

# **Submission**

By



to

**Hon Rodney Hide**

on

**Questions Arising from the Regulatory  
Responsibility Bill**

**27 August 2010**

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**QUESTIONS ARISING FROM THE REGULATORY RESPONSIBILITY BILL  
SUBMISSION BY BUSINESSNZ<sup>1</sup>  
27 AUGUST 2010**

**1. INTRODUCTION**

BusinessNZ welcomes the opportunity to comment on the paper entitled *Questions Arising from the Regulatory Responsibility Bill* (referred to as ~~the paper~~).

As the Minister points out in his introductory piece, the Government did not ask the Taskforce to consult publicly on its draft Bill. We agree that the issues the Bill deals with are too important to be debated only by politicians and officials, as the private sector - particularly business - has significant interests in the quality of regulation given the effect it has on day-to-day operations.

BusinessNZ strongly supports moves to progress a Regulatory Responsibility Bill (RRB). 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 RRB is at a stage of development where it should proceed.

**2. THE NEED FOR A REGULATORY RESPONSIBILITY BILL**

***Do you agree that the quality of legislation (Acts, statutory regulations, tertiary legislation) in New Zealand is often not as good as it could or should be? If so, what do you see as the main problems with quality, and the main causes of those problems? If not, please explain the reasons for your view.***

***Do you agree that existing parliamentary and administrative processes are unlikely to be sufficient to encourage substantial improvements in the quality of legislation? Please explain the reasons for your view.***

Overall Views

Overall, BusinessNZ strongly agrees with both of the above questions. The quality of legislation in New Zealand is in many cases nowhere near as good as it should be. Existing parliamentary and administrative processes are unlikely to significantly improve its quality. For example, the current Regulatory Impact Statements (RISs) provided for new legislation does not reflect the depth of impact across the broad economy, nor are they applied consistently between government departments. They are also not required for private members bills which provide a loop hole that can impact heavily on costs. New regulations established under existing laws also do not require RIS statements, just consultation to have occurred and whether the impact is severe or minor is not considered in many instances.

Given the issues raised in the two questions above are interlinked, we wish to answer these together.

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<sup>1</sup> Background information on BusinessNZ is attached in the appendix.

While we are often well placed in comparison with other countries regarding most day to day regulatory requirements (i.e. via ease of doing business surveys etc), such simple measures mask the fact that New Zealand continues to slip further behind regarding key international comparisons such as GDP per capita. Also, if we were to compare ourselves with our closest economic neighbour, the goal of catching up to Australia by 2025 is becoming further out of reach.

In addition, New Zealand's relatively good position regarding its ranking in some regulation/compliance international studies is still not enough to overcome New Zealand's distance from major markets and the relative size of our economy. In short, we need to grab and expand upon any advantage we can get to ensure New Zealand improves its competitive position. Addressing the quality of regulation is certainly one primary area which will assist in that regard.

### Existing Processes for Consultation

BusinessNZ regularly submits on a wide range of issues that have in one or more respects impacts on the business community, whether these are in the form of Bills, discussion documents/papers or letters from Ministers. While all our submissions examine the substantive issues at hand, we are increasingly including sections in our submissions that highlight the poor regulatory process that has taken place.

BusinessNZ has previously provided examples of this via earlier submissions on the RRB, including the State-Owned Enterprises (Agriquality Limited & Asure New Zealand Limited) Bill and the Taxation (KiwiSaver) Bill. A more recent example of poor regulatory practice includes the Climate Change Response (Moderated Emissions Trading) Amendment Bill, where we outlined our views regarding the process surrounding the passage of the Bill through the House. Among the many issues we had, we noted concern even within Government, of the process, as the Treasury stated in the Regulatory Adequacy Statement:

*“There is no discussion of the risks of harmonising with an overseas scheme that has not yet been finalised or agreed and may yet be subject to significant revision. Such risks may include the potential impacts on business certainty and investment decisions, and the overall credibility, sustainability and effectiveness of the NZ ETS”.*

Overall, BusinessNZ believed the process for this Bill was neither transparent, nor conducive to good policy outcomes.

