NEW ZEALAND BUSINESS ROUNDTABLE

Submission on Options for a Regulatory Responsibility Bill

February 2008

1. Introduction

1.1 This comment on the three options for a Regulatory Responsibility Bill that are in front of the Commerce Committee is made by the New Zealand Business Roundtable, an organisation comprising mainly 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 appreciate the opportunity to review the options and commend the Committee for the careful and constructive approach it is taking to the bill.

1.3 The bill ranks with New Zealand's other main 'economic constitutions', the Reserve Bank Act and the Fiscal Responsibility Act (now part of the Public Finance Act). It would extend comparable disciplines to the regulatory area (meaning primary legislation and major regulations). It is important because poor quality regulations can deter investment, result in resource misallocation and inefficiency, harm the environment and reduce future living standards. We note in this context that a study of Australia's good productivity performance in recent years that has just been released by the International Monetary Fund finds that it was due in large part to the removal of product and labour market regulations that had been holding the economy back.

1.4 The Committee's careful approach is particularly desirable because bad regulation was highly damaging to New Zealand in earlier years and its recent resurgence is contributing to the country's declining productivity performance. The problem is shared to varying degrees by other countries. None has found a satisfactory way of constraining ill-conceived regulation. Like the Reserve Bank Act and Fiscal Responsibility Act, the concept of a Regulatory Responsibility Bill breaks new ground and in our view holds real promise for curbing regulatory excesses. Its aim is to provide a better set of checks and balances on decisions by executive government.

1.5 While legislation with such constitutional features would ideally be put before parliament as a government bill, a member's bill in the MMP parliament allows ample scope for relevant official and private sector resources to be harnessed in order to achieve a high quality outcome. Given the ongoing costs of delay, we think the committee should proceed with all deliberate speed but also take whatever time is necessary to determine which of the three options now before it would best serve the public interest. It should not be in such a hurry to reach a decision that it rejects a far-reaching option that has the potential to make the greatest contribution to the public interest simply on the grounds that its implications have not been adequately explored. Instead, we would hope that the Committee asks for any necessary research into possible problems and remedies for them to be undertaken. Amendments to alleviate valid concerns should be considered. We make suggestions of this kind below.

2. A stocktake on the process to this point

2.1 We consider that the Committee has made good progress to date in examining the issues. There is clearly widespread agreement between key submitters, including business and professional organisations and the Law Commission, that regulatory quality is a real problem that needs addressing.

2.2 There is also widespread agreement that existing Cabinet guidelines in the form of the Regulatory Impact Statement (RIS) requirements and the Legislation Advisory Committee Guidelines (LAC Guidelines) are ineffectual. The Small Business Advisory Group of the Ministry for Economic Development (MED) summed the situation up well in its March 2006 report:

> What is clear is that the government has not adhered to its own impact analysis rules, and has allowed perfunctory and superficial regulatory impact analyses (RIA) and cost/benefit analyses to precede the imposition of new regulations. This has led to the passage of legislation that has business cost and compliance impacts that no-one assessed or appears to have anticipated. The Holidays Act 2003 is a stand-out example of this. We urge you to be vigilant on behalf of SMEs in ensuring that only regulatory impact analyses of the highest standard are accepted by Cabinet.

The report called for the government to improve the quality of cost-benefit analyses in RISs by 30 September 2006. This has not happened, even though the government indicated it wanted to tighten the RIS disciplines, including by requiring government discussion and consultation documents issued from 1 April last year to contain a regulatory impact statement or analysis. We wrote to the minister of commerce on nine occasions last year pointing out that relevant bills and discussion papers contained no such analyses. In a number of cases she acknowledged the criticisms and in others suggested there were mitigating circumstances. Even when RISs have been produced, however, many have been of a completely unacceptable standard. An example is the RIS on the government's major climate change legislation. Our criticisms of it are set out in an annex to this submission. The Law Commission is of the view that the LAC Guidelines are also routinely ignored.

2.3 Moreover, the problem is even worse than outlined in the previous paragraph in that the latest RIS requirements (issued early last year) have been seriously watered down. They no longer require a demonstration that a proposed regulation would produce a net benefit to the community. The requirement to show that the expected benefits to the community from a proposed regulation exceed the costs compared to the next best alternative was the centrepiece of the previous RIS requirements. We have been unable to find out why the Cabinet requirements were gutted in this way.

