because the liquor licence was eventually opposed, it could not be addressed locally but had to be referred to the national Liquor Licensing Authority. This incurred costs to the business from a 4 to 6 week delay.
- *National consistency* – the licence appears to have been contested on the basis that the proprietor is unfit to hold a liquor licence. However, the proprietor already held two licences in Auckland.

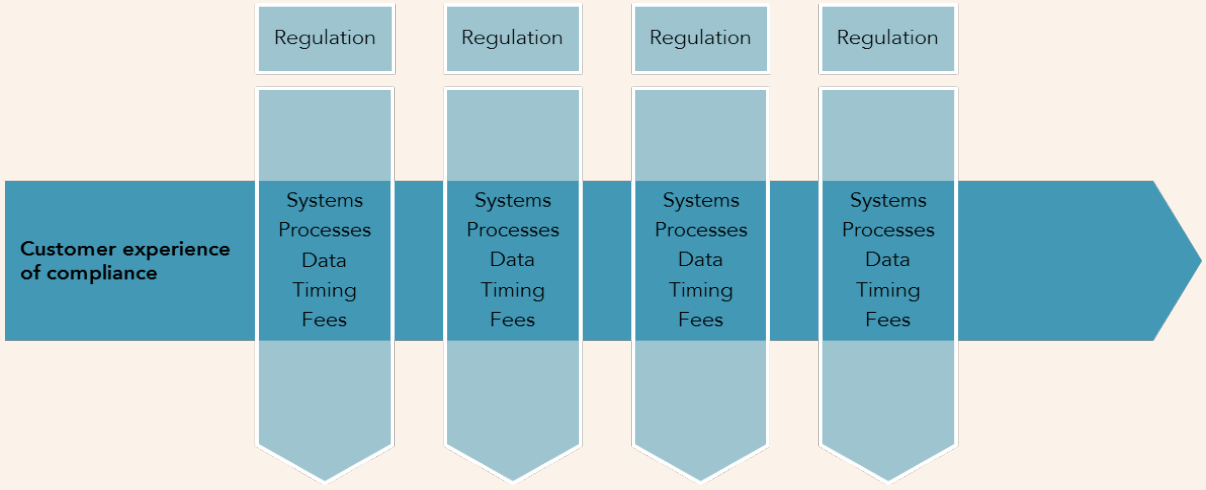
It is therefore important that the different regulations applying to the same business activity are horizontally aligned. Understanding the regulatory process from the customer's point of view is important in keeping compliance costs to a minimum and needs to be considered in regulatory design.

F11.1 Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business.

The cumulative impact of regulation

The regulatory impact and compliance costs arising from any particular regulation cannot be thought about in isolation. The cumulative effect of regulation that is also important. Other things being equal, the cumulative nature of regulatory impacts means each additional unit of regulatory cost becomes more difficult for businesses to bear. Therefore, when a new regulation is introduced, it will add to the regulatory costs already being met (Box 11.3). More technically, this means that businesses face a rising marginal cost with respect to the compliance costs they incur as these costs increase with successive layers of regulation. It is therefore important that the cumulative impact of adding to the existing stock of regulation impacting on businesses is considered as part of administrative design process (Chapter 7).

Box 11.3 **The cumulative impact of regulation**



Source: Ernst and Young, 2012, p13.

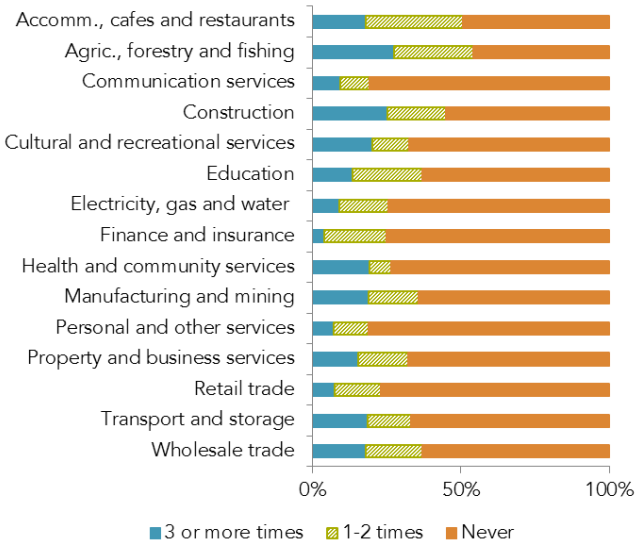
11.3 Understanding business impacts: What did the survey say?

The feedback the Commission received during engagement meetings was that the extent of the cost impact of local government regulations reflects the industry a business operates in and, potentially more importantly, whether the business is attempting to do something new or not. For example, an existing non-food retailer who rents their premises and is not looking to expand is likely to have minimal contact and costs associated with local government regulations. In contrast, a business in the food industry or a business wanting to build a new production facility that requires RMA consent is likely to encounter significant local government costs.

The results of the Commissions survey of businesses on their experiences with local government support these broad drivers of local government regulatory costs at the business level. Of the 1500 businesses surveyed[46], almost three quarters had at least some contact with local government through the regulatory process. Around 40% of surveyed businesses had contact with the local council over four or more separate regulatory areas.

In general, most regulations impact on at least some businesses across a number of industries. For example, 'planning, land use or water consents', 'building and construction consents' and 'parking and traffic control' impact on businesses operating in all industries (Figure 11.1 and Figure 11.2). However, in addition to these generally applicable regulations, the survey results indicate that the impact of particular regulations fall on businesses in certain industries disproportionately. For example, 'food safety' regulation falls disproportionately on businesses in the accommodation, cafes and restaurants industry whereas 'water quality and monitoring' regulation predominantly influences businesses in the agriculture, forestry and fishing industry.

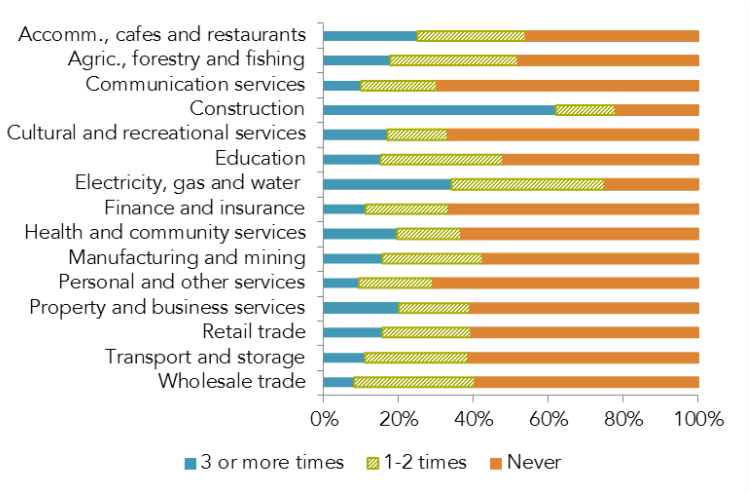
Figure 11.1 Survey result: Number of times your business had contact with a local council for planning, land use or water consents in the past three years (% by industry)



Source: Productivity Commission

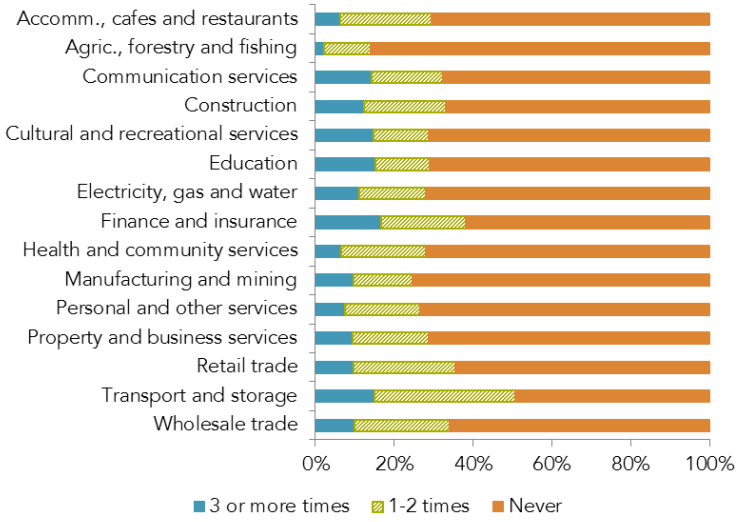
[46] 1546 businesses were asked to participate. If sampled firms refused to respond to the survey or were not eligible for the sample selection, additional firms were selected to meet the sample size. So the response rate was 100%.

Figure 11.2 Survey result: Number of times your business had contact with a local council for 'Building and Construction Consents' in the past three years (% by industry



Source: Productivity Commission

Figure 11.3 Survey result: Number of times businesses had contact with a local council for 'Parking and Traffic Control' in the past three years (% by industry)



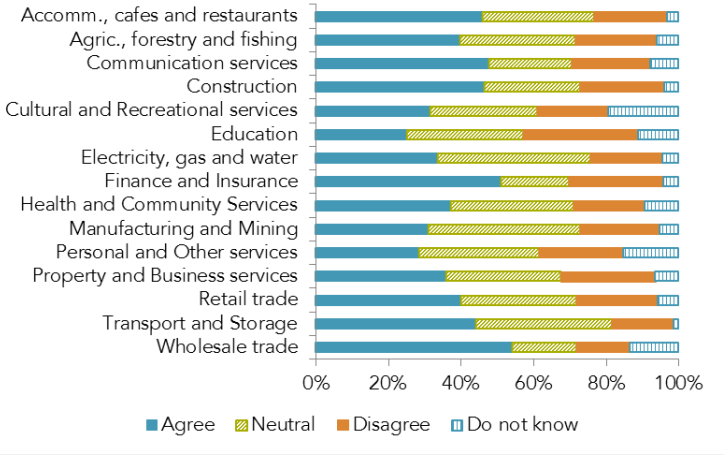
Source: Productivity Commission

Local government regulation can be costly

Of the businesses that had contact with a local council, 39% report that local government regulation places a significant financial burden on their business whereas 27% are neutral and 24% assess the financial impact of local government regulation as insignificant (Figure 11.4). The survey results indicate that 'Planning, Land Use or Water Consents' and 'Building and Construction Consents' have the greatest cost impact on businesses. Specifically, of the businesses that assessed local government regulations (not rates) as financially burdensome, 41% and 19% ranked 'Building and Construction Consents' and 'Planning, Land Use or Water Consents' respectively as having the greatest financial impact.

Both of these local government regulatory areas are typically associated with new projects such as expanding or building something new. High costs in these areas may have a 'chilling effect' on investment. As such, the survey may underestimate the true financial impact of council costs on businesses given that compliance costs may discourage some businesses from undertaking new projects and thereby avoid contact with local councils.

Figure 11.4 Survey result: Local government regulations (not rates) place a significant financial impact on my business

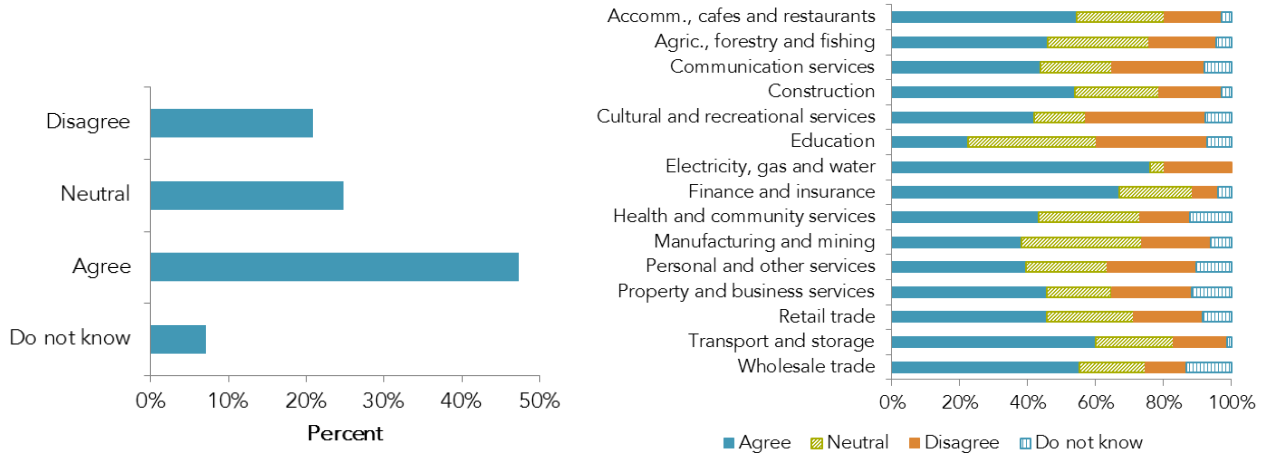


Source: Productivity Commission

The time and effort required to comply

The results of the Commission's survey of businesses show that nearly half thought the time and effort involved in complying with local authority regulations is to large (and nearly half were neutral or disagreed).

Figure 11.5 Survey result: The time and effort to comply with council regulation is too large



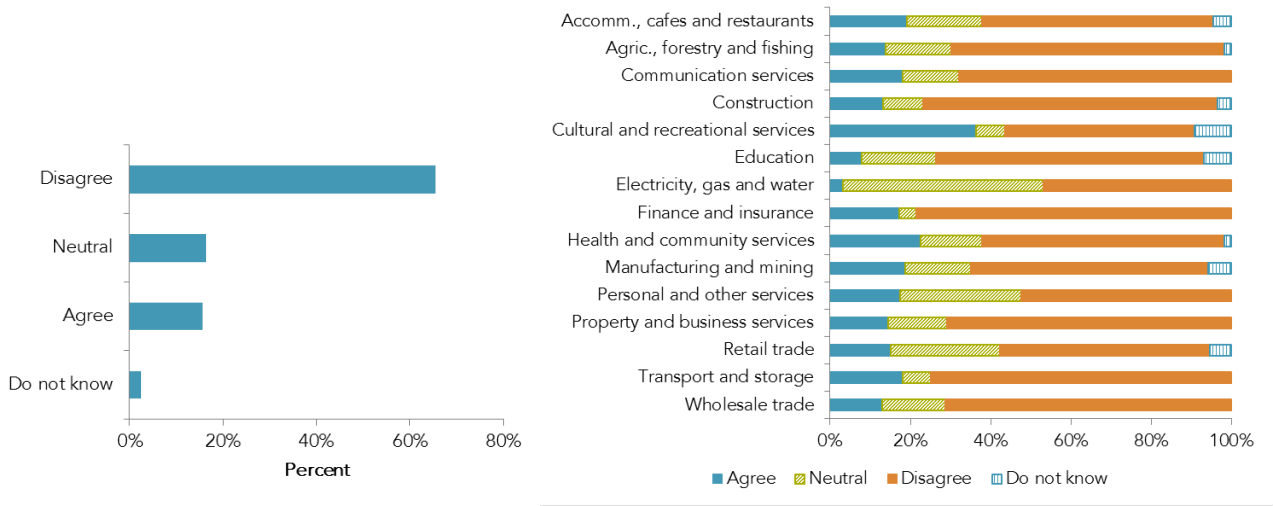
Source: Productivity Commission

There was a particularly strong negative reaction to this issue from the electricity industry. This may in part be explained by the fact that, as infrastructure providers, lines companies are designating authorities under the RMA, and can require land to be zoned for their purposes. Appeals against these designations are seldom successful, but are resource intensive. The Commission was told by one lines company that 50% of the cost of a new substation can be the resource consent, despite them being a designating authority. Other industries particularly affected by resource consents (construction and agriculture) were fairly evenly split between those that agreed with the statement and those that disagreed.

That said, one inquiry participant noted that, at least for resource consents, the costs and delays involved in the process have less to do with local authorities, and more to do with the ability of applicants to muster sufficient evidence about the likely effects of their application. The time taken to produce robust evidence on effects was therefore the real constraint on speeding up the resource consenting process, rather than local authority efficiency.

The majority of survey respondents disagreed with the statement that "the fees charged by the council for regulatory functions were reasonable."

Figure 11.6 The fees charged by the council for regulatory functions were reasonable



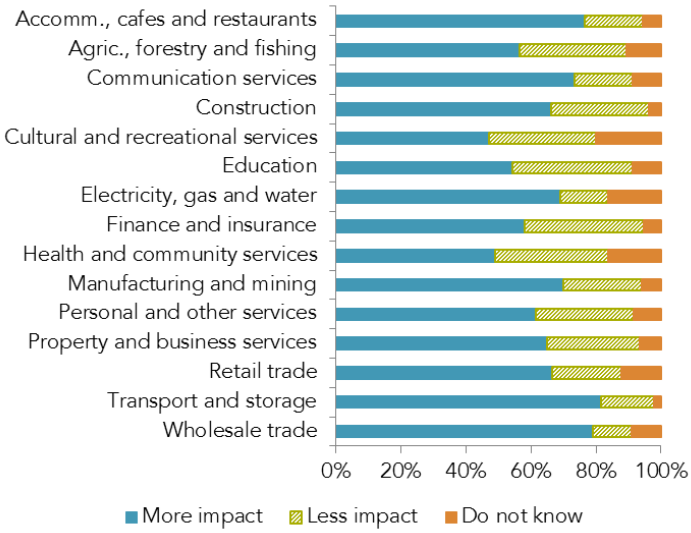
Source: Productivity Commission

How do compliance costs compare with central government regulation?

The business survey also asked businesses to compare the overall compliance costs of local government regulation with other regulations administered at the central level. 64% of businesses reported that complying with local government regulation has a greater cost impact than complying with tax regulations (eg, PAYE, GST and business income). While only 12% of businesses reported that complying with local government regulations has a greater cost impact than complying with employee superannuation schemes. (Figure 11.7).

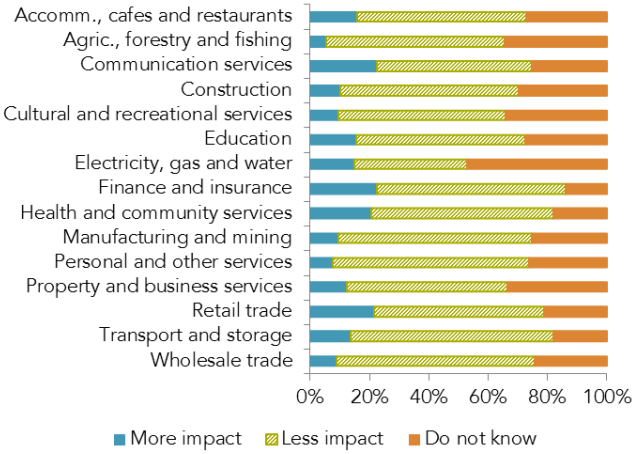
Figure 11.7 Survey result: Compliance costs of central government compared with local government

a) Compliance with tax regulations (PAYE, GST and business income tax)



Source: Productivity Commission

b) Completing paperwork associated with employee superannuation



Source: Productivity Commission

F11.2

The Commission's survey of businesses showed that almost three quarters of businesses had at least some contact with local government through the regulatory process. Of those that did:

- 39% report that local government regulation places a significant financial burden on their business.
- Nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large (and nearly half were neutral or disagreed), and 70% were dissatisfied with the fees charged.
- 'Planning, Land Use or Water Consents' and 'Building and Construction Consents' have the greatest cost impact on businesses. Both of these local government regulatory areas are typically associated with new projects such as expanding or building something new.
- Around 40% of surveyed businesses had contact with the local council over four or more separate regulatory areas.

12 Making resource management decisions, and the role of appeals

Key points

- With the introduction of the RMA in 1991 many resource management decisions underwent a transition to a strongly devolved decision-making system with a strong element of public participation. The devolved tenet of the RMA was introduced alongside largely unaltered appellate structures.
- The Environment Court is an appellate court; its workload is largely generated by decisions of local authorities. The RMA gives the Court the power to render judgement on any aspect or instrument in the planning process and resource consent system (but not National Policy Statements, NPSs). Appeals are heard on a *de novo* basis, which means the Court hears evidence afresh and comes to its own decision on the merits of the case.
- Only a small proportion, around 2%, of RMA decisions reach the Court. Of those decisions, some of them may have a substantive impact with respect to plans, large consents or establishing precedent.
- Some weaknesses and perverse incentives and outcomes have been identified by parties to the RMA decision-making processes.
- Given the Legislation Advisory Committee's (LAC) general observations on the choice of appellate procedures, the use of hearings *de novo* in the RMA stands out as unusual. The LAC guidelines note "An appeal by way of re-hearing is the appropriate procedure in most contexts. It is more expeditious than a hearing *de novo* because it focuses on specific alleged errors, but not as restrictive as an appeal *stricto sensu*. Indeed, an appeal should focus on specific alleged errors."
- The debate on RMA appeals processes appears to have centred on 'extremes' – *de novo* versus appeals on points-of-law (or even removing the Court altogether).
- The debate on the appellate procedures under the RMA would benefit from more explicit consideration of some of the options in between the extremes, notably those included in the LAC guidelines. Looking at statutes that bear resemblance to the RMA, the option of re-hearing appears to warrant consideration. Also, who should have legal standing appears to warrant further consideration.
- If the devolved decision making by local authorities is still favoured, it appears timely to revisit the RMA appellate procedures. A different set of appeals procedures may incentivise public participation in the policy-making process at the local level, rather than litigating to create regulatory policy.

12.1 Introduction

The RMA and regulation made under it was at the heart of many of the concerns raised with the Commission. This is unsurprising, given both the costs involved on the one hand, and the costs of regulatory failure on the other. Regulations made under the RMA are perhaps the most significant regulatory responsibilities local authorities have (see Chapter 5).

Because it is a significant area of policymaking discretion for local authorities, the Commission has elected to examine the regulation making process separately. The terms of reference explicitly require the

Commission to examine the decision-making and appeals mechanisms for local regulations. For this reason, the involvement of the Environment Court in reviewing or making local regulations has been considered.

Although the language of RMA rules are 'plans' and 'policies', the Commission considers these things to be regulations, as they set the conditions and limits on what individuals can do. The language of 'plan' and 'policy making' is used when talking about regulation-making in this chapter, to be consistent with the language of the RMA.

Appealing a local government decision through the Environment Court far from guarantees a positive outcome for the appellant. It is usually only worth trying if there is a lot at stake. This means that appeals to the Environment Court are limited to the most significant matters – plan and policy changes, and some large resource consents generally. Because of how it will affect various parties interests it will often be apparent that the matter will be going to the Court before the local decision-making process is fully commenced. In turn, this can disincentivise full participation in the policy process, to preserve resources and best information for the Environment Court ('keeping one's powder dry').

There are several features of the appeals process that can influence this behaviour. The *de novo* nature of appeals, and the range of interests that can appeal can all affect the likelihood that any given decision will be appealed.

By the same token, the quality of local decision making and the way the process is implemented can affect the public's confidence in the process, and the likelihood they will use it. At present, how effective the policy process is can be somewhat 'masked', because affected parties do not always participate to their fullest.

This chapter considers the process of local decision making and recent developments and suggested changes to the RMA. It also reviews the volume and composition of appeals as well as the appellate procedures that determines the role of the Court.

12.2 The local authority regulation-making process under the RMA

The local authority regulation-making process has been criticised from a number of perspectives, several of which are considered below. As well, there has been much review of the RMA regulation-making process recently. The Land and Water Forum's proposed model for regulation making is currently under consideration, and is outlined here.

The plan preparation processes

'Local' regulation is subject to a prescribed plan preparation process (Part 5 and Schedule 1). This involves monitoring the state of the environment to determine issues requiring intervention, subjecting those issues to strategic evaluation by way of defining objectives and policies, and subjecting the methods by which they are to be advanced to formal Section 32 analysis. Proposed plans are then subject to consultation with provision for submissions to be heard by the council prior to decisions being made. (The same process is applied to the review of an existing plan or an amendment to it by way of a plan change).

Section 32 requires that before public notification of plan, a council must evaluate:

(i) the extent to which each objective is the most appropriate way to achieve the purpose of the Act; and

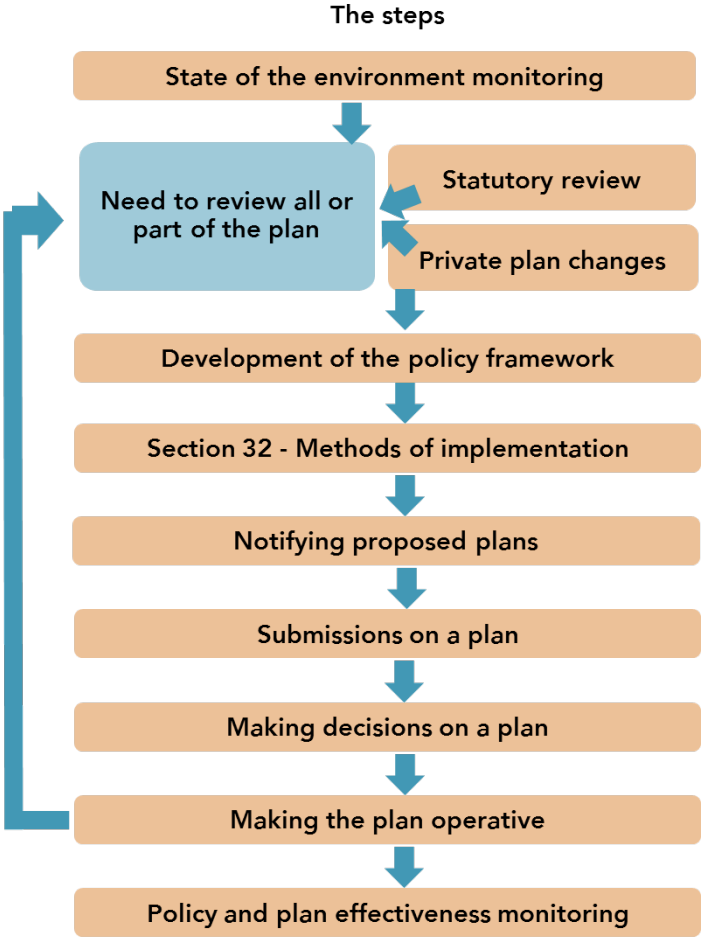
(ii) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods in the plan are the most appropriate for achieving the objectives.

This may be seen as equivalent to a Regulatory Impact Statement prepared in support of central government legislation. In addition, there is potential for significant public input into the process through provision for submissions on proposed plans and then appeals to the Environment Court on components of it.

Plans are informed not simply by national standards and policy guidelines, but also, within the context of the RMA, by local environmental matters influencing or impacting on the integrated management and use of land. These are defined in plans by objectives, policies, and the methods selected to address them.

In summary, plan preparation is the method by which councils identify levels and forms of regulation for different resource uses in different localities, and the specific matters affected. It provides the rationale for local regulation and sets out how it is to be implemented. Plan making is generally rigorous and resource-intensive. It may take considerable time and impose substantial costs on communities as a result.

