

Opposition to Regulatory Bill Utterly Predictable

The Regulatory Standards Bill (formerly the Regulatory Responsibility Bill) is now before a select committee. The bill establishes a set of regulatory principles, requires ministers and chief executives to certify whether proposals are compatible with the principles, allows an override, and provides monitoring of the certification process through a declaratory role for the courts.

The business community has been calling for stronger regulatory disciplines for over a decade. Business organisations and major law firms are firmly in support of the bill and the OECD has endorsed a version of it.

Reflecting on the experience of the Regulatory Responsibility Taskforce that unanimously recommended the current bill, respected lawyer Jack Hodder SC noted that each of its seven members (including himself) operated in the private sector. By contrast, "it has been notable that the critics operate in the public sector or in academia."

So true. Unsurprisingly, all government departments that reported to ministers on the bill opposed it. The natural tendency of bureaucracies is to extend their budgets and powers, and resist attempts to constrain them.

The lead departments on regulation are Treasury and the Ministry of Economic Development (MED). For years they have been telling the world that "New Zealand has a high-quality regulatory environment." For years the private sector has been arguing that it is staggering under an avalanche of regulation (reflected in sagging productivity growth rates). I have never known such a gulf between private and public sector perceptions.

MED is the department responsible for most regulation affecting the business sector. New MED regulatory proposals continue to pour forth, one of the latest being to criminalise cartel conduct.

The Treasury is supposed to be the gatekeeper on significant regulatory proposals through the Regulatory Impact Statement process. It has

certified a high proportion as inadequate but to little apparent effect. Despite laudable government statements about improving regulation, achievements to date have been modest.

Views held by some in academia were reflected in a recent article in the *NBR* by Alex Penk of the Maxim Institute ('A wolf in sheep's clothing', July 29).

"Legal academics Richard Ekins and Chye-Ching Huang, in a guest paper published by Maxim Institute, argue that there's no hard evidence of a problem that justifies the bill as a solution", the article said.

This gives new meaning to the term 'ivory tower'. The range of studies documenting excessive regulatory burdens runs from Bryce Wilkinson's 2001 report *Constraining Government Regulation* to reports by the OECD and the 2025 Taskforce.

The academics have described the bill as "hostile to our democratic constitutional order." For good reason, Jack Hodder has called this description "wildly inaccurate."

The bill is primarily a transparency and accountability measure, like the Fiscal Responsibility Act (now part of the Public Finance Act). All that courts may do is make a declaration of incompatibility with its principles if a case is brought before them. No consequences automatically follow. Courts are given no powers to strike down or over-ride legislation, unlike the US Supreme Court or the Australian High Court. The aim is not to spawn litigation but to get regulations right the first time.

Underlying this debate is a conflict of visions about the role of government. A sound democratic system requires checks and balances. As James Madison, one of the American framers, wrote, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself."

The difference between this liberal view and the (Christian) conservative view of the Maxim Institute was elaborated by F A Hayek in his famous essay 'Why I am not a Conservative':

"In general, it can probably be said that the conservative does not object to coercion or arbitrary power so long as it is used for what he regards as the right purposes. He believes that if government is in the hands of decent men, it ought not to be too much restricted by rigid rules.

"Like the socialist, he is less concerned with the problem of how the powers of government should be limited than with that of who wields them; and, like the socialist, he regards himself as entitled to force the value he holds on other people."

Far from being radical, the bill is based on time-honoured principles of property rights and the rule of law, too many of which have been cavalierly disregarded in New Zealand. It is a modest measure and will not be a panacea. But with all other mechanisms for screening out bad regulation having performed poorly, it is the best proposal on offer to curb regulatory overkill.

It is hoped that all parties approach the forthcoming debate with an open mind. This includes the Treasury. The taskforce that produced the bill was headed by Graham Scott, the most highly regarded secretary of the Treasury in the last 25 years. It is widely acknowledged that in recent years the Treasury has been in decline. A test for the new incumbent will be to reassess the Treasury's position and, it is hoped, support what could be an important breakthrough in the fight against the regulatory Leviathan.

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