New Zealand Business Roundtable

SUBMISSION

on the

Regulatory Standards Bill

August 2011

Summary and conclusions

- This submission on the Regulatory Standards Bill is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

- We strongly supported the Regulatory Responsibility Taskforce's proposed Bill in our last submission on this topic in August 2010, and it was supported very widely across the business community. More recently, the Organisation for Economic Cooperation and Development (OECD) has supported improving regulatory governance arrangements in New Zealand "by passing a suitably refined Regulatory Responsibility Bill".

- We continue to support the current Bill strongly and are aware of the strong and broad-based support for it elsewhere in the business community and amongst the top law firms. We agree with Russell McVeagh that the principles are sound and reflect principles that are already well established in our constitutional and legal framework; that the role proposed for the courts is not unusual; and that using one Act as a guide for interpreting others is not new.

- We consider that, in conjunction with supporting measures, it would do much to raise the standards of regulation in New Zealand. It should improve the quality of new laws and regulations by having a chilling effect on both the demand for self-interested laws and regulation, be it by public agencies or private lobby groups, and on the willingness of politicians to supply it. Greater transparency and accountability should have both effects. We would expect that legislative proposals that currently may get less scrutiny because the costs can be shifted from the public coffers to citizens at large via user charges, or failure to consider paying compensation, will have to be justified more rigorously on net public benefit grounds. Of course, there should also be major benefits in time from reviewing troublesome existing laws and regulations against the same standards.

- Even so, we think more work is needed on options for strengthening the accountability aspects. Treasury's option 5 is not worth pursuing since it would take us in the opposite direction. It should also be a priority to work on extending its scope to local government activities. Since the Bill's effectiveness in practice will also depend greatly on the quality of supporting measures, such as those recommended by the Taskforce, it is very important that careful consideration be given to their design and implementation. The proposal for a five-yearly review of the effectiveness of the measure is a desirable feature in this context.

- We have followed the debate over the Taskforce's proposal closely. In the last year senior commercial lawyers from some of the country's top law firms have written a number of articles and letters in law journals and elsewhere in support of the proposed measure. Some

of these have responded to earlier criticisms of it on legal and constitutional grounds by a small number of academics.

- This submission uses this new material and earlier material to examine at length the concerns about the Bill that were expressed in the Treasury's Regulatory Impact Statement (RIS) and in the parliamentary debate accompanying the Bill's first reading. The Hansard record of the parliamentary debate suggests that those who oppose the Bill have been particularly influenced by criticisms by Dr Richard Ekins, a Senior Lecturer at the University of Auckland, and by George Tanner QC. Sir Geoffrey Palmer was the next most-named legal critic. The only other one referred to by name was Professor Paul Rishworth from the University of Auckland. All four participated in a one-day symposium on the Taskforce's proposals that was held by the Institute of Policy Studies in February 2010. While only the first three gave papers, Sir Geoffrey, as chair, unreservedly endorsed Tanner's critical conclusions at the end of the day. The Treasury RIS was undoubtedly informed by these criticisms and some of its conclusions appear to be sympathetic to them.

- While decision makers' concerns with the Bill are based on the critical comments of less than a handful of qualified lawyers, it is important for public policy purposes that they are taken seriously and assessed carefully. One paper, in particular, by Jesse Wilson, Senior Counsel at Bell Gully has done this, but other papers by Jack Hodder SC, chair at Chapman Tripp who was also on the Regulatory Responsibility Taskforce, have also responded directly or indirectly to the criticisms. Their responses should impress those who put any weight on the critics' arguments. For example, observations made in this material by Wilson include the conclusions that:

  - charges by University of Auckland academics Jane Kelsey that the proposals attempt to embed a 'neoliberal' ideology, by Richard Ekins that they, are "hostile to our democratic constitutional order", and by Richard Ekins and Chye-Ching Huang that they would have the effect of "undermining the rule of law and parliamentary supremacy", "do not withstand scrutiny"

  - the Regulatory Responsibility Taskforce's report "provided a cogent explanation for its view that current safeguards against poor quality regulation that undermines the principles of responsible regulation" are inadequate. This contrasts with the assertion by Ekins and Huang that it suffers from "an absence of detailed evidence or argument about why the quality of legislation in New Zealand is a serious problem"

  - the criticisms that some of the principles enumerated in the Bill are "unclear, unorthodox and unconstitutional" are "insubstantial or legally misconceived"

  - contrary to George Tanner QC's charge that the principle that the law should be clear and accessible is insufficiently clear, the Taskforce report "sensibly expressed this aspect of the rule of law at the level of generality at which it is ordinarily expressed"

- Ekins and Huang's assertion that the principle of paying compensation for impairments would appear to create "a particularly extreme form of prohibition" is "absurd"

- their accompanying assertion that the principle of compensation for impairments is "not found in other comparable jurisdictions" is "legally misconceived"

- Ekins and Huang's argument that the interpretative direction in the Bill is unconstitutional provides "thin grounds to impugn the approach of the High Court or raise an alarm about the implications of the Bill". Further, Ekins's opposition to this direction appears to derive from a "wider antipathy to interpretative directions in bills of rights"

- contrary to Ekins and Huang's assertion that the proposed declaratory power would undermine parliamentary sovereignty", these types of declaratory judgments "arguably constitute a real advance in the institutional arrangements for protecting fundamental values"

- Ekins's view that even a non-binding declaration would be "hostile to our democratic constitutional order" "appears to be driven by a highly unorthodox view of the role of parliament and the courts", and

- Ekins's description of the Taskforce's Bill as "hostile to our democratic order" is described as "wildly inaccurate" by Hodder.

- Further, three of New Zealand's top law firms have written a joint letter to the Prime Minister in support of the Bill, responding to some "misconceived criticisms" and concluding as follows:

> We see this Bill as a timely and balanced set of institutional reforms which will foster principled and responsible regulation. While the Bill does not restrict Parliamentary sovereignty, it would create a vetting process and affirm some important (and too often ignored) principles. We consider that the reforms contained in this Bill will become highly regarded features of New Zealand's institutional arrangements.

  Seldom have we seen evidence of such a large gap between a group of academic lawyers and legal experts who are informed by commercial realities.

- More generally, the recent contributions from the community of commercial lawyers indicate that:

  - it is beyond dispute that authoritative voices in the commercial community consider that poor quality regulation has become a serious problem in New Zealand and agree with the OECD that this is holding back productivity, investment and entrepreneurship

  - it is also beyond dispute that Ministers of the Crown are not habitually demanding a proper regulatory analysis early in the policy formulation process. The regulatory impact statements that are supposed to supply this analysis are too

often not fit for purpose and existing parliamentary safeguards are insufficiently robust

- a principled approach to testing laws and regulations is desirable and the statement of principles in the Bill is consistent with and reinforces our constitutional and common law inheritance and liberal democracy

- the role for the courts proposed in the Bill follows the New Zealand Bill of Rights Act (NZBORA) precedent, preserves parliamentary sovereignty, and can be expected to assist in improving the quality of legislation and the public law, and

- at least three of our top law firms doubt that the Bill would generate a substantial amount of litigation.

