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‘Regulatory Responsibility’: Embedded Neoliberalism and its Contradictions

The proposed Regulatory Responsibility Bill is part of the unfinished business of regime change (Wade, 2008) from Keynesian welfarism to neoliberalism between 1984 and 1994. The imposition of far-reaching pro-market disciplines on domestic regulation is intended to complement the codification of monetarism and fiscal austerity through the Reserve Bank Act 1989 and Fiscal Responsibility Act 1994 (since absorbed into the Public Finance Act). Although these disciplines are inscribed in ordinary legislation they are attributed a ‘constitutional’ standing that their proponents hope will embed them in perpetuity.

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The strategy aims to prevent New Zealand governments from making monetary, fiscal and regulatory decisions that erode wealth, by removing such decisions from cyclical politics. Former Treasury secretary Graham Scott encapsulated this ideal shortly before the 2008 election when he called for action to ‘address the agenda of quasi-constitutional issues that might, either in specific areas or perhaps more generally, address openly the clash between short-term political incentives and long-term wealth creation.’ The Reserve Bank Act offered the ‘prime example of success

of this kind of design’ (Scott, 2008).

This article examines the prospects for ‘regulatory responsibility’ as an instrument for embedded neoliberalism and concludes that the necessary conditions are either not there or not sustainable. It argues that political consensus is eroding. Faith in markets to regulate has been severely damaged in New Zealand and internationally. New Zealand’s track record contradicts the article of faith that less regulation holds the key to international competitiveness. Threats of investor backlash if governments re-regulate markets and redistribute wealth generate a sterile spectator democracy which cannot deal effectively with crises. Moves to lock governments into a neoliberal paradigm deliberately constrain the generation and pursuit of necessary alternatives.

If at First You Don't Succeed

The neoliberal regulatory regime has proved more difficult to enact than its monetary and fiscal counterparts, so far spanning 15 years. In 1994 the Finance and Expenditure Committee on the Fiscal Responsibility Bill, chaired by Ruth Richardson, called for work to address ‘the adequacy of existing regulatory processes to produce quality regulation’. In November 1997 the Cabinet Committee on

Strategy and Priorities agreed in principle to a proposal by National's commerce minister John Luxton for a Regulatory Responsibility Act modeled on the Fiscal Responsibility Act (CSP(97)M42/9).

When the momentum stalled, the New Zealand Business Roundtable hosted a workshop, Towards a Regulatory Constitution, which featured Richard Epstein (Epstein, 2000). With other business groups it commissioned Bryce Wilkinson's report *Constraining Government Regulation* (Wilkinson, 2001), which expanded the Luxton proposal into a draft bill with a long list of profoundly ideological regulatory principles. A slightly reworked version was introduced as ACT MP Rodney Hide's Regulatory Responsibility Bill 2006. In May 2008 the Commerce Committee recommended that the Hide bill not be passed and that a high-level expert task force should examine various options to improve regulatory review and decision making.

Given this history, it was obvious that the incoming National-led government would come under strong pressure to pass the legislation. A key plank in the confidence and supply agreement between National and ACT was the establishment of a taskforce to carry forward work on the Hide bill. Hide became the minister for regulatory reform. Roger Douglas became responsible for the bill. Graham Scott was appointed to chair the Regulatory Taskforce, which reported with a refined version of the Hide legislation in September 2009.

'Better Regulation, Less Regulation'

For reasons discussed below, the legislative passage of the Regulatory Responsibility Bill is not guaranteed. Perhaps in anticipation of this, a month before the release of the taskforce report Cabinet endorsed a ministerial statement entitled 'Better Regulation, Less Regulation' (CAB Min (09) 27/11). The August 2009 package serves two functions: it strengthens the existing regulatory impact assessment mechanisms and reorients them towards risk-tolerant deregulation which aims to accept or manage rather than eliminate risk (Dodds, 2006, p.527); and it provides a fall-back position in case the bill is defeated.