Our concerns about existing regulatory processes also extend to a number of discussion documents. Although we take the view that discussion documents should be the second step along the regulatory process (after genuine consultation with outside interested parties to formulate ideas and gauge reactions to issues has first taken place), if proper regulatory process is not taken into account, the recommendations from discussion documents can effectively be turned into legislation, even when substantive numbers of submitters have argued on strong grounds against certain recommendations.

To illustrate the poor regulatory processes that are often embedded in discussion documents/papers, a recent discussion document entitled *“Consumer Law Reform: A Discussion Paper”* outlined various proposals for major reform of key areas of consumer law. While some aspects of the review made rational sense, other areas . particularly those aimed at enforcement provisions . were almost completely void

of any attempt to outline the extent of the problem that required fixing. Rectifying a problem without providing evidence of the severity of the problem makes supporting what is proposed very difficult. What made matters worse, was that many of the proposals in the Consumer Law Reform paper were the same enforcement proposals put up for consultation in 2006, which similarly had not attempted to define or outline the extent of the problem and had been overwhelmingly rejected by the vast majority of submitters.

More broadly, BusinessNZ is concerned that there appears to be a view within some government departments that if unsuccessful the first time, proposals perhaps favoured by the department are simply put forward again with almost the identical process pitfalls. We wish to point out that this does not mean that a proposal once put forward should never be re-investigated. However, the speed and similarity with which proposals are put forward suggests that at best the re-hashing of ideas overwhelmingly rejected by previous submitters is lazy, and at worst may highlight a deep-set intention to have particular regulations put forward.

To reiterate our overall view, current practices are simply not up to the mark in terms of ensuring changes to legislation or the introduction of new legislation is of a standard that leads to good policy outcomes. Therefore, further measures are required to improve the quality of such legislation as is introduced. It is currently an unfortunate fact that too often legislative language either fails to express the government's intentions or demonstrates a failure to account of unintended consequences.

#### Evidence of Regulatory Problems

We understand that while many believe there is a problem regarding regulation in general, some consider evidence of the problem is difficult to find, and that opinions are not evidence. BusinessNZ disagrees. The outcome of regulation can be assessed if the focus is put on one of the major outcomes . namely higher compliance costs for businesses.

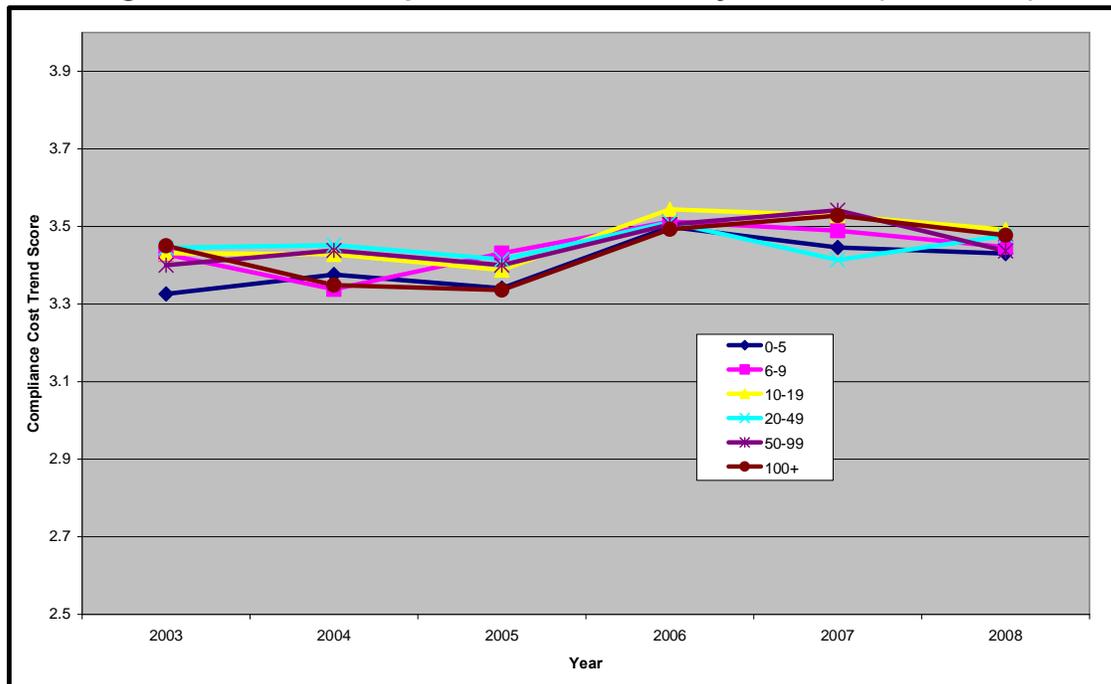
As a background, it is important to distinguish between regulation and compliance costs, as the relationship between the two is often misunderstood. Regulation (in a non-legal sense) is the process of making rules that govern behaviour, and can refer to both statutory interventions and interventions via the regulatory-making process. Compliance costs are essentially the administrative and time costs of complying with regulation, and compliance costs of a regulatory intervention are those additional costs that arise from the intervention.

