# Report of the Regulatory Responsibility Taskforce

September 2009

To Hon Bill English, Minister of Finance and Hon Rodney Hide, Minister for Regulatory Reform
Parliament Buildings
Wellington

30 September 2009

The Taskforce is pleased to present its report on the Regulatory Responsibility Bill.

In preparing this report, the Regulatory Responsibility Taskforce has benefited greatly from the assistance and input of others. In particular we would like to thank Chapman Tripp, especially Tim Smith and Colin Fife, for their support throughout the process and in the preparation of this report, and Julie Melville and Scott Murray of the Parliamentary Counsel Office for their assistance in turning the Taskforce's recommendations into a Bill. We also would like to thank Ivan Kwok and Kelly Lock, of Treasury, for their support as the secretariat to the Taskforce.

The Taskforce also appreciates the input received from its informal consultations with organisations within the public service and various experts with knowledge and experience in the fields covered by this report, including Professor Richard Epstein of the University of Chicago Law School and Professor Robert Baldwin of the London School of Economics. The recommendations of the Taskforce and the views expressed in this report remain the sole responsibility of the Taskforce.

Yours faithfully,

Dr Graham Scott
Chair, Regulatory Responsibility Taskforce

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## SUMMARY OF RECOMMENDATIONS

A The Taskforce was established to assess the Regulatory Responsibility Bill (*RR Bill*) considered by Parliament's Commerce Committee in 2007 and 2008, to consider what amendments to the RR Bill and supporting arrangements might be desirable, and to produce a recommended draft Bill.

B The Taskforce recommends a substantially modified version of the Option 3 Bill that was considered by the Commerce Committee, together with a range of associated measures and practices. The Taskforce's recommended Regulatory Responsibility Bill would:

B.I state, in substantially modified terms, the principles of responsible regulation to be advanced by the Bill, which are designed to accord with and reflect broadly accepted principles of good legislation, incompatibility with which is justified only to the extent that it is reasonable and can be demonstrably justified in a free and democratic society;

B.II require those proposing and creating legislation to certify whether the legislation is compatible with those principles, and whether any incompatibility is justified;

B.III provide for a new role for the Courts to make declarations of incompatibility (*DoI*) with the specified principles of the Bill, but otherwise explicitly exclude any power to make injunctive or compensatory orders on the basis of the Bill's specified principles;

B.IV require the Courts to interpret legislation consistently with the Bill's specified principles if possible; and

B.V require every public entity to use its best endeavours to regularly review all legislation that it administers for compatibility with the principles, and provide for the Minister with responsibility for the Bill to issue guidelines to public entities on criteria to be used and the steps to be taken in ensuring legislation is regularly reviewed.

C To enable public entities the opportunity to review, and where appropriate amend, the body of existing legislation against the RR Bill's specified principles, the Taskforce recommends that the provisions concerning DoI and interpretation not apply to legislation made before the enactment of the RR Bill for a period of 10 years. After 10 years, all legislation will be subject to the RR Bill.

D In addition to the responsible Minister's statutory power to issue guidelines, the Taskforce recommends that the Government establish a permanent group responsible for reviewing both the body of legislation, and specific proposed or existing legislation, against the principles of responsible regulation and the guidelines issued, and consulting with public entities where appropriate.

E The Taskforce also respectfully recommends amendments to Parliament's Standing Orders to ensure that Parliament has the benefit of relevant certification and supporting analysis, if sought, in relation to all new legislative initiatives, including those introduced in select committee, and to extend the jurisdiction of the Regulations

Review Committee to enable it to consider submissions that any proposed or existing legislation departs from the principles set out in the RR Bill.

## PART 1 - OVERVIEW OF REPORT

### Introduction

1.1 The Taskforce was established to assess the Regulatory Responsibility Bill considered by Parliament's Commerce Committee in 2007 and 2008, and to consider what amendments to the Option 3 Bill and supporting arrangements might be desirable, and to produce a draft Bill. In particular, the Taskforce's terms of reference emphasised that its recommendations should be principled and practicable from both a constitutional and operational perspective.