2.4 Because of the history of ineffectual efforts to rein in regulation, there now seems to be general agreement that statutory disciplines are necessary. This is pleasing. The Law Commission proposed a bill, the Legislation Standards Bill, that focused on ministerial certification of compliance with the RIS requirements and LAC Guidelines without spelling them out. However, not only are these disciplines ineffectual but they could also be amended by the government of the day without recourse to parliament (as the emasculation of the RIS requirements demonstrates). There now seems to be general agreement that the Law Commission's proposed bill is no solution.

2.5 For its part, MED continues to favour merely codification in statute of the regulatory impact statement requirements. This approach at least has the virtue of ensuring that the executive cannot amend the requirements without recourse to parliament. However, as noted, the RIS requirements no longer require a demonstration that the benefits of a regulation exceed the costs, a key test of good regulation. Moreover, even if such a requirement were reinstated, cost benefit analysis is not a robust technique, particularly when costs or benefits are largely intangible, and it is entirely silent about the constitutional aspects of state regulation, such as the need for a presumption in favour of individual security in person and property. For example, cost benefit analysis is not very helpful in assessing the intangible diplomatic and commercial benefits to New Zealand of ratifying the Kyoto Protocol (and officials have made no effort to do so) and is no help at all in evaluating the costs of the limitations on freedom of speech imposed by measures such as the Electoral Finance Act. In such cases, a simple declaration by a minister that a bill meets the Cabinet's requirements may be little more than an assertion. This approach, supplemented by a limited reference to property right issues, is the essence of Option 1. We comment further on Option 1 below but at this stage the key point to note is that, leaving aside the criticisms made in paragraphs 2.2 and 2.3 above, it is not relevant to a large body of regulation.

2.6 Recognising the limitations of Option 1, the drafters of Option 2 have added a requirement to certify compliance with the (emasculated) RIS requirements. This approach has the virtue of including a focus on constitutional matters. However, it suffers from the same problem as the Legislation Standards Bill, namely that it would allow the executive to modify the content of those guidelines without parliamentary approval. Moreover, there may be no objective answer to the question of whether a particular regulation complies with the LAC Guidelines. To some extent they are in the nature of a checklist of questions to be posed rather than a guide to what the answers to them should be. If this option were to have any substance, the essence of the LAC Guidelines, appropriately modified, would need to

be incorporated in it, along the lines of the codification of the RIS requirements (suitably improved) in Option 1. However, it would still lack teeth as there would be no recourse against an unsubstantiated assertion by the executive that a particular piece of legislation was compliant.

2.7 This unsatisfactory state of affairs appears to reflect a desire in some quarters to keep the courts out of matters of substance in relation to regulation and regulatory takings. MED doubts that Option 2 will be effective in this regard and we consider that the objective itself is undesirable. The courts are the appropriate branch of government to adjudicate legal disputes concerning takings of property rights, including regulatory takings. As the supreme law-making body, parliament can modify the law subsequent to court decisions should it wish to do so.

2.8 The desire by MED and the Law Commission to keep the courts from playing their proper role appears to reflect a fear of 'litigation risk' to the Crown and a distrust of New Zealand judges. However, litigation is a valid means of resolving disputes over property rights. Indeed, recourse to it is essential for a property rights system. Litigation risk, with the possibility of fiscal costs to the Crown, should not be a driver of a regulatory discipline framework. This should be based on a national interest perspective. As a general rule, if the Crown takes (for good reason or bad) it should pay, for the same reasons that a private individual should pay. The distrust of our judges is inconsistent with the argument advanced by the government when abolishing the right of appeal to the Privy Council that New Zealand courts were as good as the world's best.

2.9 The dilemma of trying to ensure that governments are constrained in making unsubstantiated statements that regulatory proposals comply with statutory requirements (such as those of an enhanced Option 2) has been approached in two ways by some submitters. We and all other business organisations support a role for the courts as a check on the taking of property by the executive. The New Zealand Institute of Chartered Accountants favours the setting up of a specialist

agency, independent of executive government, for this purpose. An assessment of international and domestic experience with this option in the discussion document *Constraining Government Regulation* (which was provided to the Committee as part of our initial submission on the bill) failed to find evidence that this approach has been successful. The consistent pattern, most recently seen in Australia with the removal of the Office of Best Practice Regulation from the independent Productivity Commission, has been for governments to undermine over time the independent status of such bodies. For this reason we see a role for the courts, as proposed in Option 3, as the only approach with real 'teeth'.