One can simply measure the number of regulations as a proxy for whether New Zealand's regulatory path is heading in the right direction. However, as we outline below, such a measure is relatively crude and does not delve into which regulations are actually cause for concern. Instead, a proper measurement of views towards regulation is often taken at the compliance cost level. From a business point of view, BusinessNZ, in partnership with KPMG runs a compliance cost survey (the BusinessNZ KPMG Compliance Cost Survey) that first began in 2003.

Given the time series over which the survey has been conducted, an accurate picture of compliance cost issues has now been established for New Zealand.

First, figure 1 shows the overall compliance cost trends score by FTE size that was taken from the 2003-2008 results of the survey. A value of 3.000-3.499 indicates a modest increase, while a value of 3.500-3.999 indicates a large increase. It is clearly evident that since the survey began, and no matter what the size of the business examined, compliance costs are continuing to increase. At a macro level, this provides evidence that New Zealand's regulatory environment is diverting business activity away from more productive outputs.

**Figure 1: Overall Compliance Cost Trends by FTE Size (2003-2008)**



The compliance cost survey also tries to quantify 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 leaves close to \$2 billion that does not go towards increasing economic growth.

*Example of Poor Quality Legislation – Holidays Act 2003*

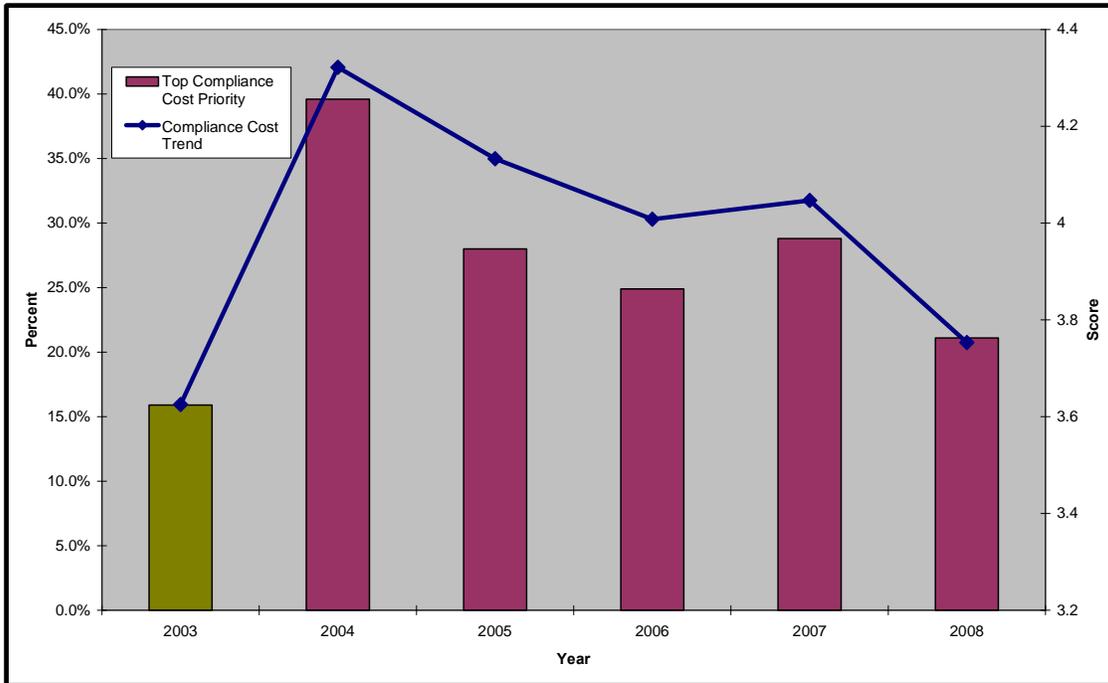
In terms of evidence for specific pieces of legislation, we would like to highlight the outcome of a change that encapsulates both poor policy processes, created regulatory burden, and imposed excessive compliance costs on businesses. This involved the Holidays Act 2003.

Table 1 shows both the top compliance cost priority and the compliance cost trend that is measured in the compliance cost survey on an annual basis. Before the 2003 Holidays Act, compliance costs for holidays legislation were in the top four in terms of respondents listing this as one of the top three priorities, but well below the 20% mark. After the new Act was introduced, perceptions of compliance priority and

trends increased considerably, which one would expect after major legislative change (although perhaps higher than one would wish from a policy perspective).

