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Ministry for Regulation
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Dear Sir/Madam

Re: Have your say on the Proposed Regulatory Standards Bill

Background

I am writing to you regarding the discussion document entitled *Have your say on the Proposed Regulatory Standards Bill* (referred to as 'the Discussion Document').

BusinessNZ has submitted on the issue of some form of Regulatory Standards Bill over many years. However, we have found the end result to be disappointing every time, either because the associated bill did not proceed, or was significantly watered down so that it did not resemble the Bill's original intent. This time, we are hopeful the Discussion Document will lead to a conclusive result bringing significant change to New Zealand's regulatory landscape.

Timing of consultation

Before discussing particular parts of the Discussion Document, BusinessNZ would like to provide comments on the consultation period. We note that it was released to the public on 19 November, with submissions due on 13 January.

Technically, this represents a period of eight weeks to provide comments, which BusinessNZ would normally support as a sufficient period to submit for most government papers released for comment. However, the reality for many submitters, including BusinessNZ, is that because of Christmas and the standard holiday period for many, the time available to submit is really five weeks. BusinessNZ believes that the minimum period for any discussion document or issues paper that the Government releases needs to be six weeks, not including the Christmas holiday period. This would help member organisations such as ourselves to properly consult with our membership so that we can provide as much feedback as possible to assist in the development of a better regulatory system.

At a broader level, BusinessNZ and others in the business community have noticed occasions in recent years where government departments have released consultation papers just before Christmas and expected responses by sometime in January. This is very frustrating for submitters as officials have often privately conceded that there is a rush to release something before the end of the year, without any consideration to those submitting. There is much irony in the Ministry for Regulation releasing a document about improving the quality of regulation without providing an appropriate period for a response.

Given the Discussion Document asks about broader issues relating to regulatory processes below, we propose that the Ministry for Regulation establish a standardised, best-practice, minimum non-holiday period for consultation that is consistently applied across government.

Recommendation: The Ministry for Regulation establish a standardised, best-practice, minimum non-holiday period for public submission consultation, to be consistently applied across government.

Specific thoughts

The Discussion Document asks a series of questions in relation to the Regulatory Standards Bill. Rather than answer each question individually, we have outlined some overall thoughts for the various sections of the report

6. What are your overall views on the quality of New Zealand's regulation?
7. What are your overall views on the current arrangements in place to promote high quality regulation?
8. Do you ever use RISs to find out information about proposed government regulation? If so, how helpful do you find RISs in helping you make an assessment about the quality of the proposed regulation?
9. Do you ever use disclosure statements to find out information about a Bill? If so, how helpful do you find disclosure statements in helping you make an assessment about the quality of the Bill?
10. What are your views about the effectiveness of the regulatory oversight arrangements currently in place?
11. What are your views on setting out requirements for regulatory quality in legislation? Are there any alternatives that you think should be considered?

<u>The regulatory challenge facing New Zealand</u>

Overall, BusinessNZ takes the view that regulating is a deeply challenging task for Government, and that ensuring effective implementation and administration of a regulatory regime is a central concern. We view the issue of regulatory practice as a key component of the regulatory puzzle.

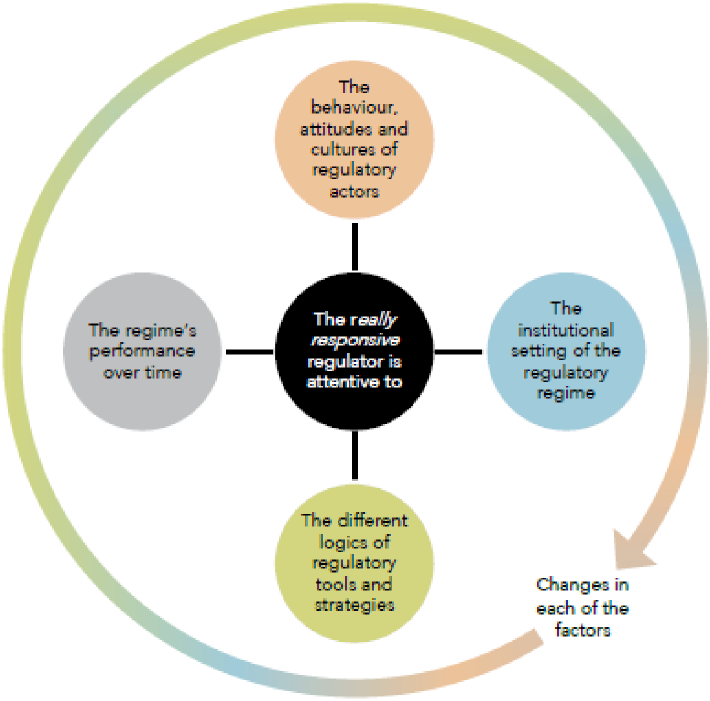
A fundamental question to consider if the Regulatory Standards Bill in its current form were to proceed is whether this would enhance the quality of regulatory institutions and practices to such a degree that there would be a significant improvement in the design of new regulatory regimes and system-wide improvements in the operation of existing regulatory regimes in New Zealand? We believe the Regulatory Standards Bill is most certainly a positive step, especially when addressing challenges around how regulation is created in the first place.