- The RIS accompanying the Bill acknowledges that there is a problem of poor quality regulation and does a competent job of tracing and explaining its causes. Its assessment of the lack of competence in regulatory skills of the type required may be realistic, but unfortunately this is seen as a reason for not proceeding with the Bill, rather than something that should be rectified urgently in its own right.

- The RIS considers that the measures in the Bill may not induce lasting behavioural changes because its principles may not attract sufficient support. This is a political judgment which Treasury should not be making. The same thing was said about the former Fiscal Responsibility Act, which Michael Cullen called "constitutional nonsense" at the time it was being debated. The weight of opinion in favour of the Bill casts doubt on Treasury's assessment. Instead of making political judgments Treasury should have assessed the likely net benefits to the community if the measures were put in place and sustained. Decision makers need to know the potential net benefit from a proposal; they don't need to be told that it won't have much benefit if it is not sustained.

- The recent material makes it clear that the measures in the Bill are at the modest end of what might be proposed as sanctions for unjustified violations of the principles. We consider that an RIS that was concerned that a measure might be insufficiently effective should then consider options for making it more effective. The RIS is one-sided in that it considers only lesser options.

- We submit that the select committee should ask Treasury to revisit its RIS and provide the required analysis of the likely net benefits to the community from sustaining the proposed measures. It should also identify and examine options (such as mandating compensation for regulatory takings) that would go further.

- We do not agree with the view that the principles in the Bill should be inserted into the NZBORA. The principles are guides for improving policy formulation and analysis. Principles can be departed from without giving rise to legal action; they are not legal rights. We have supported putting property rights into the NZBORA in the past and continue to do so.

Property rights are important, but requiring policy formulation processes to give more careful regard to other sound regulatory principles is also important. The two issues are separate and should be assessed separately. Incorporation of principles in the NZBORA would not set up the mechanisms contained in the Bill (and it is not the right place for them).

- In conclusion, we think the Taskforce has produced a report and draft Bill of exceptional quality. The Bill provides the best current option for improving regulatory quality, even though on its own it is no panacea. It may be capable of improvement as it passes through parliament. On this basis we recommend strongly that it should proceed.

1. Introduction

1.1 This submission on the Regulatory Standards Bill is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 We last submitted in support of the Regulatory Responsibility Taskforce's proposals in August 2010. There is strong and widespread support across the business community for these proposals. It is reflected in the supporting views of Federated Farmers, Business New Zealand, the New Zealand Chambers of Commerce, the Electricity Networks Association and the Local Government Forum. Collectively our organisations represent a very broad cross-section of the business community. It is also reflected in the many submissions made independently over the years by individual companies concerned about intrusive specific laws and regulations whose costs seem to be disproportionate in relation to discernible benefits. The April 2011 Economic Survey of New Zealand by the Organisation for Economic Cooperation (OECD) also identified a deficiency in New Zealand's regulatory governance practice. It advised that "[p]roductivity could be fostered by requiring clear net public benefits to justify regulatory restrictions on competition and establishing transparent quality benchmarks by passing a suitably refined Regulatory Responsibility Bill".

1.3 We agree with Russell McVeagh that there is a clear mandate from the general public and the business community that mechanisms should be put in place to improve regulatory decision-making and law-making through greater transparency and accountability. We also agree with its comment in a 2011 newsletter that the principles are sound and reflect principles that are already well established in our constitutional and legal framework; that the role proposed for the court is not unusual; and that using one Act as a guide for interpreting others is not new.

1.4 We see the measures in the Bill as working on both the demand and supply side of regulatory processes. On the demand side, politically influential groups might feel less inclined to lobby parliamentarians to legislate to confer some benefit on their group at a disproportionate cost to another group because, for example (1) the Bill's good law-making principles will require a written assessment to be made of the public interest case and of whom would benefit and at whose expense, and the resulting transparency could be uncomfortable; (2) the takings principle should mean that they can expect to be asked at the policy formulation stage for tangible evidence that those who allegedly benefit are prepared to fund the cost of any compensation (which could chill or deter those whose lobbying is primarily opportunistic, while not altering incentives for genuine cases); and (3) if the proposal involves a user charge for benefits conferred, the taxes and charges principle will make it harder to effect a hidden wealth transfer by a user charge that is excessive relative costs or is out of line with the value of benefits conferred. Some elaboration of point (3) may be useful. Much of the demand for intrusive laws and regulations arises within the public sector since government agencies naturally wish to expand their budgets and/or regulatory powers. 'Fiscal illusion' applies when a law or regulation is regarded more favourably if it is neutral on the government's budget than if its effect is negative, regardless of where the public interest lies. To the extent that fiscal illusion applies, government agencies may propose to fund their expanded activity out of user charges or uncompensated takings, when the compensation would otherwise need to be paid by the Crown. The Bill's transparency measures would require the taking to be identified, the potential level of compensation to be considered, the potential fiscal cost identified and the reasonableness of any user charge assessed. All these assessments would be required at the policy formulation stage, and all would have to be certified. Those who

were likely to incur the cost of the taking or pay the user charge could readily identify themselves.

1.5 On the supply side, the greater transparency required (in writing and subject to certification) as to such matters as the public interest case, whether liberties are being infringed, whether a taking is involved, who benefits and who gains, and by how much, what might be the hidden consequences of the measure, and the need to personally sign a certificate should make politicians hesitate to put time and effort into supplying regulations that look unsatisfactory against the set standards. To the extent that politicians are also swayed by fiscal effects, the required focus on net public benefits could also have a chilling effect on the supply side for laws and regulations that slipped through under less transparent arrangements, but would not do so otherwise.

1.6 Of course, there should also be major benefits in time from reviewing troublesome existing laws and regulations against the same standards. However, the achievement of the potential benefits from these measures depends on the discipline that is applied to ensuring that a conscientious and professional approach is taken to certification. The DOI proposal is at the modest end of the disciplines that might be applied and is unlikely to be effective in isolation. A more confident judgment can be made about that in the scheduled five-year review.

1.7 We remain open to suggestions for improvements to the Bill. It is certainly not a silver bullet and would not be very effective in isolation. First, the accountability is limited because the remedy for breaches is weak, in that it would impose real costs on a plaintiff for no tangible benefit. (It is more plausible that those with a good case will not take legal action than it is that those without a good case will rush to litigate.) We would prefer its accountability measures to be strengthened rather than weakened. Treasury's option 5 would take us in the opposite direction which is not worth pursuing. The proposal for a five-yearly review of its effectiveness is a desirable feature in this context. Second, to be effective it would need supporting measures, such as those that the Regulatory Responsibility Taskforce proposed. It is important to keep that in mind when evaluating the proposal overall. Work needs to be done on how best to extend the Bill's provisions to include the regulatory activities of local government.

1.8 Since August last year, we have continued to follow the debate over this initiative closely. New contributions since our August 2010 submission include some substantial legal analyses in support of the Bill from top commercial lawyers, the Treasury's Regulatory Impact Statement (RIS), the speeches made in parliament at the first reading of the Bill and further critical commentaries from the two most strident academic opponents. Of particular note was a joint letter written to the Prime Minister in support of the Bill by three of the New Zealand's top law firms. They summed up their view of the Bill as follows:

> We see this Bill as a timely and balanced set of institutional reforms which will foster principled and responsible regulation. While the Bill does not restrict Parliamentary sovereignty, it would create a vetting process and affirm some important (and too often ignored) principles. We consider that the reforms contained in this Bill will become highly regarded features of New Zealand's institutional arrangements.