Figure 12.1 The plan making process



Source: Quality Planning Website: http://www.qualityplanning.org.nz/plan-development/

Perspectives on local decision making

Regulatory agility

In her 2011 report on management of Freshwater Quality the Auditor-General noted that:

> Staff throughout the regions told us that the speed of getting policy through the RMA planning process is frustrating and cannot keep up with the speed of changes to the factors affecting water quality. The rapid growth in the dairy sector is a good example, with planning documents not allowing for the increase in the cumulative effects of non-point source discharge. (OAG, 2011, p.57)

Of the four plan changes relevant to the regional councils audited, two had taken 10 years, and one 7 years and ongoing under appeal (no timeframe was given for the fourth). However, the Auditor-General also noted

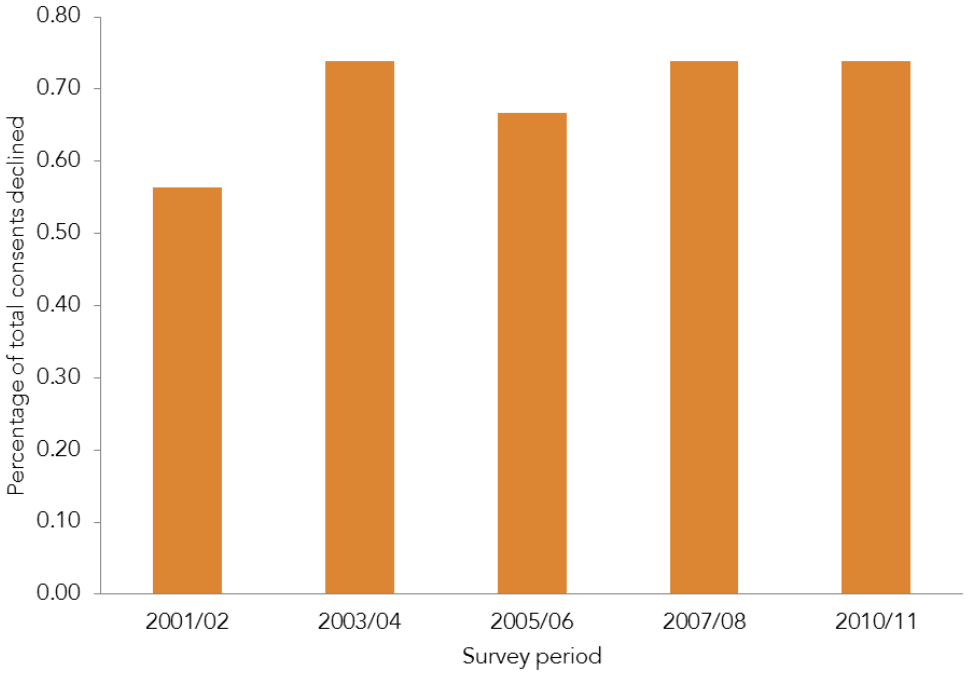
> A long planning process is not always a disadvantage. It can allow communities to be brought up to date with issues and to plan a joint way forward. However, it can also mean that a timely response to issues is delayed while freshwater quality continues to deteriorate. (OAG, 2011, p.57)

The Commission shares the concerns that regulation-making is insufficiently agile to respond to new or increasing environmental pressures. The appeals process needs to be well calibrated to addressing matters that are legitimately addressed to it, and the policy-making process needs to incentivise participation in decision making outside appeals.

Inadequate feedback loops from consenting?

Figure 12.2 indicates that consistently fewer than 1% of resource consents are declined. For some, this calls into question whether the consenting rules are too stringent. After all, the applications were found to comply with environmental standards.

Figure 12.2 Percentage of resource consent applications declined, 2001/02 – 2010/11



Source: MfE (2012)

A first observation that can be made is that the process involved deters anyone who is unlikely to get a consent from going through the process. Whilst this deterrence effect will be real, it seems unlikely that the effect would be this extreme. An alternative explanation is that going through the consenting process leads to applications being improved or assisted to comply. Both of these explanations are likely to be true to some degree.

That said, the number of consents being declined is so low that these effects would have to be very pronounced to explain it. Perhaps, with greater regulatory agility, consent conditions could be reviewed, and the requirements in the district plan could be amended so that more activities in the 'controlled' status could be made 'permitted', albeit with greater conditions.

Q12.1 Is the very low number of consents declined best explained by risky applications not being put forward, the consent process improving the applications, or too many low-risk activities needing consent?

Differences under the full intended structure of RMA regulation?

Experiences with the RMA decision-making process to date may not be a good indicator of how it will occur in the future, as the full range of policy instruments (National Policy Statements, Regional Policy Statements, and District Plans) become promulgated.

The RMA envisages a set of cascading objectives implemented in the context of local priorities. National policy statements and national environmental standards enable central government to prescribe objectives and policies on resource management, identifying environmental 'bottom lines' and ideal standards. Regional policy statements and plans and district plans must give effect to all national policy statements, and generally, a rule or resource consent may not be more lenient than a national standard.

Ministries and departments have always had the power under the RMA to develop these statements and standards, but that power was not fully utilised until relatively recently. The first national environmental

standard was not issued until 2004 (dealing with air pollution). The power to issue national policy statements has been used relatively sparingly, except in regards to coastal management.

As more national policy statements and environmental standards are issued and take effect, it is possible that the operation of the RMA and local authorities' processes may change. It could transpire that some of the problems seen in the first 20 years of the RMA's operation will not be the same.

Inappropriate revisiting of regulations?

Private plan changes are an alternative to seeking resource consent, where there is a high likelihood (or certainty) that an activity won't be consented under existing plan provisions.

This is unusual for any system of regulation. The Commission would ordinarily expect regulators to set the rules, and require people to work within them. The Land Water Forum (LWF) has criticised private plan changes as potentially undermining a limit-setting approach to freshwater management:

> One of the key themes in this report is that the policy and planning for management of water quality and the allocation of water should primarily be delivered through regional plans, rather than using the consenting process as a planning tool. Regional and catchment planning allows objectives and limits, water allocation methods, and water quality management methods and tools to all be addressed together, and for relevant communities of interest to make their views known. Planning should be done once in this way, rather than in an ad hoc manner through consenting. Among other things, this will provide certainty to resource users about the limits that will apply in a catchment, and about the set of tools that will be used to manage to those limits. (LWF, 2012b, p10)

In part, the problem may be that the planning approaches still present in District Plans don't exhibit leading planning practice. In particular, a focus on zones and rules can be quite rigid. Basing plan requirements on demonstrating the ability of the environment to sustain an activity can allow greater flexibility. This is sometimes referred to as a performance-based approach to regulation.

Q12.2 Would different planning approaches lead to less revisiting of regulation? What alternative approaches might there be?

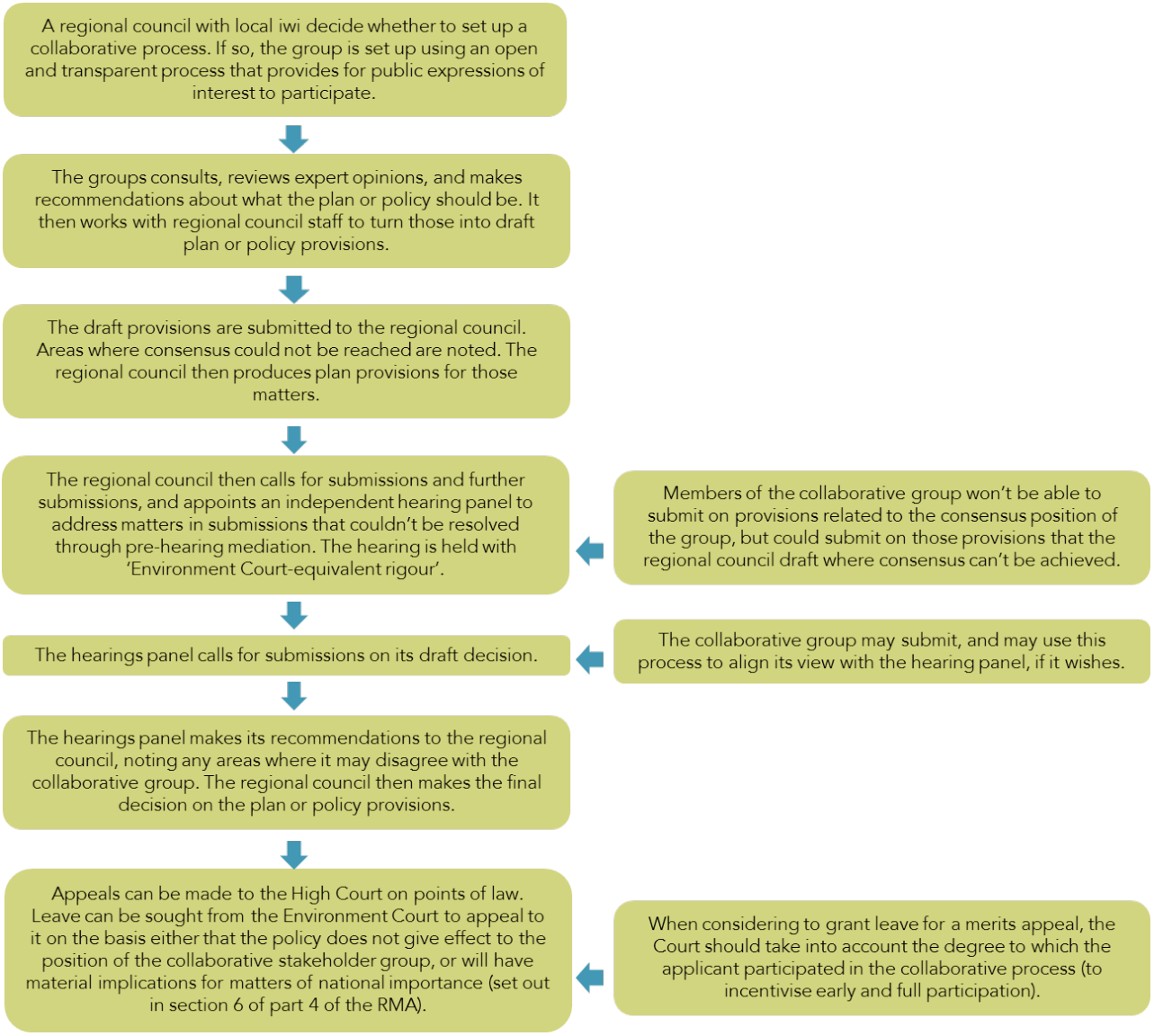
Options to enhance council decision-making processes – LWF

In a sequence of reports, the 60 members of the LWF have considered the governance structures, limit setting and allocation decisions for freshwater. In its second report, the LWF considered (amongst other things) options to improve decision-making processes at the national and regional level. The approach the LWF takes is as follows:

> For the freshwater-related elements of regional policy statements and for regional freshwater plans (including those plans that deal with the interaction between land and freshwater management) the preferred approach is to:
>
> a. insert collaboration into the core of the policy- and plan-making process
>
> b. incentivise good faith participation in collaborative processes through changes to merit appeal rights designed to balance the need for certainty that a successful collaborative process will have a significant influence on decisions and the need for a judicial safety net
>
> c. involve iwi in freshwater decision making throughout the process
>
> d. lift transparent scientific and technical debate and analysis into the early stages of policy- and plan-making
>
> e. ensure rigour and increase the efficiency of policy- and plan-making through changes to enhance and streamline hearing processes
>
> f. clarify the role of elected representatives in policy- and plan-making. (LWF, 2012a, p.32)

Although the LWF approach is specifically for regulations relating to freshwater, its model could also be considered for other regulations made under the RMA. The process itself, and incentives it intends to create, are set out in Figure 12.3.

Figure 12.3 Summary of the Land and Water Forum proposed regulation-making process



Source: Adapted from LWF (2012a), p.39

The intent of changing the plan and policy-making process is to get the full range of people and their interests involved in the process, and working together in a way that will satisfy those interests without leading to litigation. The kind of people and culture issues the LWF (2012a, pp.29-30) sees are:

- moving away from the 'decide, announce, defend' approach that many local authorities have traditionally taken to plan and regulatory policy development;
- fostering a culture of joint responsibility for regulatory outcomes and policy making with the community;
- increasing the abilities of technical experts to participate in a collaborative context, and to explain things to lay audiences;
- participants making the best available information accessible as early as possible;
- inclusion and an equitable approach to different forms of knowledge, notable Mātauranga Māori;
- building social capital amongst the interested parties in environmental management, and between them and the regional council; and
- a range of capability-building measures, so that the various interested parties can participate to the fullest.

It is unsurprising to find people and how they work together (or don't) as being the key considerations in a model of collaborative decision making. Whether or not a collaborative process is the one used to achieve a healthy recognition of the interests at stake, there are some fundamental elements of the LWF process that are likely to be desirable in any new decision-making process:

> We have reached these conclusions through a collaborative process, which places a high responsibility for reaching agreement on the participants. It obliges them to listen carefully to one another, to learn from what they hear, and to find ways of reconciling their interests. It produces policy recommendations which are not only tested in this debate but which reflect consensus. (LWF, 2012a, p.iv)

The Commission has sympathy with this view. What is needed is a process which changes the nature of the conversation that communities have about the environment, rather than to do away with that conversation wholesale. The LWF model and the role of local authorities are discussed further in section 12.7 below.

12.3 The RMA's appellate procedures

The Court, as the appellate body, was established in 1996 through an amendment to the RMA. The Court was an evolution from previous bodies. It was modelled after (and replaced) the Planning Tribunal established in 1977 through an amendment to the Town and Country Planning Act. The Planning Tribunal, in turn, replaced the Appeals Board established in 1953. However, the Court's role was widened to that of the Planning Tribunal, with expanded functions and powers over planning, resource consents and enforcement. From preparatory work on the RMA, the enforcement jurisdiction of the Tribunal (to become the Court) drew on the New South Wales Land and Environment Court established in 1979 (MfE,1988a&b, p.13ff).

The RMA represented a departure from the central planning approach at the time. The design principles may be summarised as:

- Integration – provide for social, cultural, economic and environmental considerations
- Public participation – informed decision making
- Effects-management – outcomes-based legislation
- Devolution – bring decisions closest to those affected and where the richest information is held (subsidiarity principle)

While the breadth of the RMA was new, it had predecessors; particularly noteworthy are the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. The RMA appellate procedures were largely drawn from these acts. The question is whether any perverse consequences of the *de novo* provisions of the Court under the RMA arise from the appeals process itself, or the interaction of the broader reach of the RMA with a *de novo* approach.

Hearings *de novo*

Appeals relating to resource consents and planning instruments (with the exception of NPSs)[47] are heard on a *de novo* basis. A *de novo* appeal means that the Court hears the evidence afresh and comes to its own decision on the merits; there is no presumption that the council decision is correct. It also means that no legal onus rests on the appellant to prove that the council's decision is incorrect. The Court has described its *de novo* power as follows:

> [T]he Court hears the evidence itself and decides what the facts are, based on that evidence, before coming to its own conclusion as to the proper way in which the statutory discretions should be exercised. (Waitakere Forest Park Ltd. v Waitakere City Council, 1997, p.234-235)

[47] There is no right of appeal for National Policy Statements. After preparing a proposed national policy statement, the Minister must either appoint a board of inquiry to inquire into and report on the proposed national policy statement or use a process which gives the public adequate opportunity to make a submission on the statement (RMA, s 46A). Any person may make a submission to the board of inquiry. There is no right of appeal in respect of a national policy statement.

The Environment Court is clearly a unique judicial institution. In certain matters the Court takes on the role of the initial decision maker. The Court's decision-making also takes into account the greater public interest in the matter before it. In these ways it is quite different from other courts, which do not have such a broad policy role. One of the framers of the RMA, Sir Geoffrey Palmer, recognised the unique function of the Court. He said:

> It might be argued that questions of this sort cannot be made justiciable; that the [Environment Court] judges and their [Commissioners] are being handed a task with such sweeping social and political consequences that it is impossible. (quoted in Birdsong, 1998, p.25)

Notwithstanding the above, Palmer and others believed that the Court would succeed because of its experience and expertise, political guidance in the exercise of its discretion through NPSs, and flexibility in the RMA that would permit the Court to achieve optimal outcomes in fact-specific situations (Birdsong, 1998, p.25). However, NPSs were not in place before plans and consent instruments were implemented, and as such the guidance and resulting certainty in decision-making on that account did not materialise until years later.

When determining appeals relating to plans and resource consents (under the 'direct referral' route introduced in 2009), the Court is explicitly placed in a policy-making role. For 'direct referrals', an applicant has the case heard by the Court (without the case first being heard by the council). For all other resource consent appeals, the Court exercises its own judgement about policy implementation.

Right to appeal (standing)

In the 1988 preparatory work the (then) Department of Justice concluded that there was broad agreement amongst contributors to have the then standing requirements retained. In its discussion there is reference to a concern raised by a submitter that parties could use standing to achieve perverse outcomes (delay) at no or only very little cost (MfE, 1988a&b, p.10).

The RMA takes a broad approach to standing in the Court. Any person who makes a submission to a council regarding a planning instrument or a resource consent has a right to take an appeal to the Court (RMA, s 120 (resource consents); First Schedule, cl 14(1) (policy statements and plans)). 'Any person' may participate in any Court action initiated by another person if she or he has an 'interest in the proceedings that is greater than the public generally' or 'represent[s] some relevant aspect of the public interest' (see RMA, s 274).[48] In addition, the Minister for the Environment and a local authority can be a party to an appeal proceeding.

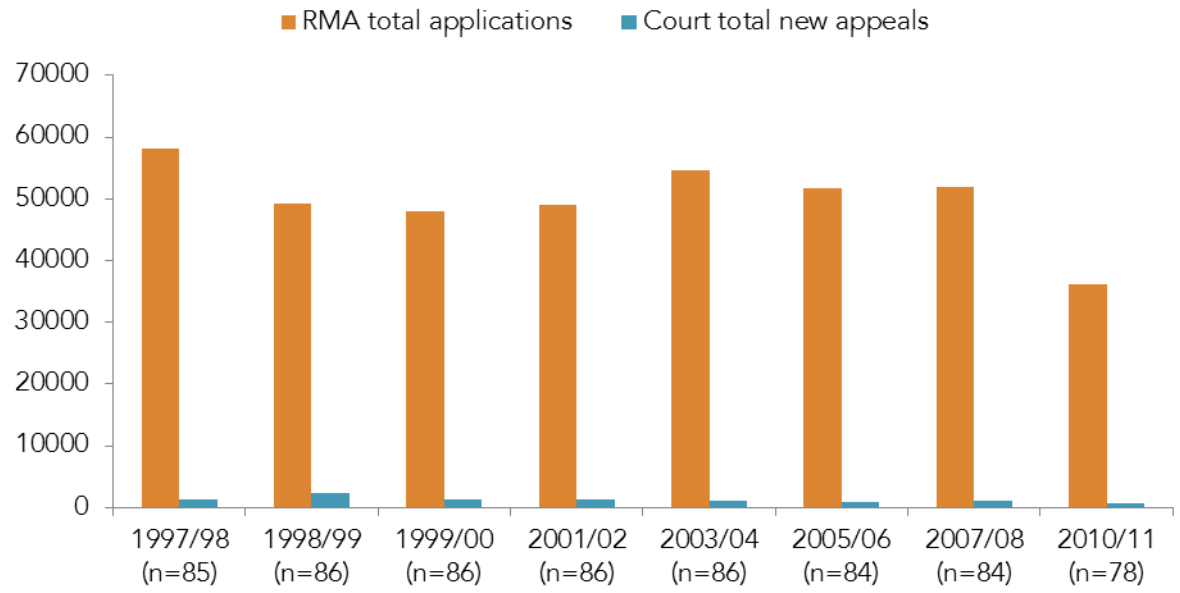
12.4 What decisions get appealed?

Around 2% of decisions get appealed

In terms of volume only a small proportion of RMA decisions reach the Court. Figure 12.4 shows the total number of resource consent applications and the number of new matters (appeals) received by the Court, for the years where Local Authorities were surveyed. The percentage of new matters received by the Court against the total number of RMA resource consent applications is between 1.67% and 2.77%, except for 1998/99 where it was at 4.6%.

[48] The exception is that a trade objector cannot be heard.

Figure 12.4 Number of resource consent applications processed to a decision by councils, and new appeals received by the Court, 1997/98–2010/11



Source: (MfE, 2012) and Reports of the Registrar of the Environment Court for the respective years.

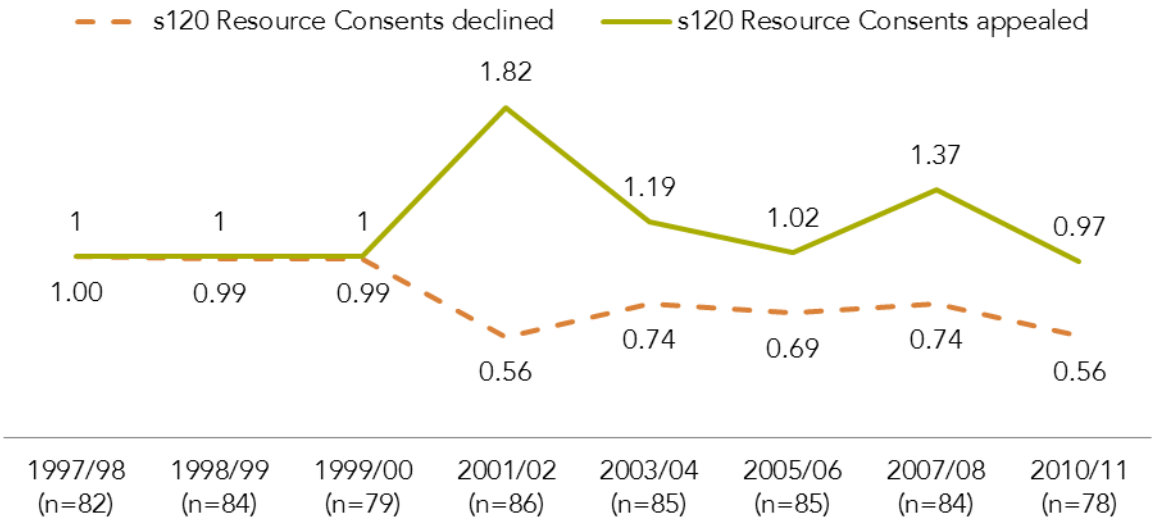
Notes:

1. N refers to the number of local authorities that were included in the survey.

Based on available, but somewhat dated (1998/99 and 1999/00), information, the use of appeals is taken up in roughly equal parts by both applicants and submitters. Looking specifically at resource consents decisions (s 120) that are declined by councils, the number is less than 1%.

Comparing the proportion of resource consent decisions (under s 120) that are appealed against the proportion of those consent applications that are declined, the number of appeals was consistently higher than the number of consents declined. This pattern suggests that parties dissatisfied with decisions made locally do consider it feasible to take matters to the Court.

Figure 12.5 Percentage of s120 resource consents declined and appealed



Source: MfE (2012)

Notes:

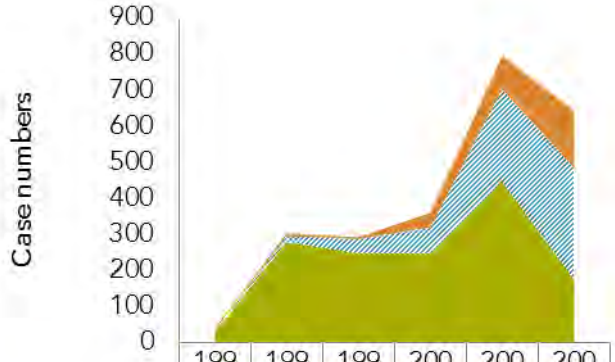
1. For the years 1998/99 and 1999/00 the percentage of resource consent applications that were declined was described as "less than 1%"; here, this has been noted as 0.99%.

While the number of appeals is relatively low, the decisions that are appealed can have a substantial impact in terms of case precedent and/or public interest. Analysis of the nature of the decisions that are appealed, and what happens as the Court is asked to resolve disputes or interpret the law, is set out below.

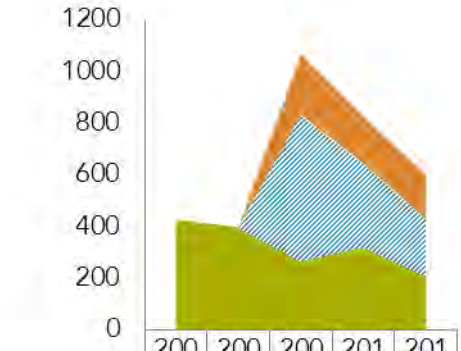
Composition

Figure 12.6 categorises matters that were before the Court (1997–2002) according to the RMA instruments; consents, plans (references) and miscellaneous.[49] The first series (LHS) is drawn from the number of cases where the Court made decisions in the period 1997 to 2002. The second series (RHS) is drawn from data on new matters referred to the Court (as opposed to decided upon) in the period 2007 to 2011.

Figure 12.6 Court workload by RMA instruments: (LHS) matters before the Court 1997–2002; and (RHS) new matters received by the Court 2007–2011



	1997	1998	1999	2000	2001	2002
misc.	6	7	5	39	92	157
consents	5	18	38	74	256	307
references	31	280	251	248	449	180



	2007	2008	2009	2010	2011
misc.			234	178	174
consents			566	324	221
plans	430	401	269	324	210

Source: Productivity Commission analysis of data from Annual Reports of the Registrar of the Environment Court, and MfE (2003).

A variety of factors can influence the overall caseload and composition of appeals. For example, the overall buoyancy of the economy will influence activities, in particular resource consent activities. This is likely to explain some of the drop in filings over 2009/10 seen in Figure 12.6 above.

It is unclear what will happen to the volume of plan appeals. So far the first generation of plans have been developed. The Commission might expect that as some matters become settled, or as good practice and case law develop, the proportion of plans tested in the Court would decrease. As well, the 2009 changes to the RMA have relieved councils of the duty to review plans every 10 years. All in all, it is not clear what the future caseload or composition of appeals will look like.

Given that there are far fewer plan changes than consent applications, plans appear to be disproportionately appealed. This would be consistent with there generally being more at stake in a plan change. There is little reason to think that the nature of the private interests affected by plans and policies will change in the future. If it is the nature of the interests at stake that most strongly affects whether a plan is appealed, it could be reasonable to expect that the likelihood of any given plan change being appealed in the future will remain high.

Q12.3 What factors have the strongest influence on whether a District Plan or Regional Policy Statement are appealed?

[49] The naming convention changed between the two sets of data. Two categories are unchanged (consents and misc.) but 'references' seized to exist and 'plans' were introduced. By way of exclusion, it is assumed that these two categories can be interpreted reasonably interchangeably.

Outcome of appeals

There is some, if limited, information available on the outcome of appeals; specifically, whether the original decisions by councils were upheld, partially upheld or overturned by the Court. Available data shows that approximately one third of resource consent decisions were overturned by the Court (18% in 1998/99, 30% in 1999/00 to 32% in 2004). On outcomes of plan appeals, McKenzie (2006, p.11) identified 13 substantive decisions in the period January to June 2004: of these four (31%) largely overturned the council decisions, and the remainder (69%) largely upheld the original decisions.

On the basis of the data it is not possible to comment on what drives the divergence in judgments between local authorities and the Court. For one thing, decisions may not be based on the same evidence due to the appellate procedure being based on hearings *de novo* (discussed further below). Notwithstanding, the divergence in itself creates a potential payoff (incentive) for parties to take councils' decisions to the Court. Because only about a third of cases have resulted in an overturned decision historically, that incentive is only likely to be strong where there are large interests at stake, to make it worth the risk of failure.

12.5 What are the concerns with the appeal process?

Some weaknesses and perverse incentives and outcomes have been identified by parties to the RMA decision-making processes. Concerns relate to behaviours and incentives of applicants, appellants and councils. To summarise:

- Appellants 'keep their powder dry' for the Court and do not present their full case at the council hearing
- Councils do not have the best available information upon which to make their decisions, and/or do not have the capability to make decisions (leading to decisions of poor quality)
- Hearings *de novo* enable council decisions to be pushed up to the Court; the Court (instead of the local communities/councils) make decisions with a policy element
- Appeals lead to increased transaction costs (time and money) of applications under the RMA
- Alternatives to *de novo* hearings have tended to focus on 'extremes'; *de novo* versus appeals on points-of-law or matters of process, with more moderate options not receiving consideration

The behaviours of applicants, appellants, councils and the Court are all framed by incentives built into the RMA.

