

# SUBMISSION

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**Submission on: A Revised Regulatory Standards Bill**

**From: Federated Farmers of New Zealand**

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## **SUBMISSION TO THE TREASURY'S DISCUSSION DOCUMENT A REVISED REGULATORY STANDARDS BILL**

### **1. INTRODUCTION**

- 1.1 Federated Farmers welcomes the opportunity to submit to the Treasury's discussion document *A Revised Regulatory Standards Bill*.
- 1.2 The Federation has a long track record over many years of advocating for less regulation, better quality regulation, and better protection of property rights. We have long been concerned that poor regulatory quality has added significant costs to the productive sector and impeded its productivity with serious implications for our members' businesses and for the wider economy. We have also been particularly concerned about a lack of sufficient protection of property rights.
- 1.3 The Regulatory Standards Bill has had a long and convoluted history as illustrated below.
  - 2001: Federated Farmers joined other business groups in promoting a Regulatory Responsibility Bill.
  - 2006: Regulatory Responsibility Bill introduced as a Members Bill and considered by the Commerce Select Committee. Federated Farmers submitted in support of the Bill.
  - 2008: National-ACT Confidence and Supply Agreement provided for a Regulatory Responsibility Taskforce to improve the Bill.
  - 2009: Regulatory Responsibility Taskforce issued its report recommending the introduction of an improved Regulatory Responsibility Bill.
  - 2010: The Taskforce's draft Bill was the subject of public consultation. Federated Farmers submitted in support of the draft Bill.
  - 2011: The Regulatory Standards Bill was introduced as a Government Bill and considered by the Commerce Select Committee. Federated Farmers submitted in support of the Bill.
  - 2011: National-ACT Confidence and Supply Agreement provided for the Regulatory Standards Bill to be amended to make it consistent with Treasury's preferred Option 5 set out in the Bill's regulatory impact statement.
- 1.3 Regulatory Standards Bill has been through an exhaustive process which improved it greatly and Federated Farmers submits that it should proceed as introduced in 2011. In contrast, Federated Farmers considers that the Treasury's revised Bill would be ineffective in improving the quality and reducing the quantity of regulation. It is particularly disappointing that the revised Bill's property rights provision will exclude disclosure of regulatory takings.
- 1.4 Federated Farmers would welcome the opportunity to meet with officials to discuss our concerns with the Treasury's preferred option.

### **2. RECOMMENDATION**

- 2.1 Federated Farmers recommends that **the Regulatory Standards Bill should proceed as introduced in 2011.**

- 2.2 If the Treasury's revised Bill proceeds Federated Farmers recommends that:
- The provisions on property rights should be amended to include disclosure of regulatory takings.
  - There should be disclosure of whether there are any issues for a Bill relating to infringements of liberty.
  - There should be disclosure of whether there are any issues for a Bill relating to delegation of the power to tax or levy charges.
  - The five-yearly reviews should be of the regulations themselves (i.e., acts or legislative instruments) rather than the 'regulatory processes'.

### 3. GENERAL COMMENT ON REGULATION

3.1 In 2011 New Zealand had 780 primary Acts and 3,365 statutory regulations. The rate of legislative change is bewildering with the Government each year creating and amending around 105 Acts and 405 regulations, representing between 6,000 and 9,000 pages of new legislation<sup>1</sup>. This does not include local government plans, policies and bylaws, many of which seem subject to constant change.

3.2 As well as quantity there is also a problem with quality. Businesses and farmers are concerned about the burden of regulation and the amount of change, and even officials concede that there are "many examples of legislation that has not met its intended objective, has had significant unintended consequences, and/or clearly lacks some of the key attributes of good legislation..."<sup>2</sup>

3.3 Federated Farmers has always taken a strong interest in regulation and its implications for and impacts on farming businesses. We acknowledge that a level of regulation is necessary but excessive or poor quality regulation can impose significant compliance costs and other economic costs outweighing the benefits.

#### **Compliance Costs**

3.4 Compliance costs are the most high profile 'cost' of regulation. However, compliance costs are only the administrative and time costs of complying with regulation and as such they do not necessarily include all the costs arising from regulation. For example they exclude the costs associated with no longer being able to undertake an activity that had been permitted prior to the regulation and they exclude the amount of the tax or fee that is paid.

3.5 Nevertheless, surveys on compliance costs provide a useful indication of the costs of regulation and where they fall. Federated Farmers participated in the Business New Zealand-KPMG Compliance Cost Survey, which ran from 2003-08. This survey consistently showed that compliance costs fall particularly heavily on small businesses, including farms. For example, in the 2008 survey farmers had a particularly high compliance burden with the average total cost per employee for Federated Farmers respondents being \$2,127, nearly three times the average for all respondents (\$728). The average compliance cost per farm business was \$9,106<sup>3</sup>.