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The centrepiece is the statement from the ministers of finance and regulatory reform, 'Better Regulation, Less Regulation', with which ministers and officials must now comply. New regulation will be introduced only where it is 'required, reasonable and robust', while existing regulation will be reviewed 'to identify and remove requirements that are unnecessary, ineffective or excessively costly'. Specifically, the government will not take a regulatory decision without considering 'the evidence, advice and feedback from consultation', and being fully satisfied that:

- the problem cannot be adequately addressed through private arrangements and a regulatory solution is required in the public interest;
- all practical options for addressing the problem have been considered;
- the benefits of the preferred option not only exceed the costs (taking account of all relevant considerations) but will deliver the highest level of net benefit of the practical regulatory options available;
- the proposed obligations or entitlements are clear, easily understood and conform as far as possible to established legislative principles and best practice formulations; and
- implementation issues, costs and risks have been fully assessed and addressed.

A higher burden of proof applies to regulatory proposals that are likely to:

- impose additional costs on business during the current economic recession;
- impair private property rights, market competition or the incentives on businesses to innovate and invest; or
- override fundamental common law principles (as referenced in chapter 3 of the Legislation Advisory Committee guidelines).

Cabinet imposed a raft of *ex ante* and *ex post* requirements on ministers and officials. The *ex ante* measures involve more rigorous market-focused audit mechanisms, open-ended advice from officials on regulatory options, stricter surveillance by the Treasury-based Regulatory Impact Assessment Team (RIAT) and certification of consistency by ministers and officials.

Departments must prepare an annual regulatory plan of all known and anticipated proposals to introduce, amend, repeal or review legislation or regulation, to the extent possible. Regulatory impact statements (RIS) become government documents that advise Cabinet on problem definition, objectives, identification and analysis for the full range of practical options, without necessarily recommending a preferred policy. Agency certification of the RIS must disclose any gaps, assumptions, deficiencies or uncertainties in the analysis and indicate policy options whose effects are not likely to align to the government statement. Independent quality assurance of RIS will be provided by the RIAT where regulation has significant effects on economic growth, and otherwise by a person in the sponsoring agency independent of the authors. Ministers must certify that they have carefully considered whether the proposals to Cabinet are consistent with the expectations in the government statement.

The *ex post* measures require a post-implementation review of 'significant' regulations that Cabinet may agree to despite non-compliance with the government statement. Such reviews must be signed off by the responsible minister and the ministers of finance and regulatory reform. All departments must

develop systems for regulatory scans that identify all primary, secondary and where possible tertiary regulation under their responsibility that is or maybe unnecessary, ineffective or excessively costly. The initial scan must be completed by 30 June 2010, with subsequent six-monthly reports. An annual Regulatory Reform Bill, presumably of an omnibus kind, will 'make it quicker and easier to remove or simplify unnecessary, ineffective or excessively costly requirements in primary legislation'. A raft of existing reviews of regulatory regimes will continue, particularly those considered to have a significant impact on productivity. These requirements are to be fully operational by mid-2010.

Adoption of the taskforce's recommendations would add six further elements to the regime. First, the proposed Regulatory Responsibility Act sets out principles categorised under 'Rule of Law', 'Liberties', 'Taking of Property', 'Taxes and Charges', 'Role of Courts' and 'Good Lawmaking', and compliance obligations including certification. Second, ministerial guidelines would be issued pursuant to the act. Third, private actors could seek judicial declarations of incompatibility stating that proposed legislation is incompatible with the principles in the act, extending to existing legislation after ten years. Fourth, judges would have to adopt a statutory interpretation that is consistent with the principles, where possible. Fifth, a permanent external Statutory Advisory Council would be mandated to review the general body of legislation, and specific proposed or existing legislation, against the principles in the act and ministerial guidelines, and consult with public entities where appropriate. Lastly, the parliamentary Regulations Review Committee would be empowered to consider submissions that proposed or existing legislation departs from the principles.