There have been two recent reviews by Technical Advisory Groups (TAGs), in 2009 and 2012. The 2009 TAG considered constitutional issues as they apply to the Court and was satisfied that changes were needed but did not go so far as to suggest that the Court be removed from plan and policy decisions. The 2012 TAG reviewed the RMA principles and echoed the earlier TAG. It found the issue was still unresolved:

> While much of the 2009 Technical Advisory Group's work was advanced in the RMA Phase 1 reform, the proposal to seek leave of the Court was not. We are also of the view that these matters warrant further consideration, following careful analysis of costs and benefits. We are now in the Phase 2 RM work programme and it is clear that the calls for removal of the Courts' role in policy and plan appeals have not abated. (TAG, 2012, p.110)

In its submission to the Commission, Local Government New Zealand (LGNZ) commented on the costs, incentives and unintended consequences of the appellate procedures as they turn out in practice:

> Reducing the role of the Environment Court to matters of process in RMA policy and planning is the change that would reduce the cost of the regulatory framework significantly. The Court's *de novo* role is extremely costly to business and communities, has been susceptible to 'greenmail', (individuals or firms referring projects to the court to cause delays) and is extraordinarily undemocratic… appeals to the Environment Court have been used for what we see as frivolous and vexatious attempts to create costs to competitors by delaying approvals. (LGNZ, sub. 49, p.28, 30)

Reflecting on the experience of Waikato Regional Council, Dormer and Payne (2011, pp.1-2) comment that "over 70%" of time occurs in the appeals phase. They also state that it was 'apparent' that some parties do

not participate fully in the council hearing processes to leave their 'powder dry' for the appeal process (Dormer and Payne, 2011, p.4). The Land and Water Forum (LWF) has also noted that:

> [M]aintaining unrestricted ability to appeal the merit of councils' decisions at the end of the plan-making process will encourage participants to preserve their negotiating position throughout and will discourage creative compromise. (LWF, 2012b, p.73)

The LWF (2012b) did not come to a united view on how to change the appellate procedures. In the round, the solutions (restricting appeals) are tied to changes at the council stages.

Counter-arguments

In response to proposals that would constrain the general right of appeal to the Environment Court in order to improve RMA plan processes, Russell McVeagh lawyers (Nolan, Matheson, Gardner-Hopkins & Carruthers, 2012) comment:

> What such an overly-simplistic approach fails to do, however, is to understand that the appeal process adds significant value to the quality of the plan at the end of the sch 1 process […] In our view, the driving concern for those involved in the planning process should not be the length of time that it can take to resolve appeals; it should be the quality of the plan. Any solutions to the timing of the sch 1 process must focus on delivering the best outcome, which surely must be a quality plan that works for the community and enables the creation of a productive and efficient economy. (Nolan et al., 2012, pp.63-64)

Nolan et al. also assert that the presence of review by the Environment Court in itself "unquestionably" provides an incentive for councils to take "a much more responsible approach to their decision-making" (2012, p.70), but does not offer evidence in the article. An alternative view is that it encourages local authorities to hurry through their decision-making processes, as they know they are going to court anyway.

In assessing whether appeals should be limited to points of law, MfE noted that it could affect natural justice and the ability of individuals to defend themselves from restrictions on their private property rights. This concern centred on the quality of decision making in the first instance (MfE, 2008, p.81).

The TAG report (2012, p.112-113) touches on the issue of quality and places it in the context of performance management, noting that this is not an overarching role for the Environment Court given the limited number of resource management matters that are determined before the Court. The TAG draws attention to the roles of the Ministry for the Environment, LGNZ and the Parliamentary Commissioner for the Environment on such matters.

12.6 Options to enhance the appellate (Court) procedures

Choice of appellate procedure

The Legislation Advisory Committee (LAC) categorise appellate procedures across four broad types (in previous versions of its guidelines):

- Pure appeals (*stricto sensu*) – the appellate body may depart from the lower body's conclusions if consistent with the evidence available to the lower body; it cannot hear new evidence
- Appeals by way of re-hearing – the appellate body is not limited to correction of errors but may take into account developments since the initial decision
- Hearings *de novo* – the appellate body is not bound by the presumption that the decision appealed from is correct and may approach the case afresh (previous versions of the guidelines noted that *de novo* hearings are "more costly" than available alternatives)
- Appeal by way of case stated – the appellate body seeks clarification, usually on points of law

The choice of appellate procedure turns on the type and purpose of the appeal and the nature of the appellate body (LAC, 2001, p.162). It also notes that appeal by way of re-hearing is the appropriate procedure in most contexts. In general there is no need to provide an opportunity to re-litigate the whole

matter, as in a hearing *de novo*, unless there is good reason not to presume that the first instance decision maker correctly ascertained the facts.

Given the LAC's general observations on the choice of appellate procedures, the use of hearings *de novo* in the RMA does stand out. The RMA appeal procedures are compared against statutes that bear resemblance in type and purpose below, to establish whether, at a high level, the procedure appears conventional. Three statutes were selected that involve the utilisation (use and management) of natural resources. The statutes are the Hazardous Substances and New Organisms Act (HSNO) 1996; the Exclusive Economic Zone and Continental Shelf Act (EEZ) 2012; and the Crown Minerals Act 1991.

Table 12.1 Comparison of appeals procedures for resource management regulation

	RMA	HSNO	EEZ	Crown Minerals
Procedure	De novo	Re-hearing (sometimes points of law)	Points of law (sometimes re-hearing)	Re-hearing
Decision maker	Councils (sometimes Environment Court)	EPA	EPA	MBIE
Appellate body	Environment Court	District Court (sometimes High Court)	High Court	District Court

Source: Productivity Commission

All three statutes use more limited appellate procedures than the RMA; namely, re-hearing or appeals on points-of-law. Taken with the comments of the LAC, the use of hearings *de novo* stands out. As discussed in section 12.3, *de novo* hearings were included in the RMA more for historical reasons than anything else. This would suggest that the interaction of the *de novo* appeals process with the much broader mandate of the RMA might have led to different behaviours.

The overarching concern with restricting appeal procedures (or legal standing) is a concern whether the first instance body is equipped to make high-quality decisions. Restricting the grounds an appeal can be held on will limit or reduce the 'payoffs' from litigation, and encourage better participation in the local authority process. This may lead to those currently 'keeping their powder dry' presenting their best evidence earlier, and thereby improve the quality of local decisions.

The issue of appellate procedure has been present in several reform works. However, discussion and analysis have tended to focus on 'extremes'; in particular, *de novo* versus restricting appeals to points of law or process.

F12.1 Explicit consideration of the more moderate options included in the LAC guidelines for appeals processes needs to be included in any discussion of changes to the plan-making process.

The option of re-hearing warrants consideration. However, narrowing the appeal procedure could result in a need to put in place more formalised processes at the council level. At the moment council hearings can be relatively informal, whereas a change to the scope of appeals could require a more comprehensive evidentiary record. This could mean that improving the process for the relatively small proportion of cases that are appealed (around 2%) could increase the cost for decisions that are not progressed to the Court (98%). The costs and benefits of moderate approaches need to be considered in full, as part of any analysis.

An alternative would be to look more closely at who has legal standing (the right to appeal), an area that appears to us to have been given relatively less attention over the years. The Commission will consider these matters further.

Q12.4 Overall, would it be feasible to narrow the legal scope of appeals?

Q12.5 Would it be feasible to narrow legal standing?

12.7 The continuing role of local decision making?

Devolved decision making was a central design principle of the RMA. Commitment (or not) to that principle is part of any rethinking of the decision-making process. Recent policy proposals or changes show some conflict about the role of local decision makers. For example, the direct referral process introduced in the 2009 'Simplifying and Streamlining' amendments moves away from local authorities being the decision maker. The LWF model effectively seeks much greater public participation, but it could also minimise the role of local authorities in policy formation. At the same time, the LGA amendment Act has reaffirmed that the purpose of local government is to enable local democratic decision making.

Direct referrals

The workload of the environment court is largely generated by decisions of local authorities. Although not the plan-making process, direct referrals are relevant as an indication of the policy directions being taken towards local decision making under the RMA. The introduction of direct referrals in 2009 was designed for matters that are not of 'national significance', yet are complex and/or controversial and therefore likely to be appealed. The process allows these applications to be considered quicker than they might have otherwise been by avoiding the need for a local authority hearing prior to an appeal to the Court.[50]

The Court sits as primary decision maker on the application for consent. It considers all of the relevant information concerning the consent, including the local authority's report, the submissions made on the application, the submissions of the parties to the proceedings, and expert evidence, and then makes a decision in reference to the factors outlined in ss 104–112 (matters that the consent authority must have regard to in considering an application for resource consent).

The direct referral process largely keeps intact the existing public participation provisions of the process. It removes the local decision makers from the process, though, to reduce duplication, and does so explicitly in favour of the Court. If the primary purpose was to reduce duplication, restricting appeals might have had the same effect.

The LWF model

A striking feature of the LWF model is that although it is described as collaborative, it minimises the role of the local authority, which does not participate as a full member. As well, part of the LWF process set out in Figure 12.3 above is a reduction of the grounds on which a *de novo* appeal can be sought from the Court. Principally, the grounds would be that the Regional Council does not adopt the collaborative group's solution.

Regional councillors will be held to account for adopting any plan that a collaborative group develops. If the plan is popular with the wider community then that will not be problematic. But if a particular section of the community feels disadvantaged by the plan, as may be the case, then significant political pressure may be brought to bear on individual councillors not to adopt the plan. The LWF model retains an appeal right explicitly on the basis that the Regional Council doesn't adopt the collaborative group's plan. The expense and uncertainty of an appeal may push against the political pressure noted above.

[50] See, for example, www.qualityplanning.org.nz/consents/direct-referral.php

Inevitably, councillors will be held politically accountable individually through elections. However, the cost of an appeal will be borne by the local authority corporately. For that reason councillors may feel their individual political accountabilities more strongly than the threat of litigation.

At its core, this is a clash between representative democracy on the one hand, and participatory democracy on the other. The LWF seeks to address this in part when it notes that it would be needful for the local collaborative group to be made up of a representative section of the community (LWF, 2012a, p.33). But by nature the collaborative process is an exercise in participatory democracy, not representative. The distinction between the two is an underlying tension within the LWF model.

For now, it seems that the challenge of creating accountabilities that lead to helpful behaviours within the context of local representative democracy remains unresolved.

12.8 Current local authority decision making under more restricted appeals rights

It is hard to predict how local decision making might perform if a more restricted model of appeal were switched to. However, there are two instances currently where local authorities are making regulations using processes with more restricted appeals rights. They suggest that the worst predictions about what might happen are perhaps unwarranted.

What the bylaw-making process can tell us

A range of matters can be regulated through either district plans or bylaws. For example, excessive noise can either be an environmental effect regulated in the district plan, or it can be a public nuisance which can have a bylaw made under the Health Act 1956. The process for creating a bylaw, though not easy, is still considerably less fraught than changing a district plan.

A bylaw is made by a three stage decision-making process:

- Stage one – the local authority must determine whether a bylaw is the most appropriate way to address the perceived problem (section 155). This decision would be subject to the section 77 requirements (which are broadly comparable to a RIS).
- Stage two – the local authority must determine what kind of bylaw is most appropriate, and ensure that the proposed bylaw is consistent with the New Zealand Bill of Rights Act 1990.
- Stage three – once the bylaw has been drafted, it must be consulted upon using the 'special consultative procedure' set out in the LGA. The LA must, after considering the views expressed during consultation, decide whether to pass the bylaw.

Whereas the RMA Schedule 1 process for changing a District Plan involves notification, submissions, publicising those submissions, counter submissions, possibly a hearing before independent commissioners that may involve expert testimony, there is always the chance that the plan change will go to the Environment Court. These kinds of plan changes can take 10 years – the bylaw making process is usually done in less than one.

That said, there is no question that the 'special consultative procedure' is a process with high degrees of public participation involved. Indeed, the amount of consultation in the process has been part of the Efficiency Taskforce's mandate to consider.

Though not perfect, there seems to be an existing local regulation-making process that is both participatory and more timely than the plan review process. It also has an appeals system to protect the public from an abuse of regulation-making powers. That the bylaw-making process is more efficient suggests that delays in the RMA regulation-making are less about the private property rights affected (because they are affected by bylaws too), and more about the process being used and its interaction with the appeals process.

Q12.6 What features of the bylaw-making process are distinct from the district plan-making process, and how might you use practice under the one to improve the process under the other?

Environment Canterbury and the Canterbury Water Management Strategy

The Canterbury Water Management Strategy was developed using a 'collaborative planning' approach. First, a mayoral forum was established to consider water issues. They developed a vision and framework for water in Canterbury. As well, zone committees at the catchment level were established. Each committee included an Environment Canterbury Commissioner, councillor from the relevant local authority, and a representative of the local Ngai Tahu rūnanga with an interest in the zone. The balance of members (six to eight) were community members, selected jointly by Environment Canterbury, the territorial authority/ies and Ngai Tahu rūnanga. Community members were nominated by the public, and expressions of interest in being on the zone committees were also called for.

Where the recommendations of the zone committees require a change to, or a new, RMA instrument, local authority staff turn those recommendations into an RMA format. In this case, it has required changes to the regional policy statement. After the ordinary local authority decision-making process, ECan will seek to adopt the RPS. Under section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, decisions on the RPS can only be appealed to the High Court on points of law. ECan suggests that:

> The removal of the normal appeal available under the RMA to the Environment Court has proven to be a key driver in focussing the participants on an effective time bound collaboration process. (Environment Canterbury, 2012, p.3)

12.9 Summing up

Improving local RMA regulation and decision making is about striking the right balance between re-calibrating the appeals process and improving the local authority decision-making process. If devolved local decision making is still favoured, then it appears timely to revisit the RMA appellate procedures with a view to reinforcing the role of local authorities as primary policy makers. Specifically, the option of re-hearing warrants consideration.

The current success of the Canterbury Water Management Strategy process suggests that restricting appeals improves the quality of local decision-making by leading to enhanced public participation. At present, the full range of appeal options identified by the LAC have not featured in the debate on RMA appeals procedures. Any further work in this area should explicitly consider the full range of options.

The introduction of direct referrals in 2009 was a move away from the devolved ethos of the RMA. The 2009 change may address a symptom (perceived or real ineffective decisions by councils), as opposed to the problem (incentives to take decisions through to the Court).

It is increasingly clear that incentives on submitters not to participate fully in local decision making will reduce the quality of decisions that local authorities can make. There is something of a vicious cycle in how the appeals mechanism for the RMA works which needs addressing before there can be any clarity on how to improve local decision making.

13 Local regulation and Māori

Key points

- The Crown cannot transfer its obligations and responsibilities under the Treaty of Waitangi. The Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA) impose certain obligations on local authorities in respect of Māori, but they do not delegate to local authorities the Crown's obligations and responsibilities under the Treaty.
- It is the Crown's responsibility to interpret its obligations under the Treaty and to translate these into policy and procedural requirements for local authorities. There is a question about whether the policy and procedural requirements in the RMA and LGA, with respect to facilitating participation by Māori in local authorities' decision making, satisfy the Crown's responsibility.
- Māori have an interest in the regulatory system, especially for environmental management, that stems from their relationship with the environment (which can include a kaitiaki relationship). Both the RMA and LGA can be interpreted as requiring provision for this relationship to be made in the regulatory decision-making process.
- A kaitiakitanga relationship is more complicated than a strict question of who owns or who regulates a resource. Māori might have a kaitiakitanga relationship with an environmental feature that they do not have a legal property title to (notwithstanding native title claims).
- The challenge local authorities face where Māori have a kaitiaki interest in regulation is to effectively mesh two governance systems in a way that works for both parties and the community.
- Adequate systems, processes, and rules need to be in place to mitigate the perceived risk that recognition of tikanga Māori might be used as an excuse for inappropriate commercial gain (accepting that such an abuse would run counter to the kaitiakitanga and manaakitanga values that exist within tikanga Māori). There are examples of good models to achieve this.
- There are rules within any regulation about who exercises or is involved in the exercise of the powers set out in the regulation. Arguably, it is these process or decision rules (rather than the actual content of the regulation) that are of most importance to maintain, enhance, or restore the kaitiakitanga relationship.
- Current regulatory design may do an insufficient job of enabling local authorities to take account of kaitiakitanga. In particular, the decision-making system relies largely on levels of capacity that often are not present.

13.1 Introduction

Involving Māori in decision making presents a significant opportunity. Recent moves towards co-governance arrangements are, for those local authorities involved, one of the most fundamental changes to their nature and operations in recent times. It can act as a catalyst for innovation. To achieve effective involvement of Māori (and joint management agreements in particular), local authorities will need to find new ways of working with their communities and carrying out environmental management.

Although the Treaty relationship is between iwi and the Crown, iwi are affected as much by the regulatory functions conferred on local authorities by the Crown as they are by central government. Indeed, because iwi and hapū rohe (areas) are at a regional or sub-regional level, a lot of their interests will be local in nature, and touch on the roles of local authorities. Māori groups are a significant community of interest for local authorities, to whom (unlike other groups) there are specific statutory obligations for inclusion in decision making.

In the wake of the Wai262 (Waitangi Tribunal, 2011) report there has been considerable debate about how local authorities and others can better involve iwi in environmental regulation and governance. Local authorities are not the Crown and therefore are not the Treaty partner. However, it is well established that when the Crown statutorily delegates regulatory functions it retains a responsibility to translate its related Treaty duties into procedural and policy requirements for the local authorities that carry out those regulatory functions. Central government needs to take an ongoing interest in whether the procedural and policy requirements it has placed on local authorities are effectively delivering on its Treaty duties.

This latter is important in a regulatory context, because appropriately recognising the relationship of Māori to environmental features involves effectively meshing two different systems of governance – local representative democracy, and the tikanga and kawa of local iwi. Put another way, it calls for the reconciliation of kawanatanga and rangatiratanga. At present, this governance or 'system' issue is left largely up to local authorities to resolve. The Commission notes, though, that the best English term available for what needs doing is establishing a partnership – the language of Treaty responsibilities.

Local authorities and iwi are best-placed to work out their relationship at the local level, but there are real questions about whether the current legislative framework best enables that relationship. There are practical issues, such as whether the current systems for including Māori in decision making rely on a level of capacity that often is not available in Māori organisations currently. This is a regulatory design issue.

Because the language of the requirements in the RMA and LGA differ (the RMA focuses on iwi, whereas the LGA talks about Māori more broadly), the broader term Māori is used throughout this chapter. However, for much of the discussion of environmental management, the relevant interests would lie with local iwi.

13.2 The obligations of local authorities toward Māori

Local Government Act 2002

The LGA recognises and respects the Crown's obligations under the Treaty of Waitangi by placing obligations on local authorities to facilitate participation by Māori in local authorities' decision-making processes (s 4). Local authorities must be informed about how their decision making can impact on Māori community wellbeing. The provisions apply to all Māori in the city, district, or region. They acknowledge that Māori other than mana whenua may be resident in the area.

The LGA includes requirements for local authorities to:

- provide opportunities for Māori to contribute to decision-making processes (s 14);
- establish and maintain processes for Māori to contribute to decision making (s 81(1)(a));
- consider ways in which they can foster the development of Māori capacity to contribute to decision-making processes (s 81(1)(b));
- provide relevant information to Māori (s 81(1)(c));
- take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga (s 77(c));
- set out in its long-term plan the steps that the local authority intends to take to foster the development of Māori capacity to contribute to decision-making processes (cl 8 of Schedule 10); and
- identify in its annual report the activities undertaken to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making process (cl 35 of Schedule 10).

Resource Management Act 1991

The now-repealed Town and Country Planning Act 1977 recognised as a matter of national importance the relationship of Māori and their culture and traditions with their ancestral lands. A number of planning decisions provided due recognition of the importance of the relationship.

The RMA extends the recognition of the relationship between Māori and the natural environment, and identifies how local authorities must consult and work with tangata whenua. Local authorities are required to consult with iwi authorities when preparing or changing regional policy statements, regional plans and district plans, and to engage with tangata whenua in other resource management decisions. The key statutory obligations are:

- Sections 6(e) and 6(f) require recognition of and provision for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" and "the protection of historic heritage from inappropriate subdivision, use and development."
- Particular regard must be given to kaitiakitanga (s 7(a)) – defined as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship."
- All persons acting under the RMA (including applicants, councils and tangata whenua) must take into account the principles of the Treaty of Waitangi (s 8).

The RMA also imposes obligations of consultation with tangata whenua. There are different requirements for resource consents, notice of requirements, and plan development processes.

Section 26A of the RMA provides that there is no duty to consult any person about resource consent applications and notices of requirement unless a duty to consult is imposed by another enactment. However, for many resource consent applications and notices of requirement, consultation with tangata whenua will play a significant role in assessing the effects of Māori cultural values and the matters set out in Part II of the RMA and will likely improve the decision-making process and outcome. For example, in *Takamore Trustees v Kāpiti Coast District Council* [2003] 3 NZLR 496, the High Court said that s 7(a) (which provides that particular regard must be had to kaitiakitanga) created an obligation not just to hear and understand the views of tangata whenua about the proposed road, but also to allow those views to influence decision making. The judge said: "Consultation by itself without allowing the view of Māori to influence decision making is no more than window dressing" (at [86]).

Consultation with tangata whenua is mandatory when developing plans and policy statements. Clause 3 of Schedule 1 to the RMA sets out a process and identifies guiding principles for consulting with iwi authorities. The consultation must go beyond the mere sending of a notice to the iwi authority, and requires affirmative action to establish and maintain a process for consultation. In certain circumstances, the process may require financial support for the consultation to be adequate and productive of relevant information (cl 3B of Schedule 1).

In 2003, the matters of national importance under the RMA were amended to add s 6(f): "[T]he protection of historic heritage from inappropriate subdivision, use and development." The RMA defines "historic heritage" to mean natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, and specifically includes "sites of significance to Māori, including waahi tapu" (s 2 of the RMA). Consents have been refused for the establishment of a wind farm on an historic ridge and telecommunication installations in areas affecting sacred hilltops.[51]

Statutory acknowledgments

Statutory acknowledgements arise from the settlement of historical claims under the Treaty of Waitangi. They are an acknowledgment by the Crown of a claimant group's particular cultural, spiritual, historical, and traditional association with specified areas. They are only ever given over Crown-owned land. Statutory acknowledgements impose particular obligations on councils when dealing with relevant resource consent applications. Councils are also required to record in policy statements and plans all areas affected by statutory acknowledgements.

[51] See the references cited at FN 68 of Kenneth Palmer *Local Authorities Law in New Zealand* (2012), p.1027.

Treaty duties and obligations of local authorities

The dominant view is that local government owes no responsibilities under the Treaty, apart from those specific statutory obligations already identified. The Treaty partners are the Crown and Māori, and because local government is not the Crown, local government owes no responsibilities under the Treaty. Even where central government delegates functions and powers to local government, the onus remains on the Crown to ensure that its Treaty responsibilities are fulfilled. This view has been adopted in the LGA. It is also the view taken by the Department of Internal Affairs (DIA). The *Policy development guidelines for regulatory functions involving local government* (DIA, 2006) advise that the Crown cannot transfer Treaty obligations and responsibilities. It is the Crown's responsibility to interpret its obligations under the Treaty and to translate these into policy and procedural requirements for local authorities. This view is also consistent with the Waitangi Tribunal's approach, which stresses that the Crown is under a continuing obligation to ensure that its Treaty obligations are fulfilled.

Because the Treaty was between Māori and the Crown, the Crown is under a continuing obligation to ensure that its Treaty duties are fulfilled. In its *Ngawha Geothermal Resources Report* (Waitangi Tribunal [Wai304], 1993), the Tribunal declared that the Crown cannot avoid or modify its Treaty obligations by delegating its powers or Treaty obligations to the discretion of local authorities. That means that, if the Crown chooses to delegate to local authorities responsibility for the control of natural resources, it must do so in terms which require local authorities to afford the same degree of protection as is required by the Treaty to be afforded by the Crown.

13.3 How local authorities are currently involving Māori in regulation making

Three types of mechanism are currently being used by local authorities to include Māori in decision making:

- Māori committees;
- joint management agreements; and
- statutory consultation.

Q13.1 Are there any other ways that local authorities include Māori in decision making that should be considered?

Māori committees

Māori committees are a fairly common response to the LGA S14 and S81 requirements to include Māori in decision-making, and to build their capability to do so. Their role and particularly the scope of decisions they are involved in varies extensively between local authorities.

> The Greater Wellington Regional Council has a charter of understanding signed by the seven iwi in the region and has an active relationship with these iwi. Each of them has a different role and each was invited to nominate somebody with the skills that the new committee requires. When we last surveyed councils on this topic more than 50% of councils had negotiated charters of understanding with local iwi or hapu. (Local Government New Zealand, sub. 49, p.13)

> The Council is satisfied, with regard to the main body of its regulatory functions, that it is able to meet its Treaty obligations. For instance, it holds monthly meetings with Te Rūnanga Executive, and an Annual Hui for all Rūnanga members, residents of Tuahiwi and Marae Trustees, representation from Te Rūnanga O Ngai Tahu, Councillors and staff. These meetings and the Annual Hui provide the opportunity to address all resource management issues, and difficulties with consent or District Plan processes, and any servicing issues.
>
> These meetings cover the scope of all regulatory functions that the Council performs as they affect Ngai Tuahuriri and include, from time to time, issues of particular relevance to them, including lowland stream water quality (in relation to Council drainage maintenance and esplanade improvement works), potable water quality, and other regulations that enhance environmental protection and improve quality of services. (Waimakariri District Council, sub. 30, p.6)

Joint management agreements

Ordinarily a result of raupatu claims settlement acts, (with one exception), joint management agreements (JMAs) create, to varying degrees, joint Māori and local authority management of natural features. Included in this category can also be some arrangements that, although not formally JMAs, have their character. The Orakei Reserves Trust is an example where the reserve is owned by Māori, but the Trust has a balance of councillors and Ngāti Whātua o Orakei members.

At the strong end of the spectrum is the Waikato River Authority:

> Another regulatory innovation is that of co-governance and co-management with iwi regarding the protection and enhancement of the Waikato River. This has had the positive effect of iwi working alongside the local authorities and developing a healthy joint working relationship. (Waikato District Council, sub. 16, p.4)
>
> For the Waikato District Council it is not the Treaty of Waitangi that has had the greatest influence but the subsequent raupatu settlement acts. This has positive effects for both parties in being able to cut costs of consultation and appeals to the Environment Court because iwi are now formally at the beginning of the decision-making process.
>
> This has led to the inclusion of a new Vision and Strategy to the District plan for the protection and restoration of the health and well-being of the Waikato River and the signing and implementation of a Joint Management and Governance Agreement. (Waikato District Council, sub. 16, p.3)

Towards the weaker end of the spectrum is the only voluntary JMA (currently), between Taupō District Council and Ngāti Tūwharetoa, where an owner of Māori freehold land may apply to have their resource consent application for that land heard by a joint committee from the district council and Ngāti Tūwharetoa.

Statutory consultation processes

> It is fair to say that the system is designed to facilitate Māori reaction to priorities being set by local councils and applicants. While this in itself is an advance on the pre-RMA position, there are obvious structural shortcomings in this approach. Other than the almost entirely unused control and partnership mechanisms to which we have referred above, there are few opportunities for Māori to take the initiative in resource management. Māori are usually sidelined in the role of objectors. (Waitangi Tribunal [Wai262], 2011, p.115)

Inquiry participants bore out that the extent of their involvement was largely as objectors. Both Māori and local authorities were dissatisfied with this state of affairs. The other common problem that can arise is insufficient capacity to actually participate in the process as currently designed.

13.4 Opportunities and challenges for including Māori

The increasing use of formal instruments for involving Māori in decision making, and particularly joint management agreements, may be one of the most significant changes to how local government carries out its regulatory functions. It is also apparent that JMAs represent the most significant and therefore (from an iwi perspective) usually most desirable form of recognition for kaitiakitanga. Making JMAs work well will be critical for environmental management in New Zealand. Increasing Māori participation in regulatory decision making creates opportunities to innovate, but also faces some challenges.

Opportunity – a catalyst for innovation

Including Māori in environmental management decision making creates some opportunities. It may be a way of 'recruiting' public assistance in monitoring the quality of the environment (increased information to the LA from vigilant kaitiaki), assistance in restoring degraded environments (volunteer labour for riparian planting etc.), and sustainable management of particular features (placing rāhui on shellfish takes, for example).