To illustrate this point by way of a related regulatory process issue, we revert back to a discussion in 2014 with the then New Zealand Productivity Commission regarding their Regulatory Institutions and Practices consultation that examined the concept of Really Responsive Regulation (RRR).

Back then, the Commission noted in its report that *"adopting a risk-based regulatory approach presents significant issues for the regulator that challenges the notion that it provides "an evidence-based means of targeting resources" or a defensible framework for undertaking enforcement activity."* We also agree that while the standard approaches around responsive regulation are a good base to start from, the concept of "really responsive regulation" needs to be seriously considered. While some New Zealand regulators currently demonstrate elements of the "really responsive" approach, the evidence suggests that New Zealand regulators are not paying enough attention to how their regimes perform over time.

Figure 1 below replicates the figure in the Report that outlines what a regulator must be aware of and responsive to when adhering to the concept of an RRR.

Figure 1: The Really Responsive Regulator



The 2014 consultation asked whether recent developments in the theoretical literature have application in the New Zealand context, both for the design of new regulatory regimes and their implementation. BusinessNZ believes they did then and still do now, given that in most instances a sophisticated institutional approach will be preferable to the more static approach currently taken that has existed for some time.

However, while the move towards RRR is one we believe needs further consideration today as part of the toolbox to support the Regulatory Standards Bill, we believe the Bill's success will depend on how the decision to regulate is handled in the future. BusinessNZ has often witnessed a political pall hanging over the operation of regulatory processes, creating significant difficulties for regulators. While RISs and Disclosure Statements have been reviewed in an attempt to improve regulatory processes, in reality they have done little to move the needle towards quality regulation.

A specific approach is required to the Government's and Parliament's initial decision to regulate. Without changes that go to the heart of why a Government decides to regulate in the first place, other interventions may fall short of their potential to improve regulatory practices in New Zealand.

Any investigation into regulatory practices that does not take into account the reasoning behind a Government's initial decision to regulate will not have its intended effect. BusinessNZ has long held that some form of regulatory responsibility legislation is required to ensure that the political aspects of regulation making do not become an undue burden on regulators and the policy making process.

Asking the right questions from day one

BusinessNZ and other business associations have advocated for some time for greater coherence and consistency across New Zealand's regulatory frameworks.

A question our members often raise (major members in particular) is, why does New Zealand have different regulators regulating essentially the same network problems but in different ways? This is not conducive to efficient business investment.

Before opting for a regulatory approach, the nature of 'the problem' should first be fully understood - who is affected by it, the costs of taking action and who will bear those costs. Regulatory intervention, because of its cost, should generally be a last resort only when all other cost-effective approaches have been exhausted. In order to justify government intervention, there must be a clear case of market failure and the failure must be significant.

Given that markets are generally faster at self-correcting than governments are at intervening, the onus of proof should be on a Government to prove beyond reasonable doubt that the benefits of intervention will exceed the cost, including the cost of any unintended outcomes (such as non-compliance).

Regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because they do not bear the costs associated with their decisions (costs will ultimately fall on consumers), they may well over-regulate rather than take into account or adequately consider the cost/quality trade-offs consumers would be willing to make.

BusinessNZ is disappointed that too often papers and discussion documents start off by not asking the fundamental question, *"Is there a problem?"* before considering any change to regulatory practices. We would further ask policymakers:

- Is there a problem *in New Zealand* with the current law (i.e. are there issues of market failure that need to be addressed)?

- If there is a problem, is the problem significant?

- What are the costs and benefits (including possible unintended costs) of any proposed changes outlined in the document?

- Are there options for improving outcomes which do not impose significant costs (e.g. by educating market participants)?

Unfortunately, government papers often fail to provide in-depth of coverage of such questions.

In the paragraphs that follow, this submission expands on the above four bullet points.

Market failure – a possible case for government intervention?

Before determining whether increased regulation and/or other interventions such as enforcement are justified, it is first necessary to determine on what grounds government might decide to intervene.

Generally, markets work best when left undisturbed by government intervention by way of regulation, taxes, or expenditures. But at times markets may not perform efficiently, raising the question of whether government intervention is justified. The question then is, *"Is there evidence to show a significant problem?"*

Does the evidence show a significant problem?