There is obvious overlap between the criteria in the government statement and the taskforce principles, especially on regulatory 'takings', and in various procedures, such as ministerial certification and regular reviews of existing legislation for compatibility with the principles.

It is understandable that most debate has focused on the taskforce.

Various of its proposals would unsettle the traditional distribution of formal constitutional responsibilities between the executive, parliament and judiciary. Its recommendations aim to empower corporations and investors to pressure governments to advance their vested interests through a range of judicial, parliamentary and 'expert' mechanisms. And it has an ideological agenda that builds on previous proposals that are linked directly or indirectly to ACT and the Business Roundtable.

By comparison, cabinet's August package has come in under the radar. Like the taskforce report, it sets out to reorder the priorities, activities and resources of government agencies to privilege market interests and mechanisms. Its more rigorous mechanisms will strengthen Treasury's surveillance role over all other state agencies, and presumably will be reinforced through performance indicators and purchasing contracts. The requirement that these new obligations are met from within existing departmental budgets will divert resources from substantive policy and regulatory initiatives and subordinate pro-social interventions.

Embedded neoliberalism?

This section of the article examines whether the 'responsible regulation'

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strategy is likely to succeed as an instrument for embedded neoliberalism. It considers and rejects claims to legitimacy based on its quasi-constitutional status, preferring to describe the legislation as 'meta-regulation'. It then argues that the political, normative, economic, reputational and institutional conditions that are necessary for its enactment, effective implementation and long-term sustainability do not exist.

Constitutionalism

Successfully ascribing 'constitutional' status to a piece of ordinary legislation bolsters its credibility and durability. Advocates of a Regulatory Responsibility Bill have consistently talked up its constitutional pedigree. A prime example is the Business Roundtable's workshop 'Towards a Regulatory Constitution'. Keynote speaker Richard Epstein argued for protection against regulatory takings that violated constitutional guarantees of private property, with other aspects of 'government intrusion' to be addressed through 'either a major regulatory constitution or some other means of imposing constitutional restraint on government' (Epstein, 2000, p.5).

That discourse draws on the 'constitutional economics' of James Buchanan, leader of the public choice school with its deeply cynical view of electoral politics and state bureaucracy. Buchanan's fiscal and monetary constitutionalism centres on protecting wealth and removing the constraints on accumulation that were imposed during the 20th century. His ideal of 'constitutional politics' provides a set of quasi-permanent rules that define the parameters for 'ordinary politics' and law making and impose disciplines that require governments to make 'choices within constraints' (Buchanan, 1991, pp.4-5).

The segue from the public-law meaning of 'constitutional' as supreme law which distributes sovereign power within a state to the 'constitutional' status of ordinary legislation is seductive and misleading. The Buchanan and Epstein theories of economic constitutionalism rely on a narrow 17th-century version of the rule of law and the presence of

constitution-like characteristics, notably pre-established criteria and processes that aim to depoliticise decisions of elected governments and pre-commit governments to a set of general principles, norms or outcomes. The state is relegated to a self-limiting role vis-à-vis capital. State actors are required to regulate in the interests of wealth accumulation, while non-market and pro-social objectives are constrained.

The international literature has developed a number of alternative terms that depict the neoliberal regulatory regime more accurately and with less hyperbole. Cass Sunstein described the Reaganite Republicans' proposed *Contract with America* (Gingrich and Armev, 1994) and alternative regulatory charters as 'supermandates' whose requirements, if implemented, would have cut across all regulatory statutes (Sunstein, 1996, p.270). He distinguished between 'substantive supermandates' that enact new decisional criteria that agencies must follow, such as a general requirement for cost-benefit balancing, and 'procedural supermandates' that dictate processes. In the European context Claudio Radaelli has described the regulatory impact assessment as a 'meta-policy' that sets rules on the process of rule formation (Radaelli, 2007, p.196). Bronwen Morgan, writing of Australian competition policy, applies the term meta-regulation to describe 'a set of institutions and processes that embed regulatory review mechanisms into the every-day routines of governmental policy-making' (Morgan, 1999, p.50).