1.2 The Taskforce is satisfied of two principal points: first, as matters of both principle and practicability, there can and should be less legislation and better legislation; and, second, the existing constitutional and operational framework cannot be expected to deliver those outcomes without significant changes.

1.3 The Taskforce is aware that the Government has expressed a similar view, as indicated by the recent Government Statement on Regulation: Better Regulation, Less Regulation:[1]

> We believe that better regulation, and less regulation, is essential to assist New Zealand to become more internationally competitive and a more attractive place to live and do business.

1.4 As part of the work associated with the Commerce Committee's earlier consideration of the Regulatory Responsibility Bill, three versions of possible legislation were considered:

- Option 1 would require the presentation of a regulatory impact statement to the House when a Government Bill was introduced or when regulations were tabled. The regulatory impact statement would disclose the underlying policy analysis and predict the impact of the proposed regulation, including business compliance cost implications. At present it is a Cabinet requirement that the explanatory note to most Government bills contains a regulatory impact statement.

- Option 2 would require both the presentation of a regulatory impact statement and ministerial certification as to whether the proposal complied with the Legislation Advisory Committee Guidelines (the *LAC Guidelines*).[2]

- Option 3, which had only minor modifications from the initial Bill introduced in 2006, would legislate for specified principles of responsible regulatory management, and, in particular, require statements of responsible regulatory management for each proposal for a new Act or regulation, signed off by the relevant Minister, chief executive and control

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[1] Hon Bill English and Hon Rodney Hide, *Government Statement on Regulation: Better Regulation, Less Regulation* (17 August 2009), available at <http://www.treasury.govt.nz/economy/regulation/statement/govt-stmt-reg.pdf>

[2] Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001), available at <http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2.pdf>

agency (Ministry of Economic Development for regulatory matters, Ministry of Justice – or Solicitor-General – for legal matters).

1.5 The Taskforce recommends a substantially modified version of the Option 3 Bill, together with a range of associated measures and practices. The Taskforce considered and substantially modified the principles of responsible regulation contained in the Option 3 Bill. The modified Bill continues to require those proposing and creating legislation to certify that the legislation is compatible with those principles, but supplements that procedure with a new power for Courts to declare legislation incompatible with one or more of those principles. This follows United Kingdom precedent,[3] and is intended to have a major impact on legislative behaviour both before and subsequent to any Court decisions. The Taskforce's recommended Regulatory Responsibility Bill is reproduced in full as Part 3 of this report. A commentary on the specific provisions of the RR Bill is included as Part 4 of this report.

1.6 The Taskforce's recommendations are based on the desirability of changes within and across the three branches of government: the executive; the judiciary; and the legislature. No limited or narrowly based changes are likely to achieve meaningful and desirable results.

1.7 The Taskforce recognises that the legislative landscape, and the impetus for legislative change, is dynamic, and a new system will require regular review and fine tuning of legislation generally, and of regulatory principles and safeguards themselves.

1.8 The Taskforce considers that the Regulations Review Committee of Parliament (*RRC*) has for some time filled an important role in improving the quality of legislation, and continues to fill that role. The RRC reviews delegated legislation, and delegated legislation-making powers in Bills, against a set of principles set out in the Standing Orders, and reports back to the House on any incompatibility. The Taskforce considers that there is additional scope for Parliamentary oversight, and respectfully suggests that the RRC become responsible for considering submissions that any existing Act or other legislation departs from the principles set out in the RR Bill.

1.9 As explained in the discussion of the RR Bill's principles and associated certification procedures below, Parliament will also have the benefit of relevant certification and supporting analysis in relation to all new legislative initiatives, including amendments to a Bill proposed after the Bill has been read a first time.