Just the process of including Māori further in the decision-making structure and needing to consider Mātauranga Māori approaches to environmental management ought to act as a catalyst for local authorities to think differently about what and how they regulate. In turn, this would likely lead to some regulatory innovation on the behalf of local authorities.

Challenge – matching decision-making systems to capacity to participate

The capability of many Māori groups to be involved in the resource consent or district and regional planning process was raised as problematic, both by Māori groups and others. For example, an inquiry participant who was part of a Māori group noted that the consultation process under the RMA, particularly with its statutory deadline of 20 days, made it almost impossible for a smaller hapū, reliant on volunteers, to engage effectively in the process. This led to their objecting to complicated proposals, and then acquiring the time and resource to try to understand and assess the proposal.

The effect of inclusion of Treaty requirements in the RMA was described simply by one submitter as:

> It places a resource demand on Māori, local authorities and applicants. (Ashburton District Council, sub. 40)

Some inquiry participants took a more nuanced position:

> Local authorities address consultation in many ways, with some local authorities set up with representation mechanisms which make consultation processes easier. However, the volume of regulation requiring consultation is often overwhelming not only to the authority concerned but to the iwi and hapū involved as well. There is a huge problem with the capacity within iwi and hapū to be able to sufficiently consider the matters being addressed in many of the consent applications and also the timescales involved in the considerations. This in turn has a profound impact on the planning process and the ability of local government to do its business in a more inclusive way, which is the principal intent of the Treaty of Waitangi. (Local Government New Zealand, sub. 49, pp.12-13)
>
> Māori are more included, greater dialogue, but their expectations are not matched by their resources/capacity to participate/respond. Capacity issues often result in protracted processes both in terms of staff time and delays. Certain relationships require face to face visits and cannot be rushed.
>
> Māori find that local authority more approachable than in the past; relationships with staff tend to work well; often more challenging for politicians as the contact is not as frequent as that of staff.
>
> Local authorities have been challenged to be engaged with Tangata whenua, and to understand the Maori world view, and the arrangements of Iwi and Hapū with their boundaries. (New Plymouth District Council, sub. 58, pp.3-4)

At present, significant capacity within Māori organisations is taken up with the settlement process, particularly as it approaches the government target for resolving all historic Treaty grievances by 2014 (Te Puni Kōkiri 2010, p.17). It has been suggested that this may change post-Treaty settlement, as capacity currently taken up in negotiating settlements becomes available for other purposes. Alternatively, that same capacity may be needed for the effective management of Treaty settlements, once they are received. Whether significant capacity for engaging in the current processes of decision making will become available in the near future is unclear.

What is clear is that although there are benefits from better including Māori in decision-making processes, there is little, if any, satisfaction for any of the parties involved in the current resource management process for including Māori in decision making.

F13.1 On the available evidence, the current system for involving Māori in resource consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

It seems clear that if the system is reliant on actors within it possessing a level of capability that they do not have, then the system will be inefficient or inadequate. In this context, establishing Māori committees may not be a sufficient response by local authorities to meet their LGA S81 obligations towards building Māori capability for involvement in decision-making.

13.5 What is kaitiakitanga?

The Waitangi Tribunal has found that kaitiakitanga forms one of two foundational and interlinked concepts within Māori thinking on environmental management (the first is whanaungatanga – the organisation of concepts and relationships through whakapapa or familial connections).

> Kaitiakitanga is really a product of whanaungatanga - that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations. (Waitangi Tribunal [Wai262], 2011, p.105)

The Tribunal explains how, because the relationship Māori have with the environment is described in terms of whakapapa, the claim that particular Māori groups have to kaitiakitanga is based on this sense of relationship. In Māori cosmology, there is little or no distinction between human ancestors and whenua, maunga, or awa from which one descends (or to put it in the appropriate cultural context, can whakapapa to). This is the whanaungatanga relationship of which the Tribunal speaks.

Box 13.1 **Example of a kaitiakitanga relationship**

Today, some Māori leaders have combined the roles of legal trustee and kaitiaki. Mr Munro explained to us how the kaitiakitanga of Poroti Springs in Northland had been handed down from generation to generation, and how European legal processes have been used (and can be used further) as part and parcel of kaitiakitanga. He told us how the 'court appointed trustees' of the land block in which Poroti Springs are contained are also kaitiaki of the springs in a long line of kaitiaki: 'We have inherited the role of kaitiaki from a long time ago from a long line of traditional guardians before us'.

Their 'guardianship' of land and springs was first 'formalised' in this way in the 1890s, when their tupuna created a legal reserve and sought the protection of the law for the springs that were of such importance to all of Ngapuhi. Before 1895, rāhui and tapu were the sole forms of management but after the creation of the reserve, the trustees were able to deal with those who sought to use their water from a position of legal strength – at least, Mr Munro told us, until the 1960s and the Water and Soil Conservation legislation. With a significant increase of private water uses in the 1970s, especially of the Waipao Stream that feeds the springs, the Poroti Springs dried up in the early 1980s. The result was a 'furore' and the kaitiaki called all the people home, held hui, and launched litigation which eventually succeeded in restoring some of the water volume to the springs. Ms Meryl Carter told us that the home people have since begun a community education programme in local schools (and through them to parents) about the importance and value of the springs to the tribe. They have also inaugurated community restoration programmes to replant the riparian strips of the Waipao and also to get funding for farmers to fence the stream (thus protecting it from stock effluent). Although the local people are not wealthy, they have participated in difficult and expensive RMA processes since the 1990s, and have been 'proactive in every single resource consent to take water and effluent discharge consent'. Frequent, expensive Environment Court battles ensued. They often lose. This is kaitiakitanga in action.

Source: Waitangi Tribunal [Wai2358], 2012, pp.77-78

A kaitiakitanga relationship is more complicated than a strict question of who owns or who regulates a resource. Māori might have a kaitiakitanga relationship with an environmental feature that they do not have a legal property title to (not withstanding native title claims).

The LGA can be interpreted as referring to the kaitiaki relationship:

> …if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga. (LGA 2002, S77 c)

The term kaitiakitanga is not used in the LGA; however the kaitiaki relationship is a relationship that would be included by the requirement in S77c. As noted in section 13.2 the Waitangi Tribunal envisages that a

range of recognition might be necessary to adequately address this relationship. Some examples, and some theory as to how that might work, are discussed further in section 13.6.

What does managing something according to tikanga mean?

Managing something according to Tikanga means the application of Māori customary law to the management of an environmental feature. There are relatively strong and weak forms of doing so, which are discussed further in section 13.6. Although tikanga Māori is a Māori way of doing things, it is not exclusively Māori. That is, many of the principles involved are consistent with the values that the broader community holds towards environmental management. At least until, like any law, a desired use and the regulation of it come into conflict. Specific principles identified by the Law Commission (2001) are:

- Whanaungatanga
- Mana
- Tapu
- Utu (including muru)
- Kaitiakitanga

The strong sustainability focus of tikanga Māori should give communities some comfort that its application will not undermine other important aims of environmental regulation, such as conservation.

Box 13.2 **Example of applying tikanga Māori to environmental management**

Priscilla Paul and Jim Elkington both referred to the practice of managing and transplanting pipi, cockles, mussels, kina, pāua, oysters and scallops for a variety of reasons, including sustainability. Transplantation was managed according to the spawning cycles of the various species, and traditional regulatory mehanisms such as rāhui were used to ensure sustainable quantities of kaimoana developed before any harvesting took place.

Source: Waitangi Tribunal [Wai262], 2011, p.112.

13.6 Recognising kaitiakitanga

The challenge in recognising and providing for kaitiakitanga is that it requires, to some extent, the merging of two systems of governance. This poses three types of challenge:

- making sure that Māori are included meaningfully (according appropriate place to tikanga Māori);
- ensuring that 'good governance' principles still prevail in the exercise of local authority's coercive powers (according appropriate place to tikanga pakehā); and
- managing the costs involved.

Meaningful inclusion of tikanga Māori

In thinking about how kaitiakitanga should be taken account of, the Waitangi Tribunal envisaged a spectrum of approaches, based on the significance of the relationship between Māori as kaitiaki and the resource, and the strength of other interests:

> Such a system should be capable of delivering the following outcomes to kaitiaki:
>
> - *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority ;
> - *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision making but other voices should also be heard; and

- *effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when the decisions are made by others.

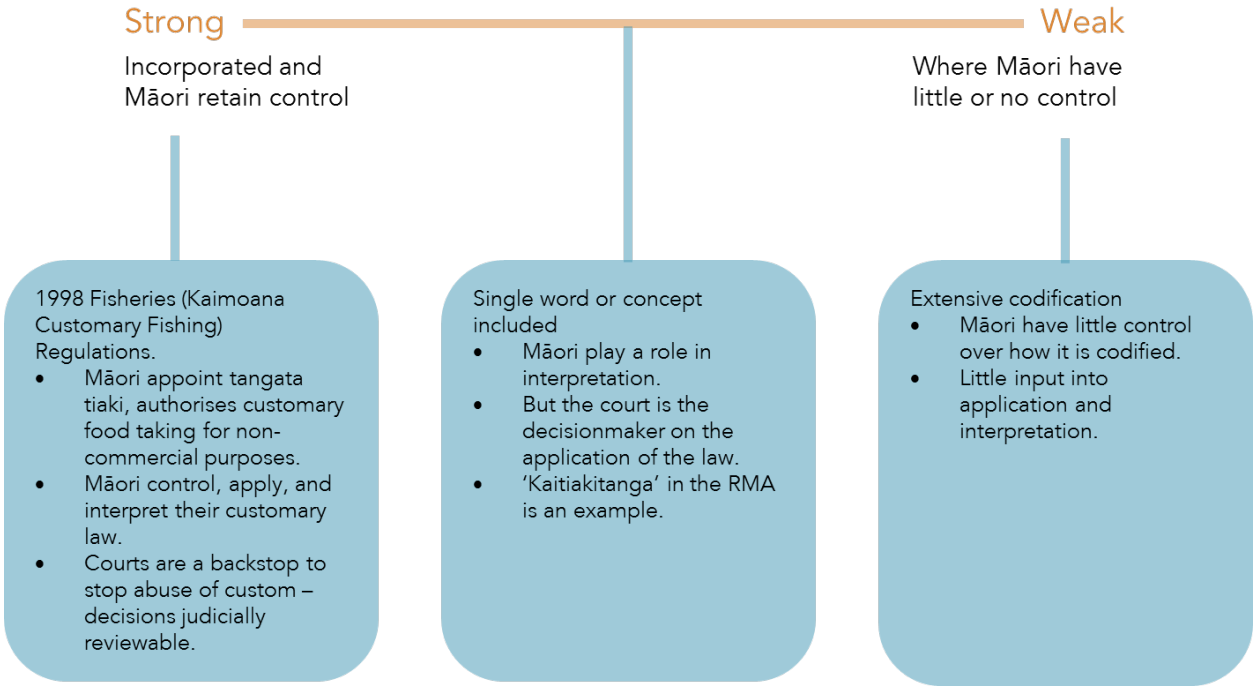
> It should be a system that is transparent and fully accountable to kaitiaki and the wider community for its delivery of these outcomes. (Waitangi Tribunal [Wai262], 2011, pp.285-286)

The aspirations of Māori place an emphasis on involvement in the making and administration of regulation ahead of but not excluding their content:

> Mr Munro concluded his korero by referring to a whakatauki expressed earlier in the hearing by Mr Maanu Paul:
>
> … if I can reach out and grasp the words that were spoken by Maanu when he said that the water is me and I am the water. That's the same expression that we want to express to yourselves as well, as the waters of Waipao are us and we are the waters of Waipao. We have been – we were charged with the responsibility from our parents, our grandparents and our tupuna to look after that water and it's been very hard for us to have to go through processes that disenfranchise us, where we are more like flies on the wall and we are not a part of the process or the decision making. The question is asked, "What is it that you want?" And our answer is that we want the right to talk about our water. We want to sit at the decision-making table. We don't want to be like flies on the wall that nobody takes any notice of. (Waitangi Tribunal [Wai 2358], 2012, pp.77-78)

Hart identifies that within any regulation there is what he calls 'secondary rules' – these are rules of recognition, rules of adjudication, and the rules of change (in Coates, 2009). Put another way, they are the rules within any regulation about who exercises or is involved in the exercise of the powers set out in the regulation. Arguably, it is these secondary rules (rather than the actual content of the regulation) that are of most importance to maintain, enhance, or restore the kaitiakitanga relationship. Coates envisages a spectrum of strong and weak incorporation of tikanga Māori into regulation, where strength is largely dictated by the degree to which Māori retain the ability to interpret how their custom should be applied.

Figure 13.1 Spectrum of ways to involve iwi/Māori in regulatory governance, from strong involvement to weak involvement



Source: Adapted from Coates (2009)

Determining a sufficient level of Māori involvement in regulatory governance is critical for achieving good regulatory outcomes in matters that affect wāhi tapu or activities that touch on tikanga. Simply making a decision maker Māori, when the rules they must apply do not include tikanga is unlikely to often suffice. Likewise, if only a Māori concept is referred to, but local Māori have no say in interpreting that concept,

there are risks of misinterpretation. The governance relationship for Māori remains a distant one, and that also is unlikely to suffice.

Providing for kaitiakitanga as defined in the RMA, or the management of an activity according to tikanga Māori can be done in strong or weak forms. Often, recognising custom effectively will require resolving:

- the way tikanga is referred to, particularly so that references to particular concepts can be set in the context of other principles of tikanga Māori;
- how to include Māori in its application, so that any interpretation or decision about tikanga has credibility; and
- what strength is given to custom – should it just be considered, or is applying it required?

As well as envisaging a spectrum of strong to weak incorporation of custom, Coates states that there are both pros and cons to any particular kind of incorporation of custom. This can be presented in tabular form:

Table 13.1 Strengths and weaknesses of different ways to incorporate tikanga Māori into regulation

Issue	Option	Strengths	Weaknesses
How the custom is referred to	Single word or concept included	Gets some greater consideration than it would if Māori were just another stakeholder.	Those deciding on the regulation have to determine whether Parliament is including the custom attached to it, or just using a Māori word. Can get that decision wrong. If a custom is inserted (through including a single word) it might not function well without complementary customs that make the system work.
	Extensive codification	Result is regulation that is accessible, largely predictable, and clear.	May not codify all the relevant customs, which may skew the kinds of decisions made under the regulation (sometimes argued as being the case for Te Ture Whenua Māori Act 1993) Relatively inflexible. Because codification establishes which customs can be recognised, it can stop other related ones from occurring. There is more flexibility in single custom reference (kaitiakitanga in RMA)
Who the decision maker is	Local Māori (manawhenua)	Regional variation in tikanga will be catered for. Will not face challenges related to translation of terms or cultural understanding.	A lot of discretion can produce uncertainty for those that the regulation might apply to (the uncertainty would be derived from lack of knowledge about the custom). Can create an impression of inequality with non-Māori.
	Local authority or Court	Perception of greater independence and objectivity.	If the custom is misinterpreted and that sets a precedent, it may move the concept away from the Māori meaning.
Whether the custom is a consideration or a requirement	Consideration	Allows greater flexibility to determine the extent of the kaitiaki relationship and match the consideration to it (as envisaged in Wai 262).	Considerations can be traded off with other values. This does not provide a safeguard that where the kaitiaki relationship is strong, it will be given due recognition.
	Requirement	Increases the likelihood that significant relationships with natural features will be addressed appropriately.	Less flexibility to take a proportionate approach to addressing kaitiaki interests, when taken into account with other interests.

Source: Adapted and expanded from Coates (2009)

Although the intent of Coates was that this be applied to the content of particular regulations, rather than the institutional structures around, say, environmental management, it is clear that there are implications for how well local authorities include Māori in their regulatory decision-making processes.

Box 13.3 **Ngāti Pāhauwera and the management of hangi stones**

Members of Ngāti Pāhauwera have expressed concern in the past that the tribe's kaitiakitanga/guardianship of the stones did not feature sufficiently in other decision making about use of river resources. Scarcity is also an issue apparently. Ngāti Pāhauwera want to ensure the stock of hāngi stones coming loose in the river beds is managed to be able to meet cultural uses. This includes traditional gift exchanges.

The deed of settlement bill proposed:

- Any person must obtain written consent from Ngāti Pāhauwera trustees before they may extract loose hāngi stones from the bed of the Te Hoe or Mōhaka Rivers within Ngāti Pāhauwera's area of interest inland of the coastal marine area. This includes riverbed landowners.
- Ngāti Pāhauwera trustees may give consent to extract hāngi stones on any terms and conditions that they see fit.
- If a person has the required consent to extract loose hāngi stones, that person does not also need to obtain consent from a local authority for the same activity.
- If a person, in carrying out another activity, extracts any hāngi stone, they must return it unless they also have Ngāti Pāhauwera's hāngi stone consent.

This new control on all extraction (compared to currently permitted levels of taking under the Regional Council's regional plan) will make Ngāti Pāhauwera values about hāngi stones much more visible in a way that the iwi has not achieved to date under the Resource Management Act.

Source: Craig Linkhorn (n.d.) *Valuing tikanga – sharing power through co-management*, pp.6-7

Maintaining 'good governance' principles

Local authority regulatory regimes are expected to maximise wellbeing across and in the interests of all the diverse communities of interest they are responsible to. A concern with involving local Māori more in regulatory decision making is that they are more likely than local authorities to encounter situations where they have a conflict of interest in regulating the interests of those communities. This would be the case where they are regulating business competitors, or have an interest in exploiting a natural resource (such as water). As well, there is some concern that recognising tikanga Māori will in some way privilege Māori interest or enable Māori to 'capture' the regulatory system for pecuniary interest.

Whether recognising tikanga Māori is likely to give special advantage to Māori is not straightforward. It needs to be said that recognising Māori customary law ought to make the practice of Māori custom easier – that is one reason to recognise it, and is entirely compatible with the nature of New Zealand's constitution, and the generally accepted Treaty law that Māori language and custom are a tāonga whose 'active protection' is guaranteed by the Treaty. Objecting to such active protection can only arise from a misapprehension of the constitutional nature of the Treaty relationship.

On the other hand, it is reasonable to object to custom being distorted or used as an excuse for inappropriate commercial gain. Such gain would run counter to the kaitiakitanga and manaakitanga values that exist within tikanga Māori. Adequate systems, processes, and rules can avoid this. Box 13.4 sets out the example of customary fishing arrangements. Although not an area that local authorities regulate, it sets out a good model for recognising the kaitiakitanga role local Māori can play within an arrangement of checks and balances that mitigates against the abuse of customary law.

Box 13.4 **Tangata tiaki and customary fishing**

The Fisheries (Kaimoana Customary Fishing) Regulations 1998 allowed tangata whenua of an area to appoint a 'kaitiaki' or 'tangata tiaki'. This person, or group of persons, once confirmed by the Minister of Fisheries, gains the power to authorise individuals to take aquatic life for customary, non-commercial, food-gathering purposes. These authorisations can require that the taking of the fisheries resources be consistent with the tikanga of the tangata whenua of that customary food-gathering area. Some examples of the types of authorisations that could be granted are when food is required for koha, tangihanga or a big hui.

Although the tangata tiaki is to apply custom in the first respect, an authorisation by the tangata tiaki to gather food can be judicially reviewed by the general courts on the grounds that it is not 'customary', or that it is non-commercial. There is therefore a judicial backstop that ensures accountability and that the tangata whenua do not abuse or overly exploit what is 'customary'.

"I would contend that provided the court does not dictate the content of the custom and only operates to prevent an overly expansive interpretation of custom, there seems to be an appropriate balance struck by the legislation as to the proper adjudicatory and decision-making mechanisms."

Source: Coates (2009), pp.33-35

Another kind of objection is that custom is not structured around the concepts that form the 'rule of law', and so its application can undermine democratic principles. Often, it is an appeal to the need for only one set of rules, that they should apply to everyone, everywhere.

Generally, that would be an argument against any local regulation, and any variation in local regulation. The actual rule of law principles involved are that the law should be accessible, and knowable in advance of its contravention. The contention would be that applying tikanga Māori undermines both of these principles.

The nature of tikanga Māori is that it is not codified, and not as inculcated through the education and other social systems as statute law. As well, tikanga Māori relies on the application of principles to a situation, rather than appealing to precedent. Precedent has been one way that knowledge of how the law will be applied has been established. On the other hand, these are relatively minor difficulties compared to the general level of ignorance of what tikanga Māori is. It seems reasonable to contend that the principles of tikanga Māori are knowable (for instance, the Law Commission (2001) outlines what it sees as the principles of tikanga Māori). As with statute law or a district plan, knowing its content gives a fair indication of how it is likely to be applied.

Managing the costs involved

In response to the question about regulatory variation due to the effect of the Treaty on how local authorities undertake their regulatory functions, submitters noted:

> Consultative requirements and costs incurred by firms that require consents may be higher than otherwise. Approvals may be delayed. Some proposals may not materialise. (Local Government Forum, sub. 15, p.17)

> In relation to Iwi input into Resource consents there will be extra costs on applicants and Council. This is part of the co-governance arrangements that will be agreed to between the Crown and Iwi. These costs will need to be accommodated as part of Iwi joint management agreement or joint committee arrangements and associated administrative costs in establishing these co governance arrangement costs could be significant for local government. (Hauraki District Council, sub. 59, p.5)

Including Māori in regulatory decision making is not costless, just as it is not without benefits. Such involvement may not be amenable to a simple cost-benefit analysis though, as there are sound constitutional reasons for including Māori in decision making further. As well, expending effort on including Māori in the decision making process well may save time and money on appeals later.

Q13.2 What are some examples of cost-effective inclusion of Māori in decision making you are aware of?

13.7 Effectiveness of current regulatory design

Both the Waitangi Tribunal and the Land and Water Forum (LWF) suggest that treaty duties have not always been effectively translated into policy and procedural requirements when regulatory duties have been delegated:

> In its first report (2010), the [Land and Water] forum identified water governance as a key issue : iwi, who have a Treaty relationship with the Crown, do not have 'a clear path to engage as a partner' with either regional councils or central government on freshwater issues… The forum concluded that the Crown had delegated water management to regional councils without resolving how the councils were to work in partnership with iwi or giving the councils clear direction on how they were to discharge 'their role on behalf of the Crown partner'. (Waitangi Tribunal [Wai 2358], 2012, pp.136)

Meshing local regulatory governance with the tikanga and kawa of local iwi requires some flexibility in regulatory regimes. In terms of inclusion in decision-making under the RMA, the discussion in Chapter 9 points out that simply including Māori in independent hearings panels may be insufficient, because it just transplants a person without necessarily providing recognition or validity to tikanga Māori as something that needs to be considered. An option for addressing this has been the inclusion in the RMA of a requirement that LAs 'take into account' iwi management plans:

> There is one important exception [to Māori being sidelined as objectors]. Section 61(2A) of the RMA requires that district and regional plans must take into account 'any relevant planning document recognised by an iwi authority' and lodged with the council, where it is relevant to the resource management issues of the region. These 'iwi management plans' provide the only mechanism by which iwi authorities are able to exercise influence on resource management decisions by setting out their own issues and priorities without any consulting council or applicant filter. It is the only instance where Māori can be proactive in resource management without needing the consent of a minister, a local authority, or an official. (Waitangi Tribunal, 2011, pp. 115-116)

Iwi management plans would fall at the 'weak' end of Coates' spectrum, as the secondary rules around them do not contain provisions for including Māori in deciding how those plans will be taken into account. Those options that fall at the stronger end of the spectrum, particularly the ability to transfer RMA powers and duties to an iwi authority, have never been used, and the joint management option has only been used voluntarily once, and in a limited way at that.

This suggests that the range of options or flexibility for including Māori in RMA decision-making may be insufficient. The experience of Ngāi Tahu with Environment Canterbury regarding Te Waihora (Lake Ellesmere) may be instructive. It is a partnership that is deepening over time, and may yet become a local authority-initiated (rather than statutorily required) joint management agreement. It illustrates both that it is possible to develop a partnership with Māori under the existing RMA arrangements, but also that co-governance is something that comes at the end of a long process of developing a partnership, rather than being the first thing that a local authority will leap to. More explicit provision for intermediate steps within the RMA might lead to more local authorities looking to deepen the existing partnerships they have with Māori.

Q13.3 What more intermediate options could there be for including Māori in RMA decision-making?

More generally, whether statutes that confer regulatory functions on local authorities enable or inhibit the appropriate inclusion of tikanga Māori in local regulation. The Commission will undertake further work in this area.

Ultimately, the effectiveness of decision-making processes will stand or fall on whether the process will work for the levels of capability present amongst the participants. At present, there is often a mismatch between the requirements of the system (notably timeframes), and the ability of Māori participants to meet them.

The LGA includes a requirement that local authorities have a policy on building Māori capability to participate in decision-making processes. The practical effect appears to have been patchy, but has largely resulted in the establishment of Māori committees. Given the range and nature of capacity constraints faced by Māori seeking to engage in local authority decision-making, this appears somewhat inadequate.

Irrespective of process requirements and who does or does not have Treaty duties, Māori and particularly local iwi are a significant community of interest within any given local authority. Effectively and appropriately involving Māori in the decision-making of a local authority would be a matter of good practice, even if there were not statutory requirements to do so. In practice, there may need to be both a reconsideration of the statutory processes for including Māori in decision making, and further attention by local government to their responsibilities to build the capability of Māori to participate in decision-making.

The Commission is keen to hear about ways to tailor decision-making processes to the level of capability present amongst participants, without compromising the integrity of their involvement.

Q13.4 What are some examples of decision-making systems well-tailored to Māori involvement?

14 Assessing the regulatory performance of local government

Key points

- Regulatory performance assessment involves gathering information about the performance of a regulatory activity, process or system, and reflecting critically on this information.
- Leading performance assessment practices include strong auditor/local authority interaction, outcome-based annual reports by local authorities, comprehensive Society of Local Government Managers guidance material and some of the regulatory performance frameworks administered by central government.
- However, the Commission has identified a number of weaknesses in relation to local government regulatory performance assessment, including:
  - insufficient focus on using performance information to identify potential improvements;
  - lack of a system mindset in the development and administration of regulatory regimes (ie, there is a focus on individual parts of regulatory regimes but less focus on how the parts link up and depend on each other);
  - lack of feedback loops between the central and local government components of regulatory regimes;
  - lack of balance in what is measured (ie, overly focussed on timeliness and transactional measures); and
  - a potential weakness in the accountability framework as it relates to assessing capability.
- Options for improving the assessment of local government regulatory performance include:
  - encouraging local and central government to consider reducing the frequency of some regulatory performance reporting and reducing the external reporting burden;
  - encouraging central government to share administrative data to reduce the need for local authorities to produce new performance information;
  - creating documents that briefly describe regulatory regimes by setting out the purpose of a regulatory regime, the roles of different players in the regime and the types of benefits and costs that the regime will create;
  - convening small groups of people with responsibilities within a regulatory regime to briefly and jointly use existing performance information to assess the performance of a regime from the policy-making stage to delivery, including to identify key system issues and concerns. Such reviews could be progressively undertaken over time; and
  - improving the consistency of performance assessment frameworks across different forms of regulation.
- The Commission seeks feedback on the proposed options (and any other options that could improve performance assessment) and their costs and benefits.

This chapter considers how to improve the efficiency and effectiveness of regulatory performance assessment. To be worth the expense and effort, performance assessment should generate value for the people that assess performance and the people that fund the activity being assessed.

14.1 The benefits and costs of regulatory performance assessment

Benefits

Regulatory performance assessment involves gathering information about the performance of a regulatory activity, process or system, and reflecting critically on this information. The main benefit of such assessment is that it enables regulatory staff and other decision-makers to drive continuous improvement in regulatory systems. Continuous improvement is a feature of high-performing organisations, which are continually and actively seeking ways to lift their game.

Continuous improvement is a day-to-day, month-to-month and year-to-year process. On a daily basis, the staff administering regulatory regimes respond to new regulatory situations and adapt their practices. There are daily discussions between staff on how to improve practices. On a monthly basis, staff discuss and improve administrative processes. Improvements on an annual basis include amendments to budgets, systems and policies to address new priorities and areas of low performance.