The disappointing aspect from BusinessNZ's point of view is that the perceived level of compliance for businesses has still not come back down to 2003 levels, with over 20% of respondents listing the Act as one of the top three compliance cost priorities, and a trend score that still indicates a very large increase. In addition, further changes in 2007 caused further compliance costs, with again no significant drop to the 2003 level for 2008.

**Table 1: Compliance Cost effect of changes to Holidays Act 2003 & 2007**



BusinessNZ appreciates that despite best intentions, any change to regulation will invariably lead to an increase in compliance costs, as changes need to be made by business to accommodate the adjustment. However, we are concerned that many changes to regulation lead to what we refer to as a severe “*shockwave of regulation*”. If a regulatory change is efficient and has been well consulted on, we would expect the initial increase in compliance costs not to be too significant, and would certainly expect a sharp fall off in terms of costs in subsequent years. Changes to the Holidays Act have not shown that pattern, and the legislation is a prime example of what can occur when poor regulatory decisions are made.

### 3. THE NATURE AND SCOPE OF THE BILL

***Do you agree that systematic testing of legislation against a set of established principles will help improve regulatory quality?***

Yes. BusinessNZ has long advocated that there should be a process for systematic testing of regulation, as the examination of regulation needs to be regular and comprehensive if it is to be successful (i.e. no no go areas).

If we were to look at different ways to testing against a set of established principles as outlined in the RRB, another possibility is a review by government. At a broad level, we would agree that such reviews should occur in some shape or form. However, there can be potential drawbacks to this approach. Reviews can often be ad hoc, and there is the potential for bias in the review process from both within a government department and even at a Ministerial level. There may be vested interests within a department that need to be recognised with, as well as a need to incorporate Ministerial views. While we would expect any departmental review to produce an unbiased and informed decision, there will always be questions surrounding this approach given many government departments often have large regulatory budgets.

Also, a significant problem with regulatory reviews is that governments often get tired after a certain time has passed as more pressing political issues often get in the way. This can be exacerbated if a review requires greater resources to ensure it is carried out properly. A government may feel increased resources may be better used elsewhere for political gains that are more instantaneous.