**The recommended RR Bill**

1.10 The Taskforce considers there is a strong case for a RR Bill to enshrine a range of important principles for regulatory, or "legislative", proposals. "Legislation" is used in the recommended RR Bill and in this report in its broadest sense, to cover all products of legislative, as opposed to administrative activities. The definition of the "legislation" to which the RR Bill would apply is drafted deliberately broadly to cover all mechanisms by which public entities exercise a legislative function. This includes Acts of Parliament, as well as regulations,

[3] Human Rights Act 1998 (UK).

rules and other instruments made by the Executive Council, Ministers, public officials, or public entities.

1.11 As the focus of the RR Bill's principles is on legislative activity, rather than administration, the Bill does not apply to decision-making powers by public entities where this involves the straightforward application of legislative criteria to an individual circumstance. However, it is expected that, where an agency determines the law or alters the content of the law in the course of making a statutory decision, the principles in the Bill will apply to the instrument that prescribes the law.

- ***the principles of responsible regulation***

1.12 The principles which the Taskforce recommends draw on the LAC Guidelines, the principles currently set out in the Standing Orders by which the RRC reviews delegated legislation, and the Government's own recent announcements on regulation, as well as other sources. The Taskforce has sought to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles.

1.13 The principles recommended by the Taskforce for inclusion in the RR Bill fall within six broad categories:

(a) *Rule of law* – legislation should be clear and accessible, not adversely affect rights, or impose obligations retrospectively, treat people equally before the law, and resolve issues of legal right and liability by application of law, rather than the exercise of administrative discretion;

(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 take or impair, or authorise the taking or impairment of, property, without the consent of the owner, unless it is necessary in the public interest and full compensation is provided to the owner, such compensation to be provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment;

(d) *Taxes and charges* – legislation should not impose, or authorise the imposition of, taxes, except by or under an Act, nor should it impose or authorise charges that exceed the reasonable cost of providing the goods or services, or the benefit that payers are likely to obtain;

(e) *Role of Courts* – legislation should preserve the Courts' role of authoritatively determining the meaning of legislation, and where legislation authorises a public entity to make decisions that may adversely affect any person or property, it should state appropriate criteria for making those decisions, and provide a right of appeal on the merits against those decisions to a Court or other independent body;

(f) *Good law making* – legislation should not be made unless those likely to be affected by the legislation have been consulted and there has been a careful evaluation of the need for legislation to address the issue concerned. Furthermore the benefits of any legislation should outweigh its costs, and any legislation should be the most effective, efficient and proportionate response to the issue available.

1.14 Given the likely scope for arguments of incompatibility between the Bill's specified principles, and to deal with circumstances where departure from the principles may be justified, there is a need for some explicit criteria to resolve such arguments and provide for such incompatibility. The Taskforce recommends the adoption with limited modifications of the formulation from section 5 of the NZBORA: "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

***- certification of compliance with the principles***

1.15 The certification mechanisms in the RR Bill require those primarily responsible for proposing or creating legislation to certify its compatibility with the RR Bill's specified principles, and, if the legislation is incompatible with the principles, the respects in which it is incompatible, and whether that incompatibility can be demonstrably justified in a free and democratic society. Certifications will be required to be published on the Internet. Where the certification relates to a Bill, the certificate will be required to be tabled in the House on the Bill's introduction, and prior to the third reading of the Bill.

1.16 Where the legislation is a Government Bill, 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 into the House of Representatives. Where the legislation is a Bill other than a Government Bill, the promoter of the Bill must certify it before it is introduced into the House of Representatives. Where the legislation is not a Bill, but is made by the Executive Council or a 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. In all other cases, certification of the legislation is to be made by the chief executive of the public entity that will be responsible for administering the legislation.

1.17 Where legislation is to be certified by both a Minister and a chief executive of a public entity, the chief executive will not be required to certify, in the case of legislation that is incompatible with the Bill's specified principles, that the legislation is demonstrably justified in a free and democratic society. The Taskforce considers that this judgment is best made by the responsible Minister, as the elected official with direct responsibilities to Parliament. Where Ministerial certification is not required, the person certifying will be required to certify as to any justification for an incompatibility. However, the Taskforce expects that these instances will be rare, as generally powers to make delegated legislation should not delegate to officials the power to make legislation inconsistent with the Bill's specified principles.