BusinessNZ has often seen documents noting that regulatory intervention may be hard to justify given the lack of evidence of a significant problem. In other words, it is clear from officials' own words that in some cases there is little justification for regulatory change.

Even with grounds for significant change, the change process must be approached in a systematic way. Widespread government-led regulatory measures must start from the position of minimising any distortion or unintended consequences a proposed intervention might produce.

The correct path of action to take

Instead of viewing Government-led regulation as the first and only solution to any perceived problem, BusinessNZ has long held the view that some key actions could be adopted to improve the quality of New Zealand regulation, including:

a) *Define the problem:* Require all proposals for regulation to include a clear analysis of the problem to be addressed.
b) *Do a cost-benefit analysis:* Require all proposals for regulation to include a cost-benefit analysis by an independent agency providing a service similar to that of the former Productivity Commission.
c) *Travel up the pyramid:* Consider non-regulatory options first, moving 'up the regulatory pyramid' to generic light-handed options, with more stringent options only if clearly warranted.
d) *Keep it generic, light-handed:* Give preference to light-handed generic regulation.
e) *Regulate only when required:* Introduce new regulations only when justified by clear cases of significant market failure.
f) *Self-Regulation as a goal, not a pathway:* Self-regulation should not be introduced as a precursor to future government-imposed regulation; instead it should be allowed to stand on its merits.

Quality of regulation is not a numbers game

BusinessNZ also takes the view that Government should always focus on the quality of regulation, not the quantity. While we approve of the Government's policy of less regulation, we are also mindful that improving regulation is not about balancing the number of regulations towards a supposed optimal number.

A policy to improve regulation is not simply a numbers game; it involves looking separately at each piece of regulation, making sure it is adequately scrutinised before determining whether it should go or stay.

Overall, BusinessNZ believes there should be a consistent set of principles applicable to all new regulations.

BusinessNZ's previous support for a Regulatory Standards Bill

BusinessNZ has, for a number of years, strongly advocated for an effective Regulatory Standards Bill (RSB), modelled on the work originally undertaken in 2009 by the Regulatory Responsibility Taskforce.

Table 1 below summarises the various steps taken so far in the attempt to introduce an RSB. As can be seen, first steps go back 18 years through the initial introduction of a Regulatory Responsibility Bill, two rounds of feedback requested by the Select Committee, the establishment of and report back by the Regulatory Responsibility Taskforce and a final push by interested parties to the Minister for Regulatory Reform.

The table also highlights related instances where broad regulatory frameworks were examined by the former Productivity Commission, where we took the opportunity to again highlight the need for an RSB.

Table 1: Consultative path towards a Regulatory Standards Bill to date

Date	Government/Select Committee	BusinessNZ Response
August 2006	Regulatory Responsibility Bill introduced	BusinessNZ submission
February 2008	Invitation on feedback on further options	BusinessNZ submission
September 2009	Report of the Regulatory Responsibility Taskforce	BusinessNZ letter to Minister for Regulatory Reform
July 2010	Questions arising from the Regulatory Responsibility Bill released	BusinessNZ submission
March 2011	Regulatory Standards Bill introduced	BusinessNZ submission
September 2012	Letter to Minister of Regulation	BusinessNZ Letter
October 2013	Regulatory Institutions & Practices Issues Paper (New Zealand Productivity Commission)	BusinessNZ submission
May 2014	Regulatory Institutions & Practices Draft Report (New Zealand Productivity Commission)	BusinessNZ submission

We believe the process leading up to the RSB in 2009 was extensive, including not only the timeline of events set out above but also the various discussions at forums and conferences where the spotlight was placed on some form of RSB.

The Bill provided a benchmark for good regulation through a set of principles that all regulation should comply with. And it provided for transparency by requiring those proposing and creating regulation to certify whether it was compatible with the Bill's standards, providing also for monitoring the certification process by creating a new declaratory role for the courts.

Therefore, BusinessNZ and others in the business community were extremely disappointed when the Regulatory Responsibility Taskforce's report was effectively gutted, with Treasury proposing a regime likely to be ineffectual in improving the quality of regulatory decision-making. While the revised RSB had no aspects we would vigorously oppose, it had nowhere near the heft or clout the initial RSB would have had in terms of raising the quality of regulation in New Zealand.

Given the importance of sound regulatory decision-making in supporting fiscal and monetary policy (epitomised by the Reserve Bank Act and Fiscal Responsibility Act, now part of the Public Finance Act), BusinessNZ believes it is crucial that the opportunity to implement a sound regulatory process should not again be passed by.

While the Government has rightly recognised the importance of regulatory reform in building a more productive and competitive economy, it has previously failed to take the critical step of ensuring that not only are regulatory incentives and resources sound, but also that the any decision to regulate is firmly-based and the quality of regulation improved.

