NEW ZEALAND BUSINESS ROUNDTABLE

Submission on Questions Arising from the Regulatory Responsibility Bill Prepared by the Regulatory Responsibility Taskforce

August 2010

1. Introduction

1.1 This submission on the Regulatory Responsibility Taskforce's recommendations, and the associated questions issued on 28 June by the Minister for Regulatory Reform, 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.

2. Overall comments

2.1 The Business Roundtable has supported proposals for a Regulatory Responsibility Act from the time of its 2001 report *Constraining Government Regulation*. We made submissions to the select committee that considered the earlier Members Bill. We agree with the Minister that the Taskforce has produced an excellent report.

2.2 We are aware of the equally supportive views of Federated Farmers, Business New Zealand, the New Zealand Chambers of Commerce, the Electricity Networks Association and the Local Government Forum. Collectively all our organisations represent a very broad cross-section of the business community in New Zealand. We submit that the government should proceed to pass the Taskforce's Bill as soon as is practicable. It should then move expeditiously to get work done on extending its provisions to local government. It should also implement the supplementary recommendations that are set out in Part 5 of the Taskforce's report.

2.3 However, we do not believe that these measures will adequately address the problem of unsatisfactory regulation on their own. The Taskforce's proposal is at the modest end of what might have been proposed. In particular, the role envisaged for the courts will be much more limited than is accepted as the norm in many other countries, including Australia. Wronged citizens will have no additional remedy except the ability to obtain, at their own expense, a declaration of incompatibility that has no legal effect. Many will dismiss this as all but worthless.

2.4 Accordingly, we recommend that, independently of passing the draft Bill, the government should make it a high priority to extend the legal protections for rights in property in New Zealand. One option would be to put property rights into the New Zealand Bill of Rights Act. Another option would be to legislate to extend the compensation provisions of the Public Works Act 1981 to encompass injurious affection or takings to property more generally. (They currently focus on property in the form of real estate.)

2.5 The remainder of this submission responds to the Minister's questions. In these responses we acknowledge various fears and concerns that relate to the relationship between officials and ministers and between the courts and parliament. We find that some of these fears appear to have no evidential basis and that what evidence is available does not support them. Nevertheless, regardless of whether the Bill proceeds, we consider that there are issues of a constitutional or quasi-constitutional nature that should be considered in respect of each relationship. In particular, we would support work on how the final court of appeal could be made more independent of a parliament that might be dominated at any point in time by an executive that is determined to influence its decisions through appointments or funding. One option would be to explore the possibility of making the High Court of Australia the court of final appeal, with one or more New Zealand judges sitting on New Zealand cases. The current panel examining the case of possible misconduct by one or even two Supreme Court judges (on account of conflicts of interest – a routine risk in a small community) illustrates just one of the reasons why we opposed the abolition of appeals to the Privy Council. We would also support work on how to make departments more accountable for giving (high quality and politically impartial) free and frank advice and, more generally, on how to create a public service culture where this is the expected norm. We commend the government for appointing an independent expert committee to review expenditure on policy advice and hope that its report will throw some light on the options.

3. Specific responses to the questions

3.1 The need for a Regulatory Responsibility Act

Q(a) *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.*

3.1.1 In our view it is beyond reasonable debate that the quality is too often poor. The reasons for this view were discussed at length in *Constraining Government Regulation*. We have seen little, if any, improvement in recent years. In the last decade a record number of pages have been added to the statute book. The reasons for regulations that reduce national welfare have been extensively discussed in the economic literature. In New Zealand, as elsewhere, governments have regulated in support of private interests rather than the general interest (the public choice problem); politicians have reacted to populist pressures to act in response to some high-profile event; the possibility of government failure associated with an intervention aimed at correcting a market failure has not been properly assessed; and official advice has often been based on mistaken diagnosis and analysis.

3.1.2 On the latter point, a recurring theme of Business Roundtable submissions on regulatory proposals during the last 15 years has been that a regulatory impact statement (RIS) supporting them has been non-existent or inadequate for the purpose. Two independent reviews of the quality of RISs have pointed to repeated shortcomings. Frequently observed deficiencies include: the failure to identify the problem carefully, moving from symptoms to causes; the tendency to choose a policy objective that pre-selects a politically preferred outcome; the failure to include relevant alternatives, particularly ones that would be politically unpalatable or would involve greater reliance on private mechanisms; omitting to quantify relevant costs and benefits that

could be quantified; confusion between fiscal costs and national resource costs; confusion between national benefits and wealth transfers; the failure to make an assessment about net benefits compared to the next best alternative; and the failure to meet the Cabinet Manual requirement to ensure the proposal conforms with the Legislation Advisory Committee guidelines. Despite government spending of $800 million a year on policy advice, we suspect that few policy analysts in government, including in the Treasury, are familiar with the LAC guidelines.

3.1.3 In our view, the fundamental reasons for these weaknesses in the advisory process are that ministers are not willing to accept regulatory disciplines and are not demanding better quality analysis, and departments have not been held to account for the quality of regulatory analysis. Some ministers may not be demanding quality analysis because there is no established practice in their departments; others may see quality analysis as being more of an embarrassment than an aid to decision-making. Departments are not taking greater responsibility for providing quality analysis and advice partly because the Cabinet papers that contain RISs are seen as the minister's document rather than the department's responsibility; partly because some lack the analytical competence; partly because they see their job as being to find out what the minister would prefer to do, and then work up a case in support of that course of action; and in some cases because self-interest is involved as the choices will affect the department's budget or regulatory powers. We have seen no evidence that the State Services Commission has applied sanctions to chief executives for these shortcomings. Another fundamental problem is that the existing RIS requirement is centred on cost-benefit analysis, which is commonly not a robust enough tool for the purpose, and is unsuited for some regulatory proposals. In short, the overall quality of regulatory analysis is poor and is being done too late in the policy development process to have a realistic chance of changing a proposed course of action.

3.1.4 We see these as very serious shortcomings. No private sector organisation has done more than the Business Roundtable to support officials responsible for quality control of regulatory analysis and to draw attention to shortcomings in submissions to select committees. We continue to support the RIS process since it needs to continue as a complement to a Regulatory Responsibility Act. However, we are in no doubt that it is not a strong discipline and that lack of adequate analysis must mean that executive government and parliament itself are making regulatory decisions on the basis of inadequate information. Such a vacuum enlarges the opportunity for decisions to be taken on the basis of political expediency rather than the national interest.

Q(b) *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.*

We have no doubts on this score. Little has come of the processes established under last year's Government Statement on Regulation. We are not aware of any significant regulations that have been identified for review or repeal. We know the Minister for Regulatory Reform shares our concerns. The Treasury does not appear to have stamped its authority on departments to measure up to expected standards. Arguably the most important regulatory initiative taken by the government, the emissions trading scheme, was certified as having an inadequate RIS. The RIS accompanying the latest significant initiative, this week's decision on liquor regulation, was certified as only partially adequate. There has been minimal quantification of net benefits in regulatory proposals, yet the essence of cost benefit analysis (which is the main feature of the RIS process) is quantification. We have no expectation of improvement under the current regime and we do not expect the Productivity Commission will be able to improve matters materially without stronger statutory disciplines.

3.2 The nature and scope of the Bill

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

3.2.1 Yes, provided it is accompanied by arrangements that make genuine compliance necessary.

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

3.2.2 We agree with their range and appropriateness. In particular, current arrangements pay far too little attention to the common law presumptions in favour of the liberty of the individual, security in property rights and the avoidance of retrospective legislation. All are features of the widely ignored LAC guidelines but are absent from the RIS requirement. In our view any alternative proposals without these features would be widely seen in the business community as a failure to recognise the magnitude of the problem.

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

3.2.3 We are open to suggestions for improvement but we do not currently favour additions or changes. The discussion in the Taskforce's report concerning the various interpretations of equality before the law demonstrates that the recommended principle is a judgment call as between worthy alternatives. The Taskforce's recommendation is at the modest end of what might be proposed.

3.2.4 We are aware of some concerns that the wording might look novel. For example, the compensation principle explicitly applies to impairment as well as outright takings. We see this as being included for the avoidance of doubt, rather than because it is saying anything new. For example, the Public Works Act provides for compensation for impairment in the form of injurious affection,

as has other legislation in the past. Nor do we agree with those who equate principles with legal rights. Principles are a guide to action, but can be properly and rightfully departed from for good reason in a particular case, without illegality. For example, in many cases compensation for impairment of a minor nature to a poorly identifiable group would be impracticable. In contrast, violation of a (legal) right is illegal.

3.2.5 We are opposed to any proposals that would have the effect of converting principles for testing laws and regulations into novel rights. For example, we would oppose attempts to add 'treaty principles' or welfare rights to the list of principles.

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

3.2.6 We agree that the net needs to be broad. The last government's *ad hoc* and expedient move to use an order-in-council to deprive shareholders in the Auckland airport company of some of their property rights without proper process or consideration of compensation illustrates this need.

3.3 The effectiveness and impact of the Bill

Q(a) *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.*

3.3.1 We have some confidence that the mechanisms proposed in the Bill will improve the quality of law-making processes, although we would prefer the stronger mechanisms of the earlier Members Bill. We note Professor Richard Epstein's concern in a paper for the Taskforce that the measures may be weak because the role of the

courts will be far too limited compared to what is the norm in many other countries. (This includes Australia.) However, we consider that this debate would be best taken up separately in the context of broader constitutional reform or the widening of the application of the compensation mechanisms in the Public Works Act.

Q(b) *What are the likely effects of the principles/certification/declaration of incompatibility incentive structure?*

3.3.2 Departments and ministers will wish to avoid the embarrassment of a departmental assessment that is contrary to the minster's recommendation to Cabinet. As a result they will be incentivised to identify the potential for such embarrassment sooner rather than later in the policy development process. The greater departmental accountability will make it harder for a minister to browbeat an agency into not providing a competent regulatory analysis. One fear is that politicians might endeavour to reduce the risk of embarrassment by seeking to appoint more compliant chief executives. An option for strengthening the position of chief executives in this respect would be to restore the requirement on chief executives to give free and frank advice in the public interest. We are at a loss to understand why this requirement was dropped.

Q(c) *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?*

3.3.3 See the response to Q(b) above.

Q(d) *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?*

3.3.4 Yes. It has always been an important role of the courts to interpret and enforce legislation. The courts are the most competent body to determine whether an action is in fact a violation of someone's legal rights and, if so, to determine the appropriate remedy. Given the legal expertise that is required for this purpose, there is no other sufficiently independent body that could carry out this role. The key point here is that the judiciary is an independent branch of government (although we would like to see its independence strengthened as suggested in Section 2.5 above). By contrast, an alternative such as the Productivity Commission or an Ombudsman, as some have suggested for this role, exists at the pleasure of the executive and parliament and can easily be influenced through appointments, funding or informal pressures.

Q(e) *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?*

3.3.5 As long as adverse rulings are the exception rather than the norm, the prospect of such a ruling will have a constraining effect on the proposals a minister takes to Cabinet. In addition to this improvement in policy formation processes, experience in the United Kingdom suggests that an adverse ruling could well cause the government to modify the measure. In short, there are reasonable grounds for hope for policy improvements both *ex ante* and *ex post*.

3.3.6 We do not consider that judges are likely to seize the opportunity to bring the courts into political controversy by making contentious, ill-argued, or biased rulings. Judges know that they are not politicians, that they are not elected by citizens, and that to politicise the courts would bring the judiciary into disrepute. Nor have we seen anything in the British experience or the precedents to date in respect of the New Zealand Bill of Rights Act that would justify such fears.

3.3.7 We have also considered the opposite fear – that parliament will be unduly deferential to a declaration of incompatibility. This seems to be even more implausible. We are not aware of any evidence that the New Zealand parliament has been subservient to the judiciary. Moreover, New Zealand has had its share of populist and dominant political leaders. We see no reason to doubt that elected members of the executive and parliament would contest a judge's ill-argued ruling if it were justified or politically expedient to do so.

Q(f) *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?*

3.3.8 No. The Bill will not alter the relationship between parliament and the courts. Parliament remains sovereign as the unchallenged supreme law-making body. The courts will continue to apply all laws and regulations that parliament passes, as best they can interpret them. There will be no change at all in these fundamental relationships.

3.3.9 Of course the proposed ability to bring down a declaration of incompatibility is an extension of the role the courts already have under the New Zealand Bill of Rights Act of assessing whether a limitation on the rights and freedoms contained in that Act "can be demonstrably justified in a free and democratic society". It is not apparent that this provision has materially and undesirably altered the relationship between parliament and the courts. As a result, the fear that the extension of the role would so alter the

relationship seems to lack substance. Fears without substance are a poor guide to policy.

3.3.10 Nevertheless, the Business Roundtable is independently concerned about the relationship between the courts and parliament. We opposed the abolition of the right of appeal to the Privy Council in part because the proposal could put at risk at some point in the future the independence of the judiciary. Put bluntly, a future New Zealand government could 'stack' the Supreme Court, whereas it had no such power in respect of the Privy Council. One option for restoring a greater separation of powers would be to allow a final appeal to the High Court of Australia.

Q(g) *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?*

3.3.11 The effects should be beneficial. Given the problem of poor quality laws and regulations already on the books, it is important that a process is put in place that is capable of addressing this problem in a timely but measured and methodical manner.

3.3.12 The proposed 10-year goal seems reasonable. To set a much longer time would invite underachievement. To set a much shorter time would probably lack credibility.

3.3.13 We do not agree with the criticism that all legislation *must* be compliant within 10 years. If that goal is achievable, well and good. But if it is not achievable, declarations of incompatibility after the 10-year period should help focus minds on correcting the problems as they are identified. Of course, parliament could

change the 10-year period if, in the fullness of time, it became apparent that it was no longer credible.

3.4 Clarifications on the Regulatory Responsibility Bill and potential alternative mechanisms

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

3.4.1 We think that it is highly desirable that the Regulatory Responsibility Bill be extended to include local government sooner rather than later, but not at the expense of holding up the Bill.

3.4.2 Among other instruments, local government implements the Resource Management Act and district plans, both of which can breach sound regulatory principles, reduce economic flexibility and resilience, and distort land prices.

Q(b) *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.*

3.4.3 We support the proposed establishment of a Productivity Commission and the supplementary suggestions of the Taskforce.

3.4.4 We consider that there is a serious lack of analytical competence in policy advice within government agencies. We support the government's appointment of a taskforce to assess the value it is getting from the $800 million a year spent on this activity. While it is proper to wait for the taskforce's assessment, higher quality recruitment and better staff training must help.

3.4.5 We also consider that the Treasury, including its senior leadership, could play a much more energetic role in promoting regulatory

quality improvements across the state sector. Given demonstrated performance, the Treasury should probably take over the residual roles of the Ministry of Economic Development in this area. In addition, agencies other than government departments that advise on regulation, such as the Law Commission and the Reserve Bank, should be brought within the RIS requirements of the Cabinet Manual.

3.4.6 We consider that MMP is another part of the problem. The horse-trading that commonly goes on in order to get a bill passed nowadays can see legislation adopted that a majority of the House would reject on its merits. Horse-trading to achieve a minor party's support can also see bills fundamentally altered in a select committee before their third reading, purely as a matter of political expediency. MPs may not have time to absorb all the changes, let alone receive competent advice on their merits, before the final vote is taken. Jeremy Waldron has written cogently about the degradation of law-making processes in New Zealand. The proposed referendum on MMP provides an opportunity for the public service to better inform the electorate about the implications of the electoral system options for policy formation purposes.

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

3.4.7 We would draw attention to the fact that resistance to the proposals can be expected to be strong amongst those who would be made more accountable (such as some government officials) and those for whom greater transparency would be a problem. The latter will include some politicians and some special interest groups. Academics who favour an unconstrained role for government and who are not sympathetic to 'economic constitutions' (such as the Reserve Bank Act and the former Fiscal Responsibility Act) will also be opposed.

3.4.8 It is important therefore to keep the wider goal of the overall public interest to the fore. The government's major economic goal is to achieve income parity with Australia by 2025. To have any chance of achieving this goal it must aim to excel, by world standards, in as many relevant dimensions as possible. Achieving excellence in the quality of regulation must be central to the achievement of this wider goal. The first report of the government's 2025 Taskforce illustrated its importance as follows (see p 116):

> Good estimates done in other countries, using a variety of methodologies, suggest that as much as a third of the income gap to Australia could be closed if we were able to move NZ to world best practice across all major areas of regulation.

For this reason we are seriously concerned about the length of time that has already elapsed – around a year – since the Taskforce's report was presented. We strongly submit that the Bill recommended by the Taskforce should be advanced without further delay. A select committee hearing on it would enable further consideration and possible refinement of its provisions.