***- a new role for the Courts: declarations of incompatibility***

1.18 The objectives of the RR Bill would be enhanced by a new declaratory role being conferred on the Courts. This new role would be limited to the making of

declarations of incompatibility (DoI) with the specified principles of the Bill (and of costs orders), and would explicitly exclude any power to make injunctive or compensatory orders.

1.19 Initially, the DoI jurisdiction would apply only to legislation (including Acts) made after the date of commencement of the RR Bill. Following a transition period of 10 years, the DoI jurisdiction would extend to all legislation (including Acts), irrespective of when enacted.

1.20 The DoI jurisdiction would be discretionary, and would be in addition to, and not a replacement of, the Courts' current judicial review jurisdiction. However, the existing judicial review jurisdiction would be enlivened by an interpretation provision in the RR Bill requiring the Courts to interpret any legislation (including Acts) consistently with the Bill's specified principles if at all possible (cf, New Zealand Bill of Rights Act 1990 (NZBORA), section 6). Initially, as with the DoI jurisdiction, this would apply only to legislation made after the date of commencement of the Bill, but would be extended to all legislation after a transition period of 10 years.

- ***regular review of body of legislation***

1.21 The Taskforce is convinced that consideration of legislation at the time it is created is not sufficient to achieve the purposes of the RR Bill, and that regular review of the body of legislation is crucial to establishing and maintaining quality, effective and efficient legislation in a dynamic environment.

1.22 The Taskforce expects that the 10 year transition period for the DoI jurisdiction and interpretation provisions will encourage Ministers and public entities responsible for administering legislation, within this period, to undertake a comprehensive review of the body of legislation for which they are responsible, and discontinue or modify legislation that is found to be incompatible with the principles set out in the RR Bill.

1.23 In addition to the transition period, the RR Bill proposed by the Taskforce would require every public entity to use its best endeavours to regularly review all legislation that it administers for compatibility with the principles. Each entity will be required to include in its annual reports a statement of what steps it has taken to review legislation during the year to which the report relates, and the outcome of any reviews completed during the year.

1.24 The Taskforce considers that this process can usefully be enhanced by providing for the Minister with responsibility for the RR Bill to issue guidelines to public entities on the steps to be taken in ensuring legislation is regularly reviewed. The Minister would also be entitled to issue guidelines on the application of the principles, and the information as to the compatibility of legislation with the principles that should be included in explanatory notes accompanying the legislation. The Taskforce recommends that this oversight role be given to the Minister of Finance. The Taskforce considers that this role would complement and reinforce the existing role of the Treasury (and the Regulatory Impact Analysis Team) as the primary agency within the public sector with responsibility for quality issues in the policy development of legislation.

**Additional recommendations**

1.25 The Taskforce considers that the RR Bill will demand and effect meaningful change within and across the three branches of government: the executive; the judiciary; and the legislature. However, effecting that change need not, and should not, be limited to enactment of the Bill. In particular, the Taskforce considers that appropriate initiatives within both the legislative and executive branches could usefully support and reinforce the mechanisms in the Bill.

1.26 The Taskforce respectfully suggests that the Standing Orders of the House of Representatives be amended to enable Parliamentary review of proposed or existing legislation against the principles set out in the RR Bill. The RR Bill will require certifications to be tabled on a Bill's introduction into the House, and for re-certification in respect of initiatives amended or inserted by supplementary order paper. In addition, the Taskforce recommends that the Standing Orders be amended to provide for certification by the Select Committee considering the Bill on its report back to the House of Representatives.

1.27 The Taskforce also respectfully suggests that the House consider giving the Regulations Review Committee an oversight role in relation to all legislation, including Acts. The Taskforce suggests that the bases on which the RRC may review legislation be expanded to consider submissions that any proposed or existing legislation departs from the principles set out in the RR Bill. The Taskforce envisages that, in the case of Acts, the RRC would be authorised to report its findings to the House. In the case of other legislation, the RRC would have the same powers in respect of disallowance as it currently has in respect of regulations.