While we would want to see regulatory reviews of various forms take place, BusinessNZ believes a more systematic approach such as the RRB provides the opportunity for comprehensive coverage.

***What is your view on the range and appropriateness of the principles identified by the Taskforce?***

Overall, BusinessNZ has no significant concerns regarding the six broad categories identified by the Taskforce. From our perspective, the principles provide a useful way of introducing greater transparency into lawmaking. One can always argue at the margins about the meaning and intent of certain principles, but given these are about what should occur as opposed to what must occur, we nevertheless believe they add greater clarity about the correct path regulatory processes should take.

***If you would favour additions or changes to these principles, what would they be and why?***

BusinessNZ has no specific changes that we would like to see regarding the principles outlined in the Bill. As we have mentioned above, there may be reason for slight wording changes but overall we are comfortable with the principles as they stand.

***The Taskforce considered that all levels of legislation (i.e. primary, secondary, and tertiary) should be tested against a set of principles. What levels of legislation do you think would benefit from such testing?***

BusinessNZ's general view has been that the net for improving the quality of regulation should be wider, rather than limited to a specific section of the broad legislative process. Therefore, we strongly welcome the stance of the Taskforce in broadening the definition of legislation to cover all products of legislation. There are many instances where the passing of regulations without a proper regulatory process has been just as damaging to growth as the passing of a Bill before Parliament.

#### 4. THE EFFECTIVENESS AND IMPACT OF THE BILL

***Do you agree that stronger benchmarking, transparency and monitoring mechanisms will improve the quality of New Zealand's legislation? Are there other mechanisms that you consider would be superior? Please explain the reasons for your view.***

BusinessNZ wholeheartedly agrees with the first question above. In fact, we would be surprised if anyone had contrary views as benchmarking, transparency and monitoring mechanisms generally provides a solid platform which in many jurisdictions have shown to be successful.

***What are the likely effects of the principles/certification/declaration of incompatibility incentive structure?***

Overall, we have no significant concerns regarding the incentive structure as outlined in the RRB. We view the overall process as adding much greater transparency so that there is more responsibility on those involved to do the job properly. We believe current problems exist because in many instances there is a lack of accountability and a poor understanding of the consequences with current mechanisms.

Also, to put any concerns about the incentive structure into context, we need to be mindful the RRB cannot stop the passing of legislation that departs from its principles. Essentially, we would see it as similar to the original Fiscal Responsibility Act, whereby the government is required to abide by a sound set of fiscal measures, but could depart from them if they wanted to. However, they had to inform Parliament why they had departed from them and on what timeframe they intended to get back on track.

***What are the likely effects of the requirement that Ministers and Chief Executives responsible for legislation certify as to its compliance with the Principles of Responsible Regulation, including the likely effects on the relationship between Ministers and government officials?***

BusinessNZ does not have any strong views on the likely effects on the relationship between Ministers and government officials. The success or otherwise of the RRB 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 Ministers, then we would expect issues to arise regarding the ongoing relationship. However, these types of relationship issues are nothing new. A RRB 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 effect on relationships should not be taken into account as a reason for the RRB not to proceed.

***Are the courts the best external body to assess the consistency of legislation with the principles set out in the Taskforce's Bill? If not, what other bodies might fulfil this role?***

BusinessNZ believes there are minimal options for identifying an alternative external body better placed to assess the consistency of legislation with the principles set out in the Bill than the courts. While there are no clear alternative candidates, the only other option of any note might be the upcoming New Zealand Productivity Commission (NZPC), given its mandate for regulatory investigations and productivity focus. However, the NZPC will not be a truly external body, and would mean any transfer of duties from the courts to the NZPC would be one less voice ensuring controls are placed on Government to improve the quality regulation.

Overall, while we would not object if a credible and robust alternative was promoted, we would favour the courts as the best external body to make assessments.