Political conditions

Because meta-regulation assumes the power to constrain the government's options, it still requires legitimation. The Regulatory Responsibility Bill draws heavily on analogies with the Reserve Bank Act 1989 and the Fiscal Responsibility Act 1994, which until recently have been treated as qualitatively superior to ordinary statutes. But the political climate has turned. There was cross-party consensus when the Reserve Bank Act and Fiscal Responsibility Act were introduced. That no longer exists. In November 2009 Labour formally ended the

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bipartisan consensus on the monetary policy targets and tools of the Reserve Bank (Goff, 2009). It seems untenable that Labour would embrace a better drafted but in some ways more extreme version of the Hide bill, when the need for the legislation is commonly blamed on Labour's preference for central planning and redistribution (Scott, 2008).

The troubled history of the Regulatory Responsibility Bill shows that there never was a bipartisan consensus, despite the assertion in the taskforce's terms of reference that it was 'carrying forward the Commerce Committee's work' on the Hide bill in the Labour era. The implication of seamless continuity is disingenuous. The select committee proposed a high-level taskforce to consider options for improving regulatory review and decision making, including through legislation and standing orders, but not limited to the options that were placed before it. The National/ACT taskforce was required to recommend a draft bill.

Moreover, the select committee said the chair should be an expert who has not been involved in advocating for or against any of the options. Graham Scott was a strong advocate of a Hide-style bill, as were many of the committee members. The announcement of its membership

suggests a desire to downplay their partisan positions: Don Turkington was described blandly as a 'company director', rather than the director of the Centre for Independent Studies in Sydney. Confirming its ideological predilections, the foreword to the report gives special thanks to Richard Epstein.

Indeed, the bill may not even secure consensus support from the governing coalition, especially in election year. Ministers might justifiably fear that populist legislation like ACT's three strikes law or National's emissions trading regime would fail any rigorous cost-benefit analysis, including the proposed bill. A pre-election audit of National, ACT, Future NZ and Māori Party manifestos against the bill's principles could prove embarrassing. An attack by Labour and the Greens which cites examples of popular moderate laws that could be struck down by the return of neoliberal extremism would generate real political traction.

Even if the legislation were to be passed under National, there is no guarantee it would survive a change of government in one or four years time. The Cabinet regime that was implemented without the need for any parliamentary scrutiny is an even less secure vehicle for embedding neoliberalism.

Normative conditions

The principles and objectives of meta-regulation also need some normative grounding. At the most superficial level, slogans like 'better regulation' and 'regulatory responsibility' have positive connotations that marginalise critics: who wants to defend worse regulation or regulatory irresponsibility? The principles of 'responsible regulation' are also equated to the national interest. According to the explanatory note to Hide's bill: 'Regardless of differences over policy, Acts and regulations will be constitutionally sound and in the public interest if they respect such principles.'

But light-handed pro-market regulation can no longer claim to be uncontested orthodoxy. A generation of New Zealanders rejected its economic fundamentalism in the 1990s. More recently, a series of high-profile regulatory failures,

from leaky buildings and finance companies to electricity and telecommunications, has generated scepticism that markets and corporate interests can deliver 'responsible' regulation.

Similar shifts are evident internationally. The Reserve Bank and fiscal responsibility legislation drew on the ascendant international orthodoxy of monetarism and fiscal austerity, encapsulated in the Washington Consensus. The regulatory responsibility regime rests its claim to orthodoxy on the adoption by most OECD countries of regulatory management regimes that use regulatory impact assessments and cost-benefit analysis (Malyshev, 2006) and the guidelines and checklists for 'quality regulation' developed by the OECD and APEC (OECD, 1995; APEC/OECD, 2005). Again, 'orthodoxy' overstates the case. Many of the New Zealand proposals, such as declarations of incompatibility and compensation for 'takings', are at the extreme end of the OECD spectrum. They are closest to the United Kingdom approach, where the flagship financial services regime failed so dramatically in the post-2007 financial crisis.