1.28 Within the executive branch, the Taskforce considers that inter-agency co-ordination on quality of regulation issues, including compliance with the proposed principles of regulatory responsibility, is appropriate and necessary to ensure consistent advances in regulatory quality are made in the public sector. The Taskforce considers that the appropriate agency to manage this co-ordination is the Treasury under the Minister of Finance, as the Government Minister with the greatest oversight of economic and fiscal management.

1.29 The Taskforce also recommends that the operation of the RR Bill once enacted, including the principles for responsible regulation, be reviewed at 5-yearly intervals to determine whether its purposes are being met, and whether amendments or other measures are necessary to improve the quality of legislation in New Zealand.

**Future work streams**

1.30 The Taskforce has determined that local government should not, at this time, be made subject to the RR Bill. While the Taskforce considers that the principles of responsible regulation are of equal application to local government legislative activities, the Taskforce has not specifically considered whether the mechanisms proposed in the Bill should be applied to local government. The Taskforce therefore recommends that further work be undertaken to address the issue of how best to ensure quality legislation at a local government level, with a view to reporting recommendations as part of the first 5-yearly review of the Bill.

1.31 The Taskforce also recommends that further work should be carried out into the appropriateness of extending the provisions of the Public Works Act 1981 to provide compensation for takings and impairments of both real and personal property. Such an extension could usefully reinforce and enshrine the proposed principle of regulatory responsibility regarding takings in the RR Bill.

## PART 2 – THE NEED FOR REFORM OF THE REGULATORY PROCESS

2.1 Quality legislation is a constitutional issue. Basic constitutional principles that New Zealand has inherited as part of our Westminster tradition include assumptions that the law should be clear and accessible, that taxes will not be imposed except by law, that the government will not take property without good reason and paying compensation, that access to the Courts will not be barred without good reason, and that vested rights will not be altered retrospectively. In New Zealand, unlike some other countries, these principles are not contained in a written constitution but are scattered throughout the statute book, common law and in constitutional conventions. These principles are described in various documents including the Standing Orders of the House of Representatives, the Cabinet Manual and the LAC Guidelines.

2.2 The LAC Guidelines, in particular, set out important matters relating to both process and content that need to be considered by policy-makers and legislators when engaging in regulation of any sphere of activity. It is easy to demand a legislative solution to a problem or a need. But ensuring that policy proposals are translated into sound and principled legislation is not so easy – and there is always a risk that fundamental rules of our constitutional system will be infringed by hasty or ill-conceived legislation. The LAC Guidelines are in effect a "checklist" of process and substantive principles for testing of all legislative proposals. The onus is ultimately on officials to ensure compliance with principles such as those contained in the LAC Guidelines. Unless those principles are taken into account early in the legislative process, it is difficult to give timely quality advice about the likely consequences of a particular legislative proposal.

2.3 Unfortunately historical experience shows that not all legislation complies with these basic constitutional principles. There are no direct political or legal sanctions for legislation which does not comply, yet citizens will ultimately bear the direct cost – especially in cases where property is taken but compensation not paid, where access to the Courts is barred, or where the law is unclear or inaccessible. In a system such as New Zealand's, with a unicameral legislature and Courts which abide by the doctrine of Parliamentary supremacy, there are few checks and balances once legislation is introduced into the House. A meaningful discussion about proposed legislation requires transparent consideration of the LAC Guidelines at the *start* of the process, not at the end.

2.4 The Legislation Advisory Committee noted in late 2007 its concern that the policy development process in New Zealand is weakened by the absence of a mandatory compliance process for the LAC Guidelines.[4] These concerns are amplified in the *Government Statement on Regulation*: *Better Regulation, Less Regulation*[5] which noted that departments have often been reluctant to certify that regulatory analysis requirements (including compliance with the LAC Guidelines) have not been met or that the analysis is inadequate. An independent New Zealand Institute of Economic Research study reached similar

[4] Legislation Advisory Committee *Activities of the Legislation Advisory Committee During 2007: Report to the Attorney-General* at p 14. Available online: http://www2.justice.govt.nz/lac/pubs/2007/annual-report-2007.pdf.