2.10 In summary, we think that the process the Committee has followed to date, with valuable inputs from MED, the Law Commission and submitters, has helped to clarify and narrow the range of options. In our view, Option 1 has no merit, and neither does Option 2 without a codification of the key LAC guidelines in it. This would make Option 2 more like Option 3. The key differences between an enhanced Option 2 and Option 3 would be the absence of an independent check on the executive; a mechanism to consider compensation for regulatory takings; and recognition of the issue of who should pay for a taking.

2.11 We think the logic of the position of the Law Commission and some other submitters points in the direction of an enhanced Option 2. Therefore the range of options for the Committee to consider can be narrowed to an enhanced Option 2 and Option 3. In both options we see merit in incorporating statements of regulatory impacts and provisions for member's bills, as has been suggested in the course of the Committee's work. There is, we understand, general agreement that the 'ouster' clause in Option 3 should be removed.

3. Detailed comments on the options

3.1 ***Option 1***

The Regulatory Responsibiity (Option 1) Bill requires a minister to present a regulatory impact statement to the House of

Representatives when a government bill is introduced and when regulations are tabled. It specifies what such a statement must contain. A variant, option 1B, specifies additional details about the impacts on property rights that must be stated.

3.2 We consider that this option would actually be a backward step because it is based on the emasculated RIS requirements. The problems with it can be summarised as follows:

(a) there is no requirement to make a case that the benefits to the community from a bill or regulation can be expected to exceed the costs; to the contrary it allows a minister to simply state that it is the preferred option because the government thinks it is the best option;

(b) there is no requirement to take a national interest perspective. In particular the statement is not required to identify benefits or costs to the community (as distinct from benefits or costs to a favoured constituency, the governing parties, or any unidentified group);

(c) there is no requirement to specify an objective that does not prejustify the preferred solution; for example, it allows a minister to simply state that the objective is to implement the government's preferred course of action;

(d) there is no requirement to consider all feasible alternatives; this allows a minister to ignore options that would be inconvenient for party political reasons;

(e) section 12 requires an examination of the “full range" of impacts on various (possibly conflicting) dimensions of outcomes, none of which mentions explicitly the welfare of New Zealanders, and with no guidance as to the tradeoffs between them;

(f) there is no requirement that any assessments of benefits and costs be professional, objective, realistic, quantified, verifiable,

or even plausible. Unsupported opinions by unidentified persons about hoped-for benefits and costs would suffice;

(g) apart from the contents of section 1B, there is no constitutional perspective and no presumption in favour of the prime role of the state – to protect individual autonomy and legitimately owned property; and

(h) it does not include more adequate accountability and transparency statements of the type that are incorporated in the Public Finance Act with respect to fiscal policy statements.

3.3 Option 1 could be improved by incorporating the requirements identified in points (a) – (d) above. Problem (e) could be resolved by eliminating the conflicting considerations and specifying that the objective is to improve citizens' welfare, as well-informed citizens would assess it for themselves. Problem (f) is much harder to address. One difficulty is that assessments of future costs and benefits are subjective in that they depend on the view taken as to how the future might unfold with and without the proposed regulation. Since reasonable people can and commonly do disagree on this, there is the unresolved issue as to whose views about future costs and benefits should be reported to the House of Representatives. A second, deeper problem is that people may fail to agree about whether something is a cost or a benefit. For example, some may consider a windfarm to be visual pollution (ie a cost) while others may consider it to be kinetic art (ie a benefit). In our view, such fundamental limitations make cost-benefit analysis too subjective a tool to be a centrepiece of a regulatory responsibility statute. This objection strikes at the heart of Option 1.