***What are the likely effects of giving the courts, or your preferred alternative agency if you have one, a role in assessing whether legislation is compatible with a set of legislative principles?***

***Under the Bill, a court's exercise of the declaration of incompatibility procedure does not affect the validity of the legislation at issue. Nevertheless, some commentators suggest that the Bill will alter the relationship between Parliament and the courts, particularly given that the courts must take into account whether any breach of the principles is "justified in a free and democratic society" when deciding whether to make a declaration of incompatibility.***

- ▶ *Do you think that such suggestions are accurate?*
  
- ▶ *If so, do you think that the potential benefits of improving the quality of legislation in New Zealand are such that such alterations to the relationship between Parliament and the courts are justified?*
  
- ▶ *Could the Bill be improved in this respect?*

Regarding the two broad questions above, one issue BusinessNZ believes may need attention is the possibility of the value of an RRA being diminished if there is constant declaration of incompatibility regarding a range of newly enacted legislation.

To illustrate this, a particular government in the future may set about introducing a range of legislative changes that are based on a mandate inconsistent with the principles outlined in the RRB. 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 the outcome of incompatibility simply fails to really mean anything as the government can simply argue they are making the changes for principles greater than those outlined in the RRB. Also, the opportunity for improving legislation through declarations of incompatibility could weaken as the wider New Zealand public simply come to accept that there is a fundamental difference of opinion between the Government's policy aims and the views of the courts.

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 a standard for what the government wishes to achieve.

BusinessNZ accepts that these are probably some of the worst case outcomes, and we do not believe the answer should therefore be to make the courts' findings enforceable in any respect. However, if the intent is to improve regulation, there needs to be additional avenues through which pressure is maintained to improve regulatory quality overall (as discussed below).

***The Bill directs the courts to prefer interpretations of legislation that are consistent with the principles (initially only in respect of new legislation, but applying to all legislation after 10 years). The New Zealand Bill of Rights Act contains a similar provision. What do you think the likely effects of this provision would be on the body of New Zealand law?***

Overall, BusinessNZ believes this provision will improve the quality of legislation. The New Zealand Bill of Rights Act has been in existence for 20 years, with government departments having to review all their legislation to ensure it is compliant. Therefore, we believe a similar approach for the RRB would also be workable.

## **5. CLARIFICATIONS ON THE REGULATORY RESPONSIBILITY BILL & POTENTIAL ALTERNATIVE MECHANISMS**

***Are there any other aspects of the Regulatory Responsibility Bill that you consider could be clarified or improved?***

***The Taskforce's Regulatory Responsibility Bill suggests one set of measures for improving regulatory quality in New Zealand. Given your answers to the questions outlined above, can you think of any possible measures not suggested by the Taskforce that might help improve regulatory quality? These measures may be supplementary to the Taskforce's suggestions or in place of some or all of them. Please explain the reasons for your views.***

***Are there any other points that you wish to raise that have not already been discussed in your submission?***

### **Process for the Regulatory Responsibility Bill**

One could argue that to live up to its name, the RRB should go through a more thorough process of meaningful consultation and rigour to ensure the Bill represents the best outcome. BusinessNZ would argue that the process leading up to this paper has been extensive, dating back to 2007. This has included an initial Private Members Bill, a follow-up paper outlining alternative options, the report by the Regulatory Responsibility Taskforce, as well as various discussions at forums and conferences where the spotlight has been placed on an RRB. The current paper to which this submission is replying to as well as another round of consultation if the Bill is again tabled before Parliament, represent significant opportunities to ensure the RRB receives broad support.

In light of our views, BusinessNZ is concerned that too much analysis will lead to paralysis. We accept that the RRB will most likely never be flawless for all interested parties, as indeed is no legislation given there are very few perfect solutions. However, if it is close to a level that means most parties believe it will have a strong positive effect on the quality of regulation, then we see no reason why it should not proceed.

