

GOVERNMENT

REGULATORY STANDARDS - THE PATH FORWARD

JANUARY 2012



Roger Partridge  
CHAIRMAN



Jesse Wilson  
SENIOR ASSOCIATE

The National and ACT parties have agreed to progress a watered-down version of the Regulatory Standards Bill (**Bill**). As we previously reported at the time of its [introduction](#) and [referral to Select Committee](#), the Bill proposed to implement the recommendations of the Regulatory Responsibility Taskforce (**Taskforce**) by, among other things, affirming certain principles of responsible regulation and providing for limited accountability mechanisms to encourage governmental compliance with those principles.

The National-ACT confidence and supply agreement, dated 5 December 2011:

- Acknowledges the assessment of the OECD and the 2025 Taskforce that excessive and poor-quality regulation constitutes a barrier to economic growth; and
- Provides that the Bill will be included in the continuance motion for the new Parliament, and the Minister for Regulatory Reform will work closely with the Minister of Finance to achieve a mutually agreed outcome (based on the Treasury's policy preferences) for enacting within the next 12 months.

This update considers the likely outcome of the process agreed under the National-ACT

confidence and supply agreement. In summary, it is expected that:

- The Commerce Select Committee will report back on 29 February 2012 recommending that the Bill should not proceed in its current form. This will pave the way for new legislation to be formulated by the Ministers of Finance and Regulatory Reform;
- There will be a requirement for new bills and regulations to be accompanied by an explanatory note which flags certain matters that require special scrutiny (e.g., retroactive legislation or the taking of private property without compensation); and
- Parliament will seek to improve the standard of the cost-benefit analysis carried out by the officials.

**Background to the Bill**

The Taskforce was established in 2009 to make recommendations for amendments and supporting arrangements for the Regulatory Responsibility Bill, which had previously been considered by the Commerce Select Committee in 2007 and 2008. The Taskforce concluded that the Government should acknowledge certain principles of regulation, with which new

rules should aim to comply unless there was a reasonable justification for non-compliance.

The Taskforce's recommendations were the basis of the Bill introduced to Parliament in March 2011. The Bill's main features included:

- Specifying key principles of responsible regulation (e.g., 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; and
- Providing limited 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).

#### Different perspectives on the Bill

The Bill received strong support from the New Zealand business community, including the Auckland and Wellington Chambers of Commerce, Business NZ, the Business Roundtable, the Corporate Taxpayers Group, Federated Farmers, and the Food and Grocery Council.<sup>1</sup> The concept of the Bill also received qualified support from the OECD<sup>2</sup> and the 2025 Taskforce.<sup>3</sup>

However, the Bill was unanimously opposed by Government departments. Indeed, the late Roger Kerr remarked that

he had never known such a gulf between private and public sector perceptions.<sup>4</sup>

#### Treasury's approach

Treasury's Regulatory Impact Statement on the Bill, dated 2 February 2011, played a key role in influencing Government decision-makers.

Treasury agreed with some of the concerns which underpinned the Bill:<sup>5</sup>

- New Zealand lacks some of the formal constitutional checks and balances often found in other jurisdictions and therefore requires robust scrutiny and quality assurance mechanisms.
- There are problems with existing arrangements. "*Regulatory planning is not particularly strategic or co-ordinated*". "*Policy analysis capability is not very deep*." Regulatory Impact Statements (**RISs**) often "*become a compliance exercise*" and "*only half of the significant regulatory proposals considered by Cabinet since November 2008 had RISs that met expected standards*". The Cabinet Legislation Committee (**LEG**) "*does not operate as a substantive check on legislative quality*" and "*LEG papers are largely a tick-box exercise*".<sup>6</sup>
- There are systemic biases towards poor quality regulatory outcomes. "*Once a Minister or agency has invested time and effort in taking a proposal through the policy process and perhaps securing necessary political or interest group support, it can be very hard to stop*". Regulatory decision-makers tend to "*downplay or ignore the risks of poor legislative outcomes*" because, among other things, "*the costs of poor legislation are often hidden or hard to estimate because they are widely*

*dispersed or take the form of future opportunities lost”<sup>7</sup>.*

In Treasury’s view: *“legislative quality is important; many people are concerned about legislative quality; the concerns are not confined to any particular type of legislation or dimension of quality; and existing arrangements for developing legislation are not particularly good at ensuring quality”<sup>8</sup>.*

However, Treasury disagreed with the Bill’s approach. Treasury’s concerns included:<sup>9</sup>

- Certifying the compatibility of new legislation and regulations with the Bill’s principles would be costly and time-consuming. Furthermore, Treasury considered that the positive impact of certification was likely to be limited. Treasury considered a Minister may be inclined to promote legislation notwithstanding incompatibility with the Bill’s principles because some of the principles lacked *“broad buy-in”*. The certification process was also considered to put officials in a difficult position if their conclusions differed from those of the Minister.
- The judicial declarations would have little effect on legislative behaviour or outcomes. Moreover, the Crown Law Office advised that the Crown’s costs of defending such proceedings could be significant.