1.9 Labour MPs and a Green Party MP opposed the Bill on its its first reading, and the Treasury came out against it on balance in its Regulatory Impact Statement (RIS). In this submission we focus on and respond, to the key concerns that these speeches and documents raised.

2. Objections to the Bill during its first reading

2.1 According to the Hansard record, the ACT and National Party members who spoke at the Bill's first reading supported it. The Maori Party gave it qualified approval, seeking more clarity about its implications for such matters as collective ownership and Treaty rights. Labour members who spoke opposed it, but differed in their reasons for doing so. The only Green Party member who spoke opposed it. The speeches opposing the Taskforce's Bill motivated their concerns in good part by endorsing critical comments made by the Treasury's RIS and four named lawyers, three of whom gave critical presentations to the Institute of Policy Studies' one-day symposium on the topic on 16 February 2010 (the papers and proceedings of which were subsequently published in the May 2010 issue of the Institute's *Policy Quarterly*, including an editorial note that asserted that the proposals "are highly controversial and raise issues of major constitutional and political significance"). The three were Paul Rishworth and Richard Ekins of the University of Auckland and George Tanner QC. The fourth named lawyer was Sir Geoffrey Palmer who chaired the one-day symposium at the end of which he heavily endorsed George Tanner's conclusions against the Bill. There can be no doubt that the Treasury's RIS was informed by these criticisms, for example in its assessment of litigation risks and its concerns about the proposed interpretative direction. It appears, not just to ourselves but also to the commercial lawyers referred to in section 1 above, that if concerns of parliamentarians with the Bill are based on the criticisms made by those three writers, then it is important for public policy analysis that their criticisms are taken seriously and assessed carefully. The rest of this submission is written in that spirit.

2.2 We consider the objections raised in this debate under the headings of:

- the need for a legislative solution
- problems with the proposed principles
- the role of the courts
- the interpretative provision, and
- certification.

2.1 The need for a legislative solution

2.3 The objections to the Bill on the grounds that no need for a legislative solution had been established were supported by the following (conflicting) set of views:

- there is no problem, and therefore no need for legislation
- there is a problem but its magnitude has been exaggerated
- there is a problem, but its causes have not been analysed, so there is no good reason to think the remedy will work, and
- there is a problem, but shifting the audit role to the Treasury and setting up a Productivity Commission, in conjunction with other supporting non-legislative measures, is a sufficient response.

There is a widespread and deep-seated problem

2.4 Our responses follow

2.5 The view that there is no problem appears to rest on little more than the observation that New Zealand rates moderately well in international rankings (although it has fallen back in some) and the claim by Ekins and Huang that the Regulatory Responsibility Taskforce's Report suffers from "an absence of detailed evidence or argument about why the quality of legislation in New Zealand is a serious problem".

2.6 The first criticism is invalid because it ignores the fact that other countries with similar international rankings to New Zealand (eg Australia, the United Kingdom and the United States) are also striving to improve their regulatory disciplines. Most OECD countries suffer from excessive and poor quality regulation. The second criticism is misconceived.[1] The Taskforce was not charged with reviewing evidence. Its task was to develop a Bill.

2.7 There is an overwhelming weight of evidence and balance of opinion in New Zealand that major regulatory problems exist. We documented this in chapter two of our 2001 publication, *Constraining Government Regulation*, copies of which form part of this submission. The chapter comprised 55 pages. It cannot be claimed that this is dated. During the last decade the business community has continued to put its ongoing concerns on the public record, in part by way of submissions, both through representative organisations and on a firm-by-firm basis. The current government has acknowledged the problem in many ways, not least by creating the position of Minister for Regulatory Reform. The response by government agencies to the Taskforce's report also makes it clear that there is general agreement in the public sector about the need to improve. The chair of the 2009 Institute of Policy Studies conference, Sir Geoffrey Palmer, was clear that there was a problem. Even George Tanner QC, who has considerably influenced Labour MPs thinking according to the Hansard record, was cited in the *New Zealand Herald* on 18 February 2011 as admitting that:

> Many of the 1000 or so statutes and thousands of regulations are pretty low grade.

2.8 Economic experts who are concerned about deficiencies in the quality of government regulation in New Zealand also abound. The OECD's latest review of the New Zealand economy identified a marked deterioration in the quality of product market regulation in New Zealand compared to other countries. The first 2025 Taskforce report identified many regulatory weaknesses in New Zealand and argued that addressing them could do much to close the per capita income gap with Australia. The New Zealand Institute of Economic Affairs' assessment of the quality of a sample of Regulatory Impact Statements in New Zealand left no doubt about the inadequacies.

2.9 The letter to the Prime Minister in support of the Bill by three of New Zealand's top law firms affirmed that there was a real problem in the following terms:

> Based on the experiences of our firms and our clients across a range of regulatory regimes, we share the view of the Regulatory Responsibility Taskforce that there is substantial scope for

[1] A article, 'Rising Regulatory Standards' in the *New Zealand Law Journal*, April 2011, Jesse Wilson examined the Taskforce's report and concluded that it "provided a clear, cogent explanation for its view that the current institutional arrangements do not provide adequate safeguards against poor quality regulation that undermines the principles of responsible regulation".

> improvement in both regulatory quality and the consistency of regulation with the principles of the rule of law. We concur with the Taskforce's conclusion that quality legislation is a constitutional issue and that shortcomings in regulatory quality raise rule of law considerations.
>
> The OECD's recently published economic survey notes that, in the past decade, New Zealand has lost its hard-won status as a front-runner in terms of regulatory governance. The OECD's assessment is widely held among legal experts in complex regulatory fields, and also by many of our clients. We agree with the OECD that productivity, investment, and entrepreneurship could be fostered by passing a suitably refined version of the Bill.

Since there is a problem, the issue of exaggeration is a red herring

2.10 The objection that the problem has been exaggerated seems to be unsubstantiated and irrelevant. If the prevailing view amongst policy analysts, legal and economic experts and the business community is that there is a real problem, remedies should be examined regardless of whether any unidentified group or person is guilty of exaggeration.

The problem exists because ministers do not habitually require quality assessments prior to taking policy decisions, and parliament has become too subservient to the executive .

2.11 According to Hansard, the Hon Lianne Dalziel asserted in the first reading of the Bill that the Treasury's Regulatory Impact Statement "does not even have a proper problem definition". She asked: "How on earth does one fix a problem if one has not identified the problem?"

2.12 In our view this objection is unfair to the Treasury's RIS. The RIS devotes over 8 pages of a sizeable 32 pages to a competent and searching consideration of the extent of the problem and its likely causes. First, it provides five reasons why legislative quality is important and takes a full page to explain how legislative quality can be assessed. Next it acknowledges that New Zealand regulation ranks quite well in international comparisons but points out that such comparisons are difficult and the results needed to be treated cautiously. It then turns to the only point that really matters – can and should New Zealand be doing better? The RIS's response is unequivocal: "informed domestic opinion consistently suggests that legislation could be much better than it is". It supports this observation under three major headings. The RIS then turns from symptoms to causes. It devotes over a page to identifying key weaknesses in current quality assurance regulatory arrangements. The list is 23 items long and cumulatively very troubling. At one point it states that only half the significant regulatory proposals considered by Cabinet since November 2008 had RISs "that met expected standards".