3.4 With respect to (g) above, we consider that Option 1 should include section 1B in order to put more weight on constitutional principles. We note that MED in its assessment of the three options (eg paragraph 25 of its report of 16 November 2007) does not favour provisions that would "elevate property and contractual rights above other impacts and outcomes". Here MED seems to be rejecting the

proposition that the prime purpose of government is to safeguard the individual's person and property. Concomitantly, it appears to be rejecting the central presumptions in the LAC Guidelines, for example the principles in favour of the liberty of the subject and the principle that property will not be taken without full compensation. The extent to which MED's apparent position is a radical departure from normal constitutional perspectives is indicated by the following passage in the LAC Guidelines:

> The basic common law perspective of the courts is that a person's liberty and property will only be taken away or confined after due process of the law, which processes are designed to ensure that no one is deprived of individual liberty unless a case is proven against that person by fair procedures. These ancient rights of due process protecting liberty and property date back at least to the 13th century and the Magna Carta. They are now in the Imperial Laws Application Act 1988 which preserves many of the ancient statutes securing liberty and due process.

MED's opposition to the elevation of security in property and contractual rights is particularly disturbing given its statutory mission of promoting economic development.

Option 2

3.5 Option 2 includes the certification requirement proposed in the Law Commission's alternative bill (the Legislation Standards Bill). It excludes the requirement in the Legislation Standards Bill relating to regulatory impact assessments. This exclusion is sensible because these requirements are now incorporated in chapter one of the LAC Guidelines and Option 2 also includes a regulatory impact statement requirement. In our view, this option is an improvement on Option 1 because it reduces the reliance on cost-benefit analysis by giving weight to the constitutional considerations embodied in the LAC Guidelines. However, we do not think that it would adequately address the major regulatory problems that the country is facing. Our principal problems with it can be summarised as follows:

- its provisions relating to the regulatory impact statement requirements are identical to those in Option 1 and are therefore subject to the same weaknesses;

- it leaves the content of the LAC Guidelines under the control of executive government;

- it allows the executive to simply assert that a bill or regulation complies with the LAC Guidelines even if its legal experts advise otherwise;

- the LAC Guidelines are multi-faceted and contain many potentially conflicting considerations without guidance as to tradeoffs;

- even as they stand, the Guidelines do not address the question of whether compensation for a taking should be paid by the taxpayer or a beneficiary group; and

- Option 2 does not include accountability and transparency statements of the type that are incorporated in the Public Finance Act with respect to fiscal policy statements.

3.6 The Schedule to Option 2 implicitly acknowledges the second of these problems by raising the possibility of requiring a government to provide notice of and consult on amendments or replacements to the LAC Guidelines following the passing of this option. While this would improve Option 2, we do not consider that it would effectively constrain the executive. If the House of Representatives really wishes to oblige the executive to report on whether a bill or regulation complies with important constitutional principles, it should not leave the final decision on them to the executive.

3.7 We understand that the Law Commission is reluctant to codify the key principles of the LAC Guidelines that should apply to government bills or regulations for fear that this would allow the courts to play too large and unpredictable a role. The notion that our courts are unreliable and unpredictable is inconsistent with the president of the

Law Commission's support for the establishment of the New Zealand Supreme Court. Moreover, Sir Geoffrey Palmer's well-known position in favour of a written constitution in order to curb executive power implies a greater role for the courts. Sir Geoffrey also now supports the inclusion of protections for property rights in the New Zealand Bill of Rights Act, which would give the courts an increased jurisdiction. In any case, as MED points out, Option 2, even as drafted, may fail to keep the courts out (see paragraphs 35, 51 and the executive summary in the report of 16 November 2007).

Option 3

3.8 Option 3 is not vulnerable to the criticisms made of Options 1 and 2. First, it contains a much more robust version of the RIS requirement in respect of the policy objective of a regulation, the consideration of relevant alternatives and the analysis of what might develop in the absence of the proposed bill or regulation. Second, it requires a demonstration that the benefits to beneficiaries of a regulation exceed the costs to those who have their property or other rights taken or impaired. Third, it codifies a number of principles of responsible regulatory management, taking these principles out of the direct control of the executive. Fourth, it uses a framework of mutual benefit from forced exchanges to combine the cost-benefit and property rights aspects in a unified and coherent manner. In particular, unlike Option 2, it incorporates the 'beneficiary-should-pay' principle, a central element of the Treasury's user charge guidelines, in a property rights context. Fifth, it incorporates accountability and transparency arrangements that ensure that statements to the House include expert professional opinions. In addition, Option 3 includes a requirement for a five-yearly review and reissue of statements. It thereby sets up a process for reviewing poor quality past laws and regulations.

