

ARE REGULATED PARTIES CUSTOMERS?

How does a regulator refer to the individuals or organisations it regulates? Are they customers, even though they are not buying a product or service, and often have little choice in the matter? Are they to be referred to as regulated entities, obligatees, licensees, taxpayers, businesses, employers or one of a number of other terms of this kind, their identity defined by their specific rights and obligations under the law? But what does this mean for regulatory agencies implementing multiple regimes?

Why does it matter?

This question matters because the current emphasis on improving how government engages with citizens in the broad sense,¹ and on improving the quality of regulation and regulatory practice specifically,² is as strong as it has ever been. If these parallel activities are to succeed, clear thinking is required.

Although questions about how to refer to regulated parties may appear trivial, they often provoke strong debate between otherwise agreeable regulatory practition-

ers, and within organisations that have a mix of functions which include, but are not limited to, regulatory activity. At worst, regulatory staff in organisations with broader functions where a 'customer focus' mantra is embraced can feel disenfranchised and limited in their ability to do their jobs effectively. On closer inspection, this tension should perhaps not be surprising: different labels raise questions that go to the heart of some important questions of regulatory practice.³ Who is the regulator working

for? Who benefits from its work? Whose interests should it please?

It's an ongoing question

The debate around whether regulated entities and people (regulated parties) should be referred to as and/or treated like customers is a recurring one. The issue originally arose during the late 1990s and early 2000s as governments worldwide attempted to promote better delivery of government services through the guise of 'customer-focused government'. A paper from the British government is indicative of this time:

To deliver lasting results, organisations need to embed customer focus throughout the system. Implementation must start by understanding the needs, expectations and behaviours of the public and then by *adjusting every aspect of the organisation to align with customer values*. (Barker, 2001, emphasis added)

Although largely a focus of government strategies rather than academic literature, the prominence of this approach provoked

a number of responses from academics with a regulatory practice interest. Malcolm Sparrow, writing in 2000, argued that regulators needed to be wary about becoming customer focused, as the regulated entity is often 'not paying for the service, often does not want, and will not be pleased by it'. He was concerned that a customer orientation may lead to 'exclusion or neglect of enforcement capabilities' (Sparrow, 2000). It is also evident that referring to regulated parties as customers (bearing in mind the 'normal' meaning of the word and the often associated concepts such as 'the customer is always right')⁴ will create certain expectations, specifically about whose interests are being served through regulatory activity.

Alford, in 2002, detailed a number of academics who had criticised the customer-centric approach, particularly because it devalued the idea of 'citizenship'. His contribution was to outline a number of reasons regulated entities were definitively not customers, including because they do not have choice and they do not consume the good or service the service is designed to deliver. Instead, he argued, regulated entities and government formed a more complex, three-way interaction, with the public as the third party (Alford, 2002).

Despite the passage of time, the debate about whether to refer to regulated parties as customers has not gone away. Within the Government Regulatory Practice Initiative – a network of New Zealand central and local government regulators – the issue about whether or not to use the term is raised regularly. A quick survey shows that varying approaches are in place. We can contrast two New Zealand regulators' approaches: Inland Revenue's *Multinational Enterprises: compliance focus* (Inland Revenue, 2016) mentions the word 'customer' six times; Maritime New Zealand's *Compliance Strategy* (Maritime New Zealand, n.d.) mentions the term not once.

More recent use of the term seems to have slightly different origins to the late 1990s/early 2000s high-level government strategies outlined above. Drivers include:

- the application and promotion of service delivery and service design

methodologies and techniques for a wide range of government services, methodologies and techniques which tend to refer to and utilise concepts of customer centricity;⁵ and

- the use of 'customer frameworks', 'customer segmentation models' or 'personas' to inform the delivery of regulatory services.

These approaches present a number of opportunities for regulatory agencies. Used appropriately, they can help regulators move beyond simple models focused on the individuals and organisations they regulate and identify the root cause of complex regulatory problems.

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These methodologies and techniques have been largely adopted from areas outside regulation, however, and bring with them terminology and values that more easily relate to private sector service delivery, or public service delivery of non-regulatory services. Although contemporary service design has expanded its concept of a service in a way that can, with careful thought, account for more of the work of a regulator, it is still orientated around a 'customer' or 'user' of that service. This does not necessarily align with regulatory practice approaches which focus on improving compliance among regulated parties, where the value derived is in the form of regulatory outcomes that benefit the public.

If care is not taken, agencies can fall into a similar trap to the one Sparrow and Alford identified – applying broad strategic frameworks that promote certain regulatory practice techniques over others, in a way that is not really responsive, but predetermined by the 'label' chosen to define the relationship

required between a regulator and regulated party.

So what's the answer?

One way to address this is described by the United States Food and Drug Administration (FDA) in a 2004 white paper, 'Defining the customer in a regulatory agency' (FDA Quality Resource and Development Team, 2004). In that paper the FDA discusses relationships with the industry it regulates as involving a spectrum of customer interactions and notes that its customer relationship with industry will differ depending on the transaction involved. Essentially (as discussed in Appendix 2 of the paper), the

proposition is that regulated parties are customers when receiving support and guidance from the FDA, but not customers when subject to enforcement action. Readers of this article who are familiar with the Tip Top ice cream advertisements from 2006 may be reminded of the 'togs, togs, undies, undies' television advertisement that asked how far you can go from the beach in your togs before you are regarded as wearing undies.⁶

Another approach would be to accept that regulated parties can never be considered customers in the ordinary sense of the word. Regulation is ultimately the exercise of the coercive power of the state. It is intended to get people to do things they might not otherwise do, or stop people doing things they would otherwise do. The customer is not always right if the customer is being regulated. Regulators can, however, and should, draw on customer frameworks or service design techniques to improve the way they deliver the outcomes they are charged with delivering. There is little doubt that

adopting innovative design thinking and continuous improvement approaches incorporating appropriate customer service principles will make regulatory practice more successful, as long as it is fit for purpose for the particular circumstances in which it is being used. The widespread engagement in and support for the Government Regulatory Practice Initiative is evidence that regulators have a deep interest in improvement.