[5] Released by Hon Bill English and Hon Rodney Hide on 17 August 2009, and see also the Treasury Cabinet paper which preceded this statement.

conclusions.[6] In the Taskforce's experience, legislation which turns out to have unforeseen effects often has not been adequately tested at an early stage against fundamental principles and regulatory analysis requirements.

2.5 The fundamental nature of the principles contained in the LAC Guidelines, and patchy compliance by policy-makers with the guidelines and the regulatory impact analysis requirements, signals the need for a coherent, mandatory, regulatory quality regime. Analysis of the scale and scope of a problem, the various options for addressing it, whether legislation is required (and whether existing laws are sufficient) should be the first things examined by policy-makers. Yet all too often they are the last. The Taskforce members are satisfied that the constitutional principles require additional and effective mechanisms to motivate early, and transparent, consideration of proposals against them. They should have legislative force.

2.6 Poor quality legislation affects all New Zealanders, not just those persons or businesses which are required to interpret and comply with particular legislation. Government regulation is vital to improving economic efficiency and – by extension – New Zealand's economic growth. But as Ronald Coase explained, the costs of governmental intervention may be very high and will not necessarily give better results than doing nothing and leaving the problem to be solved by private individuals and the courts.[7] Where governmental action cuts across private rights there is inevitably economic cost. That cost should to the largest extent possible be explicitly assessed and confronted by law-makers. Unintended effects, including unanticipated economic costs, are a common result of legislation.[8] Those costs could often be predicted (if not entirely avoided) by rigorous application of the principles of quality legislation. The LAC Guidelines have not had the desired effect in encouraging policy-makers and legislators to quantify and evaluate the costs of particular legislation. Something stronger is needed to require policy-makers to confront regulatory effects on productivity and economic costs earlier rather than later.

2.7 It is for this reason the Taskforce recommends the enactment of specified "*principles of responsible regulation*" with which all legislation should aim to comply. These principles will require an independent consideration of the foundations and requirements of high quality legislation. They are based closely on the existing regulatory impact analysis regime, the LAC Guidelines, and the principles currently applied by the Regulations Review Committee, all of which describe in abstract terms the principles of good legislation. Those principles should in the Taskforce's view be backed by effective mechanisms to secure transparency in their application, and incentivise compliance. The Taskforce therefore recommends that the chief executive of any agency seeking to enact legislation (or a Minister) must certify compliance with the

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6 NZIER Compliance *with Regulatory Impact Analysis Requirements* February 2008. Available online: http://www.med.govt.nz/upload/57459/riau-nzier-evaluation-report-2007.pdf.

7 Coase *The Problem of Social Cost* Journal of Law and Economics (October 1960).

8 There is an extensive literature on cost-benefit analysis and its consequences for regulation: Ogus *Regulation Revisited* 2009(2) Public Law 332; Epstein *Towards a Regulatory Constitution* April 2000; Baldwin and Black *Really Responsive Regulation* LSE Law Society and Economy Working Paper 15/2007; and Wilkinson *Constraining Government Regulation* November 2001.

principles. If legislation does not comply with the principles then the Courts can make a declaration to this effect.

2.8 Will these principles of responsible regulation make any difference? The Taskforce believes so. In particular, the principles, and associated reinforcement mechanisms, will require policy-makers and legislators to explicitly confront the costs of particular legislation. It is when these costs (particularly costs on private individuals) have been ignored that the most egregious examples of poor regulatory outcomes have occurred. By "poor outcomes" we mean legislation which did not accord with basic principles of the rule of law and led to punitive or capricious outcomes.