Box 14.1 **What is a regulatory regime?**

As noted in Chapter 1, any regulatory regime has three working components – standard setting (identifying the regulatory goal or target), monitoring compliance with the regulatory standard and enforcement when there is noncompliance.

Performance assessment is likewise a daily, monthly and yearly process (and sometimes it takes even longer). In day-to-day performance assessment, staff reflect on how well they perfom tasks and discuss this with their colleagues. Monthly or yearly performance assessment involves discussion among colleagues but also involves a system of information gathering and reporting. As with discussions among staff, these performance reports enable staff and other decision-makers to reflect on how well regulations are performing and how they could perform better.

Two particular ways that performance assessment drives continuous improvement are:

- *Providing feedback loops through which weaknesses in a regulatory regime can be identified and solutions devised and implemented* – Performance information is a rich source for reflecting on leading practice across a regulatory regime, understanding local and national concerns and learning how to work more effectively together. Sharing performance information between parts of a regulatory regime reduces fragmentation and misalignment within a regime, and can reduce duplication in measurement and reporting.
- *Improving understanding of the regulatory process by communities and specific regulated parties (eg, dog owners)* – Performance information enables people to have more informed opinions on regulatory performance and local issues, and this in turn sharpens incentives for local authorities to improve their performance.

It is critical to ensure that the fruits of performance assessment and continuous improvement are readily apparent to local authorities and communities. If performance assessment is not playing a noticeable role in achieving better outcomes and better value for money, such assessment will be seen to be little more than a compliance exercise.

Costs

There can be significant costs of performance assessment (Box 14.2), such as staff time, storing information for easy access and analysis, preparing performance reports, audit costs and consultation costs – all of which can reduce staff time for other activity. There is also risk that performance measures create perverse incentives, such as choosing simple and quick tasks in order to meet numerical targets, or use of measures that reward short term results that may not be in optimal long-term. In the case of smaller-scale local authorities, assessment processes should be simple and low-cost, with mechanisms to make easy use of information produced by others (eg, central government data).

Box 14.2 **Submission comments on the cost of performance assessment**

Cost influences what is measured

> The resources required to measure the outcome of regulations would inevitably fail the cost benefit test councils are required to apply when setting charges and would provide only limited information as outcomes are influenced by more than simply regulations. (Hastings District Council, sub. 41, p.22)

> The main challenge faced by local authorities in developing a good practice performance monitoring system is the cost constraints around sourcing data. Data collection and maintaining information systems that can manage the different data needs is costly business. And therefore the general tendency is to develop indicators that are easily measureable or process indicators e.g. number of inspections carried out for liquor retail premises or the percentage of dog owner properties inspected per year. (Waitomo District Council, sub. 9, p.7)

Performance assessment needs to meet a cost benefit test

> Environment Southland has concerns that further monitoring and reporting requirements would duplicate the other existing reporting formats and add a further layer of unrecoverable cost to the administrative expenditure for each council for very little benefit or opportunity for recovery for the rate payer. If anything the existing levels of monitoring and reporting requirements should be rationalised to gain cost efficiencies. (Environment Southland, sub. 28, pp.2-3)

> Local government has never shied away from the need to put in place systems and processes that provide assurance of an ability to achieve quality in the delivery of legislative requirements. However, the cost and effort involved in the process, in our view, must not be disproportionate to the benefits. Multiple agencies are already involved in the audit of local government, including the Office of the Auditor-General, the Parliamentary Commissioner for the Environment, the Ombudsman, and the central government department with lead responsibility for any particular regulation. Audit, monitoring, and information-gathering demands may be made of local government with sometimes limited ability to recover the cost of these demands. We do not see this as a capability issue but more so a co-ordination issue for central government agencies. (Local Government New Zealand, sub. 49, p.41)

Cost for smaller councils

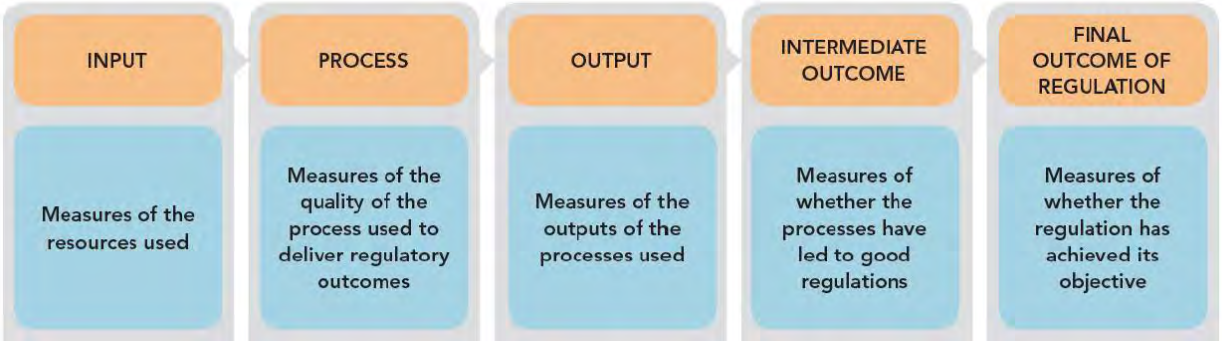
> While large councils can afford to undertake more detailed monitoring of the effects of their regulatory interventions, for smaller councils the benefits of such expenditure is outweighed by the cost. (Local Government New Zealand, sub. 49, p.29; Hastings District Council, sub. 41, p.20)

14.2 Principles for improving performance assessment

A good understanding of the steps that lead to the end outcome

The Commission's Issues Paper set out the standard view of the steps that lead to regulatory outcomes (Figure 14.1). This model is a valuable starting point because it emphasises that performance assessment is as much about understanding and assessing the activities that lead to good outcomes as assessing the outcomes themselves.

Figure 14.1 Types of performance measures



A range of considerations

The basic model in Figure 14.1 needs to be tailored to the context of local government regulatory performance. Alongside the benefit of improving outcomes, Chapter 1 of this Draft Report identifies the following considerations that are a useful starting point for this chapter:

- the adoption of lowest cost, least intrusive methods of achieving mandated aims
- the application of informed (evidence-based) expertise to regulatory issues
- the operation of processes that are transparent, accessible, fair and consistent
- the application of appropriate accountability systems
- the use of regulatory regimes that encourage responsive and healthy markets where possible

Additionally, a framework for performance assessment needs to consider the problem of attribution. That is, to what extent can local authorities attribute good or bad regulatory outcomes to the quality of their inputs, processes and outputs? To what extent do other factors such as the quality of regulatory design affect outcomes? What is the influence of social and economic conditions that are largely outside the control of the regulatory regime? These factors are not easy to identify or measure, but, if neglected, result in an incomplete picture of regulatory effectiveness.

One important implication of the influence of other factors is that central and local government should not measure their own performance in isolation. As noted in Chapter 1, regulatory systems are typically complex, multi-level and mutually dependent. Collaboration is required to put the pieces of the performance puzzle together. This requires performance assessment that crosses agency boundaries.

Adaptability

The framework for assessing regulatory performance needs to be adaptable to different regulatory regimes, and different local and national priorities. For example:

- Delegated regulations that are highly prescriptive need to be assessed in a different way to devolved regulations that provide local authorities with a high degree of discretion and autonomy (Chapter 2).
- Different local authorities face different regulatory challenges as a result of their distinct industry and land use characteristics, and the pressures resulting from population and industry growth and decline (Chapter 3). Local authorities will develop regulatory competencies in areas most relevant to their regional economies, rather than necessarily adopting one national model.
- Central and local performance assessment will differ, because these two spheres of government differ in their focus, concerns, and relationship with communities and stakeholders (Chapter 2).
- The regulatory costs and benefits experienced at a local level may differ from those experienced at the national level. The implication is that national and local decision-makers may differ over what constitutes good regulatory performance.

Minimising assessment costs

The Commission considers that there may be scope for local authorities to reduce their overall performance reporting burden. When it comes to performance assessment within government, there are often 'default settings' of measuring everything annually, setting targets for everything, and publishing all results externally in the annual report. Local authorities may be able to be more explicit about some of the choices open to them, as set out in Table 14.1.

Table 14.1 Principles for minimising assessment costs

Principles	Comment
Not everything has to be annual	Often a view of the trend in regulatory performance is more informative than the latest annual of performance. Impacts and outcomes may also take a long time to eventuate. On that basis, central and local government should consider whether performance assessment should be annual by default, or should take place less frequently. A good practice example is Education Review Office (ERO) reviews of New Zealand schools. ERO expects to review most schools within three years of the last review. However, "ERO will decide to carry out the next review in four-to-five years where ERO finds that the school's curriculum is consistently effective in promoting student learning – engagement, progress and achievement" and based on other performance criteria (ERO, 2012). This longer review timeframe lowers the compliance cost of ERO reviews for high performing schools and provides a further incentive to improve school performance.
Not everything has to have a target	Often there are demands from a wide variety of stakeholders for performance measures that address a stakeholders' special area of interest. Multiple demands for specific measures can lead to an overly long list of performance measures that is ineffective in presenting an overall picture of performance. The Office of the Auditor-General has recently emphasised to local authorities that "it is the quality of the performance measures that matter and not the quantity." The OAG recommends that "In selecting performance measures to report, entities should consider the characteristics of performance that are of greatest importance to stakeholders; reflect the financial significance of the activity; and reflect both the objectives for carrying out the activity and any (external or internal) risks needed to be managed in achieving those objectives" (OAG, 2010, p.16).
Not everything has to be externally reported	In cases where only a small number of individuals will benefit from performance information, central and local government should consider sharing this information on an as-needed basis, rather than requiring the information to be reported in external publications such as an annual report.
Not everything has to be new information	Auckland Council's submission notes that there is likely to be central government data that would assist local government to report performance. If this is the case, there may be less need for local authorities to generate some performance data sets anew (sub. 54). A good example is www.data.govt.nz, a directory of publicly-available, non-personal New Zealand government held datasets.

F14.1

Assessment of local government regulatory performance will have net benefits when it improves regulatory outcomes while minimising the cost of performance assessment. The key elements are:

- a good understanding of the steps that lead to regulatory outcomes;
- considering multiple dimensions of performance;
- adaptability to different regulatory regimes and local and national priorities; and
- a focus on minimising assessment costs by considering the frequency, form and information-requirements for performance reporting.

14.3 Current assessment practice

The Local Government Act framework

Local government's planning and annual reporting requirements are set out in the Local Government Act 2002 (LGA). The framework in the LGA is largely based on the basic performance model established in the Public Finance Act 1989 and the State Sector Act 1988. The objective is to drive performance at the local level, rather than from central government, by ensuring communities are better informed. Submissions from local authorities described how the LGA performance framework works in practice (Box 14.3).

Box 14.3 **Local Government Act performance framework**

Local authority performance measurement practice is driven by the planning process

> Councils monitor their own performance by designing performance measures which are included in their Long Term Plans and Annual Plans/Reports and assessed by the Office of the Auditor General. (LGNZ, sub 49, p.29)

Consultation is prominent

> Through the consultation/submission process local authorities receive and consider the comments of their communities and deliberate on these before adopting the final long term plan/annual plan. (Horowhenua District Council, sub 42. p.5)

Audit processes lend more rigour to the performance process

> It is our opinion that the Long Term Plans auditing regime lent more rigour to the LTP planning and development process and was beneficial to the sector and the community overall. (Waitomo District Council, sub 9, p.7)

Parliament amended the LGA in 2010. The 2010 reforms relating to standardised measures are intended to allow communities to compare infrastructure services across local authorities. Chapter 2 discusses the more recent amendments to the LGA in the Local Government Amendment Bill, which passed its third reading in the House on 29 November 2012.

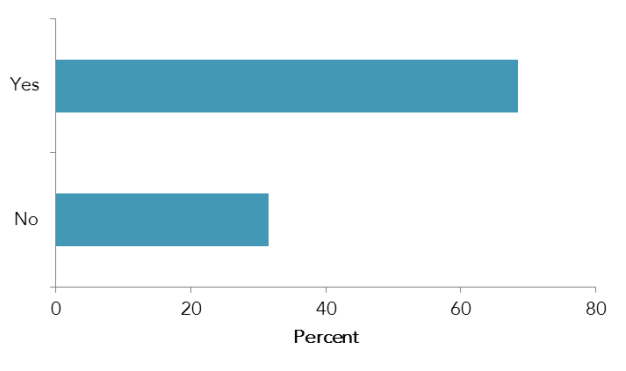
Benchmarking practice

Councils already benchmark amongst themselves and see a role for wider benchmarking of certain functions, provided that it is to learn from councils rather than to establish league tables (Box 14.4).

Box 14.4 **Council benchmarking practices and views**

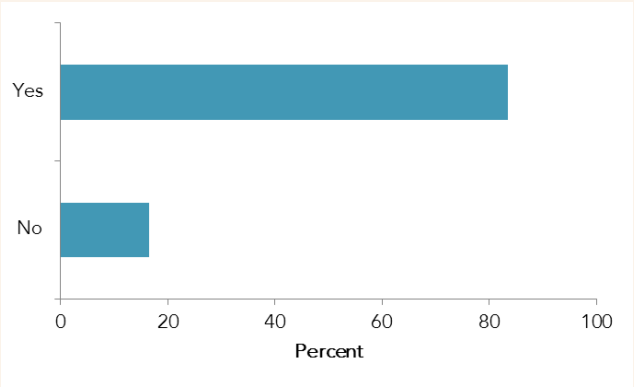
The Commission's survey asked councils about their benchmarking practice. Most councils already do benchmarking. Regulatory activities identified as suitable for benchmarking included building and construction consents, planning, land use or water consents and dog control.

Survey: does your council conduct any form of benchmarking against other councils?



Source: Productivity Commission

Survey: do you think there are any regulatory functions that lend themselves to regional or even national benchmarking?



Source: Productivity Commission

The clear message from local authorities is that benchmarking has a role in identifying leading practice across local and regional authorities, but needs to be used with care, including with respect to how benchmarks are chosen and developed to ensure local authority buy-in.

Other performance frameworks

The LGA co-exists with several other performance frameworks for local government. For example:

- The Resource Management Act provides that the Minister for the Environment (MfE) may investigate the exercise or performance by a local authority of any of its functions, powers, or duties under that Act or regulations under the Act (s24A). In addition, every local authority must monitor – among other things – the efficiency and effectiveness of the way it administers RMA requirements (s35(2)).
- The Building Act 2004 provides for the chief executive of the responsible department to monitor the performance by territorial authorities, building consent authorities, or regional authorities of their functions under the Act, and carry out reviews of territorial authorities (s204).
- The Food Act 1981 provides that the responsible minister may issue performance standards in relation to the exercise or performance, by territorial authorities, of certain functions, powers, and duties (s87E(1)).
- The Hazardous Substances and New Organisms Act 1996 provides that the responsible minister may appoint the Environmental Protection Authority to intervene if the minister considers that any territorial authority is not exercising or performing any of its functions, powers, or duties under that Act to the extent that the minister considers necessary to achieve the purposes of the Act (s101(1)).

Central government departments have set up monitoring practices under these legislative provisions, including MfE's biennial survey of local government RMA administration and the biennial audit of Building Control Authorities by International Accreditation New Zealand.

Horizons Regional Council notes several more central government monitoring practices, including:

- Ministry of Primary Industries (formerly MAF) – annual Clean Streams Accord audit;
- Regional council dairy audit – annual auditing of dairy farm compliance results; and
- investigators best practice network – six monthly meeting on enforcement/investigations best practice (Horizons Regional Council, sub. 53, p.3).

In addition, there are parliamentary and central government regulation monitoring mechanisms that are relevant to local government's administration of delegated or devolved legislation, notably the

parliamentary Regulatory Review Committee and the Treasury's regulatory oversight functions (see Chapter 6 for details).

Figure 14.2 summarises the current framework for producing information about regulatory performance.

Figure 14.2 Current framework for producing information about regulatory performance

Source: Productivity Commission

Notes:

1. In addition to the Treasury, the Office of the Auditor-General provides an oversight role on behalf of Parliament, as does the Parliamentary Commissioner for the Environment for environmental regulations. The Department of Internal Affairs provides a monitoring role on behalf of the Minister of Local Government.
2. The identification of RMA and Building Act reporting requirements is indicative only. Other important requirements include reporting for the HSNO Act.

F14.2 There is a crowded and disjointed regulatory performance reporting space for local government, driven by the combination of reporting requirements in the Local Government Act and the legislative reporting requirements for different forms of regulations.

14.4 Strengths of current assessment practice

Audit/local authority interaction

Local authorities consider that the interaction with their auditors, and more generally with the Office of the Auditor-General (OAG), is a central component of developing effective performance measurement frameworks, and one that generally works well.

> [T]he role of the Office of the Auditor General in auditing performance measurement frameworks has led to some convergence in the types of measures Council uses. (Dunedin City Council, sub. 56, p.10)
>
> [T]he Office of the Auditor General not only audits the quality of performance measures used for regulatory functions, it also advises councils on how to improve their performance frameworks, as part of the audit. (Hastings District Council, sub. 41, p.20)
>
> The role of the auditors is to ensure performance measures are fit for purpose and all councils are subject to what is a form of external assessment. Auditors will assist councils to improve the quality of their performance measures where necessary and one effect of this has been the sharing of good practice. Auditors not only have guidance provided by OAG they are also able to share good practice as they are networked and also audit more than one council. As a result we find a high degree of commonality in the measures councils use. (Local Government New Zealand, sub. 49, pp.33-34)

Local government stakeholders also provided positive feedback about their interaction with auditors in a peer-review of the OAG in 2008.

> [The Office of the Auditor-General] is seen by local authorities as knowledgeable about its sector, constructive in its approach, and reasonable to deal with.
>
> Local Government New Zealand was similarly positive about the work of the Office. They saw the OAG as a credible watchdog and a constructive partner in improving the standards of governance in local government bodies. This view was echoed by the Society of Local Government Managers, which has an overall role responsibility for improving local body management capability. They saw the OAG team as highly professional, well informed and helpful. They value the support given by the OAG to their efforts to promote and support better management practices in the local government sector. They noted that the Auditor-General had established a Local Government Advisory Group to ensure clear, strong communication with the sector. (International Peer Review Team, 2008, p.23)

Society of Local Government Managers guidance

The Society of Local Government Managers (SOLGM) has produced a guide called *Performance management frameworks: Your side of the deal.* This guide represents "the collective wisdom of the local government sector with respect to performance management under the LGA 2002" (SOLGM, 2010, p.6). It explains the reason for performance management and provides advice on how to set performance objectives, measure performance and use this information to improve performance. One particularly strong aspect of the guide is the focus on creating a 'performance culture' in local authorities. A performance culture is the sum of many parts. As the guide notes:

> Both your local authority's direction and the objectives it sets form a part of performance culture. But culture also depends on your local authority's:
>
> - systems – the mechanisms that are used to capture and report on performance information. These include both the formal (the computer software) and the informal (such as the Mayor's Monday meeting with your Chief Executive)
>
> - processes – this covers the actual measurement of results, getting results to those who should know, taking action. Most critically it also includes supporting people to succeed

> - people – we use this as a shorthand term for the driving of performance into the day to day activity of all staff, the means by which elected members and managers show commitment to performance management, and the rolling out of performance ethos (values and beliefs) in your local authority. (SOLGM, 2010, p.75)

SOLGM's comprehensive guide to performance management is an important resource for local authorities. The Commission would be interested to find out whether the guide has been useful for local authorities in regulatory performance assessment.

Q14.1 How have local authorities used the Society of Local Government Managers guide on performance management frameworks – or other guidance material – to assess local government regulatory performance?

Local authority performance assessment

Local authority performance reporting has improved over time. In 2011, the OAG reviewed six local authorities' publicly reported performance information for the seven years from 2003/04 to 2009/10. While noting areas for improvement, the OAG found that "the quality of reported performance information for the six local authorities had improved, particularly for the 2009/10 annual reports compared with the earlier years" (OAG, 2011, pp.5-6).

One area the OAG noted positively was the focus of some local authorities on measuring impacts and outcomes:

> The better annual reports showed a movement between 2003/04 and 2009/10 away from transactional process or activity-type measures (which focus on completing individual processes, tasks, or reports) toward outcome-based, impact-based, and service-based measures that could be used to understand the effectiveness of the local authorities' operations. (OAG, 2011, p.21)

Central government performance frameworks

Local authorities have provided several examples of good central government performance assessment practice:

> The Ministry for the Environment Biennial Survey is an excellent tool to monitor and compare Local Government performance on Resource Management Act performance. This type of comparative survey could be used in other areas of regulation. (South Taranaki District Council, sub. 39, p.6)

> The Council considers that the monitoring of performance is being effectively achieved in the Building Control sector through external IANZ [International Accreditation New Zealand] auditing processes. This creates national consistency in monitoring and reporting. The process also enables areas where improvement is required to be clearly flagged, and provides a clear incentive for implementation of such improvement. (Southland District Council, sub. 5, p.4)

However, some areas for improvement were identified. For instance, Southland District Council considers that "the central government monitoring by MFE of RMA performance has, in the Council's opinion, been excessively focused on timeframes, with little focus on the quality of decision-making processes, best practice identification and overall improvement of the sector" (sub. 5, p.4).

Box 14.5 describes the Ministry for the Environment's latest work to improve the approach to monitoring local government regulatory performance in respect of the RMA.

Box 14.5 Assessing Resource Management Act administration

The Ministry for the Environment provides the following report on its regulatory monitoring work:

> We are working with councils and other organisations to explore how RMA information can be better collected and shared to improve RMA processes. The project, called the 'Monitoring and Review Project – Towards an integrated monitoring framework for the Resource Management Act', began in late 2011 and is now in its second stage.

We currently capture RMA monitoring information in a number of ways including the biennial survey of local authorities, implementation surveys, state of the environment reporting, research, and data requests.

However, there is no national framework to identify and capture consistent and comparable information on how the RMA is implemented or to measure the effectiveness (performance) across the RMA. To compound this, councils differ in what, when, where and how they monitor the RMA.

From a council perspective, it is not always clear what is needed for national monitoring of the implementation and effectiveness of the RMA, therefore providing further information can require additional unplanned funding and resources. Funding pressures and local issues often impact on the extent of monitoring undertaken by councils, as monitoring funds can be spent on investigations from a regional or local perspective, which may not be of national significance.

The objectives of the project are to develop a clear and transparent national monitoring framework that can provide:

- robust information on the implementation of the RMA
- information on the performance of tools (national policy statements, national environmental standards, and water conservation orders)
- information to produce a coherent and considered picture of the outcomes from the functions, tools and processes of the RMA
- improve the availability, consistency and comparability of RMA information
- streamline the collection of information to achieve efficiencies.

Source: Ministry for the Environment, 2012

F14.3

There are several leading practices in relation to local government regulatory performance assessment, including:

- auditor/local authority interaction;
- Society of Local Government Managers guidance material;
- local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based, and service-based measures;
- International Accreditation New Zealand auditing processes for Building Control Authorities; and
- the Ministry for the Environment biennial Resource Management Act performance survey.

14.5 Weaknesses of current assessment practice

Lack of balance in what is measured

Local government is often overly focussed on timeliness and transactional measures (Box 14.6). Partly this focus on timeliness is driven by the statutory reporting requirements for regulations, but the difficulty of measuring impacts and outcomes also serves to incentivise measurement and reporting at other levels.

Box 14.6 **Local authority views on timeliness and transactional measures**

Measuring outcomes is difficult and tends to be avoided

> The most common performance indicators relate to statutory processing times. Assessing the final outcome of regulation is more important, but it is also far more difficult to measure and consequently it tends to be avoided. (Ashburton District Council, sub. 40, p.11)

But a focus on timeliness and transactional measures is costly in other ways

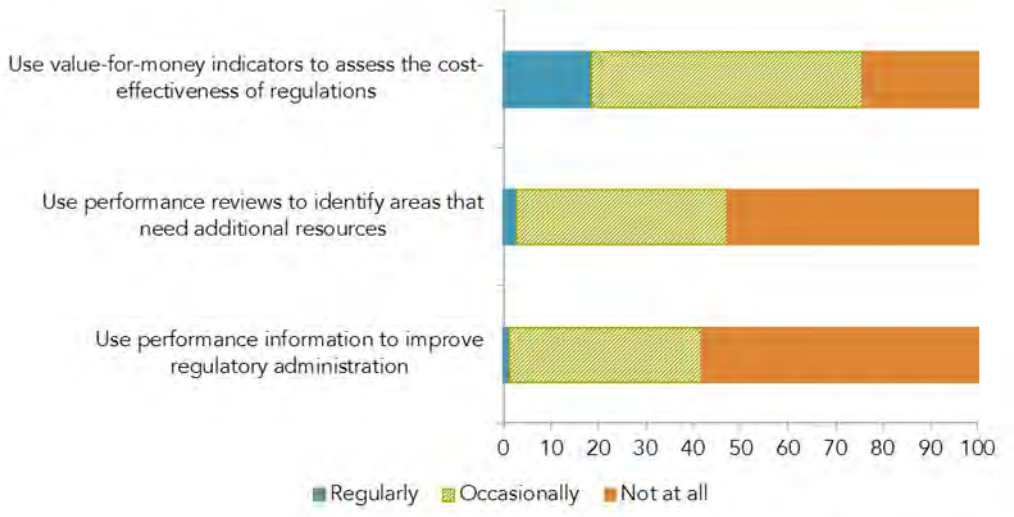
> Systems based upon timeframe achievement will only result in timeframe improvements potentially at the expense of quality and effectiveness in achieving the aims of the regulation. Something akin to the Building Consent audit process is a better way of assessing performance and getting meaningful feedback on which to build improvements. (Hutt City Council, sub. 51, p.2)
>
> It is common to attempt to measure regulatory performance based on the time and cost of consent processes. Such measures ignore more important issues such as the quality of the consent process and appropriateness of the decision and can lead to unintended consequences. (Local Government New Zealand, sub. 49, p.41)
>
> Measures based on timeframes for standard outputs seem appealing, but they can force staff to rush through complex issues, to the detriment of outcomes. (Western Bay of Plenty District Council, sub. 33, p.14)

Earlier chapters in this report note the undesirable effects of measuring and assessing just one aspect of regulatory performance. Chapter 10 notes that a focus on statutory timeframes for consent processing may divert too much resource away from monitoring and enforcing regulatory compliance.

Insufficient focus on assessment of performance information

While there is a focus on measurement of transactions and timeliness within local government, there is much less focus on assessment of this information and other performance information, in order to improve local government performance. For example, nearly six out of ten surveyed councils (58%) do not use performance information to improve the administration of their regulatory functions. About half of surveyed councils (53%) do not use performance reviews to identify areas that need additional resources. Very few of the surveyed councils regularly use the information to consider the cost-effectiveness of regulation. Overall, this is a concerning picture.

Figure 14.3 Local authority responses to question: how routinely does your council do each of the following?



Source: Productivity Commission

Weak system mindset and insufficient feedback loops

If an end outcome is not being achieved, or sufficiently achieved, what is getting in the way of this? Is it a problem with one component of the regulatory system, such as the quality of the policy making process, timeliness of consent processing? Or is a problem to do with the way the components work with each other? Performance information is an essential means to getting to the bottom of these issues.

However, to get to the bottom of regulatory regime performance, actors in the system must collaborate to put the pieces of the performance puzzle together. This requires performance measurement that crosses agency boundaries. Councils commented in submissions on the need for assessments that span a regulatory regime:

> [There is value in] external review of major regulatory regimes and comparisons of the practices among local authorities, including surveys of firms and households that are directly affected. (Local Government Forum, sub. 51, p.26)

> We believe that it is important to evaluate and feedback ineffective regulatory implementation against what was intended by the legislation. (Manawatu District Council, sub. 38, p.9)

With some exceptions, the Commission has not observed an outlook on activity that thinks about the sum of individual parts. There appears to be a general lack of focus on how activities across a regulatory regime fit together and influence each other.