3.9 Our earlier submission considered a number of possible objections to what is now Option 3, including that it could unduly limit the capacity of parliament or the executive to act. These are not repeated here.

3.10 MED has raised further objections to Option 3 in its 16 November 2007 report, namely that:

- it would give public servants a role independent of the executive and change constitutional arrangements in that officials do not report to parliament except through the executive;
- it might create a range of problems that are difficult to resolve or mitigate, "including the risk of judicial review against the substantive principles and rules"; and
- it could create a high litigation risk.

MED agrees that regulation should be subject to regular review and favours in principle including such a requirement in Options 1 and 2. However, it does not agree that review should be five-yearly.

3.11 The first point made by MED is based on a misconception. New Zealand has a public service that is independent of the government of the day unlike, say, the United States. This is an important feature of our constitutional arrangements. The role envisaged for chief executives in this bill is analogous to the statutory obligation placed on the chief executive of the Treasury to certify that budget documents meet the requirements of the Fiscal Responsibility Act (now part of the Public Finance Act).

3.12 On the second and third points, we consider that MED has ignored the desirability of incentives to encourage governments to regulate only on a principled basis and in the public interest. The aim of Option 3 is precisely to allow the possibility of judicial review of regulation that involves the taking of property rights in order to create a better set of checks and balances. If these are well structured the outcome would not be frequent court involvement; rather it would be a reduction in the volume of bad regulation that is adopted in the first place. Nothing in Option 3 prevents a government enacting laws and regulations that are demonstrably in the public interest. MED asserts that "quality assurance is probably best achieved by ensuring the

underlying analysis is disclosed, including a statutory requirement for consideration of a broad range of regulatory impacts across a broad range of outcomes". We know of no research into the effectiveness of regulatory disciplines that supports this assessment. In New Zealand's case it is abundantly clear that this approach has failed to work. If the ongoing disclosure of the analyses embodied in regulatory impact statements in New Zealand demonstrates one thing it is that the disclosure of inadequate analysis is not an effective constraint on executive government.

3.13 We consider that it is entirely proper for any citizen who believes that the government has taken or impaired their property rights to have their day in court to contend the issue. The government is not an independent party in such proceedings whereas the courts are both independent and experts in property law. In addition, governments are not above the law; they should comply with the laws of the land. As the sovereign law-making body, they can alter the law of the land, but then they should comply with it. The Crown should not be exposed to significant litigation risk if it regulates in the public interest, respects property rights and provides compensation if rights are taken.

3.14 To elaborate on this point, we see nothing in Option 3 that would allow a court to invalidate laws or regulations. Recourse to the courts should be available to resolve disputes over whether property rights have been taken. Thus in the Telecom unbundling case, for example, we see nothing in Option 3 that would have prevented the government from making the decision it did. However, if the bill had been in force, we envisage that the company or a shareholder could have sought compensation on the grounds that the action was allegedly in the public interest and therefore that the costs (in the form of the loss of value of shares in the company) should be borne by taxpayers at large, not just shareholders in Telecom. The Crown would have been able to present defences, such as that it was simply removing market power and depriving investors of excess returns. The court would adjudicate on the merits of the arguments and

determine whether the regulation took investors' property rights or not. If a court of first instance did so determine, the Crown might choose to appeal, provide compensation or review its actions. However, no compensation would be due if the court found that it had been ruled out by parliament. (The LAC Guidelines state that "if compensation is not to be paid for a taking of property the legislation should make quite clear this intention.") The key point here is that such disciplines would create stronger incentives for the executive to ensure that the case for a particular regulation was robust in the first place.

3.15 Finally, we think it is important for the Committee to note that MED's criticisms of Option 3 should be seen against the background of its earlier advice to the Committee that regulation in New Zealand is not a significant problem. This is an astonishing point of view and not one that has been shared by any key submitters. Government regulation around the world is not in good shape and New Zealand's high ranking in some surveys (eg by the World Bank) in selected areas of business regulation (mainly of relevance to developing countries) is not evidence of the overall quality of its regulations. In the final analysis, the issue is not whether the disciplines embodied in Option 3 are perfect and will have no problematic outcomes. All institutional arrangements are imperfect; the relevant issue in this context is which set of checks and balance is likely, overall, to produce better outcomes. The MED assessment does not address this question. Given the manifest shortcomings of present arrangements we have no doubt that the framework of Option 3 would be superior.