Economic conditions

The economic rationale for a neoliberal regulatory regime is that over-regulation is damaging New Zealand's international competitiveness. The Cabinet paper in August 2009 argued that New Zealand needs a 'better' regulatory environment than its OECD peers to boost its international competitiveness. In support it cited the OECD's opinion that 'mediocre policies will not be enough to overcome the economic disadvantages of New Zealand's small size and geographical isolation', and the fact that other OECD countries often struggled to maintain regulatory discipline.

There is no logical nexus. As Chye-Ching Huang points out, New Zealand already has a relatively high international ranking for core economic regulation: second in the world in the World Bank's Ease of Doing Business rankings, and fifth in the Heritage Foundation and Wall Street Journal Economic Freedom Index (Huang, 2010, p.95). Moreover, the OECD's 2009 Economic Survey highlighted the

paradox that New Zealand was at the forefront in adopting purportedly high-growth policies, but still ranks toward the bottom end of the OECD's productivity league. 'Better Regulation, Less Regulation' and the Regulatory Responsibility Bill are seeking to embed that strategy.

Reputational conditions

When political, normative and economic conditions turn sour, the most reliable bulwark against regime change is to create fear of reputational damage to politicians and the country from a crisis of business confidence. In a return to pre-democratic 17th-century politics, the propertied become privileged political actors who are empowered to promote and protect their individual and class interests. Positive political economists colourfully describe the support mechanisms as 'stacking the deck' and setting up the 'fire alarms'.

Radaelli argues that regulatory impact assessments do not exist to ensure 'quality' for its own sake (Radaelli, 2008, p.6). Principles, such as 'the benefits must exceed the costs', and hurdles, such as 'no new rules unless a market failure is proven beyond doubt', 'stack the deck' to ensure the broad political trajectories of policies are maintained, even if majorities change. Fire alarms, such as published regulatory impact analyses, alert the business constituency when something 'dangerous' is under contemplation.

Lessons can and should be learned from the historical compromise of the 20th century, where the state was forced to step in to absorb, collectivise and redistribute risks arising from a barely-regulated market.

While the August 2009 ministerial statement both stacks the deck and installs the fire alarms, the taskforce goes much further. It creates opportunities for business interests to intervene at select committees, through judicial processes, seeking reviews by the Regulation Review Committee or by participating in the 'independent oversight' of regulation. The paradox of public choice comes to the fore: the rent-seeking business community becomes the guardian of the public interest while elected politicians are pincered between threats of investor flight and credit downgrades and an electoral backlash against corporate dominance, failure to deliver on manifesto promises or impotence in the face of crises.

Institutional conditions

The sustainability of the proposed regime also depends on its impact on effective public administration and the regulatory interventions that people expect from their governments. Both the Cabinet package and the proposed bill impose contested, complex and costly obligations on diverse public agencies in the guise of improving quality through rational and objective procedures and criteria. The methodology of 'cost-benefit analysis' is imbued with scientific qualities of certainty, precision and objectivity. But these assessments are not conducted in an antiseptic laboratory:

Law making is not a de-contextualised exercise in rational policy analysis, and tools like the standard cost model or cost benefit analysis are operated in a process that is contingent on specific institutional settings, history, and purposeful political action. (Radaelli, 2007, p.7)

'Better Regulation, Less Regulation' requires officials and ministers to apply pro-market criteria for 'quality regulation' that are highly subjective and operate as closed reference points that exclude 'competing visions for the good society, different regulatory motivations and concerns about political and public legitimacy' (Haines and Gurney, 2003, p.354). Ministries and communities of interest that have non-commercial responsibilities and appeal to different

ideological premises, values, priorities and constituencies will need to reconstruct their rationale in market terms if they are to be heard at all.