2.13 It is obvious that this situation would not occur if ministers habitually insisted on high quality analysis prior to taking regulatory decisions. Why don't they? The answer must surely be that it is all too often expedient not to, and they are not constrained by their colleagues, parliament or anyone else to do so. The RIS takes over one page to explore the problems of incentives, pressures and human bias that could be contributing to poor quality regulatory processes and outcomes. It points out that MPs, government agencies and private lobbyists all have incentives that are not directly aligned with overall community welfare.

2.14 Notwithstanding her complaint, Lianne Dalziel's own assessment, as recorded by Hansard, appears to line up well with the RIS's assessment. First, she observes that: "I have not gone back to do a count of the bills passed in those first 100 days of this Parliament, but not many had regulatory impact statements of any quality attached to them at that particular time". Next she proposes that the reason for this is a lack of political will: "National was elected on a platform, and that is what politics is about. National was elected on a platform stating that it would do certain things, and there was no way that it would introduce regulatory impact statements in order to back up those changes."

2.15 Of course, the current practice of not requiring parliament to be informed by a competent national interest assessment prior to taking a decision cannot be defended by saying that this is "what politics is about". Why, for example, does the electorate, through parliament, not require the executive to produce sound assessments of proposed regulations? After all, under the Westminster system, members of parliament have a responsibility to all members of their constituencies, not just to those who happened to vote for them. The House of Lords held in a 1982 case that an elected (local) body had a responsibility to balance an election campaign commitment against their fiduciary obligations to those who would bear the cost, being ratepayers as a whole in this case. (The box below provides more details of this case.)

Election Manifesto Commitments vs Fiduciary Responsibilities to the Electors generally*

Greater London Council case (1982)

The status of a commitment by a political party in its election manifesto, after its election, was considered by the English Courts in Bromley London Borough Council v. Greater London Council and another [1982] 2 All ER 129. In that case the majority party in the Greater London Council had issued a manifesto in which it promised to cut the bus fares on London Transport by 25%. The majority of the Council treated its election as a mandate to fulfil that promise.

The House of Lords held that the Greater London Council, in exercise of its undoubted discretion to determine the proportion of income which the London Transport Executive received from fares and grants, could exercise that discretion according to its own judgment of what best met the transport needs of London. But it also had a fiduciary duty to the ratepayers of London which had to be weighed in the balance of its other obligation to users of London Transport. The decision of the Council was thus a thriftless use of ratepayers' money and was in breach of fiduciary duty.

Three of the five Law Lords held that the Greater London Council had not exercised its discretion lawfully in regarding itself as irrevocably bound by the majority group's commitment in its election manifesto to implement the reduction in fares, regardless of the consequential cost to ratepayers, which had not been foreseen when the commitment in the election manifesto was made.

Lord Wilberforce said that the GLC acted in breach of its fiduciary duty to its ratepayers by failing to adequately balance the interests of transport users and ratepayers.

Lord Brandon was clear that the GLC did not exercise its discretion lawfully. In his view it was an inevitable inference from the evidence taken as a whole that the majority on the GLC, when they approved the proposals for a 25% overall reduction in fares, were motivated solely by the belief that, because they had promised such a reduction before their election, they were completely and irrevocably bound to implement it after being elected".

* A fuller discussion of this case is at http://www.stlucia.gov.lc/features/commissionofinquiry/BlomCooper.htm

2.16 The RIS suggests that ministers often legislate poorly because of undue haste and the lack of institutional balances, such as a second chamber. It postulates that undue haste might be due to the pressure to deliver results in a short three-year parliamentary term while minimising the call on precious House time. Sir Geoffrey Palmer and former parliamentary draftsman George Tanner have also proposed that the short three-year term might be an important factor. However, we are not aware of any systematic evidence that the quality of regulatory analysis prior to the passing of a bill or regulation is better in countries that have longer parliamentary terms, or a second chamber. Certainly, the populist pressure on governments 'to be seen to be doing something' in response to the latest disturbing news headline arises independently of the length of any parliamentary term. Another opposing consideration is that a short three-year term makes it easier for a government to defer a decision by setting up a commission or special inquiry to look into a matter and report back after the next general election.

2.17 Professor Jeremy Waldron's 2008 Sir John Graham annual lecture to the Maxim Institute contains a wider-ranging assessment of the possible reasons why parliament is not holding executive government much more fully to account for the quality of the decisions being taken. He identifies many steps taken over a large number of years that he considers have reduced the ability of parliament to avoid undue domination by the executive, meaning a prime minister who can cobble together a parliamentary majority on an issue and force a vote without proper debate or safeguards. Waldron makes the point that the New Zealand concept of parliamentary sovereignty does not seem to acknowledge the importance of a separation of powers as embodied, for example, in the separation between the executive office of the President and the two houses of Congress in the United States. He expresses his views in strong, even strident, language. For example:

> In New Zealand there is none of this [independence of the legislature from the executive that is a central feature of the US system]: there is a unicameral legislature, which has evolved procedures for fast-track legislation which are quite disgraceful by world standards, and which is by and large the plaything of the executive.

The Electoral Finance Act comes to mind in this context. A parliamentary majority for a specific measure could simply reflect horse-trading with reciprocal support for another measure or measures, none of which would have been achieved a parliamentary majority in their own right.

Treasury and the Productivity Commission can't solve the problem of political expediency

2.18 Some have claimed that shifting the audit role to the Treasury and setting up the Productivity Commission might have dealt to the underlying problem. The Treasury's RIS makes it clear that even the Treasury does not believe this. If the problem is that an overly powerful executive prefers to ram legislation and regulations through parliament without proper scrutiny of where the overall community interest might lie, it is unlikely to tolerate for long any entity whose budget it controls to stand in its way. Self-restraint by a current ephemeral executive is obviously not an enduring solution. That might last only until the next change of government or prime minister. Under current institutional arrangements, one obvious solution – that proposed in the Bill – is for parliament to increase the transparency and accountability of executive government's proposals.

2.2 Problems with the proposed principles

2.19 The Taskforce's report takes 16 pages to spell out the authorities that underlie its choice of stated principles and did not consider that any of them were novel or unorthodox. To the contrary, it explicitly states that it sought "to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation". It would naturally be hoped that critics would suggest wording that better met this objective if they had any concerns to the contrary.

2.20 Unfortunately, this has not been the case. For example, University of Auckland academic Jane Kelsey has asserted that the proposals attempt to embed a 'neoliberal' ideology; Ekins has asserted that the Bill's proposals are "hostile to our democratic order" and has described various of the principles as unclear, unorthodox and/or unconstitutional; and with Huang has claimed that they would have the effect of "undermining the rule of law and parliamentary supremacy". The article by Jesse Wilson that is cited above in footnote 1 examined and rejected such claims and concluded variously that they "do not withstand scrutiny" and that "their specific criticisms are insubstantial or misconceived".