New Zealand's regulatory style and characteristics

Regulators often focus narrowly on a certain regulatory path, without taking into account the influence New Zealand's specific, nuanced characteristics have had on the way regulation is designed and operated here.

Should New Zealand have a unique regulatory style?

BusinessNZ doubts whether a unique regulatory style is needed. To some degree, every country has its own unique regulatory aspects distinguishing its regulatory processes and practices from those of other countries - no two countries are exactly the same. However, while acknowledging that New Zealand's regulatory style has some unique aspects, given that most Western-style countries have a core regulatory similarity, such aspects should not be given unnecessary weight when regulatory settings are established.

If we had to pinpoint what makes our style unique, a contributing factor would be the pragmatic approach often taken to influences affecting our country. For instance, as a nation we realise that border controls and safety must be of an extremely high standard given the potential economic costs if certain diseases are found here or outbreaks occur. On the other hand, we recognise that the financial reporting requirements for small-sized businesses do not need to be the same as for large-sized businesses, so we have threshold limits relevant to the New Zealand context.

Whether the level of pragmatism shown in regulatory decision-making is greater or less than that of other countries is obviously difficult to ascertain. But it is unlikely that New Zealand's style differs significantly from that of other countries; there are differences, but few that many other countries will not also face.

Looking beyond the issue of a unique regulatory setting, a number of observations have been made by BusinessNZ over recent years when submitting on government papers and in interactions with officials. These observations may not be game-changers of themselves, but collectively they provide an indication of where it is considered improvements could be made across the whole of government.

First in the world and world-leading?

Too often BusinessNZ has seen Government and the general public take a view that we should be world-leading or the first in the world to introduce something. This can sometimes be beneficial, but sometimes it can lead to unintended consequences, creating significant distortion. A better alternative, being a 'fast follower,' makes it possible to observe mistakes that have been made and actions that were successful.

New Zealand's taking a lead has at times put us on the world stage. While, in 1893, being first in the world to give women the vote was a significant and positive leap forward for male and female equality, the 1938 introduction of universal (cradle to grave) welfare happened at a time when New Zealand's structure was very different from today, with very different outcomes in terms of affordability over time.

On a positive note, other world firsts, including the Reserve Bank Act and the Fiscal Responsibility Act, have by and large provided for a more stable economic setting, but were first well-debated and analysed to ensure their success.

BusinessNZ's concern is that our current culture often sees it as important to make New Zealand first in the world or world-leading and that as a consequence, many policy proposals fail to identify the benefits and costs that ought first to be considered.

Of itself, being first in the world or world-leading is neither a benefit nor a cost; it is simply a consequence of whatever action is taken. Being first in the world or world-leading may give rise to costs or to benefits but these possibilities are seldom considered during the regulatory process. Often, too much weight is given to treating something as important when it is not.

New Zealand as a part of a global regulatory system

A different but equally dangerous practice also capable of producing a poor outcome stems from a desire to harmonise New Zealand's regulations with those of other countries. BusinessNZ agrees that many regulatory systems are now global and that there are issues that Governments acting alone cannot address, including banking and financial regulation, intellectual property matters and concerns to limit the spread of infectious diseases. While this can have a number of advantages, it can equally be disadvantageous, especially where an exceptionally good regulatory environment is needed to help mitigate the impact of economic geography on economic performance.

BusinessNZ appreciates that New Zealand does not live in isolation from other countries. International movements and trends have to be taken into account when domestic regulations and laws are examined, much as the private sector needs to observe and respond to consumer trends or product changes offshore. We also agree that a high-quality regulatory structure can provide New Zealand with a competitive advantage. However, this can quickly be eroded by the introduction of low quality off-shore regulation or regulation that does not properly fit the New Zealand context.

A Government preoccupation with alignment with Australia

In various regulatory investigations, the aim of aligning with our closest economic neighbour, Australia, has been strongly evident. In some instances, it has been explicitly stated in discussion documents or in a Bill's explanatory note, that alignment with Australian law is one of the policy objectives.

BusinessNZ supports moves that lead to closer economic relations between the two countries but we have always taken the view that any form of harmonisation should only occur if there is a clear net economic benefit to New Zealand. We are increasingly of the view that the debate around trans-Tasman harmonisation has become far too simplistic in regard to regulatory change and as a consequence tends to overlook some fundamental differences when endeavouring to decide what should or should not be considered for harmonisation. The push towards harmonisation is often viewed as an end in itself, or as an overwhelming reason for change. This, however, overlooks subtle differences associated with the need for regulatory change.