As part of this, there do not appear to be strong feedback loops between the central and local government components of many regulatory regimes. This is compounded by the feeling in local government that central government does not understand local conditions. For example, local authorities surveyed by the Commission generally disagreed with propositions that central government understands local impacts of regulation and incorporates local government feedback. Councils also commented in submissions on the lack of feedback loops (Box 14.7).

Box 14.7 **Council views on performance feedback loops**

Feedback loops do not exist

> Annual reports are currently filed for Sale of Liquor and Animal Control activities. However, feedback on what this reporting achieves is sparse (aside from the internal feedback within a local authority). The information supplied needs to be for other that statistic gathering purposes – it needs to be directed towards both process improvement (generally within territorial authorities) or policy improvement (applies to central and local government). It should also directly drive the process of policy updating (amendments to Acts and subordinate Regulation, Bylaws or Council Policy). (Napier City Council, sub 44, p.6)

> Under the Dog Control Act every year a section 10 report is submitted to the Department of Internal Affairs on functions undertaken, however feedback is not received in return this could be done in the same fashion as the MFE and Department of Building survey and reports. (Rotorua District Council, sub 11, p.23)

Feedback loops are too slow

> When there is a feedback loop for monitoring, sometimes it can take a considerable amount of time to be communicated to the affected parties and follow upon actions taken are minimal. This is one of the weakest links of local/central government communication. (Waikato District Council, sub 16, p.7)

However, the Hutt City Council considered that the Ministry for the Environment RMA survey and the Corrective Action Request system operated with the Building Control Authorities were effective in providing feedback loops (sub. 51, p.2).

A potential weakness in the accountability framework as it relates to capability

Capability is an important dimension of accountability. Owners and stakeholders have a strong interest in future results and these depend crucially on capability and its development and deployment. As noted in

Chapter 4, understanding national and local regulatory capabilities is also an important part of allocating regulatory responsibilities.

Regulatory capabilities are more critical for some regulatory regimes than others. Chapter 4 notes that greater regulatory capability is required when adopting performance-based rather than prescriptive regulatory regimes. Other parts of this report stress the important role of regulatory capabilities, including Chapter 7 (capability of policy agencies) and Chapter 13 (capability of many Māori groups to be involved in the resource consent or district and regional planning process).

The LGA does not itself mention 'capability'. This is in contrast to Acts that govern how central government is to be held to account. The State Sector Act, Public Finance Act and Crown Entities Act all require departments to assess and report in some way on their organisation's health and the capability. Although Local Government New Zealand and the Society of Local Government Managers provide a valuable role in promoting regulatory capability, there is a question of whether there should be a greater focus on capabilities in local authority planning and reporting under the LGA.

Q14.2 Is there a sufficient focus on regulatory capabilities in local government planning and reporting under the Local Government Act?

Potential inconsistencies in the way regulatory performance is assessed across regulations

As noted earlier in this chapter, different regulatory regimes have different performance assessment frameworks set out in legislation. For example, the Food Act includes legislative provisions to enable the responsible minister to set performance standards for the territorial authority. The Resource Management Act and the Building Act have departmental performance assessment processes, leveraged off the legislative power of the minister or head of the administering department to assess the performance of territorial authorities.

The diversity of performance assessment frameworks may reflect the different types of regulation that local government delivers. However, the diversity in performance frameworks may be problematic in some ways. For instance, LGNZ notes:

> External monitoring by the agencies responsible for delegation varies considerably … Multiple agencies are already involved in the audit of local government, including the Office of the Auditor-General, the Parliamentary Commissioner for the Environment, the Ombudsman, and the central government department with lead responsibility for any particular regulation. Audit, monitoring, and information-gathering demands may be made of local government with sometimes limited ability to recover the cost of these demands. We do not see this as a capability issue but more so a co-ordination issue for central government agencies. (Local Government New Zealand, sub. 49, pp.29 and 41)

Q14.3 Have local authorities encountered difficulties in dealing with different performance assessment frameworks across different forms of regulation? Which forms of regulation do a good job of establishing performance assessment frameworks, in legislation or by other means?

Summary of weaknesses in performance assessment

The weaknesses identified above are likely to be impairing the efficiency and effectiveness of local government regulatory performance assessment. The Commission seeks feedback on the impact of these weaknesses for local and central government, and whether other weaknesses are also apparent.

F14.4 The value of performance assessment is likely to be impaired at present as a result of lack of balance in what is measured, insufficient focus on assessment of performance information, a potential weakness in the accountability framework as it relates to capability, and potential inconsistencies in the way regulatory performance is assessed across regulations.

14.6 Improving the efficiency and effectiveness of performance assessment

Table 14.2 summarises the Commission's observations of the strengths and weaknesses of the current framework for performance assessment, based on the elements set out at the start of this chapter. The table includes a set of proposed options for improving performance assessment. The Commission seeks feedback on these options, but also seeks sector input in identifying further options.

Table 14.2 Options to improve the efficiency and effectiveness of performance assessment

Elements of efficient and effective assessment	Comments on the current framework of performance assessment	Potential options for improvement	Pros and cons of options
A good understanding of the steps that lead to regulatory outcomes	Strong auditor-local authority relationships and comprehensive Society of Local Government Managers guidance material Insufficient focus on assessment of performance information Lack of feedback loops between the central and local government components of many regulatory regimes	**Regulatory 'terms of reference' documents** The Government could require policy departments to develop a terms of reference for each regulatory regime that is centrally designed and locally delivered regulation. Each terms of reference should be brief and set out the purpose of the regulatory regime, the roles of different players in the regime and the types of benefits and costs that the regime will create. The terms of reference should be short enough to get players in the regime (central and local government, OAG etc) on the same page about who does what; how the governance and feedback systems link up; what are the types of costs and benefits of the regulation; what is the information base; and who has responsibility for maintaining a system overview. The work would also identify the top issues and concerns related to a regime.	Improved alignment of activities across regulatory regimes Clarity of purpose Cost of developing the terms of reference documents
		A joint health check programme A health check would involve central and local government staff jointly assessing the performance of one particular regulatory regime (such as dog control regulation), from the policy making stage to delivery. The health check would filter the extensive available performance information and the experiences of staff in the regime, with a view to briefly identifying problems, missing information, duplication and potential best practices.	Benefits of identifying and addressing regulatory problems Potential savings from identifying duplication of reporting and information across a regulatory regime Cost of performing the health checks and follow up actions

Elements of efficient and effective assessment	Comments on the current framework of performance assessment	Potential options for improvement	Pros and cons of options
		One health check would be conducted every year for a particular regulatory regime.	
Considering multiple dimensions of performance	Local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based, and service-based measures Lack of balance in what is measured A potential weakness in the accountability framework as it relates to capability assessment	**Adoption of elements of the PIF model** A new model for assessing and improving capability in central government is SSC's Performance Improvement Framework (PIF). In the words of SSC (2012), "a PIF review looks at the current state of an agency and how well placed it is to deal with the issues that confront it in the medium-term future. It then proposes areas where the agency needs to do the most work to make itself fit-for-purpose and fit-for-the-future. It is not an investigation. It is not an audit." **Existing local government capability assessment models** As an alternative to the PIF process, the Commission would like to hear about any existing models for assessing local government capability that are more appropriate than the PIF model. **Increase focus on regulatory capabilities** To the extent that there is insufficient focus on regulatory capability, this could be addressed by adding a capability focus in local government planning and reporting under the Local Government Act	Benefit of addressing capability concerns Cost of performing PIF assessments and follow up actions Cost of preparing documentation for PIF assessments Benefit of addressing capability Staff cost of assessing capability and follow up actions Benefit of addressing capability Cost of additional reporting requirements
Adaptability to different regulatory regimes and local and national priorities	Some well-regarded regulatory performance frameworks (Ministry for the Environment biennial Resource Management Act performance survey and International Accreditation New Zealand auditing processes for Building Control Authorities)	**Potential expansion of leading practices to other regulatory regimes** Assess the Ministry for the Environment's monitoring and review project once it has been implemented, to determine if the project is a model for other areas of local government regulation. Consider whether the International Accreditation New Zealand auditing processes for Building Control Authorities are suitable for other forms of regulation, as a substitute for detailed external performance reporting.	Benefit of better understanding of regulatory performance Cost of developing new reporting frameworks

Elements of efficient and effective assessment	Comments on the current framework of performance assessment	Potential options for improvement	Pros and cons of options
A focus on minimising assessment costs by considering the frequency, form and information-requirements for performance reporting	Lack of balance in what is measured Potential gaps and inconsistencies in the way regulatory performance expectations are set	**Reduce the frequency of regulatory performance reporting** As noted above, ERO school performance audits are less frequent if the previous audit found good performance. This principle could be adopted by central government departments that seek assurance about local government regulatory performance.	Reduced cost of reporting from reducing frequency, external reporting and information requirements
		Reduce the external reporting burden In cases where only a small number of individuals will benefit from performance information, central and local government should consider sharing this information on an as-needed basis, rather than requiring the information to be reported in external publications such as an annual report.	
		Encouraging central government to share administrative data to reduce the need for local authorities to produce some performance information The Auckland Council explains this idea in its submission: "Many central government agencies collect data which may assist in monitoring and determining the effectiveness of local government regulation. For example, District Health Boards and the Police collect information which may assist in monitoring the impact of local regulation on public health and safety. There can be challenges to the establishment of data sharing practices which often involve local authorities making specific local arrangements with these agencies for data exchange. There may therefore be some merit in identifying and making freely available (or at a nominal cost) agreed core data sets which would assist local government in the monitoring of regulation" (Auckland Council, sub. 54, pp. 19-20).	Reduced cost to local authorities of gathering performance information Cost to central government departments of providing data in a form suitable to local government
		Improve consistency of performance assessment frameworks across different forms of regulation Legislative amendments to improve consistency of performance assessment frameworks across regulations. (However, it is not clear that the problem is large enough to warrant legislative changes. Legislative amendments might be more disruptive than beneficial.)	Reduced cost of having to adapt to different regulatory reporting requirements across regulatory regimes. Cost of adapting existing reporting frameworks.

Q14.4 Which of the Commission's performance assessment options have the best potential to improve the efficiency and effectiveness of assessment of local government regulatory performance and improve regulatory outcomes? What are the costs and benefits of these options? Are there other options in addition to those that the Commission has identified?

Summary of questions

Chapter 3 – Diversity across local authorities

Q3.1 To what extent should local government play an active role in pursuing regional economic development?

Chapter 4 – Allocating regulatory responsibilities

Q4.1 Have the right elements for making decisions about the allocation of regulatory roles been included in the guidelines? Are important considerations missing?

Q4.2 Are the guidelines practical enough to be used in designing or evaluating regulatory regimes?

Q4.3 Are the case studies helpful as an indicative guide to the analysis that could be undertaken?

Q4.4 Should such analysis be a requirement in Regulatory Impact Statements or be a required component of advice to Ministers when regulation is being contemplated?

Q4.5 Should the guidelines be used in evaluations of regulatory regimes?

Chapter 5 – The funding of regulation

Q5.1 Do any regulatory functions lend themselves to specific grants? If so, what is it about those functions that make them suitable for specific grants?

Q5.2 If general grants were to be considered, on what basis could 'needs assessments' be undertaken? What indicators could be used to assess need?

Q5.3 What would appropriate accountability mechanisms for funding local regulation through central taxation look like? How acceptable would these be to local authorities?

Chapter 7 – Regulation making by central government

Q7.1 What measures, or combination of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government?

Q7.2 What measures, or combination of measures, would be most effective in lifting the capability of central government agencies to analyse regulations impacting on local government?

Chapter 8 – Local government cooperation

Q8.1 What are the benefits and costs of cooperation? Are there any studies that quantify these benefits and costs?

Chapter 9 – Local authorities as regulators

Q9.1 Are there potential pooled funding or insurance style schemes that might create a better separation between councillors and decisions to proceed with major prosecutions?

Q9.2 Are bylaws that regulate access to council services being used to avoid incurring costs, such as the cost of new infrastructure? Is regulation therefore being used when the relationship between supplier and customer is more appropriately a contractual one?

Q9.3 What factors (other than the type of regulation most commonly experienced by different industry groupings and the size of businesses in these sectors) explain differences in the satisfaction reported by industry sectors with local authority administration of regulations?

Chapter 10 – Local monitoring and enforcement

Q10.1 Are risk-based approaches to compliance monitoring widely used by LAs? If so, in which regulatory regimes is this approach most commonly applied? What barriers to the use of risk-based monitoring exist within LAs or the regulations they administer?

Q10.2 The Commission wishes to gather more evidence on the level of monitoring that LAs are undertaking. Which areas of regulation do stakeholders believe suffer from inadequate monitoring of compliance? What are the underlying causes of insufficient monitoring? What evidence is there to support these as the underlying causes?

Q10.3 Which specific regulatory regimes could be more efficiently enforced if infringement notices were made more widely available? What evidence and data are there to substantiate the benefits and costs of doing this?

Q10.4 Is there sufficient enforcement activity occurring for breaches of the RMA, other than noise complaints? If not, what factors are limiting the level of enforcement that is occurring?

Q10.5 Should the size of fines imposed by infringement notices be reviewed with a view to making moderate penalties more readily available? What evidence is there to suggest that this would deliver better regulatory outcomes?

Q10.6 Is sufficient monitoring of liquor licences occurring? What evidence and data exists that would provide insights into the adequacy of current monitoring effort?

Q10.7 How high is the burden of proof for each kind of enforcement action? Is it proportional to the severity of the action?

Q10.8	Is the different 'gradient' in the use of compliance options because there are missing intermediate options?
Q10.9	Are the more severe penalties not being used because there is insufficient monitoring activity by local authorities to build sufficient proof for their use?
Q10.10	Why are relatively few licences varied?

Chapter 12 – Making resource management decisions, and the role of appeals

Q12.1	Is the very low number of consents declined best explained by risky applications not being put forward, the consent process improving the applications, or too many low-risk activities needing consent?
Q12.2	Would different planning approaches lead to less revisiting of regulation? What alternative approaches might there be?
Q12.3	What factors have the strongest influence on whether a District Plan or Regional Policy Statement are appealed?
Q12.4	Overall, would it be feasible to narrow the legal scope of appeals?
Q12.5	Would it be feasible to narrow legal standing?
Q12.6	What features of the bylaw-making process are distinct from the district plan-making process, and how might you use practice under the one to improve the process under the other?

Chapter 13 – Local regulation and Māori

Q13.1	Are there any other ways that local authorities include Māori in decision making that should be considered?
Q13.2	What are some examples of cost-effective inclusion of Māori in decision making you are aware of?
Q13.3	What more intermediate options could there be for including Māori in RMA decision-making?
Q13.4	What are some examples of decision-making systems well-tailored to Māori involvement?

Chapter 14 – Assessing the regulatory performance of local government

Q14.1 How have local authorities used the Society of Local Government Managers guide on performance management frameworks – or other guidance material – to assess local government regulatory performance?

Q14.2 Is there a sufficient focus on regulatory capabilities in local government planning and reporting under the Local Government Act?

Q14.3 Have local authorities encountered difficulties in dealing with different performance assessment frameworks across different forms of regulation? Which forms of regulation do a good job of establishing performance assessment frameworks, in legislation or by other means?

Q14.4 Which of the Commission's performance assessment options have the best potential to improve the efficiency and effectiveness of assessment of local government regulatory performance and improve regulatory outcomes? What are the costs and benefits of these options? Are there other options in addition to those that the Commission has identified?

Findings and recommendations

The full set of findings and recommendations from the report are below.

Findings

Chapter 2 – Local government in New Zealand

F2.1 The level of tension between central and local government about their respective roles may now be at a level that is unhealthy and could undermine the development and performance of regulatory functions.

F2.2 It is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government, because these matters will determine what options for the design of the regulatory system are feasible and appropriate.

F2.3 Contrary to common perceptions, almost all regulations made or administered by local authorities are undertaken on the direction of central government, or are necessary for carrying out their duties under Acts of Parliament.

Chapter 3 – Diversity across local authorities

F3.1 New Zealand's national population is projected to grow over the next 25 years, but almost half of New Zealand's TA areas are expected to decline in population over this period.

F3.2 Differences in demography, labour markets and local incomes across New Zealand's local authorities may drive different regulatory needs and capacity at the local government level.

F3.3 Physical endowments vary across New Zealand's TAs, as does industrial activity. Employment data indicate a pattern of larger hub TAs, which tend to have fuller suites of industries, along with a larger number of more specialised smaller authorities.

F3.4 Greater industrial specialisation in smaller TAs suggests more specific regulatory needs in smaller authorities. This provides one explanation for variation in regulatory activity across New Zealand's TAs.

F3.5 New Zealand's TAs have had mixed employment growth experiences. Employment growth has been steadier in larger TAs, while varying significantly across smaller TAs.

F3.6 Local variation likely drives different regulatory approaches. Part of this variation in regulatory approach appears to be differing interpretations of local government's role in promoting economic growth.

F3.7 The appropriate role of local government in fulfilling its mandate to pursue economic growth has been left unclear by central government.

Chapter 4 – Allocating regulatory responsibilities

F4.1 Better regulatory decisions will be made, and overall wellbeing improved, when those who bear the costs and benefits from the regulation have representation in the jurisdiction making the decision.

F4.2 If there are spillover effects, better regulatory decisions will be made if the costs and benefits that are borne by those outside the decision making jurisdiction are taken into account.

F4.3 There are advantages from local decision making if preferences are heterogeneous because local governments are better at aligning local preferences than central governments, but where preferences are more homogenous across the country, there may be advantages from reducing the effort and cost of multiple decision makers.

F4.4 When allocating regulatory responsibilities, consideration should be given to what level of government has, or can most efficiently obtain, the relevant information needed for effective decision making and implementation.

F4.5 When allocating regulatory responsibilities, consideration should be given to the capabilities required of the role and the existence and quality of governance and accountability arrangements within the jurisdiction tasked with the role.

F4.6 Good regulatory outcomes are more likely to be achieved when there is clarity of role and coordination between levels of government responsible for standard-setting and implementation.

F4.7 Good regulatory decision making and implementation will be compromised if the level of government responsible is inherently inefficient or unaccountable.

F4.8 Submissions point to a mismatch between national and local preferences and priorities when it comes to regulation. Around half of local authority survey respondents agreed that there are conflicts between local priorities and regulations originating at central government level.

F4.9 Approximately 70% of businesses in New Zealand only deal with one council and for those businesses that operate over more than one jurisdiction, this is over a limited range of regulatory matters.

F4.10 Targeted approaches could be adopted for reducing the costs for businesses operating across multiple jurisdictions while maintaining the benefits of local tailored regulation.

F4.11 There are issues with insufficient regulatory capability but this can be found at all levels of government. There are a number of ways of dealing with capability gaps that do not always require a reassignment of roles to a different level of government.

F4.12 A misallocation of risk can have costly consequences. Insufficient attention has been given in the past to the ability to manage risk when allocating regulatory roles.

F4.13 Both local and central government need to work on a constructive engaged relationship for the development of quality regulations and the delivery of regulatory outcomes.

Chapter 5 – The funding of regulations

F5.1 The local government sector has a strongly held view that central government passes regulatory functions to local authorities without sufficient consideration of the funding implications for councils.

Chapter 7 – Regulation making by central government

F7.1 Regulation making at the central level is below leading practice. This is having a material impact on the quality of regulations devolved or delegated to the local government sector.

F7.2 Current institutional arrangements can shield central government agencies from the full fiscal and political cost of decentralising regulatory functions.

F7.3 When regulations are developed centrally and implemented locally, the incentives faced by central government to undertake rigorous policy analysis are reduced. However, care needs to be taken not to confuse implementation problems with inadequacies in the underlying design of regulations – this requires careful post-implementation analysis.

F7.4 The degree of Ministerial pressure on the public service to provide quality advice on local government regulatory issues is a key influence on behaviour. It is therefore important that Ministers have strong incentives to ensure that the advice they receive on these issues is of high quality and the product of a rigorous policy process.

F7.5 The tendency of central government agencies to operate independently has resulted in regulatory functions being conferred on local government without considering their interaction and impact on existing regulatory functions administered by local authorities.

F7.6 An opportunity exists to use the Better Public Service Initiative to promote a more joined up, whole of government approach to regulatory policy involving the local government sector.

F7.7 The RIS process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present this value is not being fully realised and improvements to the process are required.

F7.8 While there are some examples of leading practice, consultation with local government on the design of new regulations is generally poor.

F7.9 There is evidence to suggest that implementation analysis is a generic weakness of regulatory policy analysis in New Zealand. This weakness impacts on local government because local government is often the implementer of government policy.

F7.10 The financial, capability, capacity and risk management challenges faced by local government in implementing regulations appear to be poorly understood within central government. There is little analysis of how these challenges will impact the successful achievement of regulatory outcomes.

F7.11 A spectrum of measures exist that would help improve the quality of regulation delegated or devolved to local government. Many of these would have broader benefits for the overall standard of central government regulation making.

F7.12 While guidance and training material on good policy practices are available, the incentives on agencies to ensure they utilise this material are weak. Perhaps the most relevant example of this is the limited traction obtained by DIA's policy guidelines for regulatory issues involving local government.

F7.13 Pragmatic approaches to building better relationships between central and local government are needed. These relationships must be based on a mutual understanding that both levels of government ultimately exist to create public value and that their ability to create public value is tied, at least in part, to the actions of the other.

Chapter 8 – Local government cooperation

F8.1 There is significantly more cooperation, coordination, and sharing of resources occurring amongst local authorities than is commonly known.

F8.2 Despite the wide use of cooperative arrangements, very few empirical studies have been undertaken (either domestically or internationally) to quantify the benefits and costs of council cooperation on regulatory functions.

F8.3 Because local authorities operate within a highly diverse set of circumstances, the returns from cooperation are likely to be highly situation-specific. As a result, significant care must be taken in applying or interpreting business cases from one jurisdiction in another.

F8.4 Cooperation can capture many of the benefits of centralisation while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences).

F8.5 The speed with which central government seeks to implement new regulatory initiatives may materially affect the likelihood of local cooperation. Central government consultation processes, done well, can lay the foundation for local authorities working together.

Chapter 9 – Local authorities as regulators

F9.1 Local authorities do not appear to be using their powers of general competence to get into new areas of regulation. However, local authorities are using the powers available to them to deal with the local issues they face. Some local authorities will take a very cautious approach with regulation that requires a high level of technical expertise, reflecting capability or risk issues.

F9.2 Elected council members involvement in individual regulatory decisions is most likely greater than previously understood.

F9.3 The independent hearings panel process can be a good way of ensuring the views of interested parties are heard fairly and lead to recommendations being made to councils.

F9.4 Centralising functions or providing more national guidance is often seen as a solution to inconsistency. However, inconsistency more often than not occurs because of the different understandings or approaches of local officials working on the ground. Greater consistency is more likely to be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.

F9.5 Twenty seven per cent of business survey respondents were actively dissatisfied with the regulatory services and approach of their local authorities, however there is considerable variation between industries.

Chapter 10 – Local monitoring and enforcement

F10.1 Statutory timeframes for consent processing may have the unintended consequence of diverting resource away from other parts of the regulatory process, especially monitoring and enforcing regulatory compliance.

F10.2 Local authorities need a wider range of enforcement methods to ensure they can always take a proportional approach to enforcement.

Chapter 11 – The cost impact of local government regulation on firms

F11.1 Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business.

F11.2 The Commission's survey of businesses showed that almost three quarters of businesses had at least some contact with local government through the regulatory process. Of those that did:

- 39% report that local government regulation places a significant financial burden on their business.
- Nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large (and nearly half were neutral or disagreed), and 70% were dissatisfied with the fees charged.
- 'Planning, Land Use or Water Consents' and 'Building and Construction Consents' have the greatest cost impact on businesses. Both of these local government regulatory areas are typically associated with new projects such as expanding or building something new.
- Around 40% of surveyed businesses had contact with the local council over four or more separate regulatory areas.

Chapter 12 – Making resource management decisions, and the role of appeals

F12.1 Explicit consideration of the more moderate options included in the LAC guidelines for appeals processes needs to be included in any discussion of changes to the plan-making process.

Chapter 13 – Local regulation and Māori

F13.1 On the available evidence, the current system for involving Māori in resource consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

Chapter 14 – Assessing the regulatory performance of local government

F14.1 Assessment of local government regulatory performance will have net benefits when it improves regulatory outcomes while minimising the cost of performance assessment. The key elements are:

- a good understanding of the steps that lead to regulatory outcomes;
- considering multiple dimensions of performance;
- adaptability to different regulatory regimes and local and national priorities; and
- a focus on minimising assessment costs by considering the frequency, form and information-requirements for performance reporting.

F14.2 There is a crowded and disjointed regulatory performance reporting space for local government, driven by the combination of reporting requirements in the Local Government Act and the legislative reporting requirements for different forms of regulations.

F14.3 There are several leading practices in relation to local government regulatory performance assessment, including:

- auditor/local authority interaction;
- Society of Local Government Managers guidance material;
- local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based, and service-based measures;
- International Accreditation New Zealand auditing processes for Building Control Authorities; and
- the Ministry for the Environment biennial Resource Management Act performance survey.

F14.4 The value of performance assessment is likely to be impaired at present as a result of lack of balance in what is measured, insufficient focus on assessment of performance information, a potential weakness in the accountability framework as it relates to capability, and potential inconsistencies in the way regulatory performance is assessed across regulations.

Recommendations

Chapter 5 – The funding of regulations

R5.1	Regulations should be reviewed to remove specific fee amounts and make those fees at the discretion of local authorities, subject to the requirements of section 101(3) of the Local Government Act 2002.