Instead, Treasury suggested an alternative option to *“formalise and expand the requirement for, and content of, an explanatory note accompanying legislation, and provide increased administrative and analytical support for Parliamentary scrutiny of legislation”<sup>10</sup>.*

### Expected content of a revised Bill

The confidence and supply agreement indicates that Treasury’s preferred option

will provide the starting point for a revised Bill. While Treasury’s RIS identified the broad features of its preferred option, it did not provide a detailed proposal. However, Treasury suggested that the Legislative Standards Act 1992 (Queensland) may provide something of a model.

It is expected that the main features of a revised Bill will be as follows:

- Parliament will set out a series of matters which require careful scrutiny. This stands in contrast to the current version of the Bill which stipulates principles for responsible regulation. Treasury has two main concerns about the current Bill’s proposal to recognise principles. First, it is said that recognising *“principles”* may *“irritate those who think the norm implied by the wording of a principle is inaccurate or wrong”*, whereas Treasury’s approach simply requires acknowledgment that a matter is *“important and warrants careful attention”<sup>11</sup>*. Second, Treasury was concerned about some of the principles contained in the Bill. For example, Treasury flagged a concern that the principle against impairing property rights without compensation may have the unintended consequence of protecting incumbents against measures to promote competition and market efficiency.
- Parliament will require new bills and regulations to be accompanied by explanatory notes disclosing and justifying any features which are required to be flagged. Unlike the current Bill, Ministers and departments would not be required to certify compliance with the principles of responsible regulation. It is possible that the Bill will be drafted in such a way as to give Governments

### FOOTNOTES

- <sup>1</sup> See [http://www.parliament.nz/en-NZ/PB/Legislation/Bills/8/2/0/00DBHOH\\_BILL10563\\_1-Regulatory-Standards-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/8/2/0/00DBHOH_BILL10563_1-Regulatory-Standards-Bill.htm)
- <sup>2</sup> OECD *Economic Surveys: New Zealand* (April 2011), page 19.
- <sup>3</sup> See first report, 30 November 2009, page 117 and second report, 3 November 2010, page 140.
- <sup>4</sup> Business Roundtable, “Opposition to Regulatory Bill Utterly Predictable” (19 August 2011).
- <sup>5</sup> Treasury, “Regulating for Better Regulation: What is the Potential of a Regulatory Responsibility Act?” (2 February 2011).
- <sup>6</sup> Treasury, *ibid*, page 7.
- <sup>7</sup> Treasury, *ibid*, pages 10-11.
- <sup>8</sup> Treasury, *ibid*, page 11.
- <sup>9</sup> Treasury, *ibid*, page 14.
- <sup>10</sup> Treasury, *ibid*, page 12.
- <sup>11</sup> Treasury, *ibid*, page 25.
- <sup>12</sup> Geoffrey Palmer SC, “What is Parliament for?” [2011] NZLJ 378, 380.

To view all our publications or update your details please visit our website: [www.bellgully.com](http://www.bellgully.com)

For further information, please contact your usual Bell Gully adviser or:

**Roger Partridge**  
64 9 916 8922  
[roger.partridge@bellgully.com](mailto:roger.partridge@bellgully.com)

**Jesse Wilson**  
64 9 916 8843  
[jesse.wilson@bellgully.com](mailto:jesse.wilson@bellgully.com)

considerable latitude to determine whether legislation requires disclosure.

- Parliamentary Select Committees may receive additional resources to improve their standard of work. The detail of this was not settled in the Treasury's recommendations, which considered options such as a new Officer of Parliament and a specialist Legislative Quality Select Committee.
- The revised Bill may provide for the Attorney-General to commission an independent, five-yearly report on the performance of existing executive and parliamentary processes for developing legislation.

Most of the significant accountability mechanisms in the current Bill will be removed. In particular, the requirement to certify compliance and the ability to seek a judicial declaration of incompatibility will be removed. The revised Bill will also dispense with the obligation for public entities to regularly review the legislation which they administer for compatibility with the principles.

### Key issues going forward

The revised Bill will contain far more limited – but nevertheless worthy – measures to improve the quality of new legislation and regulations. The indication that the revised Bill will be based on Treasury's preferred option leaves open substantial questions of detail in relation to the design of the new Bill. It may be hoped that:

- The substantive content of most of the Bill's principles will remain intact. Ideally, Parliament would adopt these in the form of principles, rather than a list of matters to be flagged in explanatory notes. This would be consistent with the model of Queensland's Legislative

Standards Act (which codifies "*fundamental legislative principles*").

- The explanatory notes will be required to include a reasoned and particularised explanation for departing from the principles, rather than treating the explanatory notes as a compliance exercise.

In any case, the Bill would usefully focus the attention of law makers on the importance of improving legislative quality. In December last year, Sir Geoffrey Palmer SC (who does not support the Bill) made a comment with which many in the legal and business communities would sympathise: "*It is incontestable in New Zealand that legislation needs more and better scrutiny than it receives. ... The quality of legislation is getting worse in my view. Not enough time and effort is spent on getting it right*".<sup>12</sup> Dealing with concerns about legislative and regulatory quality will require ongoing measures and a suite of legislative and institutional reforms. The revised Bill will represent an incremental step in the right direction.

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.

All rights reserved © Bell Gully 2012