

GOVERNMENT

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SELECT COMMITTEE TO CONSIDER REGULATORY STANDARDS



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A set of measures designed to improve the quality of New Zealand regulation will be considered by a Parliamentary Select Committee later this year. As reported in [our previous update](#), the Regulatory Standards Bill (**Bill**) would require Ministers and departments to certify that new regulatory and legislative proposals are compatible with a number of constitutional principles (such as the rule of law, preserving the role of the courts, and compensation for the taking of private property). With the support of National, ACT, and United Future, the Bill has advanced to the Commerce Select Committee for public submissions, which are due on 18 August 2011. In our view, the Bill provides a welcome opportunity to consider the state of regulation in New Zealand and the prospects for reform.

New Zealand's regulatory environment

The Organisation for Economic Co-operation and Development's (OECD) most recent annual economic survey of New Zealand identified regulatory practice as a key driver of growth and international competitiveness. The OECD expressed concerns about New Zealand's regulatory environment:¹

Wide-ranging reforms in the 1990s liberalised the economy and

significantly reduced competitive restrictions, putting New Zealand at the forefront in terms of regulatory practice. Since then, however, the reform momentum has waned, and policy has even occasionally moved in the direction of discouraging competition. At the same time, other countries have been making progress, and, as a result, regulatory quality now appears average relative to other OECD countries. It needs to move again to the forefront to promote sustained growth.

New Zealand businesses and their advisers might well agree with that assessment. Indeed, the Government's own *Statement on Regulation* recognises that unnecessary and ineffective regulation is impeding innovation and productivity.²

Institutional improvements

While a degree of dissatisfaction with the standard of regulatory settings is shared by the Government and many New Zealand businesses, the measures required to improve regulatory quality are less straightforward.

The institutional mechanisms for scrutinising new legislative proposals are an important driver of regulatory quality. Regulatory impact analysis is one such

mechanism for weeding out inefficient proposals; though the Treasury has expressed concerns about the consistency and quality of regulatory impact analysis in relation to a number of proposals.

Another possible vetting mechanism is the enactment of specified principles of good law-making against which to benchmark new regulation. As the OECD reported, in relation to its qualified support for the Regulatory Responsibility Bill (a predecessor³ to the Regulatory Standards Bill):⁴

But more work and political will is required to instil a culture of continuous improvement within the public bureaucracy, supported by evidence-based decision-making. Productivity could be fostered by requiring clear net public benefits to justify regulatory restrictions on competition and establishing transparent quality benchmarks by passing a suitably refined Regulatory Responsibility Bill.

The Bill seeks to complement existing institutional mechanisms for good law-making by:

- Specifying key principles of responsible regulation. For example, one of the principles is that legislation should not authorise the taking or impairment of property without the owner's consent unless the taking is in the public interest, full compensation is provided and, to the extent practicable, the compensation is provided by or on behalf of the persons who benefit from the taking.
- Requiring Ministers and departments to certify whether new legislative proposals are compatible with the principles and, if not, to publicly articulate why they should proceed notwithstanding such incompatibility. Adopting similar language to the New Zealand Bill of Rights Act (**Bill of Rights**), the Bill provides that any incompatibility with the principles is justified to the extent that it is

“reasonable and can be demonstrably justified in a free and democratic society”.

- Providing recourse to the courts for a declaration as to whether new legislation or regulations are compatible with the principles (though not to hold them ineffective or obtain damages).
- Directing that, in the case of ambiguity, courts should prefer an interpretation of new legislation which is compatible with the principles of responsible regulation (e.g., preferring an interpretation which permits compensation for confiscated property).

Matters for debate at Select Committee

Two issues have become contentious and are likely to be considered carefully by the Select Committee:

- First, a number of Government agencies and Treasury have expressed concerns about the costs associated with the certification requirements in the Bill.¹ Balanced against this, the additional costs required for officials to scrutinise their proposals against core principles may lead to substantial savings for business, both in terms of reduced compliance costs and a more competitive regulatory environment. Moreover, principled and coherent regulation is important to the Rule of Law, as the Regulatory Responsibility Taskforce recognised.¹
- Second, some academic commentators have expressed concerns that the Bill unduly curtails Parliamentary sovereignty in order to advance its principles of responsible regulation. However, the Taskforce designed the Bill to ensure that it contains ample safeguards to preserve Parliamentary sovereignty. For example, Parliament can legislate inconsistently with the principles if its wishes, courts must

give effect to any legislation even when it is incompatible with the principles, courts cannot award any damages or injunctive relief under the Bill, and the Bill does not apply to any existing legislation for ten years after it comes into force.¹ It is also worth recalling that when the Bill of Rights was passed in 1990, similar objections were expressed by some commentators. Those concerns proved unfounded and the Bill of Rights has proved to be a useful evolution in New Zealand's constitutional arrangements.

Efficient and principled regulation is a matter of interest to all citizens, and it has a particular impact on the competitiveness of New Zealand businesses. Written submissions to the Select Committee on the Bill are due by 18 August 2011.

We will keep you updated with further developments. In the meantime, if you have any questions or would like assistance with making a submission of your own, please contact your usual Bell Gully adviser.

¹ OECD Economic Surveys: New Zealand (April 2011), page 19.

² *Government Statement on Regulation*, 17 August 2009.

³ The Regulatory Responsibility Bill did not proceed past the Select Committee stage; see *Report of the Commerce Committee*, 30 May 2008.

⁴ OECD, page 19.

⁵ Treasury, *Regulatory Impact Statement for the Regulatory Standards Bill, Regulating for Better Regulation - What is the Potential of a Regulatory Responsibility Act* (2 February 2011).

⁶ Report of the Regulatory Responsibility Taskforce (September 2009). The Taskforce was chaired by Dr Graham Scott and included Jack Hodder SC, Richard Clarke QC, the Hon David Caygill, Dr Don Turkington, Dr Bryce Wilkinson, and Paul Baines.

⁷ See, e.g., Wilson, “Raising Regulatory Standards” (2010) NZLJ 99.