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<sup>1</sup> Regulatory Impact Statement *Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act*, The Treasury, February 2011 (pg. 4).

<sup>2</sup> Ibid (pg. 6)

<sup>3</sup> Business NZ-KPMG Compliance Cost Survey 2008.

- 3.6 The issues of greatest concern for farmers were slightly different from those of businesses in general as shown in Table 1 below. Local government and the Resource Management Act are of greater concern while employment-related issues are of lesser concern. This reflects the nature of farming businesses, which are land intensive and make use of natural resources such as water, while most farmers employ fewer people than the average business.

**Table 1: Compliance Cost Priorities**

All Respondents			Federated Farmers' Respondents		
Rank	Issue	%	Rank	Issue	%
1	Tax	70	1	Tax	70
2	ACC	34	2	Local Government	47
3	Employment Relations Act	32	3	RMA	31
4	Health & Safety in employment	30	4	ACC	29
5	Holidays Act	21	5	Statistics NZ surveys	25

*2008 Business NZ-KPMG Compliance Cost Survey*

- 3.7 Federated Farmers also undertakes a six monthly Farm Confidence Survey. This survey, which commenced in July 2009, has shown that regulation and compliance consistently ranks as a significant concern for farmers and a high priority for government to address.
- 3.8 The most recent Farm Confidence Survey was undertaken in July 2012. Table 2 shows respondents' top ranked concerns and top ranked priorities for the Government. It is notable that compliance costs and regulation is of greater concern to farmers than the exchange rate (despite it being at record highs), input costs, banking, commodity prices, and the weather. Meanwhile, reducing compliance costs and regulation is also considered a high priority for government to address.

**Table 2: Concerns and Priority for Farmers**

Single Biggest Concern			Highest Priority for Government		
Rank	Issue	%	Rank	Issue	%
1	Farmgate & commodity prices	20.2	1	Reduce government spending	17.3
2	Regulation & compliance costs	13.2	2	Economy & business (general)	13.2
3	High & increasing input costs	7.4	3	Reduce compliance & regulation	9.3
4	High & volatile exchange rate	7.3	4	Reduce government debt	8.4
5	Industry specific issues	6.4	5	Monetary policy	7.3
6	Local government & rates	6.2	6	Biosecurity	6.0
7	Interest rates, debt & banks	5.1	7	Support agriculture & exporters	5.7
8	Weather	5.1	8	Local government reform	4.6

*July 2012 Federated Farmers Farm Confidence Survey*

### **Economic Costs**

- 3.9 Even more important than compliance costs is excessive and poor quality regulation making the economy less productive and flexible. Instead of facilitating prompt and efficient responses to changes in overseas and domestic markets, such an environment results in slower economic growth, unemployment, inflation, and economic imbalances.
- 3.10 This was very much the case in the 1970s and early 1980s when the New Zealand economy struggled in response to a series of economic shocks, most notably the 1973 and 1979 oil price spikes combined with the UK's entry into the EEC. The economic malaise was deep and long-lasting and saw a slump

in our relative position against the OECD average and the countries with which we like to compare ourselves, including Australia.

- 3.11 It took many years of at times painful economic reform by successive governments, of which deregulation was a key aspect, to put the economy on a stronger footing. The reform period delivered historically strong productivity growth which is illustrated in Table 3 below. Since 1978 the best periods for labour productivity, capital productivity, and multifactor productivity were the 1990-97 and 1997-2000 economic cycles.
- 3.12 However, there was public and political resistance to economic reform and in the 2000s there was a trend towards re-regulation. It is not the purpose of this submission to debate specific policies pursued at that time but it would appear that deteriorating productivity may have been one of the consequences. The more recent economic cycles (2000-06 and 2006-10) have experienced below-average performance for all three productivity indicators (see Table 3 below).
- 3.13 The impacts of deteriorating productivity took time to manifest themselves and initially they were masked by high growth in both labour and capital inputs. However, it eventually led to renewed inflationary pressures and ultimately helped push New Zealand into recession in 2007-08, before the Global Financial Crisis.