This will require an acceptance that regulation and regulatory practice has a special character; it is not simply another line of government service delivery, for the reasons set out above. In turn this would require those leading and influencing the way government agencies undertake improvement activity to step back and consider how they can reframe their offerings to cater for regulators, alongside non-regulatory service delivery.

Take, for example, this extract from the Department of the Prime Minister and Cabinet's description of 'design thinking':

As a process, design thinking can help public service providers *get closer to customers, uncover their unmet needs, and develop innovative products and services to meet those needs.* It is particularly useful for addressing 'wicked' problems, for being more person-centric and for encouraging innovation. (Department of the Prime Minister and Cabinet, 2017, emphasis added)

How much more useful would it be for regulators if the framing was as follows:

As a process, design thinking can help regulators *get closer to the parties they regulate, uncover what they need to support, encourage and require them to comply, and develop innovative approaches to achieve this.* It is particularly useful for addressing 'wicked' problems, for being more person-centric and for encouraging innovation.

Of course, it's more complicated than this. But the point is, if it is accepted that regulation and regulatory practice is different from service delivery in the general sense, that the recipients of regulatory services are not 'customers' in the ordinary sense of the word, but the same kinds of techniques and thinking that are applied to improving customer services can be used, with appropriate modification, to improve regulatory activity, then the suite of design thinking and continuous improvement tools being used can be modified accordingly. This article might be thought of as an invitation to government's leaders in customer service improvement thinking to engage with leaders in regulatory practice to address the tensions and risks associated with referring to regulated parties as customers – by making those tensions and risks go away.

With this approach we can move past labels, and innovation can be brought to regulatory practice in a very considered

way. The debate will move on. The purpose and nature of the relationship required between regulators and regulated parties will first be defined through careful assessment of the relationships required in what can be significantly different regulatory constructs,⁷ without the influence of labels that might be loaded with meaning that is potentially unhelpful; then practices can be put in place to ensure that those relationships deliver on the outcomes desired. A common lexicon may not be entirely possible – or necessary – but a deeper understanding of the underlying issues may be.

- 1 Highlighted by the Design Thinking approach led by the Department of the Prime Minister and Cabinet and the Continuous Improvement 'better every day' approach led by the State Services Commission. This process is described at <https://www.dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/design-thinking/journey-mapping>.
- 2 Highlighted by the 2013 commissioning of the New Zealand Productivity Commission to inquire into regulatory institutions and practices and the comprehensive government response to its subsequent report.
- 3 In this article 'regulatory practice' relates to the range of activities that are undertaken to support, encourage and require compliance with regulatory obligations, from information and education to administrative sanction and prosecutions.
- 4 The phrase 'The customer is always right' was originally coined in 1909 by Harry Gordon Selfridge, the founder of Selfridge's department store in London, and is typically used by businesses to convince customers that they will get good service at this company and convince employees to give customers good service (http://www.huffingtonpost.com/alexander-kjerulf/top-5-reasons-customer-service_b_5145636.html).
- 5 For example, the Design Thinking approach led by the Department of the Prime Minister and Cabinet and the Continuous Improvement 'better every day' approach led by the State Services Commission.
- 6 Accessed 17 September 2017 <https://www.youtube.com/watch?v=h-Lx2ihpGbc>.
- 7 There is a wide range of different types of regulation, including prescriptive and performance-based; and positive and negative regulation, in the sense that in some areas a licence is required to operate, while in others no licence is required but you can be sanctioned if you do not do what is required. In some areas regulation is focused on individuals and business; in others just on individuals. Each requires different systems, processes, skills and engagement methods on the part of the regulator.

References

- Alford, J. (2002) 'Defining the client in the public sector: a social-exchange perspective', *Public Administration Review*, 62 (3), pp.337-46
- Barker, J. (2001) *Customer-focused Government: from policy to delivery*, London: Public Services Productivity Panel
- Department of the Prime Minister and Cabinet (2017) 'Design thinking', <https://www.dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/design-thinking>
- FDA Quality Resource and Development Team (2004) 'Defining the customer in a regulatory agency', white paper, <https://www.fda.gov/downloads/drugs/developmentapprovalprocess/manufacturing/odmanufacturingpracticescgmppfordrugs/ucm176384.pdf>
- Inland Revenue (2016) *Multinational Enterprises: compliance focus*, Wellington: Inland Revenue, <http://www.ird.govt.nz/resources/6/2/62414b82-6ab8-4017-b04d-cc5d950cab47/compliance-focus-2016.pdf>
- Maritime New Zealand (n.d.) *Maritime New Zealand Compliance Strategy*, <https://www.maritimenz.govt.nz/about/what-we-do/compliance/documents/Compliance-Strategy.pdf>
- Sparrow, M. (2000) *The Regulatory Craft: controlling risks, solving problems, and managing compliance*, Washington, DC: Brookings Institution Press