2.21 Wilson's article also considered a paper by George Tanner QC that examined at length the obvious point that many complexities and difficulties arise when general statements of principles are applied to specific situations. Tanner's paper concluded *inter alia* that the Taskforce's Bill "attempts to define good law-making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent". However, the paper did not adequately acknowledge the need to balance the virtues of brevity against the complexity of detail, nor the Taskforce's recognition of the need for detail in its provision for the Minister of Finance to issue guidelines. Wilson concluded that Taskforce "sensibly expressed this aspect of the rule of law at the level of generality at which it is ordinarily expressed".

2.22 Nevertheless, concerns with the statements of principles in the Bill that were raised in the first reading, while collectively contradictory, indicated that the views of the academics had been influential to some extent. The principles were variously objected to on the basis that they:

- are novel and unconstitutional to a material degree
- are already embodied in other Acts to some extent – ie are redundant
- are unclear as to their detailed application
- would stop redistribution
- might stop such worthy laws and regulations such as those requiring plain labelling for tobacco products and to leaky buildings regulation, and
- are so "right and self-evident" and so obviously form the basis of our legal system that nobody could argue with them, so the problem is not with them but with the ineffectual way they would be applied.

2.23 Our responses follow.

The stated principles are orthodox and constitutional

2.24 The Taskforce was guided by top legal expertise for its stated principles. One member, Jack Hodder, SC was and is partner and chairman of Chapman Tripp and a longstanding member of the Legislation Advisory Committee. A second member, Richard Clark QC, had been a long-standing leading member of the Legislation Advisory Committee and chaired that committee from 1999-2004. A third member, Hon David Caygill, has long experience with parliament and the law and also endorsed the recommendations. The Treasury secretariat serving the Taskforce included the highly respected Ivan Kwok, former Treasury solicitor and also a longstanding member of the Legislation Advisory Committee. In addition, able younger lawyers from Chapman Trip assisted the Taskforce, on a *pro bono* basis, with in-depth research on the principles. The legal experts on the Taskforce informally consulted constitutional experts outside the Taskforce. In addition, the Taskforce's report provided an extensive discussion of the Bill as a whole and in particular the principles for public scrutiny. The proposition that such eminent experts would present a set of principles for vetting laws and regulations that would not pass scrutiny by their peers is not credible.

2.25 Nevertheless, Ekins and Huang, who are young academics with nothing like the standing of those mentioned above, have asserted that some of the principles are "constitutionally unorthodox and substantatively unsound". For example, they assert that the liberty principle is constitutionally unorthodox. They also argue that the compensation principle is unorthodox because it is explicit that the principle applies to partial takings as well as to full takings. They are so hostile to the concept of the protection of interests in property as to speculate that it is "intended to constitute a particularly extreme form of prohibition against government regulation of property not found in other jurisdictions".

2.26 Hodder has presented a paper to a New Zealand Law Society seminar on 25 February 2011[2] that responds to most of these criticisms by laying out New Zealand's constitutional inheritance in relation to property and liberty. He dismisses as "wildly inaccurate" Ekins' assertion that the Bill is "hostile to our democratic order". He traces the development of parliamentary sovereignty back to the Glorious Revolution and the associated 1688 Bill of Rights Act and identifies the emphasis placed on the protection of individuals' interests, including interests in property, at that time and subsequently, with particular attention to the writings of Locke and Blackstone. He argues that the events in 1688 reflected acceptance of the rule of law as fundamental to government activities, confirmed the political importance of protection of the lives, liberties and estates (not limited to land) of individuals and the enduring importance of "ancient and indubitable" rights. His paper recognises that property interests are not absolute and can be adversely affected by legislation, in the expectation that compensation will be paid. It identifies nothing untoward about the Taskforce's approaches to property, or other rule of law issues, and reaffirms that:

> The Taskforce's Bill proposes a range of principles consistent with and reinforcing our constitutional and common law inheritance, and our liberal democracy.

2.27 Wilson's paper, mentioned above, explicitly examined Ekins and Huang's arguments. It concluded that the assertion that the principle of compensation for impairments is "not found in other comparable jurisdictions" is "legally misconceived", and states that the assertion that the principle of paying compensation for impairments would create "a particularly extreme

[2] Jack Hodder SC, 'Public Law, Property Rights and Principles for Legislative Quality', 25 February 2011, published in a seminar booklet "Administrative Law – the public law scene in 2011", by the New Zealand Law Society, Wellington.

form of prohibition" "is absurd". The very charge demonstrates a misunderstanding of the point that principles are not absolutes (see below).

2.28 Nevertheless, Ekins and Huang give a number of examples to motivate their concerns. The first bizarrely proposes that the owner of a road network would not have the right to exclude dangerous vehicles from that network. Why propose that the owner or operator of the network would not have the right to exclude such vehicles? The second is that the principle would mean that "any property owner who suffers loss from regulatory change is entitled to be made whole". This is also wrong. Property rights are not absolute. The assertion also wrongly conflates a loss in value of property with a taking. Eliminating import controls could greatly affect the value of an import-competing business, but that business had no legal rights over the issuance of import licences. In the private sphere the common law compensation requirement does not apply to losses that result from a decision by someone else to change what they are doing, as long as the change is legal.

2.29 Next the authors propose that if parliament wanted to ban dangerous weapons, it must buy them. But why must it? Is the ban clarifying existing law so as to reduce transaction costs, or is it making illegal a use that was legal? If the latter, what is the loss being imposed on the existing owners, whom are the beneficiaries and what is their gain? What if the existing owners are given a grace period to sell their weapons on the overseas market? These are surely all proper public policy questions.

2.30 The next suggestion is that legislation imposing closing times on certain pubs could attract compensation. A similar suggestion is that to criminalise prostitution could lead to the need to compensate brothels. But, abstracting from moral questions, the principle at stake here is that one group (which may be the entire community) wants to stop another group from using its property for a currently legal activity. The straightforward question in these generic situations from a public policy perspective is whether the benefit to the first group from the changed use of the property exceeds the cost to the second group. If it does, the first group could simply offer to buy the property and both groups could be better off. If this is impracticable, the case for a Crown taking in the public interest should be looked at in the normal manner and the question of compensation addressed. The reference in the paper to pubs and brothels raises moral issues whose main purpose is unclear, unless it is to distract attention from the underlying generic resource allocation/compensation issue.

2.31 Perhaps it is worth emphasising here our concern that objections to the long-accepted principles of protection of individual liberty and property appear to lie in part in a refusal to accept that the principles are general presumptions rather than absolutes. They are things for governments to demonstrate that they have taken into account. They permit valid and invalid exceptions. In particular, the Bill permits governments to continue to take without compensation any time they want to, as long as they make their intentions very clear. The Bill simply requires the government to identify at the policy formulation stage whether it is breaching a principle and explain the reasons for it. To assert that it would be *required* to compensate for this or that is simply to misunderstand or misrepresent the content and the intention of the Bill.