**Table 3: Average Annual Growth Rates for Productivity, 1978-2010**

Economic Cycle	Labour Productivity	Capital Productivity	Multifactor Productivity
1978-82	2.1%	0.8%	1.6%
1982-85	1.2%	-1.9%	-0.1%
1985-90	3.0%	-3.5%	0.4%
1990-97	2.4%	1.2%	1.9%
1997-2000	2.8%	0.8%	1.9%
2000-06	1.5%	0.1%	0.9%
2006-11	0.5%	-1.9%	-0.6%
<b>1978-2011</b>	<b>1.9%</b>	<b>-0.6%</b>	<b>0.9%</b>

*Source: Statistics New Zealand Productivity Statistics 1978-2011, March 2012*

### **Improving Regulation**

- 3.14 Federated Farmers has long supported initiatives to improve the quality of regulation (including removing regulation where appropriate) and to reduce compliance costs.
- 3.15 What is clear to farmers is that New Zealand has a problem with both the volume of legislation passed and the quality of that regulation. This is worsened by public, media, and political ‘angst’ over real and imagined risks, accidents, and misdeeds. This angst has encouraged in both central and local government a culture of excessive risk aversion and a ‘government knows best’ mentality.
- 3.16 Attempts have been made by successive governments to improve the quality of regulation, exemplified most recently by the intent of the 2009 Government Statement on Regulation. However, these measures have yet to stem the tide and if anything the volume of regulation seems to be increasing. According to the Treasury *“Only half of the significant regulatory proposals*

*considered by Cabinet since November 2008 had regulatory impact statements that met expected standards”.*<sup>4</sup>

- 3.17 It is Federated Farmers’ view that the current regime will never be enough on its own to achieve or sustain the kind of improvements that New Zealand needs. There needs to be a real culture change within government and we submit that this requires legislation to make officials and politicians (at both a central and a local level) take notice.

#### **4. GENERAL COMMENT ON REGULATORY STANDARDS BILL**

- 4.1 The Regulatory Standards Bill is essentially a transparency mechanism, similar to the Fiscal Responsibility Act (provisions now included in the Public Finance Act). It would not prevent a government from putting forward legislation inconsistent with the principles. Nor would it give the courts the power to strike down legislation or award compensation to aggrieved parties.

- 4.2 Clause 7 states the principles for responsible regulation, which are designed to accord with and reflect broadly accepted principles of good legislation, and are in six broad categories:

- **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 exercise of administrative discretion.
- **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.
- **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.
- **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.
- **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 against those decisions to a Court or other independent body.
- **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

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<sup>4</sup> Regulatory Impact Statement *Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act*, The Treasury (pg. 7).

its costs and any legislation should be the most effective, efficient and proportionate response to the issue available.

- 4.3 Clauses 8-10 of the Bill provide for ministers and chief executives to certify whether the legislation is compatible with these principles, and whether any incompatibility is justified.
- 4.4 **Federated Farmers strongly supports these principles** and when we consulted our elected representatives there was unanimous agreement with them. We particularly support the principle around the taking of property as it is consistent with the Federation's long-standing efforts to protect and promote private property rights and the rights associated with property ownership.
- 4.5 Clauses 12-14 of the Bill provide for a new role for the courts to make declarations of incompatibility with the principles in the Bill, but otherwise it would specifically exclude any power to make injunctive or compensatory orders on the basis of the Bill's principles. It would require the Courts to interpret legislation consistently with the Bill's specified principles if possible. We note that this provision should address the concerns of those who thought that the original Regulatory Responsibility Bill would compromise the supremacy of Parliament. **We support this provision.**
- 4.6 Clause 15 provides for the Minister responsible for the Act to issue guidelines to public entities and clause 16 of the Bill provides for every public entity to use its best endeavour to regularly review all legislation that it administers for compatibility with the principles. **We support these provisions.**

#### **Matters Excluded from the Bill**

- 4.7 Clause 4's definition of a 'public entity' specifically excludes local government. The Regulatory Responsibility Taskforce recommended that 'further work' should be undertaken to address how best to ensure quality legislation at a local government level. The Federation's strong preference is for the Bill to be extended to local government as soon as practicable. As discussed in section 3 above, farmers are particularly concerned about the costs of local government regulation, which in many cases (particularly its implementation of the RMA) is also eroding farmers' property rights. We accept that extending the Bill to local government might not be possible without additional work and we would not want this additional work to delay the Bill. So, we would **support the Bill advancing in its current form subject to it being extended in due course to local government.** We also note that much of what local government does in terms of regulation is in response to national legislation (which will be subject to the Bill).
- 4.8 The Taskforce has also recommended further work on 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. We support this work being undertaken as a high priority.
- 4.9 **Recommendation: Federated Farmers recommends that the Regulatory Standards Bill should proceed as introduced in 2011.**

## 5. COMMENT ON ARGUMENTS AGAINST THE BILL

5.1 This Bill has been the subject of criticism by a number of interest groups and by the public sector. The opposition to the Bill is disappointing but perhaps not surprising.