For instance, there may be some harmonisation options where perfect alignment makes sense as it reduces transaction costs between the two countries. There may be other regulations that New Zealand should pick and choose from, given Australia has had them for some years, providing New Zealand with the benefit of hindsight. But there are some Australian regulations which are clearly unpalatable from a New Zealand perspective, either because they would not fit with New Zealand's associated laws or would place undue regulatory requirements on New Zealand businesses. Regulations of greatest concern to BusinessNZ are those which reduce our competitive ability, resulting in stunted growth.

As with the issue of wanting to be a leading nation when it comes to policy development, we believe harmonisation with other countries, particularly Australia, receives too much weight in government papers, given other factors at play.

Discussion area one: setting standards for good regulation

12. What are your views on setting principles out in primary legislation? Page 24 -25
13. Do you have any views on how the principles relate to existing legal principles and concepts?
14. Do you agree with the focus of the principles on:
a. rights and liberties?
b. good law-making processes?
c. good regulatory stewardship?
15. Do you have any comments on the proposed principles themselves?

In terms of the three broad principles, BusinessNZ supports their inclusion. Upholding rights and liberties ensures that policies respect fundamental freedoms and avoid overreach, which helps build trust in the regulatory system, with stakeholders more likely to view rules as fair and just. Good law-making should provide transparent, evidence-based processes that lead to well-designed regulations, while good regulatory stewardship ensures ongoing accountability, adaptability, and responsiveness of regulations to changing contexts.

The only issue that the Government might need to be mindful of when outlining the particulars of the principles in the RSB is around competing interests, where, for example, a strong focus on rights and liberties might conflict with public interest goals, such as safety protection. This could require trade-offs that are politically and socially challenging.

Overall, BusinessNZ is not wedded to any exact wording of the principles outlined in the Discussion Document. We have examined the principles from an economic perspective as opposed to legal perspective, so if there are amendments that could be made from a legal angle we would support such moves to ensure the Bill is given every chance to succeed.

16. In your view, are there additional principles that should be included?

BusinessNZ notes that one of the current principles is that compensation must be provided for in the case of the taking of property. However, it should be made absolutely clear that this should also include compensation for regulatory takings as well.

While the taking of private property in the public interest is generally already covered under the Public Works Act 1981, there is often little or no compensation provided for when the Government restricts the ability of businesses to utilise their land and/or buildings as they consider appropriate.

This issue is expanded upon below, but there are a number of instances over recent years where the Government of the day has seriously impacted on the ability of businesses to operate in an efficient manner without actually confiscating their property per se.

Probably the most prominent of these regulatory takings was the case of the general Covid lockdown in March 2020 (and a number of subsequent national and regional lockdowns thereafter).

While it could be argued that the Government provided some form of relief for businesses in the form of wage subsidies and grants to try and keep employees attached to the labour market, many businesses also felt that they could have operated in a relatively low-risk way but were prohibited from doing so, and faced significant economic losses.

Other examples of significant regulatory takings include the decision to require earthquake-prone buildings to be upgraded to a certain percentage of the building code within a certain time frame, with some limited exemptions. Again, the Government did not directly confiscate property, but seriously impacted on the ability of many businesses to operate.

To be fair to the current Government, they have initiated a review of earthquake legislation to try and ensure that it is fit for purpose and takes adequate account of actual risks to property and human safety.

Another significant example of regulatory takings is the case of restrictions on land use, where previous Governments tightened controls the usage of land and in some cases restricted stock numbers and required the provision of buffer areas.

Other examples can also be readily identified such as Significant Natural Areas (SNAs) where local government have locked up or at least restricted the use of privately owned land without any form of compensation.

The above examples indicate why it is necessary to not only consider the taking of property but also restrictions on the use of property in respect to compensation.

The importance of upholding property rights to encourage investment

It is a fundamental pillar of a market economy that property rights should be clear and unambiguous and able to be upheld in a court of law. Where property rights are removed or reduced by way of regulatory takings, compensation should generally be paid.

Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.

There is still much debate about property rights boundaries. At one extreme, property rights can generally be considered reasonably clear, for example, a private title over land and buildings. At another level, property rights can be assigned by government - resources such as fishing quotas, for example. Here property rights are generally reasonably secure or, if reductions in take are made (e.g., because of over-fishing), current quota holders have reasonable certainty their proportion of the total take will remain the same. At the other extreme, government, or its delegated authorities, gives rights to particular people to do certain things or use particular resources, but with significant restrictions. For example, water permits are issued to users for periods of up to 35 years (often for much shorter periods), but with authorities able to modify those permits during their tenure, on the basis of changed circumstances. The point here is that while some property rights are relatively certain and enduring, others are not.