Some of the principles are indeed already embodied in other Acts, or could be incorporated into other Acts

2.32 The Taskforce itself noted that some of the principles are already embodied in other Acts. Moreover, if a government had a mind to do so, it could add protection of property rights to

the NZBORA. Indeed, respected legal academic Paul Rishworth has proposed that this should be done[3]

2.33 We agree that protection of property rights or interests is vital for economic prosperity and the preservation of individual liberty.[4] We have supported putting property rights into the NZBORA in the past, and continue to do so, although we are open as to how this might best be done.[5] But not many of the Bill's principles could be converted into statements of rights. We strongly disagree with any suggestion that the rest of the Bill should then be discarded. The proposition that the parts of current principle statements that might be expressed as legal rights should take the legislative form of legal rights and the rest be dropped would effectively give up on the idea that parliament should be insisting that competent regulatory analyses are undertaken in a timely manner as part of its decision making processes. This would largely defeat the entire enterprise.

2.34 The Bill is focused on principles rather than rights because its purpose is to create standards of law-making in order to improve law-making processes by inducing greater consideration of key principles. A rights focus is not appropriate for this purpose. Principles are guides to behaviour that are not commonly prescriptive in particular cases, such as when a decision must violate one principle in order to conform with another. They can be departed from for good reason without breaching anyone's legal rights. Legal rights are, however, absolutes that are actionable if violated.

The stated principles, being general, are inevitably unclear in their application to difficult cases, but this is not an argument in favour of an unprincipled approach to law-making

2.35 Tanner's major criticism of the Taskforce's Bill was that general statements of principle do not provide a clear guide to action in particular cases. Ekins's argument that the principles are substantatively unsound is in similar vein. The supplementary objection is that it is inappropriate to ask judges to adjudicate such principles.

2.36 Since all statements of principle are likely to be general rather than specific, this line of criticism seems to be potentially more of an attack on the merits of written constitutions, the NZBORA, and even the fundamental common law principles enumerated in the LAC Guidelines than on the Bill itself. The critics do not make their position clear on this point.

2.37 For example, Tanner has expressed the concern that: "[t]he bill will bring the courts into areas of law making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by democratically-elected governments on complex social and economic issues and the allocation of resources". It is not clear that the Bill would bring about any such changes. The NZBORA exists, judges deal with it and there is no reason to think that this situation is going to change in the foreseeable future. Judges these days also have to adjudicate over the Human Rights Act and concepts such as treaty principles, intrinsic values, environmental harms and sustainability that are much more novel than principles that can be traced back to the 1688 Bill of Rights Act, and beyond. The Environment Court has to adjudicate complex judgments about social and economic issues and the allocation of resources. What would the critics have us do about that?

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[3] Unfortunately, but perhaps understandably, he did not explain how it would be done. If it took the form of a compensation principle, for example, who would write the cheque in difficult cases?

[4] See: *A Primer on Property Rights, Takings and Compensation*, Business New Zealand, Federated Farmers, the New Zealand Business Roundtable, and the New Zealand Chambers of Commerce, 2008.

[5] Another point is that the NZBORA is not the only statute that contains rights. For example, the Human Rights Act contains various civil and political rights.

2.38 The Taskforce's proposal recognises the desirability of guidance for government policy analysts by allowing for the Minister of Finance to issue guidelines. The critics do not appear to have noticed this provision. Judges are, of course, already experts in law and in adjudicating disputes. They have less need for such guidance, but the guidelines may be useful for them on occasions.

2.39 Where a government agency is uncertain as to whether a proposed regulation violates a principle or not, it should just explain why it is uncertain in its advice to ministers. Where a judge has to make a ruling on whether a departure has occurred and, if so, whether it is justifiable, a declaration cannot be avoided. Opponents of the Bill fear that judges will seek to intrude into the political arena in these cases. We are inclined to the contrary view that judges are more likely to defer to parliament about matters of political judgment, rather than get involved in political brawls.

The Bill will not stop wealth redistribution

2.40 The enumerated principles do not prevent state redistribution. They do not stop redistributive taxation and welfare and other spending. Regulations are generally considered to be an inefficient means of achieving redistribution because of their lack of transparency and their non-general nature. Tax and welfare policies are better instruments for this purpose. Nevertheless, redistributive laws and regulations which involve taking without compensation would still be permitted as long as parliament was clear that this was what it intended (ie the status quo in this respect would be unaltered).

The Bill will not stop regulation of tobacco and leaky buildings

2.41 The aim of the Bill is to make sure that in the fullness of time all regulation is better justified than is commonly the case at present. Where a regulation cannot be justified in terms of the principles it can still be defended on the grounds of being a reasonable departure. Even when this defence fails in a court, the regulation will remain in force, unless parliament rescinds it. The regulation would only fail because of the Bill if the greater transparency and accountability had the effect of turning parliament against it. It is hard to see much wrong with that.

The problem is not with the principles but with their limited remedy

2.42 We are sympathetic to this criticism. The remedy of a Declaration of Incompatibility (DOI) which may have no effect on outcomes is a weak one. We would prefer a stronger remedy.

2.4 The role of the courts

2.43 The Bill confers a new power on the courts – the power to make a Declaration of Incompatibility. Such declarations have no legal effect and can only be made in limited circumstances. Jack Hodder identifies eight limitations in the paper referred to above. An additional limitation is the exclusion of some of the principles from consideration. He notes that the Taskforce assumed the continued existence of the NZBORA (which must be the starting point with debate over the Bill). The NZBORA allows the courts to exercise jurisdiction over: (1) an interpretative preference for interpretations compatible with NZBORA's contents; (2) issues that have a 'political' content, such as incompatibility with specified rights and freedoms or are demonstrably justified in a free society; and (3) an ability to declare incompatibility while the offending legislation remains valid and operative. He

concludes that "there is nothing novel in the features of the DOI jurisdiction" proposed in the Bill. His broader conclusion in the paper on the role contemplated for the courts is that:

> The role of the Courts contemplated by the Taskforce Bill follows NZBORA precedent, preserves parliamentary sovereignty and may be expected to assist in improving the quality of legislation and public law.

2.44 Writing prior to this paper, Ekins and Huang have seen it as undermining parliamentary sovereignty. They fear that parliament will be excessively subservient to the courts and refer in general terms to responses by the UK parliament to adverse declarations. Wilson's paper finds that they do not identify any case that points to an unduly deferential response. He also uses one case to motivate the suggestion that there may be others or even many when the response was arguably an improvement on the pre-declaration position. His overall assessment is:

> … these types of declaratory judgments arguably constitute a real advance in the institutional arrangements for protecting fundamental values.

2.45 The fear that the Bill would alter the balance of power between parliament and the courts must rest on the proposition that parliament would defer to the courts in undesirable ways. This seems implausible. New Zealand has had its share of dominant politicians and the courts are more under the control of executive government than when the final court of appeal was the Privy Council. Parliament could rescind or amend a Regulatory Standards Act as it wished. Further, significant problems of this type do not appear to have occurred to date with the opportunities provided to the courts by the NZBORA and the Human Rights Act.

2.46 Hodder's paper gives careful consideration to the possibility that the DOI power could, in some subtle manner, alter the dynamics of the relationship between the branches of government. He provides five reasons for answering this question in the negative, on the balance of probabilities. First, a DOI provision comes nowhere near generating the US or Australian situation of a formal veto position that some might fear. Second, the limited nature of the Bill's remedies for breaches make the political incentives to take a more political approach to the appointment of judges correspondingly small. Third, the debate over the DOI concern should help reduce the scope for credible claims and alert judges to the need to adjudicate genuinely political issues in a cautious and non-intrusive manner. Fourth, appeals for a DOI are likely to be limited given its limited effect. Fifth, he is optimistic about the good sense and intelligence of our current and future judges. In our view Hodder as a senior practising litigator is in a far better position to assess the calibre and tenor of our judges than most academics.