5.2 Federated Farmers has seen the arguments made by the Bill's opponents and our comments follow.

- **The need for legislation** – The argument is that New Zealand has no need for a Regulatory Standards Bill because we already have a good regulatory environment. We strongly disagree and even Treasury, which opposes the Bill, acknowledges that there are 'obvious limitations' to current legislative development, scrutiny, and quality assurance arrangements<sup>5</sup>. While it might be relatively easy to set up a business in this country, current regulatory management processes do not seem to be stemming the tide of regulation or reducing compliance costs. There is also little recognition in legislation of important principles such as protection of property rights, as observed in 2008 by Evans, Quigley and Counsell<sup>6</sup>.
- **Inappropriate principles** – We strongly disagree that the Bill's principles are 'not appropriate'. Our understanding is that the six principles were taken from the Legislation Advisory Committee Guidelines (LAC Guidelines) and from the common law so are hardly novel. More fundamentally, we find it hard to believe that any reasonable person could object to any of the principles.
- **Compliance costs** – Treasury estimates costs to departments of around \$3-4 million per year in certification costs with additional costs in the event of court action<sup>7</sup>. Our expectation is that the certification process should be able to be undertaken in conjunction with current regulatory management processes and the costs met within existing budgets.
- **Role of Courts** – The argument is that the Bill would alter New Zealand's constitutional balance by giving the courts a mandate to inquire into policy considerations. While the original Bill as introduced in 2007 would have run that risk, the Taskforce did a lot of work to address this concern. The Bill now being considered has been substantially altered and the role of the courts made more a kin to the process for the Bill of Rights Act. We therefore consider that opponents to the Bill have overblown this concern.

## 6. COMMENT ON TREASURY OPTION

6.1 Treasury opposed the Bill but acknowledged that there is a problem with existing regulatory processes. As part of the RIS, it considered several other options, most of which were unappealing even to the Treasury. In doing so it

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<sup>5</sup> Regulatory Impact Statement *Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act*, The Treasury (pg. 3).

<sup>6</sup> *Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand*, Lewis Evans and Neil Quigley with Kevin Counsell, Victoria University and NERA Economic Consultancy, 2008.

<sup>7</sup> *Adoption of Regulatory Responsibility Bill Drafted by the Regulatory Responsibility Taskforce*, paper to Cabinet Economic Growth & Infrastructure Committee, February 2011 (pg. 11).

developed an alternative proposal ('Option 5') of legislative and non-legislative actions to strengthen parliamentary review of legislation<sup>8</sup>.

- 6.2 In its submission on the Bill, Federated Farmers recognised that aspects of Option 5 could be an improvement on the status quo, but the improvements were marginal and should have been done anyway. Federation continued to prefer the Regulatory Standards Bill as it was introduced. This is because the Bill puts the six principles in legislation and provides for the incompatibility process, which in our opinion provides a more powerful incentive for ministers and departments to properly consider implications of proposed regulation.
- 6.3 Since then Option 5 appears to have been weakened. Most concerning to Federated Farmers is the discussion document's proposed treatment of property rights<sup>9</sup>. Option 5 originally stated that one of the matters needing to be flagged for disclosure in a Bill's explanatory note would be whether it *"takes or impairs private property without compensation"*. This has now been changed to *"whether a Bill would implement or allow a compulsory acquisition of private property"*. The discussion document claims that the precise ambit of 'regulatory taking' is *"still unclear in law and theory"*. It therefore proposes that the provision would not apply to disclosure of regulatory takings.
- 6.4 Federated Farmers considers that this change will make the Bill almost worthless in protecting private property rights. Compensation for compulsory acquisition of private property is already provided for in the Public Works Act. The issue of primary concern for Federated Farmers is the lack of compensation for regulatory takings. This is a massive problem for farmers, especially when dealing with the Resource Management Act (RMA).
- 6.5 In 2007 it was estimated that the RMA cost farmers around \$81 million in compliance costs. Although a number of changes to the RMA have since been made that might reduce some of these costs, one of the biggest issues remains unresolved. That is the impact on landowners when councils are protecting nationally important values, particularly the interpretation and implementation of section 6 (Matters of National Importance).
- 6.6 Federated Farmers notes that the recent report of the Technical Advisory Group on RMA Principles has recommended changes to section 7 (Other Matters) to make reference to private property rights. Federated Farmers supports this change and we hope the Government proceeds with it.
- 6.7 In relation to the Regulatory Standards Bill, we believe that if a body of RMA experts can agree to recommend an amendment to the RMA to make reference to private property rights then surely disclosure of 'regulatory takings' can be provided for in this Bill, which is simply an enhanced disclosure mechanism and where there will be no ability for anyone to take any form of legal action, so no risk of cost to the Crown.
- 6.8 Federated Farmers does not accept Treasury's argument that requiring disclosure of regulatory takings would require explanatory notes to contain *"essays on the nature of property rights and appropriate government action"*. With respect, this is a weak excuse. Disclosure of regulatory takings should

