

Submission

By



to

Commerce Select Committee

on the

Regulatory Standards Bill

18 August 2011

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**REGULATORY STANDARDS BILL
SUBMISSION BY BUSINESSNZ¹
18 AUGUST 2011**

1. INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to comment on the Regulatory Standards Bill (referred to as 'the Bill').
- 1.2 As the Bill's explanatory note points out, *"the purpose of the Regulatory Standards Bill is to improve the quality of regulation in New Zealand"*. BusinessNZ strongly supports moves that lead to the Bill being part of New Zealand's regulatory landscape. We have previously taken the opportunity to submit on this issue over a lengthy consultation period (as should be the case given the Bill requires the same analytical rigour as any other piece of legislation), and have raised issues that needed addressing. However, as outlined below, over-analysis can often lead to paralysis, as almost all legislation is likely to be imperfect in some shape or form. Therefore, we believe the Bill is at a stage of development where it should proceed.

2. SUMMARY OF RECOMMENDATIONS

- 2.1 BusinessNZ **overall recommendation** is that:

a) The Bill proceeds (p.2).

Notwithstanding the recommendation above, BusinessNZ also recommends that:

b) Option 5 of the Regulatory Impact Statement is not considered as a replacement for the Regulatory Standards Bill (p.8);

c) Elements of option 5 are considered as ways to support the Regulatory Standards Bill going forward (p.8);

d) The Regulatory Standards Bill is reviewed after 5 years (p.8); and

e) Local government regulation is considered as part of the 5-yearly review of the Regulatory Standards Act (p.9).

3. THE PATH TOWARDS A REGULATORY STANDARDS BILL

- 3.1 Table 1 below summarises the various steps taken so far in the attempt to introduce a regulatory responsibility/standards bill. As can be seen, first steps go back close to 5 years, including two bills, two rounds of feedback requested by the Select Committee, and the establishment of and report back by the Regulatory Responsibility Taskforce.

¹ Background information on BusinessNZ is attached in the appendix.

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

- 3.2 BusinessNZ would argue that the process leading up to this paper has been extensive, including not only the timeline of events set out in the table above, but also the various discussions at forums and conferences where the spotlight has been placed on some form of Regulatory Responsibility/Standards Bill (RSB).

Overall Recommendation: That the Bill proceeds

4. COMMENTS ON ASPECTS OF THE BILL

- 4.1 BusinessNZ does not intend to go through every issue that has been previously raised via the submission process on the introduction of a RSB. Instead, we wish to comment on some aspects of the Bill, and on issues others have raised.

The Need for a Regulatory Standards Bill

- 4.2 Many opposing the Bill have variously commented that there has been little or no evidence put forward that legislation is required to improve the quality of regulation in New Zealand. Other opponents have taken this view further by questioning whether there is an issue of poor-quality regulation in New Zealand at all. To support these views, internationally comparable surveys are mentioned, such as the Ease of Doing Business survey that New Zealand typically ranks highly on. However, such simple surveys are a very poor proxy for indicating what regulatory processes are undertaken every day. BusinessNZ believes this argument against the Bill is nonsensical. The timeline of events leading up to the establishment of the Regulatory Responsibility Taskforce (RRT) via submissions (including BusinessNZ's) to the Commerce Select Committee clearly showed a need to significantly improve the quality of regulation in New Zealand. To provide numbers around our argument, one needs only to examine the results of the BusinessNZ-KPMG Compliance Cost Survey from 2003-2008 to see how the many costs of regulation (via compliance costs) have diverted attention away from business growth.
- 4.3 In addition, those opposed to the Bill state that the RRT that designed the RSB failed to justify why this sort of Bill is necessary. This view completely

overlooks why the RRT was established, namely to assess the private member's bill on regulatory responsibility, consider what amendments and supporting arrangements might be desirable, and recommend a draft Bill. There had already been consensus that the overall quality of regulation in New Zealand was an issue that should be dealt with. Therefore, the RRT began its work from the basis of a problem already identified. This point was also raised in paragraph 18 of the RSB's RIS, which states that *"to be fair to the Taskforce, it was not asked to do so"*.

- 4.4 As a further point, it is not only submitters who have outlined the poor quality showing of regulatory processes. The background and contextual information outlined in the Treasury's RIS for the RSB does an excellent job of succinctly explaining the position New Zealand finds itself in, in terms of poor regulatory paths.