2.47 The more extreme assertion, that declarations would be hostile to our democratic system, is even less credible. We are sure that no one on the Taskforce saw the Bill as undermining parliamentary sovereignty. Parliament would remain the supreme lawmaker and could take no notice of any court declaration if it chose to do so. Should the courts start to interpret laws in a way that were inconsistent with the intention of parliament, all it would have to do is to make its intention clear in the proper manner. Wilson's article examines Ekins's earlier writings to try to get a better understanding of the basis for his assertion. He finds that it "appears to be driven by a highly unorthodox view of the role of Parliament and the courts". In particular, Ekins appears to regard limited constitutional government as "undemocratic",

even when the limit is imposed by government on itself and it could vote to remove it at any time. On this basis the NZBORA would be seen as hostile to our democratic order.

2.48 Ekins seems to envisage that there would be a change in the balance of power from the passing of the Bill and that any reduction in the power of parliament would be undemocratic. Yet the separation of powers is fundamental to the longstanding Westminster practice of a sovereign who is separate from parliament, independent courts, and a bicameral legislature. It is also fundamental to democracy that parliamentarians are elected by voters and that parliamentarians are thereby not their lords and masters. In the United States there is a further separation between the legislature and the executive. Few would see this as being undemocratic. An implication of the extreme view that parliamentary sovereignty is absolute would be that it is proper constitutionally for a government to murder citizens in order to prolong its own tenure, as long as it observed due processes.

2.49 As already mentioned, we are much more concerned about the risk that the DOI provision will be ineffectual in practice than we are that its effect will be overly powerful. We are sympathetic to the view of MP Charles Chauvel, expressed in the parliamentary debate on the first reading of the Bill, that the Bill's principles are sound, but the proposed remedy might be too weak.

2.50 We note in this context that Sir Geoffrey Palmer and Matthew Palmer proposed a written constitution for New Zealand in 1996 that would have given the courts far more sweeping powers to provide a remedy than a DOI. Here is what they proposed:

> (1) Any person may seek a declaration in the High Court that any of the following are inconsistent with the Constitution
>
> a) Any law;
>
> b) Any action by the sovereign, legislative, executive or judicial branches of the government of New Zealand;
>
> c) Any action by a person or body in the performance of any public function, power or duty conferred or imposed on that person or body or pursuant to the law.
>
> (2) Where any law or action has been held by any court to be inconsistent with the Constitution, the court may make such orders as are fair and reasonable in the circumstances in order to remedy any person adversely affected by the action.

2.51 Palmer and Palmer's position on these matters was based in part on their considerable confidence in the ability of our courts to make sensible decisions. They wrote: (p 262) "The courts have a vital role to play in prodding government to be fair, and in checking it when it is not. To the extent that we have trusted the courts in the past, they have not let us down."

2.3 The interpretative direction

2.52 The interpretative direction in the Bill was criticised in the first reading debate on the grounds that:

- it would create business uncertainty about existing law by unsettling the established meaning of all legislation and regulations
- the 10-year time horizon is unworkable, and
- it is undemocratic.

2.53 In fact, the language of this clause is taken expressly from section 6 of the NZBORA. This was to enable the significant body of precedent developed under that section to be available to the courts in approaching clause 11. Again objections to its inclusion in the Bill would seem to be objections to its existence in the NZBORA.

2.54 The argument that it will be pervasively destabilising is an argument that much existing law is non-compliant with the Bill's principles. Yet uncertainty about the remaining life of poor quality laws and regulations might be better for business than loss of hope about improving them. Also the 10-year period gives businesses considerable time to renegotiate contracts that might be vulnerable to a changed interpretation.

2.55 The argument that the 10-year time horizon is unworkable appears to misunderstand the proposal. There is no need under the proposal for all legislation to be compliant in 10 years; that might well be unachievable. Instead the intention is that real progress towards this goal be made during this period. This progress should have identified priority areas for rectifying what appear to be unjustifiable departures. Any subsequent adverse DOI will not have any legal effect, but it should give greater priority to reviewing the offending legislation.

2.56 The claim that the direction is undemocratic proposes that parliament is undemocratic when it instructs the courts to interpret the law in a particular way. This view seems to be inconsistent with the view that parliament is, and should be, the sovereign lawmaker. Once again this argument seems to be addressed at the NZBORA in the first instance rather than at the Bill.

2.57 Wilson's paper examines the basis for Ekins and Huang's assertion that this direction is 'unconstitutional'. He finds that their argument provides "thin grounds to impugn the approach of the High Court or raise alarm about the implications of the Bill". Digging deeper into earlier writings by Ekins, he finds that the opposition to the interpretative provision appears to derive from a "wider antipathy to interpretative directions in bills of rights". This antipathy is expressed in remarkably hyperbolic language. Wilson's concluding observation is that it is odd to accuse Law Lords of thwarting the will of parliament and at the same time blame parliament for directing them to do so.

2.58 Ekins has expressed a concern that the interpretative provision could be interpreted by the courts to mean that the good law-making principles 7(1)(i)-(k) are part of that provision. We understand that this was not intended by the Taskforce and suggest that the Commerce Committee could request officials to suggest modified wording that removes any ambiguity (see below for a specific suggestion).

2.4 Certification

2.59 Certification is a key step towards accountability. Accountability is naturally not commonly welcomed by those who would become more accountable. The main public policy objections expressed against the Bill's measures are that certification:

- will politicise chief executives, and
- create compliance costs for government agencies

2.60 While there will be tensions and compliance costs, these do not establish that they are greater than offsetting benefits. Critics are inconsistent when they argue that existing arrangements are sound, or can be made sound, *and* that a certification requirement will add

to government agency compliance costs. If existing arrangements are sound, or can be made sound, the necessary analysis will be done regardless of the certification requirement. The cost of signing a piece of paper certifying the conclusions will be minimal.

2.61 We note in this context that the Treasury's RIS considers that most policy teams do not currently have the skills to assess proposed laws and regulations against the proposed principles. This is telling. It indicates that spending more resources on analysis is both necessary and desirable.

2.62 If government agencies do the analysis competently and make it public, as is supposed to be the case with RISs, there will be tensions between chief executives and politicians even without certification. A certification requirement can reduce this tension by (1) forcing the analysis to be done at an earlier stage in the policy formation process and (2) giving the chief executive more clout in persuading a minister of the desirability of improving the quality of a proposed law or regulation before putting it to the public. In this sense the certification requirement can make it easier for a chief executive to be seen to be providing independent professional advice.

2.63 What critics of this proposal, and the Bill more generally, do not seem to recognise is that it aims to achieve its goals by making it much harder for poor quality laws and regulations to get through the policy formation process. It is the threat of an adverse certification or a future adverse DOI that should lead to more careful policy formation processes. The Bill is not intended to spawn litigation, nor do we believe it would have this effect.