3.16 Nevertheless, we have given serious thought ourselves to improvements to Option 3 to meet possible concerns. Besides those suggested in our earlier submission we have identified some other potential improvements:

- We would not wish the bill to catch regulations that have only minor impacts. A materiality clause could be added of the type that is included in Options 1 and 2.

- Concerns have been expressed (eg by the Law Society) about what might be regarded as a property right, and whether, for example, import licences, tariffs, taxi licences, welfare benefits and the like could be regarded as property. We think the courts are quite familiar with what constitutes property and would regard such things as government-conferred privileges or benefits, not property. The Ministry of Justice did not consider this to be an issue in its advice to the government on MP Gordon Copeland's member's bill that would have included economic rights in the New Zealand Bill of Rights Act. If there is any legal advice to the contrary, we suggest that a 'for the avoidance of doubt' clause could be added clarifying that any change in welfare benefits, government subsidies or privileges that parliament is not legally bound to continue should not be deemed to be a compensable taking.

- The suggestion has been made that the bill could be used to take injunctive action to stop a bill that is before parliament from proceeding. We do not believe this would be the case, but if legal advice suggests there is any doubt on this point a clause could be added to prevent any such action.

- The provisions of the bill are intended to be prospective, ie to apply to the flow of new regulation and the stock of existing regulation when reviewed. It may be useful to explicitly state that it does not apply immediately to existing regulation. (For that reason we see no need for its implications for the existing stock of regulation to be exhaustively researched prior to its enactment.) Existing bills and regulations would be reviewed over time in accordance with the principles and timetable laid down in the bill to see if they conform with them, and if not to be suitably amended.

4. Conclusions

4.1 In our view Option 1 would be a material set-back on the status quo since it would enshrine in statute an emasculated version of the original regulatory impact statement requirement. If it were modified to codify the original version with the further specific features noted above it would be an improvement on the status quo. However, it would still not be useful for evaluating many regulations, and in other cases the weaknesses of cost-benefit analysis, both those that are intrinsic and those that arise in practice from shoddy evaluations, would gravely limit its effectiveness.

4.2 Option 2 is effectively ruled out as it stands by the impracticability of requiring certification of compliance with the LAC Guidelines in their entirety and because the executive can change the Guidelines at any time. Codifying their key features could alleviate these problems but the problem would remain that there would be no independent check on the quality of the certification or on an executive that was determined to ignore the intended constraints.

4.3 Option 3 is the most promising because it would reduce the incentives of pressure groups to lobby for regulations that benefit themselves at the expense of others and it would reduce the ability of politicians to use regulations to confer benefits on a favoured constituency. Parties that were the subject of unjustified and uncompensated regulatory takings would have the opportunity to seek redress in the courts. MED's assessment of the options appears to have ignored the key issue of the relative efficacy of different institutional arrangements in terms of improving incentives. This is not to say that that all concerns that have been expressed about it are unfounded or immaterial. In addition to the improvements we have suggested, we believe that the Committee should consider further ways of meeting genuine concerns and seek additional advice and input from outside parties as necessary.

Annex

Critique of Regulatory Analysis of Climate Change Policies

This annex uses the case of the government's climate change policies to illustrate the ongoing ineffectiveness of the Regulatory Impact Statement (RIS) approach.

The essential question for decision makers considering climate change measures is what costs New Zealanders should be forced to bear in the interests of supporting international efforts to mitigate greenhouse gas emissions. Those costs should be assessed against the likely benefits to New Zealanders' welfare in the form of gains from any reduced risk of adverse climate change, reduced risks of protectionist measures or improved diplomatic relationships.

The general public need to be convinced that costly action is in their interests, otherwise it is unlikely to be politically sustainable.

The first point to note here is the difficulty of quantifying the benefits with any precision or objectivity. This problem immediately limits the usefulness of cost-benefit analysis as a regulatory discipline.

However, the cost issue is amenable to quantitative analysis, at least in terms of orders of magnitude. If we knew that the costs to New Zealanders were likely to be of the order of, say, $50 million annually, they would be more reasonable in relation to possible benefits than if they were, say, $500 million or $5 billion.