Appendix A Public consultation

Submissions

INDIVIDUAL OR ORGANISATION	SUBMISSION NUMBER
Airfoam Wall Insulators (Palmerston North) Ltd	046
Ashburton District Council	040
Auckland Council	054
Bill Malcolm	018
Christchurch City Council	057
Civic Futures Ltd	007
Clutha District Council	032
Dunedin City Council	056
Electricity Networks Association	012
Environment Southland	028
Far North District Council	055
Federated Farmers of New Zealand	026
Fonterra Co-operative Group Limited	029
Gisborne District Council	001
Gordon George	013
Grass Roots Institute of NZ Inc, Jay Weeks, Gordon Levet & Sandra Goudie	014
Greater Wellington Regional Council	037
Hastings District Council	041
Hauraki District Council	059
Horizons Regional Council	053
Horowhenua District Council	042
Hurinui District Council	043
Hutt City Council	051
IPENZ Engineers New Zealand	017
John Mellars	022
Local Government Forum	015
Local Government New Zealand	049
Mackenzie District Council	021
Manawatu District Council	038
Miles Hayward-Ryan	020
Napier City Council	044
New Plymouth District Council	058
New Zealand Council for Infrastructure Development	025
Noelene Buckland	008
NZ Public Service Association	023
Opotiki District Council	036
Palmerston North City Council	034
Queenstown Lakes District Council	052
Rangitikei District Council	035
Richard Fisk	019
Rotorua District Council	011
Ruapehu District Council	024

SOLGM - New Zealand Society of Local Government Managers	048
South Taranaki District Council	039
Southland District Council	005
Tararua District Council	027
Tasman District Council	006
Tauranga City Council	002
The West Coast Regional Council	050
Waikato District Council	016
Waikato Regional Council	045
Waimakariri District Council	030
Wairarapa Chamber of Commerce and Manawatu Chamber of Commerce	031
Waitomo District Council	009
Wanganui District Council	003
Water New Zealand	004
Wellington City Council	047
Western Bay of Plenty District Council	033
Whangarei District Council	010

Engagement meetings

INDIVIDUAL OR ORGANISATION

Association of Non-Governmental Organisations of Aotearoa
Auckland Chamber of Commerce
Bay of Plenty Regional Council
Canterbury Earthquake Recovery Authority
Cottages New Zealand
David Shand
Department of Conservation
Department of Internal Affairs
Electricity Networks Association
Environment Canterbury Regional Council
Environmental Protection Authority
EziBuy
Federated Farmers of New Zealand
Foodstuffs New Zealand
Forest and Bird
Grow Wellington
Hawke's Bay Master Builders
Health Quality and Safety Commission
Heritage Hotels
Higgins Contractors
Homeworx Design and Build Limited
Hospitality New Zealand
Ian Gordon
Land & Water Forum
Lion
Local Government Forum
Local Government New Zealand
Manawatu Chamber of Commerce
McCain Foods Limited
McDonald's
Ministry for Primary Industries
Ministry for the Environment
Ministry of Business, Innovation and Employment
Ministry of Health
Ministry of Social Development
Morgan Slyfield
New Zealand Historic Places Trust
New Zealand Society of Local Government Managers
Ngā Hapū ō Ngāruahine Iwi Incorporated
Noelene Buckland
NZIER
Office of the Auditor General
Peter McKinlay
Powerco
Progressive Enterprises Limited
Silvereye Communications

South Taranaki District Council Māori Committee
Standards New Zealand
State Services Commission
Te Rūnanga o Ngāi Tahu
The Mill liquor
The National Wetlands Trust of New Zealand
The New Zealand Initiative
The Treasury- Regulatory Impact Analysis Team
Waikato Regional Council
Wellington Regional Chamber of Commerce
WHK Hawke's Bay
Wind Energy Association
ANGOA – Marion Blake
Professor Tim Hazeldine
Vernon Rive

CLUSTER MEETINGS

Manawatu-Whanganui region:
Palmerston North (host)
Manawatu District Council
Horowhenua District Council
Tararua District Council
Rangitikei District Council
Horizons Regional Council
Taranaki Region
New Plymouth District Council (host)
Stratford District Council
South Taranaki District Council
Hawke's Bay
Hastings District Council (host)
Napier City Council
Wairoa District Council
Hawke's Bay Regional Council
Wairarapa District Councillors meeting
Masterton District Council
South Wairarapa District Council
Carterton District Council
Wellington Regional Mayors forum
Upper Hutt City Council (host)
Hutt City Council
Wellington City Council
Porirua City Council
Kāpiti Coast District Council
Masterton District Council
Carterton District Council
South Wairarapa District Council
Greater Wellington Regional Council
South Island Strategic Alliance – Core Group

LGNZ ZONE MEETINGS

Zone 1 : Local authorities in the Auckland and Northland regions
Zone 2 : Local authorities in the Bay of Plenty and Waikato regions
Zone 5 & 6 : Local authorities in the South Island

LGNZ SECTOR MEETINGS

Metro
Regional
Te Maruata Māori Committee

CONFERENCES

SOLGM – Auckland	09 Sept 12
Local Government New Zealand Conference – Queenstown	16/17 July 12

Appendix B Diversity across local authorities: Data

Table B.1 Summary characteristics of New Zealand TAs on 2006 Industry Composition (census)

Industry	001 Far North District	002 Whangarei District	003 Kaipara District	004 Rodney District	005 North Shore City	006 Waitakere City	007 Auckland City	008 Manukau City	009 Papakura District
Agriculture, Forestry and Fishing	16.35%	8.95%	32.60%	10.52%	0.45%	1.65%	0.28%	0.80%	4.18%
Mining	0.32%	0.21%	0.72%	0.18%	0.01%	0.03%	0.04%	0.05%	0.38%
Manufacturing	7.61%	11.40%	12.19%	11.95%	11.40%	17.39%	10.78%	19.00%	19.89%
Electricity, Gas and Water Supply	0.59%	0.75%	0.29%	0.11%	0.07%	0.08%	0.36%	0.16%	0.09%
Construction	6.45%	6.73%	5.19%	11.08%	5.76%	6.68%	4.03%	4.90%	8.24%
Wholesale Trade	2.67%	4.86%	3.46%	4.55%	10.99%	5.62%	9.36%	9.05%	5.97%
Retail Trade	13.76%	14.67%	11.95%	14.07%	14.78%	18.00%	10.10%	13.23%	15.95%
Accommodation, Cafes and Restaurants	8.81%	4.54%	5.09%	5.21%	3.35%	3.05%	4.76%	3.61%	3.92%
Transport and Storage	2.69%	2.72%	1.68%	2.21%	2.24%	1.92%	3.40%	8.70%	4.20%
Communication Services	0.50%	0.74%	0.62%	0.57%	1.50%	0.56%	2.51%	1.23%	0.33%
Finance and Insurance	1.75%	3.11%	1.01%	2.61%	4.86%	2.06%	7.14%	2.98%	2.71%
Property and Business Services	10.22%	11.12%	7.15%	13.26%	17.92%	10.95%	23.05%	11.65%	9.77%
Government Administration and Defence	2.51%	3.20%	1.63%	1.86%	3.31%	4.49%	2.09%	2.55%	2.27%
Education	11.18%	8.87%	7.39%	7.64%	8.26%	10.53%	6.69%	9.48%	9.27%
Health and Community Services	8.17%	12.22%	5.33%	6.91%	8.44%	9.14%	7.64%	7.35%	6.89%
Cultural and Recreational Services	2.28%	2.07%	1.58%	3.53%	2.60%	3.42%	4.01%	1.67%	1.84%
Personal and Other Services	4.14%	3.84%	2.11%	3.74%	4.06%	4.43%	3.75%	3.58%	4.11%

Industry	010 Franklin District	011 Thames-Coromandel District	012 Hauraki District	013 Waikato District	015 Matamata-Piako District	016 Hamilton City	017 Waipa District	018 Otorohanga District	019 South Waikato District
Agriculture, Forestry and Fishing	19.92%	9.02%	27.08%	30.50%	28.78%	0.55%	21.92%	42.01%	19.11%
Mining	0.57%	0.22%	1.88%	2.64%	0.13%	0.04%	0.20%	0.17%	0.09%
Manufacturing	11.55%	10.95%	8.72%	8.60%	16.46%	13.20%	10.13%	7.74%	21.75%
Electricity, Gas and Water Supply	0.56%	0.16%	0.29%	1.36%	0.05%	0.35%	0.41%	0.09%	0.21%
Construction	7.10%	9.36%	5.19%	6.94%	6.06%	5.85%	5.56%	3.15%	4.64%
Wholesale Trade	5.56%	3.45%	2.74%	2.69%	4.05%	6.48%	4.36%	2.38%	1.79%
Retail Trade	13.54%	17.62%	14.31%	8.08%	12.47%	14.52%	13.99%	9.86%	13.87%
Accommodation, Cafes and Restaurants	3.94%	10.31%	4.16%	3.51%	2.39%	4.86%	3.62%	2.55%	4.04%
Transport and Storage	2.29%	2.59%	1.82%	3.10%	3.87%	1.77%	4.23%	2.47%	2.47%
Communication Services	0.49%	0.98%	0.86%	0.33%	0.31%	1.54%	0.37%	0.26%	0.43%
Finance and Insurance	3.25%	1.83%	1.94%	0.95%	1.53%	3.26%	2.24%	0.68%	1.23%
Property and Business Services	9.69%	9.24%	7.58%	11.59%	6.82%	14.39%	9.43%	7.82%	6.64%
Government Administration and Defence	1.35%	2.50%	2.85%	2.15%	1.32%	4.31%	1.35%	0.94%	2.00%
Education	8.20%	6.45%	8.95%	7.86%	5.98%	9.48%	8.87%	6.97%	10.98%
Health and Community Services	5.07%	8.57%	7.13%	5.20%	5.34%	13.35%	6.75%	3.40%	6.38%
Cultural and Recreational Services	2.57%	2.94%	1.20%	1.90%	1.86%	2.39%	3.05%	0.85%	1.11%
Personal and Other Services	4.36%	3.80%	3.31%	2.59%	2.60%	3.66%	3.53%	8.67%	3.28%

Industry	020 Waitomo District	021 Taupō District	022 Western Bay of Plenty District	023 Tauranga City	024 Rotorua District	025 Whakatane District	026 Kawerau District	027 Opotiki District	028 Gisborne District
Agriculture, Forestry and Fishing	30.02%	9.46%	36.07%	1.51%	7.59%	15.41%	1.36%	27.67%	17.25%
Mining	1.52%	0.86%	0.37%	0.04%	0.06%	0.06%	0.00%	0.00%	0.17%
Manufacturing	14.21%	9.13%	10.00%	12.50%	11.78%	8.48%	50.37%	4.22%	10.28%
Electricity, Gas and Water Supply	1.52%	1.03%	0.05%	0.14%	0.42%	0.82%	0.10%	0.00%	0.12%
Construction	3.93%	7.32%	7.20%	8.44%	5.22%	6.61%	7.51%	6.33%	5.79%
Wholesale Trade	2.17%	2.80%	3.65%	6.10%	5.06%	2.80%	1.98%	2.61%	3.41%
Retail Trade	9.39%	16.25%	8.90%	16.99%	14.19%	15.35%	8.86%	14.27%	13.94%
Accommodation, Cafes and Restaurants	5.94%	12.79%	3.33%	4.56%	9.12%	4.31%	1.98%	6.45%	4.38%
Transport and Storage	2.73%	3.33%	1.86%	4.60%	2.73%	2.48%	2.09%	1.61%	2.44%
Communication Services	0.40%	0.63%	0.44%	0.95%	0.85%	0.44%	0.52%	0.62%	0.62%
Finance and Insurance	1.52%	1.74%	1.23%	3.18%	1.97%	1.95%	1.98%	1.36%	1.53%
Property and Business Services	6.50%	10.52%	9.63%	13.65%	10.69%	8.77%	5.21%	7.44%	8.60%
Government Administration and Defence	1.69%	2.15%	0.59%	2.70%	2.82%	3.82%	1.36%	2.48%	2.71%
Education	7.87%	6.69%	6.25%	7.28%	9.48%	12.09%	8.45%	12.78%	11.19%
Health and Community Services	6.18%	6.01%	6.25%	11.48%	10.07%	11.13%	4.38%	6.82%	11.15%
Cultural and Recreational Services	2.73%	3.96%	1.40%	1.91%	4.27%	1.69%	0.52%	1.49%	2.11%
Personal and Other Services	1.69%	5.32%	2.79%	3.99%	3.68%	3.82%	3.34%	3.85%	4.32%

Industry	029 Wairoa District	030 Hastings District	031 Napier City	032 Central Hawke's Bay District	033 New Plymouth District	034 Stratford District	035 South Taranaki District	036 Ruapehu District	037 Wanganui District
Agriculture, Forestry and Fishing	23.72%	16.13%	3.33%	30.76%	8.36%	32.06%	28.75%	22.40%	6.32%
Mining	0.21%	0.07%	0.05%	0.55%	1.08%	0.62%	1.13%	0.28%	0.04%
Manufacturing	22.76%	15.82%	13.26%	19.49%	12.30%	6.31%	26.91%	5.94%	15.24%
Electricity, Gas and Water Supply	0.75%	0.42%	0.09%	0.39%	0.91%	0.72%	0.08%	0.91%	0.28%
Construction	5.34%	5.24%	6.64%	4.31%	6.07%	4.14%	4.07%	6.90%	6.53%
Wholesale Trade	1.92%	5.19%	4.96%	2.71%	4.77%	4.45%	2.69%	2.32%	4.05%
Retail Trade	12.07%	12.92%	17.50%	10.44%	14.88%	13.34%	9.64%	11.48%	14.59%
Accommodation, Cafes and Restaurants	3.53%	3.25%	6.85%	2.15%	4.96%	5.07%	2.60%	7.07%	4.75%
Transport and Storage	1.60%	2.29%	3.74%	2.37%	2.83%	2.07%	1.58%	1.98%	1.68%
Communication Services	0.32%	0.31%	1.27%	0.72%	0.86%	0.72%	0.31%	0.40%	0.87%
Finance and Insurance	0.64%	2.01%	2.74%	1.16%	2.45%	1.24%	1.02%	0.96%	2.09%
Property and Business Services	3.63%	9.92%	11.32%	5.74%	12.10%	6.31%	4.78%	4.75%	8.38%
Government Administration and Defence	2.67%	1.62%	3.44%	1.99%	2.36%	4.24%	1.53%	15.05%	3.29%
Education	10.26%	7.62%	8.94%	6.13%	8.38%	7.96%	6.13%	8.54%	10.28%
Health and Community Services	6.41%	11.67%	8.67%	5.91%	11.35%	6.62%	5.51%	5.32%	13.63%
Cultural and Recreational Services	1.71%	1.53%	2.33%	1.10%	2.25%	1.45%	1.07%	2.71%	2.22%
Personal and Other Services	2.46%	4.00%	4.88%	4.09%	4.09%	2.69%	2.20%	3.00%	5.75%

Industry	038 Rangitikei District	039 Manawatu District	040 Palmerston North City	041 Tararua District	042 Horowhenua District	043 Kāpiti Coast District	044 Porirua City	045 Upper Hutt City
Agriculture, Forestry and Fishing	27.44%	24.28%	2.18%	33.39%	15.32%	4.15%	1.02%	1.28%
Mining	0.43%	0.07%	0.12%	0.00%	0.00%	0.11%	0.00%	0.00%
Manufacturing	15.04%	16.80%	8.61%	16.22%	16.92%	7.27%	7.36%	12.38%
Electricity, Gas and Water Supply	0.06%	0.04%	0.30%	0.46%	1.50%	0.38%	0.15%	0.34%
Construction	5.16%	5.38%	5.30%	3.43%	5.14%	7.97%	6.80%	5.77%
Wholesale Trade	2.82%	4.06%	6.29%	2.33%	3.71%	3.96%	4.35%	6.11%
Retail Trade	11.66%	10.93%	15.42%	13.93%	15.04%	18.90%	18.53%	14.74%
Accommodation, Cafes and Restaurants	5.83%	3.17%	4.62%	2.60%	4.44%	6.62%	3.95%	3.93%
Transport and Storage	2.03%	2.03%	2.25%	1.60%	1.29%	1.94%	1.40%	1.40%
Communication Services	0.25%	0.36%	1.27%	0.32%	0.87%	1.40%	0.79%	0.69%
Finance and Insurance	1.11%	1.07%	2.75%	1.60%	1.64%	2.58%	1.91%	1.53%
Property and Business Services	5.28%	7.83%	11.91%	6.26%	6.47%	13.67%	12.24%	11.78%
Government Administration and Defence	1.90%	7.30%	7.88%	1.74%	1.99%	2.21%	4.15%	10.13%
Education	10.50%	7.30%	11.13%	6.76%	8.57%	11.41%	16.52%	10.32%
Health and Community Services	6.20%	5.38%	12.25%	5.98%	11.61%	10.23%	13.82%	8.17%
Cultural and Recreational Services	1.84%	1.03%	2.03%	1.23%	1.96%	2.91%	2.14%	2.37%
Personal and Other Services	2.46%	2.99%	5.69%	2.15%	3.53%	4.31%	4.89%	9.07%

Industry	046 Lower Hutt City	047 Wellington City	048 Masterton District	049 Carterton District	050 South Wairarapa District	051 Tasman District	052 Nelson City	053 Marlborough District	054 Kaikoura District
Agriculture, Forestry and Fishing	0.32%	0.25%	11.00%	24.05%	29.51%	24.60%	3.09%	17.50%	17.64%
Mining	0.07%	0.11%	0.18%	0.59%	0.20%	0.13%	0.01%	0.20%	0.00%
Manufacturing	15.26%	4.00%	9.00%	20.38%	9.27%	11.93%	13.37%	14.61%	7.56%
Electricity, Gas and Water Supply	0.64%	0.31%	0.11%	0.24%	0.10%	0.44%	0.12%	0.49%	0.19%
Construction	6.57%	3.19%	5.90%	4.74%	6.48%	7.07%	5.57%	6.28%	5.43%
Wholesale Trade	8.32%	3.66%	4.01%	2.73%	2.49%	4.54%	5.54%	3.54%	3.10%
Retail Trade	13.89%	9.08%	17.32%	11.49%	11.77%	14.45%	13.95%	13.28%	12.79%
Accommodation, Cafes and Restaurants	3.46%	4.75%	4.95%	2.61%	10.87%	6.50%	5.88%	6.89%	21.90%
Transport and Storage	3.37%	2.54%	1.72%	1.54%	1.89%	2.59%	4.42%	3.41%	4.46%
Communication Services	1.93%	1.72%	0.56%	0.59%	0.50%	0.50%	1.04%	0.66%	0.19%
Finance and Insurance	2.62%	8.71%	2.42%	1.90%	0.80%	1.40%	2.40%	1.45%	1.16%
Property and Business Services	14.68%	23.25%	10.23%	12.09%	9.07%	8.49%	13.62%	8.91%	4.46%
Government Administration and Defence	3.17%	15.29%	3.09%	2.13%	1.50%	1.06%	2.33%	4.15%	1.55%
Education	8.96%	6.68%	9.56%	4.74%	5.68%	5.65%	8.52%	5.67%	5.62%
Health and Community Services	9.83%	6.89%	13.11%	5.92%	5.98%	5.71%	13.10%	8.15%	5.23%
Cultural and Recreational Services	2.90%	4.39%	2.42%	2.01%	1.50%	2.02%	2.86%	1.72%	5.04%
Personal and Other Services	4.00%	5.17%	4.43%	2.25%	2.39%	2.92%	4.18%	3.09%	3.68%

Industry	055 Buller District	056 Grey District	057 Westland District	058 Hurunui District	059 Waimakariri District	060 Christchurch City	062 Selwyn District	063 Ashburton District	064 Timaru District	065 Mackenzie District
Agriculture, Forestry and Fishing	15.57%	8.08%	16.60%	46.07%	16.93%	1.15%	29.37%	26.26%	11.57%	30.14%
Mining	8.95%	3.27%	0.69%	0.07%	0.06%	0.03%	0.12%	0.23%	0.09%	0.00%
Manufacturing	8.95%	10.85%	15.47%	5.00%	12.55%	15.07%	8.02%	17.94%	18.83%	2.53%
Electricity, Gas and Water Supply	0.75%	0.11%	0.43%	0.00%	0.85%	0.19%	0.09%	0.58%	0.30%	0.67%
Construction	5.19%	7.48%	5.27%	4.00%	7.88%	5.21%	4.33%	4.84%	5.81%	5.56%
Wholesale Trade	2.18%	3.82%	2.16%	3.29%	4.94%	6.76%	2.62%	4.69%	4.68%	1.35%
Retail Trade	14.56%	15.17%	11.15%	6.79%	16.08%	14.57%	8.51%	13.08%	14.82%	6.73%
Accommodation, Cafes and Restaurants	10.54%	7.36%	18.41%	9.43%	3.91%	5.92%	4.33%	3.88%	4.89%	22.73%
Transport and Storage	3.68%	3.88%	4.49%	2.00%	2.03%	4.60%	2.30%	2.38%	3.53%	5.22%
Communication Services	0.50%	1.00%	0.43%	0.50%	0.56%	1.61%	0.32%	0.50%	0.89%	0.34%
Finance and Insurance	1.00%	1.99%	1.04%	0.64%	1.35%	3.70%	1.16%	1.98%	2.25%	0.51%
Property and Business Services	6.86%	8.25%	4.41%	6.21%	9.70%	13.76%	11.45%	6.74%	8.05%	5.39%
Government Administration and Defence	2.09%	3.32%	1.47%	1.07%	1.24%	2.67%	7.73%	0.93%	2.16%	2.86%
Education	7.11%	8.69%	5.79%	5.57%	9.61%	7.59%	10.17%	5.24%	7.40%	6.90%
Health and Community Services	7.36%	11.41%	6.05%	4.79%	6.73%	10.31%	3.92%	6.97%	9.76%	2.19%
Cultural and Recreational Services	2.18%	1.77%	4.58%	2.50%	1.85%	2.74%	2.12%	1.45%	1.68%	4.38%
Personal and Other Services	2.51%	3.54%	1.56%	2.07%	3.73%	4.13%	3.46%	2.33%	3.30%	2.53%

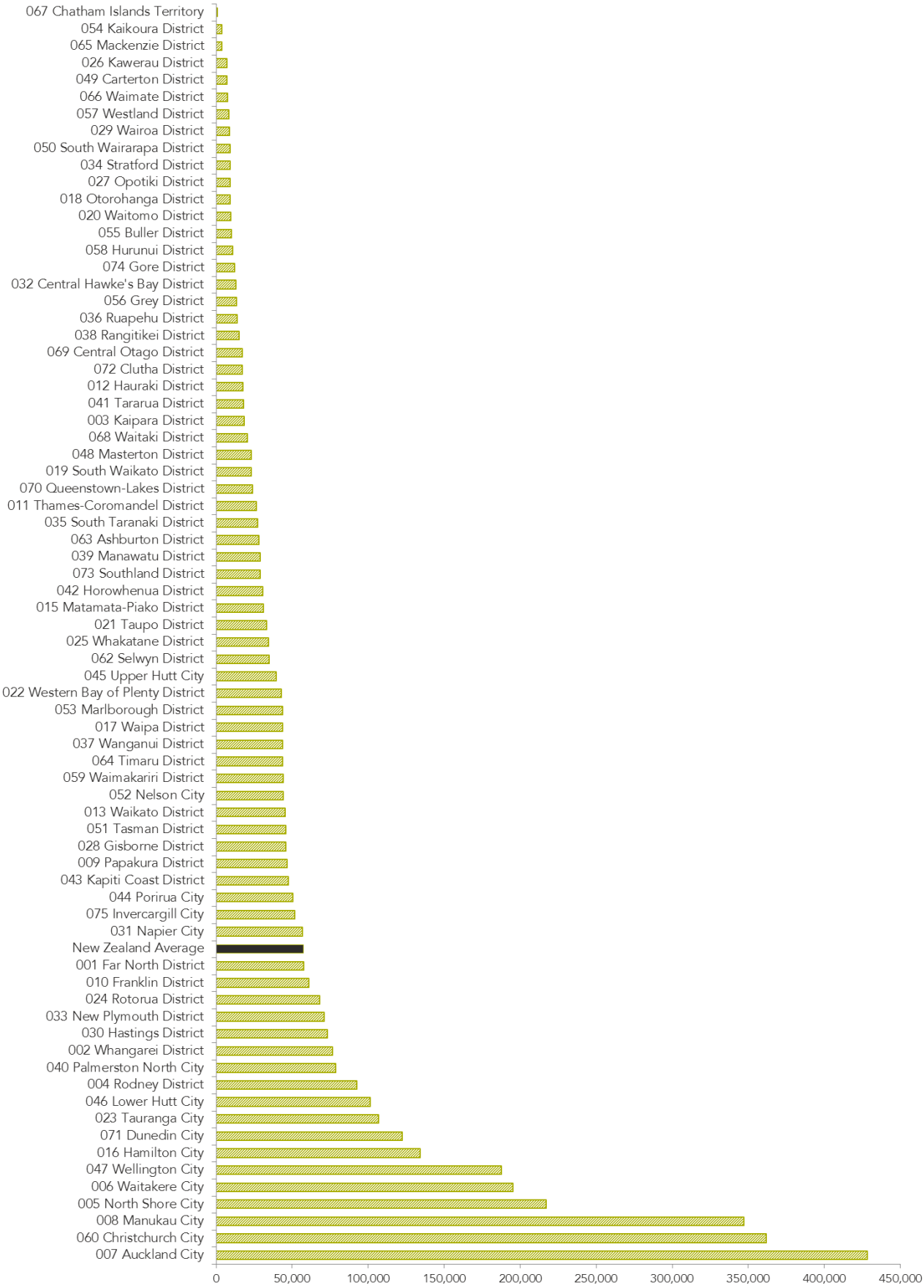
Industry	066 Waimate District	067 Chatham Islands Territory	068 Waitaki District	069 Central Otago District	070 Queenstown Lakes District	071 Dunedin City	072 Clutha District	073 Southland District	074 Gore District	075 Invercargill City
Agriculture, Forestry and Fishing	49.44%	32.97%	20.09%	24.13%	3.96%	2.26%	36.34%	46.71%	17.70%	2.99%
Mining	0.00%	0.00%	1.85%	0.17%	0.16%	0.10%	0.35%	0.52%	0.48%	0.06%
Manufacturing	7.01%	7.69%	16.44%	7.09%	4.52%	12.77%	16.92%	12.55%	20.12%	14.50%
Electricity, Gas and Water Supply	0.13%	1.10%	0.67%	0.59%	0.03%	0.37%	0.09%	0.10%	0.12%	0.26%
Construction	4.26%	3.30%	5.43%	9.28%	12.23%	4.83%	5.37%	3.49%	4.79%	6.17%
Wholesale Trade	1.38%	2.20%	3.19%	3.46%	2.73%	4.66%	1.06%	1.15%	4.49%	5.50%
Retail Trade	9.14%	5.50%	13.37%	14.55%	14.41%	14.65%	9.87%	7.17%	17.88%	16.91%
Accommodation, Cafes and Restaurants	2.88%	5.50%	6.76%	6.62%	19.95%	8.31%	4.14%	6.85%	3.64%	4.70%
Transport and Storage	2.38%	7.69%	2.16%	2.40%	5.62%	2.92%	2.69%	4.93%	2.55%	2.68%
Communication Services	0.50%	0.00%	0.63%	0.59%	0.50%	0.84%	0.35%	0.12%	0.42%	0.95%
Finance and Insurance	2.00%	2.20%	1.46%	1.69%	2.31%	2.69%	0.88%	0.47%	2.30%	4.02%
Property and Business Services	5.26%	8.79%	7.24%	9.11%	14.99%	10.26%	4.98%	4.06%	5.58%	9.98%
Government Administration and Defence	2.13%	3.30%	1.46%	1.94%	0.58%	3.09%	1.19%	0.62%	1.70%	3.78%
Education	6.26%	7.69%	6.88%	5.86%	4.12%	11.08%	7.23%	5.33%	6.49%	8.07%
Health and Community Services	5.01%	5.50%	8.22%	7.89%	3.75%	13.26%	5.55%	2.66%	7.70%	12.24%
Cultural and Recreational Services	0.50%	5.49%	1.57%	1.94%	6.56%	3.58%	0.93%	1.79%	0.97%	2.25%
Personal and Other Services	1.75%	1.10%	2.60%	2.70%	3.57%	4.32%	2.07%	1.47%	3.09%	4.94%

Source: Census 2006

Notes:

1. For each listed TA, the percentage of employment across each of the 17 listed industries was calculated. This gives an indication of the degree of industrial specialisation within each TA TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean

Figure B.1 Population of New Zealand's Territorial Authority areas, 2006

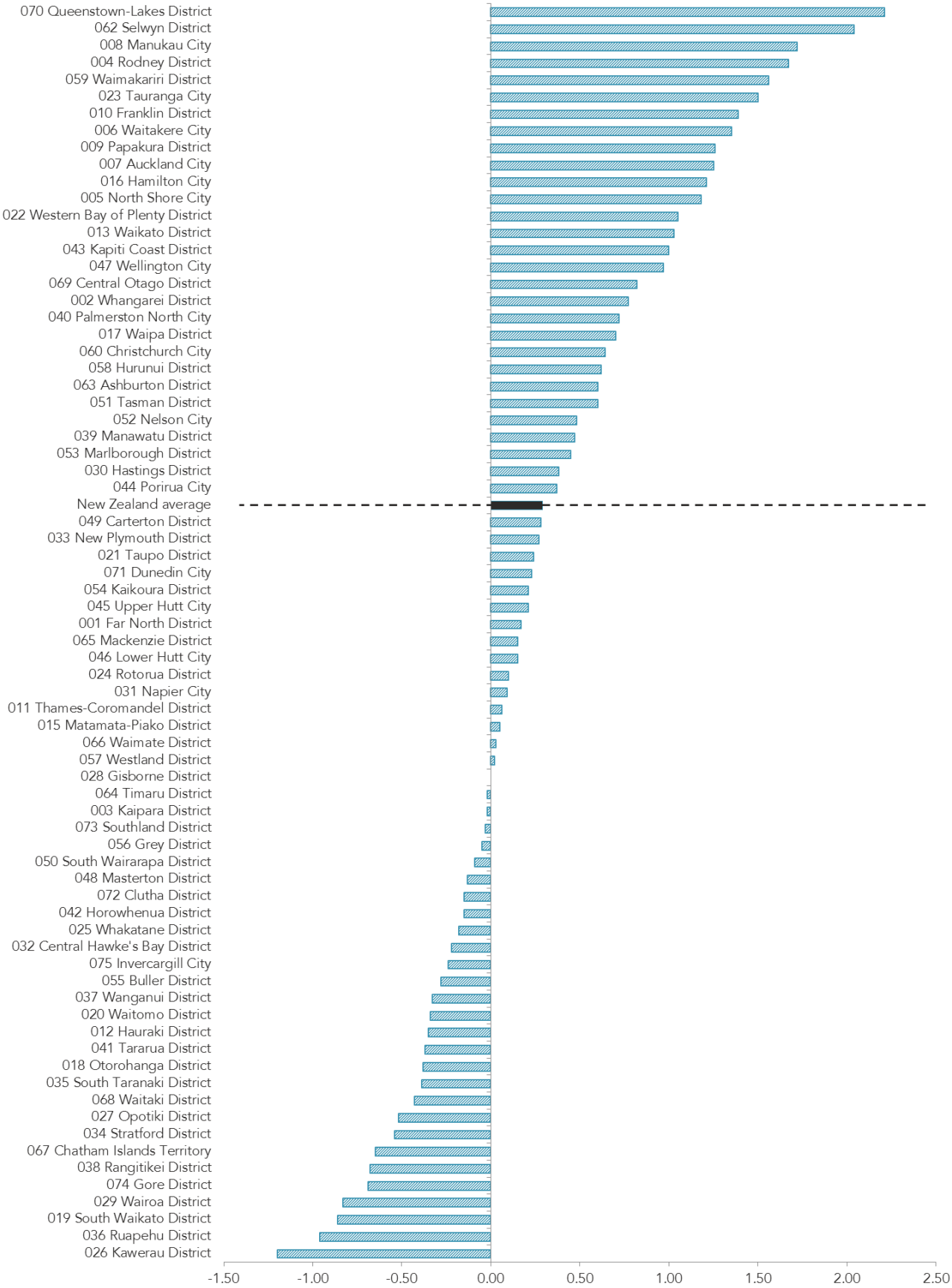


Source: Census 2006

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean.