2.9 To take an overseas example, a recent decision of the United States Supreme Court is a useful illustration of the circumstances in which the principles are intended to provide a "brake" on poor quality legislation. In the well-known case of *Kelo v City of New London*[9] a town developed a plan for the rejuvenation of its inner-city suburbs and sought to compulsorily acquire Ms Kelo's property for use in the development. Ms Kelo objected on the basis that the beneficiary (i.e. the owners of the new development) was a private corporation. She unsuccessfully appealed to the United States Supreme Court.

2.10 Ms Kelo's objection, had it been made in New Zealand, would have succeeded because existing New Zealand public works legislation does not empower the taking of land for such a "private" development. However, it is possible to conceive of an amendment to our legislation which would allow such a taking to occur. The proposed RR Bill would require those proposing legislation granting such a power to consider whether such a taking was in "the public interest", as opposed to private benefit, and that compensation to a property owner should be paid, to the extent practicable, by the beneficiaries (i.e. owners) of such a development and make a public certification of the results. That certification, together with any supporting analysis, would inform public debate on the proposal.

2.11 Some recent examples of controversial legislative initiatives which might have benefited from more extensive public consideration in light of the Taskforce's suggested principles include:

(a) the cancelling in 2000 of the 1994 West Coast Accord which had provided for a perpetual sustainable supply of rimu for sawmilling, inducing Westco Lagan Limited to build a significant business on the basis of that supply. The Government's legislation provided that no party was entitled to compensation by the Crown for any loss or damage. Westco Lagan sued the Crown and lost.

(b) the foreshore and seabed legislation enacted by the Government in 2004 in response to the Court of Appeal's decision in *Attorney-General v Ngati Apa*.[10] The legislation vested full legal and beneficial ownership of the foreshore and seabed in the Crown, limited the jurisdiction of the Maori Land Court to examine Maori claims for customary rights to the foreshore

[9] 545 US 469 (2005).

[10] [2003] 3 NZLR 643.

and seabed, and barred that Court from making certain types of orders otherwise available under the Te Ture Whenua Maori Act 1993;

(c) the announcement by the Government in May 2006 that the local loop owned by Telecom New Zealand would be forcibly unbundled following the introduction of the Telecommunications Amendment Bill into Parliament. Telecom New Zealand's share price fell sharply, reportedly reducing the value of its shares by $3 billion in six weeks;

(d) the rejection by Government Ministers of the proposal by the Canadian Pension Plan Investment Board to acquire up to a 40% shareholding in Auckland International Airport Limited, following the recommendation of the Overseas Investment Office that the investment proposal be accepted. After the proposal, but before the decision was made, the Government introduced by regulations an additional criterion of maintaining New Zealand control of "strategically important infrastructure";[11]

2.12 In each of the above cases policy advice may well have been given by officials to the Government on the likely costs of legislation, the likely winners and losers, litigation risks, violation of principles and any alternatives to legislation. But this analysis was not made public: the likely costs were not adequately discussed, and full debate and consultation did not occur.[12] An application of the Taskforce's principles may not have changed the outcome in any of the cases but it would have ensured the policy development process was informed by a meaningful discussion about the costs of various options *before* a decision was made.

2.13 There are always winners and losers in policy-making. But legislators and policy-makers should bear the political cost of publicly acknowledging who loses and by how much. When regulating sensitive commercial spheres, public debate and consultation is not always possible. But intra-Government discussion should, at a minimum, be accompanied by an explicit recognition of the costs of legislating and ensure that real alternatives are debated.

2.14 The Taskforce's principles will not operate to bar the enactment of legislation– Parliament is sovereign and ultimately may enact any laws it wishes. The principles are, however, intended to ensure full consideration of basic constitutional concepts at the early stages of the formulation of new legislation. If this is achieved, the Taskforce considers the political and economic costs of new legislation will be much clearer, and this will enable more accurate and informed governmental and public debate about the legislation before it is enacted.

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[11] Overseas Investment Amendment Regulations 2008 (2008/48), amending reg 28 of the Overseas Investment Regulations 2005. See the discussion in Report of the Regulations Review Committee *Complaint Regarding the Overseas Amendment Investment Regulations* AJHR I.16P September 2008.

