

COMMERCE AND SMALL BUSINESS

Our Vision

Effective policy and regulatory frameworks are important in order to promote confidence in our capital markets, promote competition, support efficient business transactions (with a focus on minimising compliance costs), improve the environment for doing business in New Zealand and develop international linkages. They help to create dynamic and trusted markets; establish effective international linkages and set standards so that firms have access to markets in other jurisdictions and can grow global businesses.

Labour's approach to Commerce policy will build on the platform we began to establish when last in office in order to provide the regulatory environment that supports businesses and our wider economic agenda.

We see regulation as an element of our core infrastructure as it affects all aspects of business and our relationship with international markets.

Recent events, both nationally and internationally, have highlighted the price that is paid when regulation is seen as a barrier in itself and deregulation becomes an end in itself. The Australian Productivity Commission made this point clearly in its *Rethinking Regulation* report where it said:

"[that] does not mean that [we] should engage in a 'race to the bottom' and abandon worthwhile regulations. There are important economic, social and environmental goals that warrant regulation, and should not be traded off simply to improve business competitiveness."

National has promoted the 'race to the bottom', and we must turn this around, with appropriately framed regulation that supports business growth, promotes confidence and meets international best practice.

We have decided to merge our Small Business policy with our Commerce policy as they both fit within the same overall framework. We will still have a Minister for Small Business but this will be extended to cover a more realistic definition of the small to medium enterprise (SME) sector to align with international approaches.

This will enable the policy to provide a platform for what we have described in our Economic Development policy as the "Pipeline for Business Growth".

Capital Markets Development

The Capital Market Development Taskforce (CMDT) developed a blueprint around New Zealand's capital markets as a system as opposed to focussing on its component parts. Our policy needs to reflect this systemic approach to reform.

Principles

The UK's Financial Services Authority has a set of 11 principles which provide a mechanism to hold participants and their advisers to account even when there has been strict compliance with the rules that might apply.

Labour will introduce a set of principles to underpin all legislation that relates to the capital markets and financial advice, recognising in particular the obligations of fiduciaries.

We recognise that compliance with the letter of the law does not necessarily mean compliance with the spirit of the law and we will ensure that a set of enforceable principles underpin all aspects of the financial sector's regulatory framework. These principles require firms to conduct business with integrity, due skill, care and diligence.

One of the lessons arising from the finance company failures suggests that the level of risk was hidden by many finance companies. They made their returns look just slightly better than the bank rate of return in order to encourage investors, while at the same time implying that the risk wasn't much greater than that of the bank. This in itself is unethical and would have been a breach of the principles had they been in place at the time.

Financial advisers worth their salt should have been able to identify that the rate of return was too low and been able to warn their clients off such an investment. The registering of financial advisers and requirements around qualifications and accountability has been addressed. However there remains the question around commissions and whether they can be justified in a fiduciary relationship.

This is an issue we will address in our first year of office, along with a review of the Authorised Financial Advisors/ Qualified Financial Entity structure.

Labour will review the Authorised Financial Advisors/ Qualified Financial Entity structure, together with the qualification regime, to ensure that it is fit for purpose.

Labour in government made considerable inroads in relation to an appropriate regulatory framework for Credit Unions. Given the nature of the relationship between credit unions and their members, we will review the work programme and establish a priority for updating the framework and passing the necessary amendments into law. Concerns were raised about the impact of the No Asset Procedure on credit unions prior to the 2008 election. The present government has not addressed those concerns and we will review the rules with specific reference to credit unions.

Labour will prioritise the Credit Union legislative timetable.

Labour will review the application of the No Asset Procedure rules as they relate to loans made by credit unions within a certain period prior to the NAP being applied for.

Reduce Compliance Costs for Capital Raising

As a consequence of a need for increased regulation of finance companies that were masquerading at low risk when they were higher risk, New Zealand has increased the regulation of offers of security to the public. This has led to increase costs for all capital raising, not just for finance companies.

Raising share capital for small companies has been too difficult, with compliance costs now including on-going issuer audits and various hurdles to registration of prospectus and heightened risks to directors.

Labour has said all along that while additional regulation of debt security was necessary, equity offerings have been over-regulated in the process. This increases the cost of capital and is a serious barrier to small to medium sized businesses expanding in export markets.

Labour will reduce compliance costs for equity offerings, which openly describe the risk of loss of investment, by simplifying prospectus and audit requirements.

Having been in the process of strengthening regulation around the finance companies as they collapsed, it is interesting to note that our one registered exchange, NZX, was not a factor in this massive destruction of wealth that affected thousands of New Zealanders. The NZX is not a target for major reform, as our early years in government were used to provide a solid regulatory framework for registered exchanges.

There is a weakness however in the application of this framework to NZX's secondary board. Their status as a registered exchange makes it difficult for NZX to use their Alternative Exchange (NZAX) as a springboard to the main board.

Having looked at the operation of secondary boards internationally, particularly the AIM (Alternative Investment Market) board attached to the London Stock Exchange, we propose to loosen the regulatory framework around the NZAX so that it can play a pivotal role in preparing companies for the main board. The reporting requirements will not be as strict, but that will be offset against improved support for the individual companies.