Figure B.2 Projected annual population growth rate of New Zealand's Territorial Authority areas 2006-2031 (%)

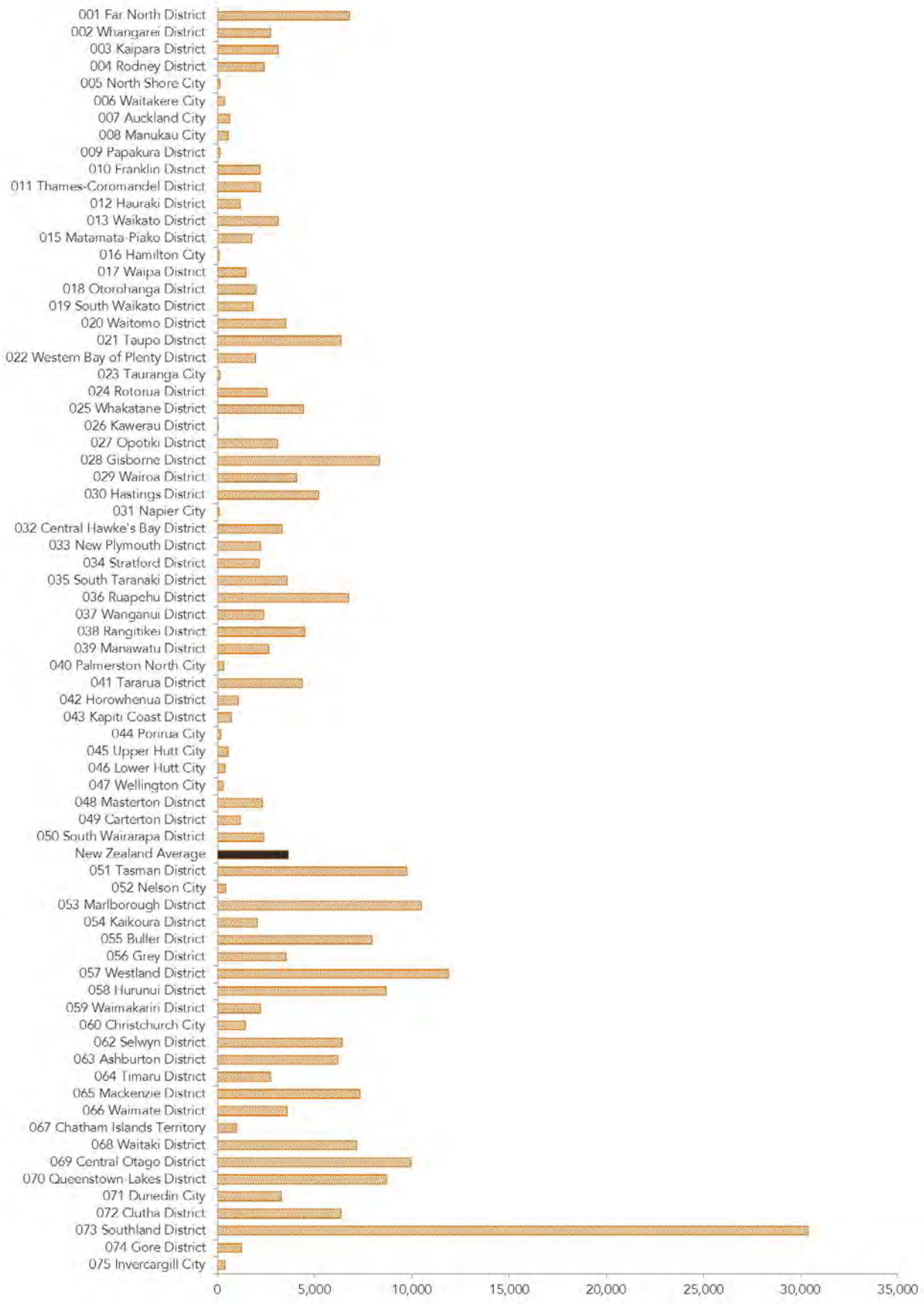


Source: Statistics NZ (2010): "medium" projections.

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean. Chatham Islands not included (no data).

Figure B.3 Physical size of New Zealand's Territorial Authority areas (km square)

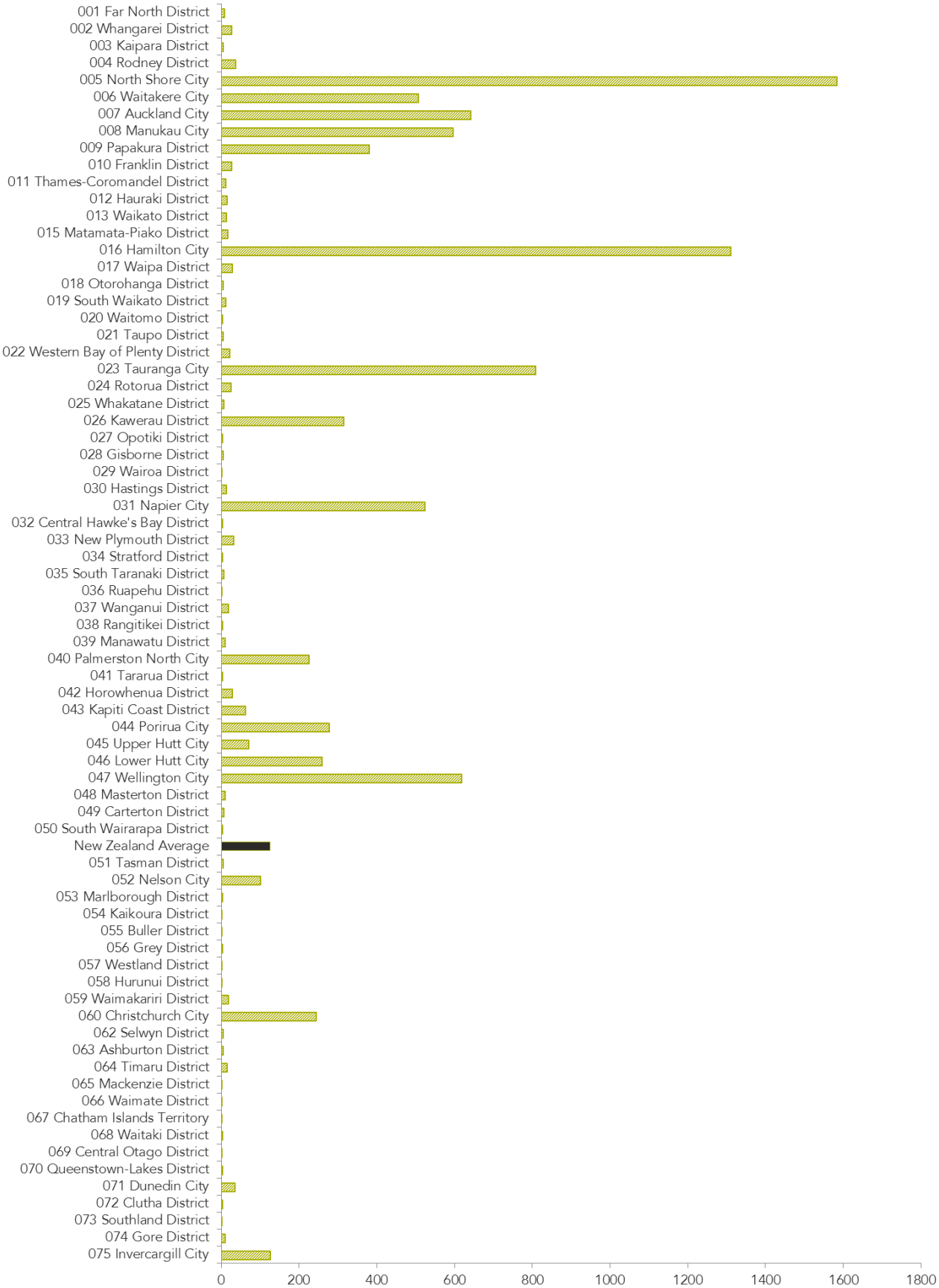


Source: Census 2006

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean.

Figure B.4 Population density of New Zealand's Territorial Authority areas (people per km square)

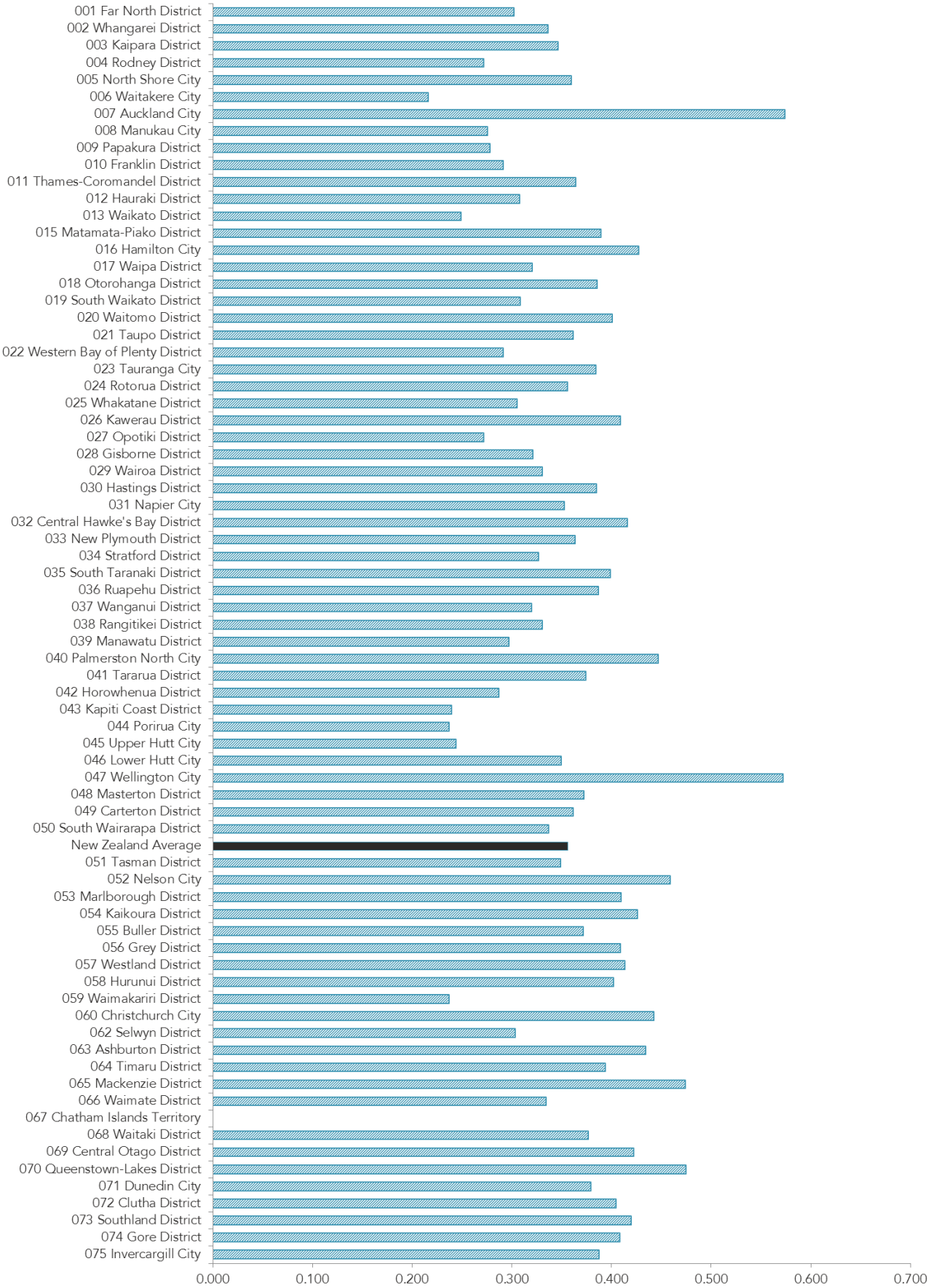


Source: Census 2006

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean.

Figure B.5 Employment rate in New Zealand's Territorial Authority areas (jobs per head of population)

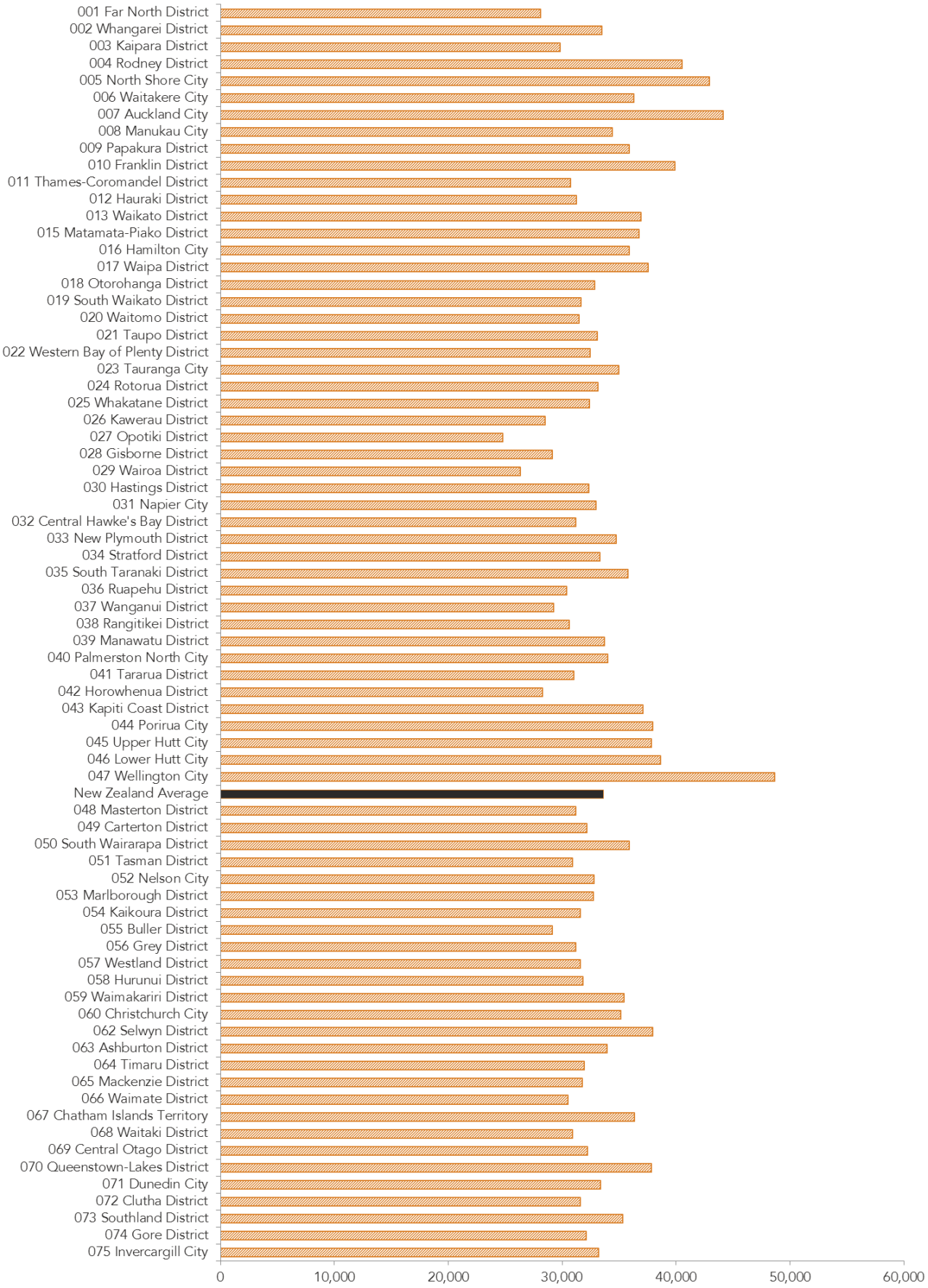


Source: Census 2006

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean.

Figure B.6 Mean annual income of 25-44 year olds across New Zealand's Territorial Authorities, 2006 ($)

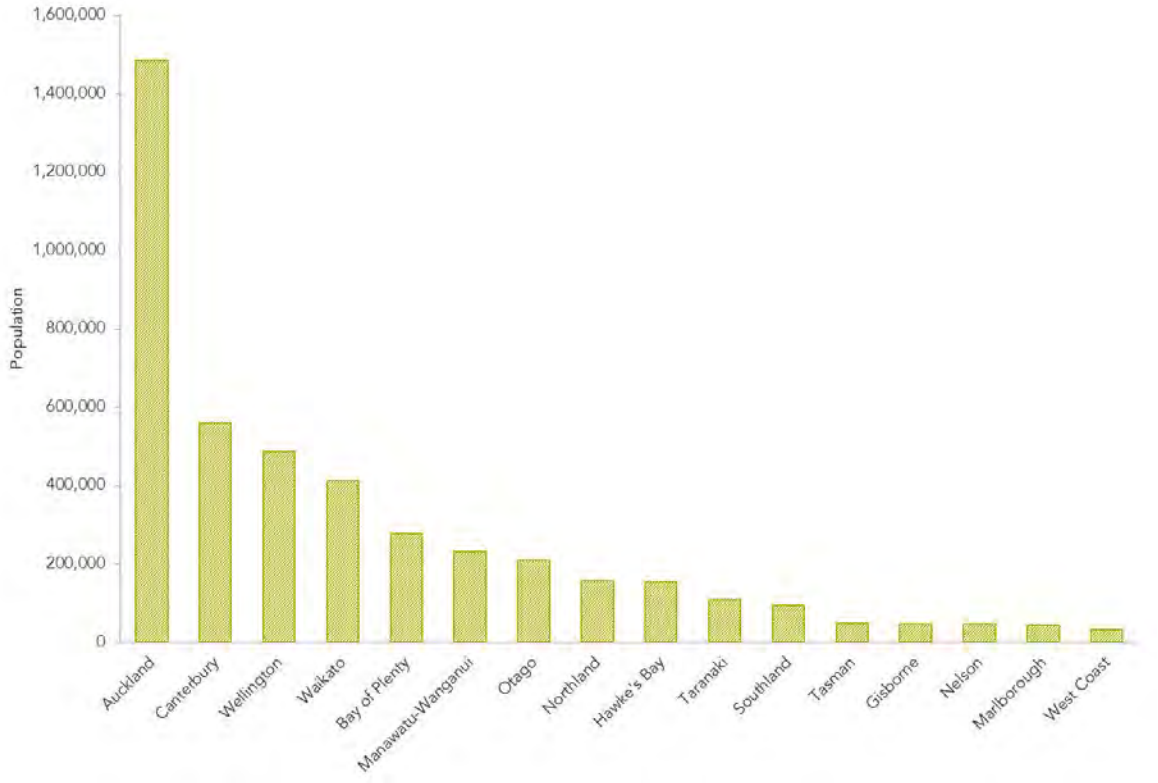


Source: Census 2006

Notes:

1. TAs are arranged according to the Statistics NZ TA index, which indexes TAs geographically from North to South. Numbers "14" and "61" are not included as they refer to TAs no longer in existance. The "New Zealand average" is the arithmetic mean. Figures based on self-reported census data.

Figure B.7 Population of New Zealand's regional areas

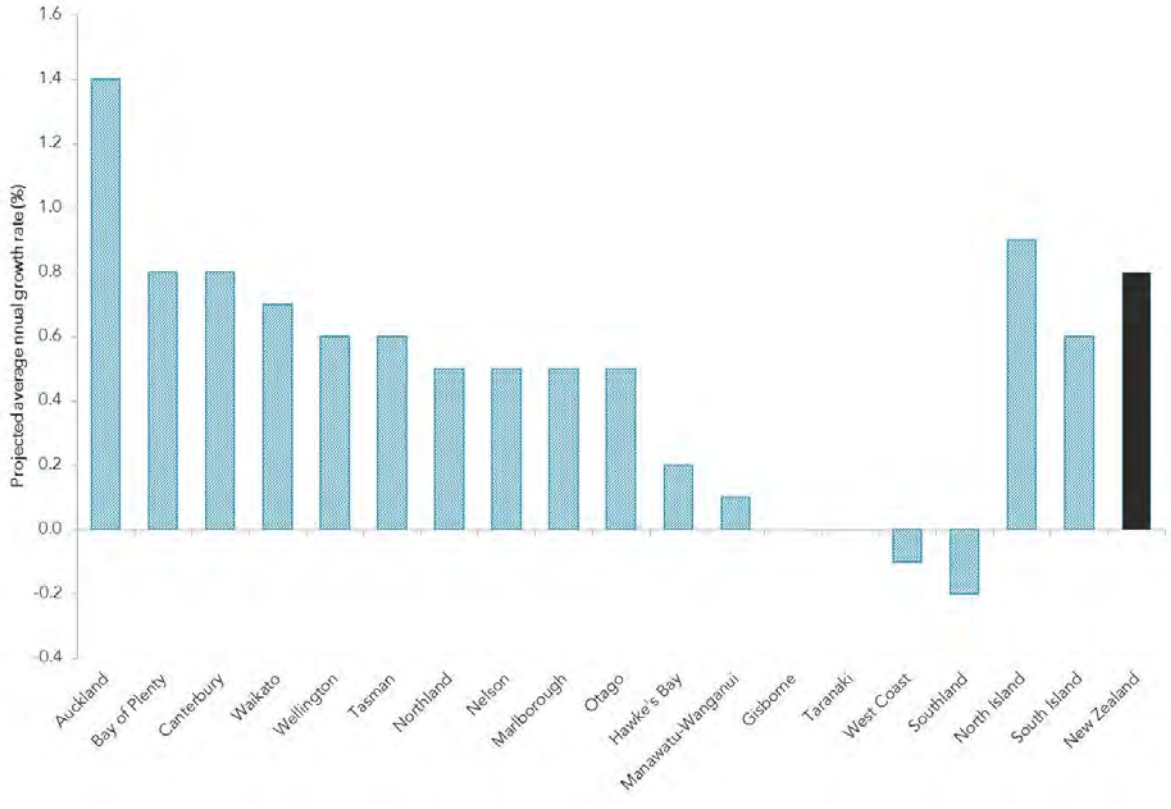


Source: Statistics NZ (2011)

Notes:

1. Unitary authority and regional authority areas are both included in this graph. Figures based on Statistics NZ subnational population projections.

Figure B.8 Projected annual population growth rate in New Zealand's regional areas, 2006-2031

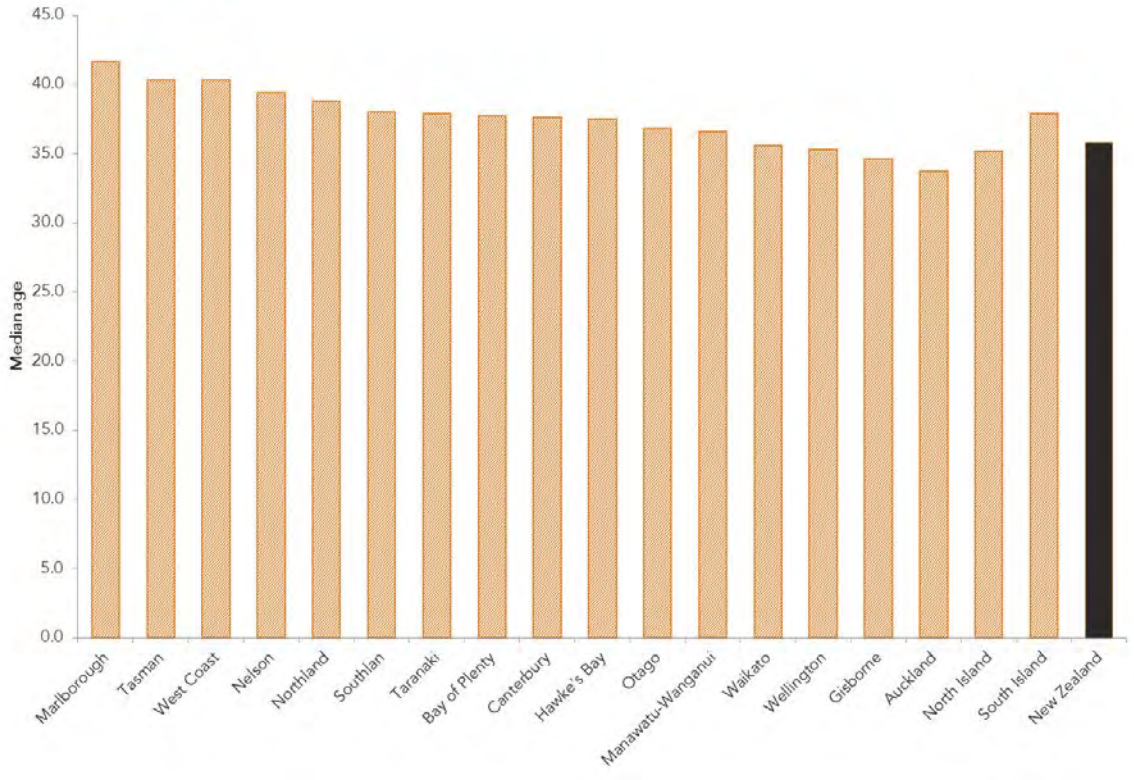


Source: Statistics NZ (2010)

Notes:

1. Unitary authority and regional authority areas are both included in this graph.

Figure B.9 Median age of New Zealand's regions



Source: Statistics NZ (2010)

Notes:

1. Unitary authority and regional authority areas are both included in this graph. Figures based on Statistics NZ subnational population projections.

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