

## **A Regulatory Responsibility Act: An Idea Whose Time has Come?**

Last month the report of the Regulatory Responsibility Taskforce was released. Federated Farmers' reaction was that it deserved an A+ mark for quality.

The report confirms the merits of a statutory framework for regulation – meaning acts of parliament and other legislative instruments – in the form of a Regulatory Responsibility Act.

Good regulation is necessary to promote social, economic, environmental and other goals. However, countries around the world have struggled with the problem of poor quality regulation which is economically costly and unnecessarily curtails citizens' freedoms and choices.

The idea of a Regulatory Responsibility Act in New Zealand goes back over a decade. John Luxton as minister of commerce in the last National-led government prepared a draft which would essentially have incorporated in statute the regulatory impact statement (RIS) requirements in the Cabinet Manual.

This did not proceed, and in any event would have been limited in scope. This is because the essence of an RIS is a cost benefit analysis – an analysis that establishes whether the likely benefits of a regulatory proposal exceed the costs. CBA is a valuable tool but is not applicable for many regulations. An example would be the Electoral Finance Act, a key principle of which is freedom of speech. Here the Legislation Advisory Committee (LAC) Guidelines are more relevant for policy.

A more comprehensive regulatory statute was proposed in a substantial report on constraining government regulation commissioned by the Business Roundtable, Federated Farmers and the Auckland and Wellington Chambers of Commerce and published in 2001.

This incorporated the essence of the RIS requirements and the LAC Guidelines and proposed a role for the courts where regulatory takings of property were involved (along the lines of the Public Works Act).

A member's bill in the name of MP Rodney Hide was based on this proposal and considered by the Commerce Committee of parliament in 2007-08. It attracted many supportive submissions and the Committee recommended that it be given closer scrutiny by an expert group.

This year a high quality taskforce headed by former secretary of the Treasury Graham Scott and including Paul Baines, Hon David Caygill, Richard Clarke QC, Jack Hodder SC, Dr Don Turkington and Dr Bryce Wilkinson has performed this role.

The Taskforce report is an outstanding piece of legal and economic analysis. It should give the government comfort that the bill it proposes respects constitutional principles and the sovereignty of parliament. The bill would present no barriers to the adoption of sound regulations but should help to screen out bad ones.

The structure of the bill has three main elements.

First, it elaborates principles for responsible regulation, drawing on the RIS requirements and the LAC Guidelines, that are to apply to new legislation and, over time, to all legislation. These cover such things as the rule of law, personal liberties, taking of property, taxes and charges, and processes for good law-making.

Second, it requires those proposing new legislation (such as ministers and chief executives) to certify that the legislation is compatible with those principles and, if not, the reasons for the incompatibility.

Third, it grants courts the power to declare legislation to be incompatible with those principles.

Courts are given no other powers: they would not be able to stop the passage of legislation by injunctions and would have no new ability to

award compensation for regulatory takings. A declaration would only carry moral authority.

In this respect a Regulatory Responsibility Act would be comparable to New Zealand's other main 'economic constitutions', the Reserve Bank Act and the Fiscal Responsibility Act (now part of the Public Finance Act).

These are essentially accountability and transparency statutes containing principles, mechanisms and reporting requirements aimed at promoting sound monetary and fiscal policy respectively. They have acquired authority through good design and respect by successive governments: former finance minister Michael Cullen initially called the Fiscal Responsibility Bill "constitutional nonsense" but subsequently re-enacted it.

There may be opposition to a 'regulatory constitution' by politicians who do not wish to tie their hands but rather be free to regulate for the benefit of some interest group rather than in the public interest.

However, many business and professional organisations are likely to be united in pressing for it to be adopted. Current regulatory disciplines are too often ineffective. The Treasury recently certified that the regulatory impact statement in the important emissions trading scheme amendment bill was quite inadequate.

The government has signalled its commitment to less and better regulation. It has not yet taken a decision on the Taskforce report but parliament is expected to be asked to consider it next year.

So far there has been minimal media coverage of a proposal that stands to rank with the earlier 'economic constitutions' and attract international interest.

It deserves wider public exposure and debate. Higher quality regulation is fundamental to national goals of achieving greater prosperity and closing the income gap with Australia.

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