There is nothing preventing elements of the RRB which for whatever reason create issues in the future from being rectified, especially when the exact problems are better understood. This is another reason why a 5-yearly review of the RRB needs to take place so that any unintended consequences can be outlined and improved upon.

### Regulatory Responsibility Bill – Part of the Solution

On invitation from the Regulations Review Committee in 2007, BusinessNZ provided the Committee with an outline of mechanisms to provide for an ongoing and systematic review of current regulations and the revocation of redundant regulations. In summary, we recommend the following:

- An independent government body such as the proposed New Zealand Productivity Commission should be charged to oversee all regulatory practices and become effectively the Gate Keeper for regulation and legislation;
- The introduction of a Regulatory Responsibility Bill;
- All proposed Bills and regulations have a cover sheet attached that provides an identification of the purpose of the regulation and pass/fail mark by the independent government body regarding the impact the proposals will have in terms of regulatory burden;
- Sunset clauses are introduced so that all regulations and legislation are reviewed;
- Regulatory Impact Statements and Business Compliance Cost Statements are attached to all Private Members Bills, and there is further exploration of other areas where these could be included; and
- Continued work towards the introduction of a Standard Cost Model that is mandatory and used across all government departments.

The key point we were conveying to the Committee regarding the list of recommendations is that there are a myriad of mechanisms required to create sufficient change to improve regulation is a step in the right direction, on their own they are probably not enough to ensure the improvement in the quality of regulation is as high as envisioned.

### Less Regulation vs Quality of Regulation

As paragraph 1.2 of the Taskforce's report states, 'The taskforce is satisfied of two principal points: first, as matters of both principle and practicability, there can and should be less regulation and better legislation...'. While BusinessNZ understands the general thrust of this statement, we urge caution in respect to the idea of less regulation as this is an area where government can quickly go down the wrong path, with unintended consequences.

Decreasing the number of regulations often carries with it the notion of specific target setting for regulatory change. While we support the stipulation of a clearly defined outcome at the beginning of any process or task, the idea of reaching a specified target can end up creating perverse outcomes as it becomes a means to an end, with the target taking attention away from the process getting there.

For example, say a target of reducing the number of regulations in existence by 20% over three years was introduced. Simply reducing the number of regulations by that amount may have minimal economic benefits if only redundant legislation was taken out to obtain easy runs on the board. If, however, a comprehensive review took place that put a stronger focus on those pieces of regulation that were causing the greatest issues for business, subsequent changes may mean only 5% of regulation was altered or withdrawn, but had a far stronger positive outcome. Again, while we support a defined outcome, introducing targets can often be a fraught path to take.

The notion of how best to handle reducing the number of regulations in New Zealand means avoiding policy practices often adopted offshore that typically mirror a one-in, one-out approach. BusinessNZ unequivocally rejects this type of approach to new regulation. Improving the quality of regulation is not about balancing the number of regulations in existence. It is about improving the quality of regulation. If the introduction of a new regulation means the subsequent removal of another, then we would argue why wasn't the removed regulation eliminated in the first place? Why has it taken the introduction of a new regulation before an inadequate one was removed? Simply put, any improvement in regulation should automatically involve the modification and removal of inadequate regulation, and the introduction of any new regulation should involve a high threshold test.

#### Extension of Regulatory Responsibility Bill to Local Government

Paragraph 1.30 of the Taskforce paper briefly mentioned 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.

BusinessNZ strongly agrees that future work needs to be carried out regarding local government regulation. Significant changes to the Local Government Act in 2001 giving local governments the power of general competency led local authorities to view their activities as needing to be managed to '*promote their 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 a RRB to the local government area would certainly be a step in the right direction.

## **APPENDIX**

### **Background Information on Business New Zealand**

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 56 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, Business New Zealand is New Zealand's largest business advocacy body. Business New Zealand 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.

In addition to advocacy on behalf of enterprise, Business New Zealand 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.

Business New Zealand'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.