Compensation for regulatory takings

As a general principle, individuals and companies should bear the full cost of their behaviour (i.e., costs should be internalised). Over-consumption of resources is always likely if costs can be shifted on to third parties. Management of land use and risk is no different. If individuals and companies are to make rational decisions about land use, they should ideally bear the costs (and gain the benefits) associated with specific options/outcomes. If, on the other hand, individuals and companies are forced to pay a greater amount than any cost they bring into effect , the outcome will either be a more expensive product and/or reduced commercial activity, with associated flow-on implications for employment etc.

There is no allowance in the Resource Management Act (RMA), other than in some specific instances, for the payment of compensation in recompense for regulatory takings (or for a reduction in private property rights) in the public interest. This is a substantial flaw in the RMA and serves (and will continue to serve) to depress necessary economic activity.[1]

The persistent and ongoing departure from the principles of consent to the diminution of private interests in the name of the public interest, and the provision of compensation when this occurs, have created an enduring and deep-seated dissatisfaction among the business community with the way the RMA is implemented.

Regulatory takings should not be legislatively condoned. Instead, as noted above, BusinessNZ believes that core to the issue of property rights, where regulatory takings are contemplated, is the acknowledgement of the right to compensation. As a general principle, property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital economic system check and balance.

The need to compensate for regulatory takings is hardly a novel conclusion in public policy. Over recent years the Crown, in the process of regulating private property rights in the perceived public interest, has at least accompanied regulation with compensation. This has occurred most notably in the areas of carbon emissions and fisheries management.

Recommendation: The principles require that compensation be provided for in cases of regulatory takings in the public interest although it is accepted some reasonable threshold would be required.

Discussion area two: showing whether regulation meets standards

17. Do you agree that there are insufficient processes in place to assess the quality of new and existing regulation in New Zealand? If so, which parts of the process do you think need to be improved?

If we were to first look at new regulations, as we have outlined above, there are existing processes to assess their quality, but these are often not thorough enough and lack the rigor required to ensure that any unintended consequences are minimised. The lack of quality of RISs is perhaps the best example of this, as well as various discussion papers. For existing regulations, apart from ad-hoc reviews, there is little in the way of consistent and sufficient processes to address whether such regulations are currently fit for purpose.

18. Do you think that the new consistency checks proposed by the Regulatory Standards Bill will improve the quality of regulation? Why or why not?
19. Do you have any suggested changes to the consistency mechanisms proposed in this discussion document?

BusinessNZ strongly supports the idea of consistency checks. While many government agencies do their best to ensure the regulations they oversee are relevant for today's society, having this front and centre on an ongoing basis can be challenging. Political machinations of the day often lead to resources being directed towards reactionary efforts, as opposed to a proper work plan that focuses on an overall rise in the quality of regulation. Therefore, we believe an RSB will likely ensure a much stronger focus on improving the quality of regulation across government.

20. Which types of regulation (if any) do you think should be exempt from the consistency requirements proposed by the Regulatory Standards Bill, (for example, regulation that only has minor impacts on businesses, individuals, and not for profit entities, regulation that corrects previous drafting errors, or regulations made under a declared state of emergency)?

On balance, BusinessNZ agrees with the views expressed in the Discussion Document that there should be an ability for the MfR to determine which types of regulation are required to comply with consistency requirements. While we generally take the view that exemptions should always be limited and narrowly defined, we would be concerned if the MfR became entangled in proposed or existing regulations that had little chance to provide a noticeable impact on the effectiveness of regulation.

We would expect the MfR to discern which regulations would be required to comply with consistency requirements. However, this could be part of a review, which is discussed in more detail below.

Discussion area three: enabling people to seek independent assessment of whether regulation meets standards

21. Have you used any of the existing mechanisms described above to raise issues or bring complaints about the quality of regulation to the Government? If so, did you find them effective?
22. Do you think that New Zealand needs a new structure or organisation to consider complaints about the quality of regulation? Why or why not?
23. If a new structure is created specifically to consider complaints about regulation:
a. do you think a Regulatory Standards Board would be the best mechanism to do this?
b. are there any alternatives that you think would be preferable to the proposed Board for investigating complaints about regulation?
24. Do you have any views on the detailed design of the proposed Board, including how it would operate and the proposed number of members?
25. In your view, what individual skills or experience should Board members have?

BusinessNZ understands why the Government considers that a Regulatory Standards Board is more appropriate than utilising the courts to determine whether particular regulatory initiatives meet appropriate standards.

Notwithstanding our general support for a Regulatory Standards Board, it is important that the Board remains independent of Government and has a broad cross-section of expertise (including, in particular, legal and economic expertise as outlined in the Discussion Document), but also includes expertise in cost-benefit analysis to ensure that legislative initiatives are soundly based.

BusinessNZ is concerned to ensure that appointments to the board should be based on expertise, not politically motivated appointments as could be considered with some agencies in the past.