[12] As to appropriate consultation see the LAC Guidelines at [1.3.1] – [2.3.2] and the Cabinet Manual at [5.14] – [5.21].

**Costs and benefits of the Taskforce's recommendations**

2.15 The Taskforce expects that the introduction of the RR Bill will improve the policy development process and therefore the quality of the legislation passed. Better legislation should make New Zealand a more attractive place in which to live and do business. Higher quality legislation should impose fewer unintended consequences, reduce compliance costs and better achieve the intended policy objectives.

2.16 The benefits and costs of the RR Bill are not easily quantifiable. The Taskforce is convinced, however, that the potential benefit to the New Zealand economy of a step-change in the quality of legislation significantly outweighs the additional compliance costs placed on the Government by the Bill. Even quite small gains from raising economic growth as a result of an improvement in legislative quality are capable of producing gains in public welfare that are likely to significantly outweigh any additional compliance costs incurred by the public sector.

2.17 The passage of the RR Bill will provide a firm foundation for the Government's attempts to improve regulatory quality and raise economic growth. The Bill will also support the government's other steps to improve regulatory quality. These steps include the administrative changes to the Regulatory Impact Analysis regime and the Government's Statement on Regulation.

2.18 The RR Bill should improve the quality of laws and regulations and reduce the amount of legislation that would otherwise be passed. The expected benefits will be enhanced if associated measures require regulatory proposals to be tested against the proposed principles before any political commitment is made to proceed with those proposals. This is because the early identification of poor quality proposals in the policy development process should reduce the resources put into some of these proposals. In addition, where improved proposals proceed, fewer subsequent amendments can be expected as the legislation that is passed is more likely to be fit for purpose. This will reduce the costs to the New Zealand public of undertaking policy development and is likely to improve the productivity of privately- and publicly-funded resources spent on the policy development and law-making processes.

2.19 Improving regulatory quality – including getting it right the first time – should also improve the investment environment by reducing uncertainty as to future amendments to legislation. The potential for gains in economic growth come in good part from this aspect.

2.20 The introduction of the RR Bill will raise public sector administrative costs in a 'before-and-after' comparison. But it will not necessarily raise them compared to what would be likely to occur anyway in the fullness of time. For example, the Government's recent regulatory announcements and initiatives commit it to reviewing the quality of much existing regulation and also to require greater accountability from government agencies for the quality of their regulatory analysis.

2.21 Nevertheless, the passing of the RR Bill into law could be expected at least to bring forward public sector costs, for example in the form of new guidelines and training sessions for policy analysts. The extent to which this is so

depends in part on how ill-prepared policy analysts are currently to apply the principles in the LAC Guidelines and also on the extent to which they would be required to be better trained anyway as part of the response to the Government Statement on Regulation.

2.22 The RR Bill will also increase the state's claims on public resources in other ways. The new role for the Courts of declaring compatibility with the principles will lead to public entities being required to defend the legislation they administer. In such situations, the state will incur costs associated with the Courts' time and with defence of legislation. As the Courts can order costs to the plaintiff, public entities could in some cases be liable for the plaintiff's costs.

2.23 Nothing in the above discussion suggests that the *overall* claims of public entities on taxpayers will be increased by the passage of the Bill, relative to the claims that public entities would be expected to make as a result of alternative arrangements for improving regulatory quality. However, the discussion does identify likely changes in the composition of these claims.

2.24 The important consideration in terms of community welfare overall and the achievement of the Government's policy objective, as set out in the August 2009 Government Statement, is whether the benefits the New Zealand public derives from the Bill overall exceed the likely costs. The Taskforce considers the potential benefits to the New Zealand public from the Bill markedly exceed any increases in administrative costs. The degree to which these potential benefits are converted into actual gains depends on the accompanying supportive measures. In particular, current and future Governments would need to take action to improve the quality of existing legislation as reviews under the Bill identified weaknesses and pointed to effective remedies.