Recent Changes to Regulation Processes

- 4.5 In relation to the point above, another argument put forward against the RSB is that changes to regulatory processes over the last few years are sufficient. While BusinessNZ has been supportive of the changes, we still believe they do not go far enough in terms of lifting regulatory standards to a suitable level.
- 4.6 The various changes have included, among others:
- Quality Regulation Review (2006/2007)
 - Sector analysis (2006 onwards)
 - Oversight of regulatory impact analysis within Treasury
 - Measures to strengthen regulatory impact analysis
 - Programme of regulatory reviews
 - Government-wide scan of regulation on legislative books
 - Establishment of the New Zealand Productivity Commission
- 4.7 The changes above represent work from both the last Labour Government and the current National Government, which we believe constitutes steps in the right direction. The fact that such measures have taken place across the political divide shows the importance most parties place on ensuring high quality regulatory processes.
- 4.8 However, despite such steps, the quality of regulation in New Zealand remains a problem. Treasury notes that only half of Cabinet's significant regulatory proposals since Nov 2008 had RISs that met expected standards. In other words, many RISs were more of an afterthought and/or compliance exercise than a valued component of the regulatory process.
- 4.9 Even when RISs have been conducted as part of the RIA process, we have outlined in previous submissions how these are often of very low quality. For instance, a recent BusinessNZ submission on Cartel Criminalisation highlighted the inadequate level of evidence and problem definitions to show criminal sanctions are justified. At a discussion document level, many of these inadequacies are still very evident early on in the consultation process. For instance, the recent Consumer Law Reform review discussion document

on which BusinessNZ submitted recommended particular sanctions, despite almost no evidence that justified their introduction. Therefore, despite the positive work done to improve regulatory processes, more needs to be done.

The RSB does not provide all regulatory solutions – Clause 3

4.10 A fallacy we have seen various commentators fall into when assessing the RSB is that some think it is supposed to provide the answer to all of New Zealand's regulatory woes. This is simply not the case, nor would BusinessNZ expect it to.

4.11 An example of this is a piece Brian Easton wrote for Victoria University's Policy Quarterly publication, entitled '*Regulatory Lessons from the Leaky Home Experience*'. In his article, Easton stated after going through events leading up to the leaky buildings saga from the 1990s that:

"The Regulatory Responsibility Taskforce submitted a Regulatory Responsibility Bill in September 2009. Again, we ask: would the bill, were it a statute at the time, have done anything to prevent or forewarn of the adequacies of the Building Act and the Building Code? The answer is no. The bill establishes a set of principles, not one of which addresses the issue of what happens if some statute or regulation fails to deliver on its intent. From this perspective, the proposed RRB is ineffective."

4.12 The Bill has never claimed to be everything to all. Instead, the RSB provides a higher level of transparency in regulatory decision making, which should lead to fewer unintended consequences, reduced compliance costs and therefore achieve better policy outcomes. The RSB is not about absolutes, but rather a key mechanism to ensure policy makers get it right first time.

Costs and Responsibilities Associated with the Regulatory Standards Bill – Clauses 8-10 & 15-17

4.13 Treasury's preliminary analysis has estimated that certification requirements introduced will likely cost in the order of \$3-4m per year. There will be other costs, including those involving courts and Crown Law. An estimate of the cost for an application brought as a stand-alone proceeding could cost around \$500,000 to defend. Also, there will be additional compliance costs for public entities, such as considering whether regulation (both old and new) is consistent with legal principle.

4.14 Such costs have been stated by some as a reason for the Bill not to proceed. However, this argument looks solely at the costs of the RSB and not the benefits for the wider New Zealand economy.

4.15 BusinessNZ believes the probable costs associated with Government complying with the RSB simply pale in comparison with the compliance costs currently imposed on the business community. For instance, the KPMG-Compliance Cost Survey quantified the costs of compliance, broken into four main areas, tax, employment, environment and other. When the 2008 survey results were extrapolated out to take into account New Zealand's entire

business demographics, the total compliance cost for firms with fewer than 20 staff was around \$2.5 billion, and for firms with 20 or more employees, \$1 billion. Obviously, a proportion of what was spent on compliance was beneficial, but even if 50% constituted “useful costs”, that still left close to \$2 billion that did not go towards increasing economic growth.