There are two features of the AIM Board that assist: the first is a tax incentive around investors leaving their investment in a company on the AIM Board for three years (this relates to Capital Gains Tax only).

The second relates to the use of highly experienced advisers – called Nomads (nominated advisers) - who prepare these smaller companies for listing on the AIM board. Nomads are the sole conduit for listing, which means that these companies can face a much lower level of regulatory compliance than their LSE listed counterparts as they are very well-prepared.

Labour will work with NZX to ensure that its Alternative Exchange (NZAX) can be a springboard to listing on NZX.

Quality Regulatory Design

The current government has squandered its term in office by focussing on the form as opposed to the substance of regulatory reform.

As already stated, regulatory frameworks are part of our core infrastructure and it is important that they are 'right-sized' and proportionate in terms of their design and their implementation/enforcement. During the Quality Regulation Review in 2006-07 we identified a range of issues that we will continue to address.

Labour will progress the large number of small “fixes” to a range of regulatory frameworks identified in the Quality Regulation Review.

We will do this through the Regulatory Improvements Bill process, which is an omnibus bill that we designed to deal with items that were not significant enough for departments to prioritise.

The Minister for Regulatory Reform will be able to oversee the policy work in the first instance, which will speed up the process.

Large Enterprises vs Small to Medium-sized Enterprises (SMEs)

There is often a difference between large enterprises and SMEs in terms of both the nature and the impact of regulation. Large enterprises often prefer principles-based regulation so they can design their own fit and smaller enterprises tend to prefer clear rules that they can follow.

The approach many of the SMEs are seeking is one which tells them that they are complying with the law, which in turn offers some protection against being sued for breaching the law. This is described as a ‘safe harbour’.

Various inspectors used to provide this reassurance in practice, although not technically in law, however the governments of the 1980s & 90s pulled away from this kind of regime, preferring that business paid for its own advisers and auditors, while the role of government simply became one of enforcement.

We have recognised the weakness in this model and will develop a range of safe harbour mechanisms to promote compliance.

Labour will work with relevant stakeholders to develop a consensus-based mechanism for designing ‘safe harbours’ for a range of compliance requirements.

Standard Business Reporting

The question “why can’t the many arms of government extend a single hand to business?” became the expression of business frustration at their experience of dealing with the government.

The solution lies in the implementation of a form of Standard Business Reporting (eg eXtensible Business Reporting Language (XBRL)). This would enable businesses to electronically submit their financial data to many government agencies in one transaction and thereby reduce the time and effort spent preparing and filing reports for government.

This was approved under the last Labour government and placed on the backburner by the present administration. We will reinstate this work, as it is vital to meeting our commitment to removing regulatory barriers to business growth.

Labour will reinstate work on standard business reporting, which has been proven internationally to significantly reduce compliance costs for business.

Standards & Accreditation

Labour will review the provisions of the Standards & Accreditation Bill that has been languishing on the Order Paper since the last election and substitute a Bill that meets the needs of industry. Our best advice is that it only requires minor adjustments to achieve its original purpose.

We have seen the results of the failure to provide for standards – e.g. this was a contributing factor in the leaky building debacle – and it is vital that the standard-setting processes are effective and up-to-date.

Labour will review the provisions of the Standards and Accreditation Bill.

NZ standards should also guide the minimum requirements for government procurement contracts as part of the value for money requirements over the lifetime of the product (as discussed in Labour's Procurement policy).

Competition Policy

When the Commerce Commission is constantly rebuffed by the courts when it is trying to promote and protect the interests of consumers, we need to investigate the cause and be prepared to respond.

Ten years on from the changes we made to Part 2 of the Commerce Act, which deals with restrictive trade practices (significantly section 36), it is time to review the section that requires:

- A substantial degree of market power (a lesser threshold than a “dominant position”, which was previously the standard)
- Taking advantage of that market power, and
- Motivated by a prohibited purpose.

The substance of the question that a court considers is what is known as the “counterfactual test” - namely whether the firm with substantial market power would have engaged in the type of conduct under scrutiny if it did not possess market power.

The Telecom 0867 case put the test in front of the Court of Appeal, which, bound to follow a Privy Council precedent, decided in Telecom's favour. Hammond J said:

“This case exposes the realities of the difficulty of counterfactual analysis and that it is not always of utility in the context of a case such as the present. The reality of the case is that it is about terminating charges which are markedly above cost and the willingness of Telecom, under threat of regulation, to share its monopoly rents with Clear.

Any realistic counterfactual must take monopoly rents as a given. It is difficult to see how there can be any plausible counterfactual about the distribution of monopoly rents where non-dominance has to be assumed: in the absence of dominance there

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can be no monopoly rents.” (Commerce Commission v Telecom Corporation of New Zealand Ltd [2009] NZCA 338).

The Supreme Court upheld the Court of Appeal and dismissed the Commerce Commission’s appeal. This outcome was not intended in the last review of s36 and therefore we will make this an urgent priority for review.

Labour will urgently review the provisions of Part 2 of the Commerce Act with emphasis on s36.