3. The Treasury's RIS – options, argumentation and conclusions

Assessing the general conclusion

3.1 The RIS's general conclusion about the Taskforce's proposed Bill is summarised on p 17 in three sentences:

> We do not support the Taskforce's proposed Bill. We doubt the chosen principles can attract the broad-based support necessary to induce enduring behavioural changes, and compliance costs could exceed benefits. The interpretative direction presents a particular risk of unintended consequences.

3.2 The second sentence is a political judgment about the sustainability of a policy change. It is not an assessment of whether the policy would be in the national interest, if sustainable. If the public is not to be informed of the prospective net benefits of a proposal, let alone had the chance to experience them on a trial basis, on what basis is Treasury to decide that the proposal would not be sustainable if the public were informed about those benefits? Furthermore, politicians are better placed than the Treasury to judge both the changing mood of the electorate and the likely future responses of other major parties to a mooted policy change. When Treasury fails to provide them with an informed assessment of the net benefits to the community of a proposed course of action, it fails to help them form a judgment about whether the community might come around to supporting those changes in the fullness of time, and therefore about what political capital in the short term it might be desirable to use to make those changes. The Reserve Bank Act and the Fiscal Responsibility Act were both controversial when first proposed, but are now well accepted.

3.3 Treasury's approach is very worrisome given that it is now the guardian of the Regulatory Impact Statement requirement. The fundamental concept of that requirement is that it compares the net benefits of a proposed course of action against the next best alternative. To fail to do so on the grounds of a political judgment that the proposed course of action would not be adopted or sustained invalidates the process.

3.4 The text supporting the third sentence considers that the interpretative provision is "highly risky" and that it could have significant unintended side effects. The first supporting reason claims that this is a new interpretative direction for the courts that "will inevitably increase uncertainty". However, this analysis does not acknowledge, let alone respond, to the points made by the Taskforce itself on p 58 of its report; Chapman Tripp's Tim Smith in his Institute for Policy Studies paper (pp 7 & 8), and most recently by Wilson, namely that the wording of this provision is taken expressly from the NZBORA so as enable the significant body of precedent developed under that legislation and the Human Rights Act 1988 (UK) to be available to the courts, thereby limiting the scope for unduly strained or tenuous interpretations to be given to legislation. These sources point out that this interpretative provision is consistent with the traditional common law canons of interpretation which support individual liberties and operate against uncompensated expropriations. Furthermore, the best judges at this point of whether this provision is more likely to raise or lower uncertainty are arguably the legal experts who have the greatest experience with advising the commercial community about such matters. Since the authors of all three of the above contributions fall into this category, and none of them expressed concern about this possibility, and certainly did not see it as 'inevitable', one wonders why Treasury regards other interpretations as more authoritative. Treasury should also have given weight to the real benefit intended from the policy – that existing laws and regulations be made more principled and coherent in the fullness of time through the application of this principle.

3.5 The RIS's second supporting reason claims that some of the principles and terminology are novel and unorthodox. It even suggests that the property rights principle "could lead to compensation being awarded in respect of government actions where the government had no intention of paying compensation". This specific concern is almost entirely misplaced since, as noted immediately above, the existing common law canons of interpretation would require courts to presume in favour of compensation unless the government's intention not to do so was clear. The interpretative clause changes nothing in this respect.

3.6 The RIS does not identify which of the principles it considers are novel and unorthodox, let alone the authoritative basis for expressing this view. As noted, the Taskforce's report takes 16 pages to spell out the authorities that underlie its choice of stated principles and did not consider that any of them fall into the category of novel or unorthodox. To the contrary, it explicitly states that it sought "to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation". Given this objective, if any of the principles do prove to be novel or unorthodox it should be a straightforward matter to revise them so that the new wording is neither novel nor unorthodox. The RIS should have proposed an alternative wording as a superior alternative to any of the principles. It does not do so.

3.7 The third and final reason in the RIS for assessing that the interpretative provision is very risky is that it is unclear what it would mean to interpret the law in line with good law-making principles. This appears to read the Bill as requiring that the interpretative clause applies to principles 7((1)(h)-(k). Arguably, it is implicit that the interpretative clause does not apply to principles (h) and (i) because these principles relate to the process for making legislation and can't relate to its meaning. As to principles (j) and (k), it is debatable whether it would cause

difficulties if a court were able to take them into account in determining meaning. Should it be decided that the good law-making principles should not have application to the interpretative clause, one option might be to make this explicit by amending clause 11 and inserting the words "specified in section 7(1)(a) to (g)" after the word "principles" in the second line.

3.8 In summary, the RIS's consideration of the proposed RSB appears to suffer from the following major deficiencies:

- it does not assess the benefits the public might reasonably expect from the Bill if it were implemented on a sustained basis and supported with accompanying measures
- it appears to have accepted, as authoritative, polemical criticisms from a handful of commentators who lack familiarity with the problems the private sector actually experiences with government regulations and which are not endorsed by those with greatest legal and commercial experience in these matters
- since it does not acknowledge, let alone respond to, dissenting expert views, it fails to demonstrate that its overall conclusions are sound and balanced, and
- where it identifies unintended and undesired deficiencies in the proposed Bill it should consider the alternative of a revised Bill that addresses these problems, while retaining its thrust. For example, an obvious response to the third expressed concern with the interpretative clause would be to insert the minor clarification suggested in paragraph 3.7. This has not been done.

Expected effects of setting out the principles

3.9 We do not agree with the view in the RIS that the property rights, liberties and merit review principles are "too strict distillations of more flexible guidelines gathered from other sources", and we do not know what authorities would agree with it. To illustrate, the principles allow property to be taken when in the public interest and compensation is paid to the extent practicable and by or on behalf of those who benefited. Even absent this the taking might be justifiable under the general exception clause 7(2). Without that justification the Bill would still give the property owner no right to prevent the taking or to seek compensation. As Wilson's article concluded, "[i]n this respect the modesty of the Bill is striking".

3.10 We do not agree that the principles fail to recognise the benefits of aligning New Zealand regulation with international norms or of coordination with trading partners. For example, the good law-making principle requires costs and benefits to be assessed and the compensation principle allows takings in the public interest when compensation is paid. Moreover, the norms being established in free trade agreements are providing greater formal protections of private property rights to foreign investors than might be available to domestic investors. The Bill could be seen as a step towards closing the gap.

3.11 Finally under this heading, we consider that the fear in the RIS that the property rights principle "could weaken competition and market efficiency" by inducing governments to refrain from making any regulation that infringes private property rights is grossly overblown. Policy advisers are charged with identifying whether or not any taking provides a net benefit to the community. A requirement to pay compensation cannot reduce the net benefit to the community; all the payment does is redistribute that benefit, ensuring that it does not fall on the investor, unfairly and to the detriment of investment incentives. If the consideration

changed policy outcomes it could surely only be for the better since soundly based advice would be unchanged.

Expected effects of DOIs

3.12 The RIS considers that it is likely in the early years that declarations will be frequently sought. However, the joint letter by the three law firms is sceptical that this will be the case. It notes in particular that very few claims have occurred under Part 1A of the Human Rights Act since 2002.

4. Recommendation

We think the Taskforce has produced a report and draft Bill of exceptional quality. The Bill provides the best current option for improving regulatory quality, even though on its own it is no panacea. It may be capable of improvement as it passes through parliament. On this basis we recommend strongly that it should proceed.