- 4.16 In addition, the RSB should encourage the public sector to get regulatory proposals right the first time, helping to save both private and public sector costs in terms of fixing problems. Obviously, such figures on both the cost and benefit sides of the equation are estimates and assessing the true benefits of better quality regulation can be difficult. However, the potential for the RSB to improve regulations and reduce costs to business are vastly significant compared to the costs of the RSB to the Government.
- 4.17 Others have raised the issue of additional responsibilities being placed on Ministers and officials, which are viewed as a negative. These include regular reviews of regulation, annual reporting requirements by every entity and ministerial oversight of the reviews. Simply put, BusinessNZ would see many of these checks and balances as something that should take place anyway within Government departments to ensure responsible regulation making at reasonable cost.

Relationship between Ministers and Government Officials – Clauses 8-9

- 4.18 BusinessNZ notes that there have been concerns raised regarding senior public servants certifying whether legislative proposals comply with regulatory responsibility principles. Some believe this would potentially politicize the civil service and create an incentive for Ministers to appoint politically congenial Chief Executives of government departments. This is again an extreme view as opposed to reality.
- 4.19 Instead, BusinessNZ believes there would most likely be a range of outcomes from such a relationship. The success or otherwise of the RSB in the context of Ministers/officials will depend on the economic versus political dimensions that already exist. If economic and political will are aligned, then one would suspect on balance there would be minimal problems. If the policy direction of officials is out of line with that of Ministers, then we would expect issues to arise regarding the ongoing relationship. However, these types of relationship issues are nothing new. An RSB may exacerbate the problem in some cases, but may also cause many Ministers and officials to identify the need to work more collaboratively. In short, the possible effect on relationships should not be taken into account as a reason for the RSB not to proceed.

5. PROBLEMS/ISSUES WITH THE RSB

- 5.1 Although we do not see any issues that would be significant enough for the Bill not to proceed, this does not mean we do not see room for improvement. Indeed, there are aspects of the Bill that we would encourage the Select Committee to consider to ensure the Bill provides the greatest chance to improve New Zealand’s regulatory landscape.

Interpretation of the Principles – Clause 7

- 5.2 A number of commentators and government departments have voiced concern regarding the six RSB principles. BusinessNZ finds the level of discontent surprising, given the principles are largely based on existing law sources, including LAC guidelines and common law. Therefore, the principles themselves are hardly a fresh page start.
- 5.3 Nonetheless, BusinessNZ is not wedded to the exact wording of the current principles. We have examined the RSB 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 introduced with its best foot forward.
- 5.4 However, we believe it is also important to point out that even if there are some issues with the existing principles that cause concern in certain circles, these are in no way a sufficient reason for the Bill not to proceed.

Constant Declarations of Incompatibility – Clauses 12-14

- 5.5 One issue BusinessNZ has mentioned previously that may need attention is the possibility of the value of an RSB being diminished if there is constant declaration of incompatibility regarding a range of newly enacted legislation.
- 5.6 To illustrate, a particular government in the future may set about introducing a range of legislative changes based on a mandate inconsistent with the principles outlined in the RSB. In every instance the courts find the changes incompatible, with such results picked up by the opposition, interest groups and the media. With the same outcome reached by the courts each time, there is the risk that a finding of ‘incompatibility’ simply fails to really mean anything as the government can simply argue that its changes are based on principles other than those outlined in the RSB. Also, the opportunity for improving legislation through declarations of incompatibility could weaken as the wider New Zealand public simply came to accept that there was a fundamental difference of opinion between Government’s policy aims and the views of the courts.
- 5.7 Likewise, the government of the day is free to pass legislation that departs from the principles, but must declare what it is doing openly. A repeated series of declarations away from the principles could also be seen as ‘standard’ for what the government wishes to achieve.
- 5.8 BusinessNZ would hope that such repeated declarations of incompatibility are a least probable scenario that may never eventuate. Also, we do not believe the answer should therefore be to make the court findings enforceable in any respect. In terms of how this situation could be improved we have no obvious solutions as we believe there is a level of responsibility on those in the political process to use (or not use) this type of information as they see fit. However, it is an issue that the Select Committee needs to be aware of.

The Regulatory Standards Bill needs Mates

- 5.9 A key point we have repeatedly conveyed to both the Minister for Regulatory Reform and the Select Committee is that there are a myriad of 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 enough to ensure the improvement in the quality of regulation is as high as envisioned. Therefore, we view the RSB as a significant part of the solution for improving regulation in New Zealand. However, by itself it may not have the best chance for long-term success.
- 5.10 As stated in paragraphs 4.6-4.7 above, BusinessNZ notes that recent changes to improve the quality of regulation have been steps in the right direction. However, prioritising and initiating a set of measures that combined improve the full regulatory process remains difficult.
- 5.11 One area where BusinessNZ sees the possibility of further enhancements involves the New Zealand Productivity Commission (NZPC). We believe the Commission represents an ideal way in which to independently assess various areas of existing and/or proposed regulation. Therefore, BusinessNZ believes overall funding for the NZPC will most likely need to be significantly revised upwards in the near future, assuming the NZPC is able to show its value through quality research and the breadth of the investigations/inquiries undertaken. For the NZPC 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.
- 5.12 Another area where further gains could be made in improving overall regulatory quality involves the alternative approaches that Treasury has examined in the context of the RSB, which are detailed below.