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<sup>8</sup> Regulatory Impact Statement *Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act*, The Treasury (pp. 24-28)

<sup>9</sup> A Revised Regulatory Standards Bill, The Treasury (page 19-20)

be able to be briefly highlighted with more detailed explanations referenced through links or footnotes. We are strongly of the view that the 'trade-off' should be to disclose regulatory takings even if it means some additional content in an explanatory note.

**6.9 Recommendation: Federated Farmers recommends that the provisions on property rights should be amended to include disclosure of regulatory takings.**

6.10 Also missing from the Treasury's revised Bill are two very important provisions that should be 'flagged':

- **Infringement of 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. Federated Farmers believes that any infringements of liberty should be flagged.
- **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. Federated Farmers believes that any delegation of the power to tax (including levying the types of user charge mentioned above) should be flagged.

6.11 Federated Farmers notes that these issues should be considered through the LAC Guidelines so we do not believe that adding these provisions would unduly increase work or cost for departments (that is if the departments are compliant with the LAC Guidelines).

**6.12 Recommendation: Federated Farmers recommends that there should be disclosure of whether there are any issues for a Bill relating to infringements of liberty.**

**6.13 Recommendation: Federated Farmers recommends that there should be disclosure of whether there are any issues for a Bill relating to delegation of the power to tax or levy charges.**

6.14 With regard to 'supporting elements', discussed in section 6 of the discussion paper, Federated Farmers believes that the proposed provision for statements of Government expectations on regulation could be helpful. However, the proposed provision for independent five-yearly review of regulatory management processes and requirements is insufficient. Instead, Federated Farmers believes that departments should be required to review the **content** of their acts and regulations.

**6.15 Recommendation: Federated Farmers recommends that the five-yearly reviews should be of the *content* of the regulation (i.e., acts or legislative instruments) rather than the 'regulatory processes'.**

6.16 The discussion document does not touch in detail upon the changes to parliamentary processes floated in the RIS Option 5, observing that this is a matter for Parliament to consider. However, Federated Farmers would support many of these ideas, including:

- Establishment of a specialist legislative quality select committee;

- Subject select committees being required to report to the House on legislative quality criteria when reporting back on a Bill; and
- Increasing resources for select committees for scrutiny of regulatory quality matters.

6.17 Federated Farmers notes that Treasury does not support the establishment of a new Officer of Parliament saying that it would be better to “*pursue more straightforward ways of increasing support for select committees*”. The Federation tends to agree and we would question the need for another layer of bureaucracy. A robust and meaningful Regulatory Standards Bill would in our view obviate the need for such an Officer.

## **7. CONCLUSION**

7.1 Federated Farmers supports the Regulatory Standards Bill as it was introduced in 2011. We believe this Bill addressed the concerns about the original Regulatory Responsibility Bill but in a way that retained teeth as a transparency mechanism. Farmers and the wider business community have waited a long time for this Bill and much work has been done to refine it. Federated Farmers now wants the Bill advanced as soon as possible.

7.2 Federated Farmers considers that Treasury’s revised Bill will be ineffective in improving the quality and reducing the quantity of regulation. We are particularly disappointed that it will not provide for disclosure of regulatory takings and that it does not include the flagging of infringements of liberty and delegations of the power to tax or levy charges. However, we do support the supporting elements discussed in section 6 of the discussion paper, although the five-yearly reviews should be of the content of regulation as opposed to the processes.

## **8. ABOUT FEDERATED FARMERS**

8.1 Federated Farmers is a member based organisation that represents farmers and other rural businesses. Federated Farmers has a long and proud history of representing the needs and interests of New Zealand’s farmers.

8.2 The Federation aims to add value to its members’ business. Our key strategic outcomes include the need for New Zealand to provide an economic and social environment within which:

- Our members may operate their business in a fair and flexible commercial environment;
- Our members’ families and their staff have access to services essential to the needs of the rural community; and
- Our members adopt responsible management and environmental practices.