This reinforces that the Act will need to clearly articulate the requirements for the position(s) on the Board so the ability of Governments to make politically-motivated appointments is minimised.

There may be opportunity to require the appointing Minister to consult with credible public and private sector organisations to get feedback before making Board appointments. While ultimately the power of appointment would rest with the Minister, requiring consultation with a range of organisations could help ensure the credibility of the office is retained over political cycles.

BusinessNZ also notes that reports of the Board could be presented to the House to help strengthen Parliamentary scrutiny. BusinessNZ is supportive of this but considers that a further step could be provided whereby the appropriate select committee (possibly the Finance and Expenditure Select Committee) could allow for public submission to be made on the Board reports (perhaps annually) which would provide an opportunity for the public to review the quality of Board reports and ensure that there is opportunity for the public and organisations to express their views on the quality of the overall process.

This would take resourcing but could be a helpful step to improving the overall quality of regulation and ensuring that the Board, Minister, and ultimately Government, are held to account for the quality of regulatory decision making.

Recommendation: Notwithstanding our general support for a Regulatory Standards Board, it is important that the Board remains independent of Government and has a broad cross-section of expertise, including expertise in cost-benefit analysis to ensure that legislative initiatives are soundly based.

Recommendation: The appropriate select committee (possibly the Finance and Expenditure Select Committee) could allow for public submissions to be made on the Board reports (perhaps annually) which would provide an opportunity for the public to review the quality of Board reports and ensure that there is opportunity for the public and organisations to express their views on the quality of the overall process.

Discussion area four: supporting the Ministry for Regulation to have oversight of regulatory performance

26. Do you support the proposals in this section for strengthened regulatory stewardship expectations on agencies to be set out in a Bill?

Overall, BusinessNZ supports the proposals for strengthened regulatory stewardship expectations on agencies. We believe there needs to be some way in which the RSB can hold the feet to the fire of various government agencies so that they are actively reviewing, maintaining and improving the legislation they administer.

27. Do you agree that there may be some situations where a power for the Chief Executive of the Ministry for Regulation to obtain information will be required to help decide whether a regulatory review is warranted and to inform regulatory reviews?

Given the broad business community typically views the various public sector agencies as simply being 'the government,' we would automatically expect a high level of cooperation between agencies and the MfR when any regulatory review is undertaken, including the sharing of information to help decide whether a regulatory review is warranted in the first place.

If this is not the case, then beyond the standard checks and balances that may already exist around privacy of information that applies to certain legislation, we would seriously question what circumstances could lead an agency to openly refuse to cooperate with the MfR.

28. Do you agree that the proposed information gathering powers are justified for the purpose of informing regulatory reviews? Do you think the powers should apply to all the types of entities listed above, or only some?

We note that there would be standard safeguards around such powers not overriding prohibitions or restrictions on the sharing of information already set down in legislation. Also, while we understand that such requests for information are likely to incur costs, we do not see this as an impediment given the likely economic benefit of a review to the economy will be greater than the costs for one or more agencies.

Pages 35-36 of the Discussion Document outline the broad groups of agencies that the Chief Executive of the MfR can require information from in support for a review. While BusinessNZ agrees with the list outlined, our only pause for thought would be regarding *"any entity contracted by the Government to support the delivery of a regulatory function, also known as third-party service providers."*

Government agencies typically have best-practice guidelines around what they expect from third-party service providers, including adequately protecting and managing the information they collect. If the RSB proceeds, there may need to be some form of 'no surprises' communication by the relevant agency that a third-party provider could be contacted by the MfR in the future.

29. Do you think the information gathering powers are broad enough to enable the Ministry for Regulation to undertake regulatory reviews effectively and efficiently?

In some respects, the information-gathering powers would likely be akin to the market studies powers given to the Commerce Commission, where it can issue a call for information from interested parties and commence an information-gathering phase. Often, the information requests by the Commerce Commission on individual private sector entities can be substantial, which can lead to significant costs in time and money. Therefore, if such responsibilities are already in place for the private sector, there should be a similar level of accountability on the public sector to also assist with a regulatory review undertaken by the MfR.

30. Do you think any safeguards or procedures should be applied to limit how the information gathering powers are used by the Ministry for Regulation? What safeguards do you think should be put in place?
31. Do you support the proposals in this section in relation to the Ministry for Regulation's broad oversight role?
32. Are there any other measures you think a Bill should contain to support the quality of regulation?

Given the Discussion Document states that, *"any such powers would not override prohibitions or restrictions on the sharing of information already set down in legislation,"* as well as what we have outlined above, BusinessNZ is generally comfortable with proposed information-gathering powers that will be given to the MfR. However, if that were to change through the consultation process so that such powers would also apply in some way to the private sector, this would most probably indicate the MfR has overreached its limits.