6. TREASURY'S PREFERRED APPROACH – STRENGTHENING THE PARLIAMENTARY REVIEW OF LEGISLATION

- 6.1 While BusinessNZ believes the RIS for the Bill does a very good job of outlining the need for change, Treasury does not favour the Bill going forward in its current form. Instead, Treasury wishes to see Strengthening Parliamentary Review of Legislation (option 5).
- 6.2 As paragraph 34 of the RIS outlines, Option 5 has essentially drawn inspiration from Queensland's Legislative Standards Act, and it would therefore 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.
- 6.3 BusinessNZ believes option 5 is a very watered down option that simply lacks the bite to ensure sufficient regulatory process gains are made. In short, we believe it is a poor alternate to the RSB, and should not be viewed as a better option going forward.

- 6.4 Also, BusinessNZ is concerned that exploring yet another option essentially takes us back to square one. Given the exhaustive process already undertaken, we believe the right outcome has been achieved with the introduction of the RSB. Dismissing the RSB to examine another option simply extends the when no overarching regulatory quality standards are put in place, with absolutely no guarantee that any overarching process to improve regulatory quality will be introduced.

Recommendation: That option 5 of the Regulatory Impact Statement is not considered as a replacement for the Regulatory Standards Bill.

- 6.5 Option 5 outlines ways in which Parliament could be given a more explicit mandate to consider legislative quality issues, as well as additional support for Select Committees to carry out their enhanced role. While we believe the RSB represents the best avenue going forward, ideas such as additional resources for select committees certainly deserve further consideration. Therefore, BusinessNZ recommends to the Select Committee that rather than taking a 'this or that' approach to what option is best going forward, there is scope for elements of option 5 being further considered as ways to support the RSB as we highlight in section 5 above.

Recommendation: That elements of option 5 are considered as ways to support the Regulatory Standards Bill going forward.

7. LOOKING AHEAD

Regulatory Responsibility Act Reviewed after 5 Years

- 7.1 Paragraph 1.29 of the report by the Regulatory Taskforce recommended that *"the operation of the RR Bill once enacted, including the principles for responsible regulation, be reviewed at 5-yearly intervals to determine whether its purpose are being met, and whether amendments or other measures are necessary to improve the quality of legislation in New Zealand"*. BusinessNZ agrees. Given courts can make declarations only in relation to regulations made after the commencement of the Bill as existing regulations have a 10 year exemption, a review after 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. If, for whatever reason the Government believes there is a strong need to hold a review earlier than 5 years, BusinessNZ would support this as long as the reasons for the earlier review are clearly identified to the public.
- 7.2 As mentioned previously, this review could be carried out by another independent Regulatory Taskforce, or perhaps by the NZPC if increased resources are given to the NZPC to enhance the number of services it provides.

Recommendation: That the Regulatory Standards Bill is reviewed after 5 years.

Extension of Regulatory Responsibility Bill to Local Government

- 7.3 Paragraph 1.30 of the Taskforce paper briefly mentioned that the principles of responsible regulation are of equal application to local government legislative activities. However, the Taskforce did not specifically consider whether the mechanisms proposed in the Bill should be applied in such a way. Instead, it recommended that further work be undertaken to address the issue of 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.
- 7.4 BusinessNZ strongly agrees that future work needs to be carried out in relation to local government regulation. Significant changes to the Local Government Act in 2001 giving local governments 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 certainly be a step in the right direction.

Recommendation: That local government regulation is considered as part of the 5-yearly review of the Regulatory Standards Act.

8. APPENDIX

Background Information on BusinessNZ

- 8.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association, Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 73 member Major Companies Group comprising New Zealand's largest businesses, and its 76-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 8.2 In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.
- 8.3 BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.
- 8.4 For the purposes of this submission, we wish to point out that the Bank of New Zealand Ltd (BNZ) – does not support this submission. BNZ recognises that regulation and legislation generally could and should be vastly improved, however they do not think the RSB is the best answer to the problem.