The primacy of economic analysis over political bargains places the responsibility for 'quality regulation' on professional economists ahead of sector-specific policy experts. Scott presaged this reordering in his speech to the New Zealand Institute of Economic Research in 2008, when he recommended putting Treasury 'back into high level regulatory policy from an economic development perspective' after some of its functions were transferred 'to organisations that are less concerned with economic analysis and more in tune with the central planning and coordination methods that have replaced it' (Scott, 2008).

Finally, government agencies must be able to function. The August Cabinet paper acknowledged that some departments had concerns that ongoing regulatory scans would divert resources from other priorities and that implementation timeframes were unreasonable. Cabinet

made it clear that there was no new funding. Presumably, resources would be re-allocated to the deregulation project from regulatory activities that are likely to fall foul of the ministers' statement and Treasury surveillance.

Far from improving the quality of government, Sunstein suggests that onerous, complex and subjective obligations are likely to have the reverse effect:

A system in which agencies decide what is to be done only after considering all costs and benefits is likely to be time-consuming and will inevitably produce large-scale errors. Such a system imposes enormous data collection requirements on agencies and forces them to make difficult and unscientific judgments about basic values. (Sunstein, 1996, p.301)

Contradictions

This article has argued that the necessary conditions do not exist for the 'regulatory responsibility' regime to advance its goal of

embedding neoliberalism. The dogmatic pursuit of that project is profoundly irresponsible.

It exemplifies what John Toye called the 'Empowering Myth', which freezes or concretises ideas, 'losing sight of the fact that they are always in flux, always embedded in critical debate' (Toye, 1994, p.39). Dominant paradigms are not set in stone. History shows that they are fluid and contested. Lessons can and should be learned from the historical compromise of the 20th century, where the state was forced to step in to absorb, collectivise and redistribute risks arising from a barely-regulated market. The turmoil of successive financial crises raises the spectre of history repeating itself.

Tragically, the obsession with paradigm maintenance prevents the exploration of viable alternatives. Truly responsible regulation would actively stimulate new ideas to meet the imminent challenges of global financial instability, energy scarcity, food shortages, global warming and the obscene imbalance of wealth and poverty.

References

- APEC/OECD (2005) *Integrated Checklist on Regulatory Reform*, Paris: OECD
- Buchanan, J. (1991) *The Economics and Ethics of Constitutional Order*, Ann Arbor: University of Michigan Press
- Dodds, A. (2006) 'The core executive's approach to regulation: from "better regulation" to "risk-tolerant deregulation"', *Social Policy and Administration*, 40 (5), pp.526-42
- Epstein, R. (2000) *Towards a Regulatory Constitution*, Wellington: New Zealand Business Roundtable
- Gill, S. (2002) 'Constitutionalizing Inequality and the Clash of Globalizations', *International Studies Review*, 4 (2), pp.47-65
- Gingrich, N. and D. Armev (1994) *Contract with America: the bold plan*, Washington: Times Books
- Goff, P. (2009) Speech to Federated Farmers National Council, 19 November
- Haines, F. and D. Gurney (2003) 'The shadows of the law: contemporary approaches to regulation and the problem of regulatory conflict', *Law and Policy*, 25, pp.353-80
- Huang, C.-C. (2010) 'Regulatory responsibility and the law', *New Zealand Law Journal*, pp.91-96
- Malyshev, N. (2006) 'Regulatory policy: OECD experience and evidence', *Oxford Review of Economic Policy*, 22 (2), p.274
- Morgan, B. (1999) 'Regulating the regulators', *Public Management Review*, 1 (1), pp.49-65
- OECD (1995) 'Recommendation on improving the Quality of Government Regulation', