

Regulatory Alert

24 November 2009

How to Regulate Regulation?

Introduction

The current government has stated that improving the quality of regulation is one of its priorities. It has sought to demonstrate this commitment by appointing a Minister for Regulatory Reform (Hon Rodney Hide) and recently issuing a Government Statement on Regulation. As part of the post-election arrangements between the National Party and the ACT Party, it was also agreed to appoint a Regulatory Responsibility Taskforce ("**Taskforce**") to assess and report on Mr Hide's Regulatory Responsibility Bill ("**Bill**").

Seeking to improve the quality of regulation is not a new idea (the previous government implemented a Quality Regulation Review), but finding a solution is a vexed matter. Essentially, it requires lawmakers (politicians, officials and regulators) to find ways to make their own jobs more difficult and demanding. This does not provide a compelling incentive for them to get it right.

The independent Taskforce report is therefore a valuable contribution to the effort to improve the quality of regulation in New Zealand. It is the boldest proposal to date, and includes some ideas which, if implemented, could make a real difference. Ironically, that could end up being the cause of its eventual downfall. This Alert outlines the key proposals in the Taskforce report, and discusses some of their potential implications for the lawmaking process in New Zealand.

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Background

Mr Hide introduced the Bill in August 2006, but it was not until May 2008 that the Commerce Select Committee reported to the House following its consideration of the Bill. In short, the Committee couldn't agree on the merits of

the Bill. It recommended that it not be passed but that an expert taskforce be established to recommend measures to improve regulatory review and decision-making processes. Measures could be implemented by *Standing Orders of the House of Representatives* ("**Standing Orders**"), legislation, or both.

Following the October 2008 election, ACT and the National Party agreed to establish a taskforce to carry forward work on the Bill. Mr Hide announced the membership of the Taskforce, chaired by Dr Graham Scott, on 1 April 2009. The Taskforce was essentially required to determine how the Bill should be amended to achieve its objectives, and to produce a new draft Bill.

The Taskforce's recommendations

The Taskforce's key conclusions are that:

- (a) there should be better and less regulation in New Zealand; and
- (b) this objective will not be achieved unless significant changes are made.

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The Taskforce therefore recommends that a Bill be enacted although proposes a substantially modified version.

The issue is characterised by the Taskforce as a constitutional one. "Good quality" legislation reflects the fundamental principles of our constitutional system. These principles include, for example, assumptions against retrospective legislation and the rule that taxes can only be imposed under an Act. As noted in the Taskforce report, these principles are currently scattered across statutes, the common law and documents such as the Cabinet Manual and Legislative Advisory Committee Guidelines. The problem is that the principles tend to be applied too late in the process and there are no sanctions if they are not applied.

““Good quality” legislation is legislation that reflects the fundamental principles of our constitutional system. ... [Under the Bill,] principles for responsible regulation [are] specified in legislation.”

In brief, the Bill provides for:

- (a) principles for responsible regulation (“**principles**”) being specified in legislation;
- (b) a process for certification that legislation is compatible with the principles (by the Minister/public entity responsible). The Taskforce has also recommended that the Standing Orders be amended to require certification by the Select Committee that considers a Bill;
- (c) a process for obtaining declarations of incompatibility in the courts (similar to the Human Rights Act in the UK); and
- (d) regular review of legislation (after a ten year transition period).

Basic framework

The Bill applies to legislative proposals, which is defined broadly to include Acts of Parliament, regulations, rules and other legislative instruments. It does not apply to administrative decision-making (ie application of the law to an individual circumstance). This is a very broad definition and would include, for example, determinations by the Commerce Commission under the Commerce Act 1986.

Principles are established, being:

- (a) *Rule of law* - legislation should not adversely affect rights or impose obligations retrospectively, and should treat people equally;
- (b) *Liberties* - legislation should not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own, use or dispose of property, except as necessary to provide for any such liberty, freedom or right of another person;
- (c) *Taking of property* - legislation should not authorise the impairment or taking of property rights without consent, unless it is necessary in the public interest and full compensation is provided;
- (d) *Taxes and charges* - taxes should only be imposed by an Act of Parliament, and charges should not exceed the reasonable cost of providing the relevant goods or services;
- (e) *Role of courts* - legislation should preserve the courts’ role of determining the meaning of legislation, and where legislation authorises a public entity to make decisions that may adversely

affect any person or property, appropriate criteria for decision-making should be stated with a right of appeal on the merits to a court or other independent body;

- (f) *Good law making* - legislation should not be made unless those likely to be affected have been consulted and there has been careful evaluation of the need for legislation to address the issue concerned. Benefits of legislation should outweigh the costs, and it should be the most effective, efficient and proportionate response to the issue.

The Bill includes some key mechanisms to give effect to these principles in lawmaking, as discussed below. The principles have no independent legal effect - that is, they cannot override incompatible legislation.

Certification

The key accountability mechanism will be certification to the House of Representatives that proposed legislation is compatible with the principles, or that any incompatibility can be demonstrably justified in a free and democratic society. The Bill would introduce the following certification requirements:

- (a) For Government Bills, the Minister responsible and the chief executive of the public entity that will be responsible for administering the Bill when enacted must certify the Bill before it is introduced to Parliament;
- (b) For non-Government Bills, the promoter of the Bill must certify it before it is introduced to Parliament;
- (c) For legislation that is not a Bill, but is made by the Executive Council or Minister of the Crown, both the Minister responsible and the chief executive of the public entity that will be responsible for administering the legislation must certify the legislation before it is made; and
- (d) In all other cases, certification of legislation is to be made by the chief executive of the public entity that will be responsible for administering the legislation.

Declaration of incompatibility

The courts would be given jurisdiction to declare legislation to be incompatible with the regulatory principles. There would also be a provision requiring courts to interpret legislation consistently with the Bill’s principles, if possible. This is similar to the current requirement for legislation to be interpreted consistently with the New Zealand Bill of Rights Act 1990.

Regular review

The Taskforce also considers that regular review of legislation is necessary - it is not sufficient that it is

assessed against the principles at the time of enactment. There will be a requirement for every public entity to use their best endeavours to review all legislation that it administers for compatibility with the principles. They will be required to include in annual reports a statement of what steps they have taken to review legislation, and the outcomes of those reviews.

Amendments to Parliamentary process

The Taskforce believes that the measures in the Bill could be usefully supplemented by amending the Standing Orders to:

- (a) Require a select committee considering a Bill to certify the Bill on its report back to the House; and
- (b) Give the Regulations Review Committee an oversight role in relation to all legislation, including Acts. This would include considering submissions that legislation (whether proposed or in force) departs from the principles.

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Comment

While the principles should already be observed by lawmakers, and can be found in various existing sources, the Taskforce's recommendations are new and extensive in critical respects.

The formal certification requirements and the prospect of court proceedings should provide a real incentive for lawmakers to make the effort to comply with the principles, and to be seen to comply with the principles. In turn, this will provide stakeholders engaging in law reform a stronger platform from which to advocate change and influence outcomes in their favour. This could remain the case even if the Bill is not progressed - given the depth and quality of expertise on the Taskforce, the Taskforce report should remain an authoritative statement of applicable regulatory principles which stakeholders can point to when urging the Government to adhere to its (recent) regulatory commitments.

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The Taskforce report notes that the declarations of incompatibility jurisdiction would be in addition to the Court's judicial review jurisdiction and that judicial review may be "enlivened" by the requirements in the Bill (legislation would have to be interpreted consistently with the Bill if possible). Accordingly, the impact of the Bill, if enacted, could be wide reaching.

The Taskforce considered that there is a **strong case** for a Bill to "enshrine a range of important principles for regulatory, or "legislative", proposals". Mr Hide welcomed the Taskforce report in his press statement of 29 October, stating that the Taskforce's recommendations will help deliver the goal of better law making through greater transparency and accountability.

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The next steps nevertheless remain unclear. The Bill could be adopted by the Government, or the House could refer it back to select committee as a Member's Bill for further consideration and amendment. Or it could go nowhere. While Mr Hide will be keen to drive the Bill forward, his National Party ministerial colleagues have remained silent on the matter. The National-Act confidence and supply agreement did not include a commitment to advance the Bill.

The challenge for those who are in favour of the Bill is to convince the Government to support an initiative that will significantly increase its regulatory accountability, and which therefore will ultimately have broader political implications.

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