Despite its controversial elements, the Stern report provided such an analysis at a global level – a more demanding task. A recent Canadian White Paper supporting the government's decision not to meet its Kyoto emission targets put the cost of meeting them at 6.5% of GDP or C$4,000 per Canadian household. New Zealand policy makers and the public should have the benefit of well-quantified estimates. This has never been the case.

National Interest Analysis *2002*

The first application of regulatory analysis (RIA) requirements in a climate change context occurred in February 2002. The National Interest Analysis released by the government purported to assess the costs and benefits of ratifying the Kyoto Protocol. However, it failed to determine whether projected climate change would be likely to be moderate and beneficial overall for New Zealanders, or marked and adverse. It recognised that there would be benefits to New Zealand from moderate warming but asserted, without any evidence or analysis of the underlying assumptions, that the longer-term consequences would be adverse. The analysis also failed to consider the question of intergenerational transfers – whether initial warming would benefit some generations of New Zealanders but impose a cost on later generations that might be much wealthier.

As a result of these inadequacies, the so-called national interest analysis was effectively just a statement that the government considered Kyoto ratification would be a good thing.

In the absence of a convincing analysis, the policy of introducing costs for no demonstrated benefits was bound to be unstable. The proposed methane levy, the

carbon tax and negotiated greenhouse agreements were all subsequently abandoned for lack of political support.

Emissions Trading Scheme *2007*

The latest test of the RIS requirement in a climate change context is the August 2007 RIS 'supporting' the Cabinet Policy Committee paper recommending an Emissions Trading Scheme (ETS) for New Zealand.

Again this RIS fails to make any case that projected warming would be negative overall for New Zealanders, although it did at least acknowledge in paragraph 22 the question of whether this could be demonstrated. It also acknowledged at the same point the issue of whether any the benefits from any averted risks of harm from climate change would exceed the costs to New Zealanders. Again it did not attempt to answer this question, perhaps because it is obvious that no New Zealand ETS could avert risks of damage from global warming because our emissions are insignificant in a global context.

Instead, officials proposed in paragraph 22 a different benefit for New Zealanders from reducing emissions, namely that New Zealand might otherwise fail to meet international commitments. However, the RIS made no case that New Zealand would fail to meet its Kyoto commitments under the status quo. Nor could it. Under the status quo the government could fund its international commitment – the Kyoto liability – from taxation. There is no suggestion that it will be unable to do so.

Earlier (at paragraph 10), the RIS had proposed yet another reason for rejecting the status quo, namely that imposing a price for carbon might be an efficient way of reducing emissions and meeting the Kyoto liability. However, the RIS does not attempt to quantify this expected saving, even though it would have been comparatively easy to do so. Moreover, if the problem is to reduce the cost of meeting the liability, the option of withdrawing from the Kyoto Protocol in accordance with its withdrawal provisions, or deciding that New Zealand could not meet its obligations, as the Canadian government has done, would be obvious alternatives. The RIS ignored these options, thereby failing to analyse the issue from a national interest perspective.

Suppression of relevant, if politically unpalatable, options is clear evidence of failure to consider the public interest.

The RIS's stated policy objective (at paragraph 28) introduced further confusion about what the policy problem might be for which the ETS was the best solution. The stated objective was not to protect New Zealand's international credibility and influence. It was much narrower – to reduce New Zealand's net emissions below business as usual levels while complying with the government's chosen international obligations, including the Kyoto obligation. That narrow objective statement bore no obvious relationship to New Zealanders' welfare and ruled out the status quo and the option of withdrawing from the Kyoto Protocol.

Statements of the public policy objective that are so narrow as to prejustify the preferred option violate the RIS requirement.

Furthermore, the RIS makes no assessment of the likely intended and unintended costs of introducing an ETS scheme. On the benefit side it makes no case that New Zealand would materially reduce international commercial and diplomatic costs as a

result of doing so. No cost or benefit estimates are quantified – the essence of a cost-benefit analysis. As a result the RIS provides no reason for expecting the benefits to New Zealanders from an ETS to exceed the costs. It is simply silent on this central issue.

Yet this ineffectual RIS was certified as satisfactory by the audit unit of the Ministry of Economic Development.