Other comments

33. Do you think the overall proposal will be effective in raising the quality of regulation in New Zealand?

Looking at previous times an RSB has been proposed, it was evident that many commentators thought the RSB would provide the answer to all of New Zealand's regulatory woes. This is simply not the case, and no version of an RSB has ever claimed to be everything to everyone. Instead, the RSB provides a higher level of transparency in regulatory decision-making, which should lead to fewer unintended consequences, reduced compliance costs and better policy outcomes. The RSB is not about absolutes, but rather a key mechanism to improve regulation over time.

34. Do you think there are other provisions that should be included in the Bill. If so, what would they be?

Extension of Regulatory Responsibility Bill to local government

While previous work on an RSB did not specifically consider whether the mechanisms proposed in the Bill should apply to local government, it did recommend that further work be undertaken on how best to ensure quality legislation at a local government level, with a view to reporting recommendations as part of the first 5-yearly review of the Bill.

BusinessNZ believes that consideration needs to be given in relation to the RSB and local government regulation. Significant changes to the Local Government Act in 2001 giving local government the power of general competency led local authorities to see their activities as needing to be managed to 'promote social, economic, cultural, and environmental well-being in the present and for the future.' This meant many well-meaning local authorities undertook activities or imposed interventions that either duplicated or were at cross-purposes to national economic, social, and environmental policies. Therefore, a line must be drawn between what is sensible to handle on a national basis and what should be handled at a local level. The extension of the RSB to the local government area would be a step in the right direction.

Recommendation: Local government regulation is also considered to be covered within the ambit of the Regulatory Standards Bill, given the impact of local government regulation on businesses and households.

Private Members Bills

BusinessNZ considers that in addition to the Regulatory Standards Bill potentially applying to local government legislation/regulation, consideration should also be given to including Private Members Bills within the ambit of the proposed Bill.

Unlike Government Bills which often have the widespread support of government departments, having been scrutinised and analysed by them before being promoted, Private Members Bills do not generally receive particular scrutiny before they are presented.

Private Members Bills can therefore have significant effects on policy settings without having been subject to adequate scrutiny or analysis before their implementation.

While it is true that all Bills are generally voted on by Parliament (i.e. they have to get a majority decision before being referred to a parliamentary select committee), there have been many cases where controversial issues have been voted on by parliamentarians to go to a select committee "to see what the public think."

While constitutionally it may be difficult to require Private Members Bills to go through a rigorous process before being introduced, it is an issue which BusinessNZ considers should be considered. At a minimum, allowing Private Members Bills to be subject to the scrutiny provided for in the Regulatory Standards Bill could well provide greater comfort for promoters of Private Members Bills that they are soundly based and could bring greater parliamentary support for their introduction across traditional party lines.

Recommendation: Consideration should be given to including Private Members Bills within the ambit of the proposed Bill.

The Regulatory Standards Bill needs mates

A key point we have underlined on numerous occasions when submitting on various forms of an RSB is that there are many mechanisms required to create sufficient change to improve the quality of regulation. While many proposals put forward are a step in the right direction, on their own they may not do enough to ensure improvement in the quality of regulation is as high as envisioned. We view the RSB as a significant part of the solution for improving regulation in New Zealand, however, it needs mates.

One area where BusinessNZ sees the possibility of further enhancements involves the establishment of the MfR itself, which BusinessNZ supported as a replacement to the former Productivity Commission. We believe the MfR represents an ideal way in which to independently assess various areas of existing and proposed regulation. Therefore, BusinessNZ believes overall funding for the MfR will most likely need to increase in future years, assuming it is able to show its value through quality research and the breadth and depth of the investigations undertaken. For the MfR to be truly effective, we would want it to be adequately resourced in future years so that budgetary constraints do not hamper its ability to undertake significant research into key areas of regulation and productivity.

Regulatory Responsibility Act reviewed after 3-5 years

We note that previous versions of the RSB outlined a review of the legislation at 5-yearly intervals to determine whether its purposes were being met, and whether amendments or other measures were necessary to improve the quality of legislation in New Zealand. BusinessNZ believes this should also be the case with the proposed RSB. However, in this instance, a review somewhere between 3-5 years should provide a balance between examining any issues relating to the Act from its inception, while providing enough time to ensure any potential adjustments are able to bed down before existing regulation is included.

Recommendation: The Regulatory Standards Bill is reviewed after 3-5 years.

35. Would you prefer any alternative options to the Bill, including non-legislative options?

BusinessNZ believes an RSB as outlined in the Discussion Document is the best way forward to provide a step-change in the quality of regulation in New Zealand. However, as outlined above, we would also support other regulatory measures that complement an RSB.

Kind regards,

Katherine Rich
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BusinessNZ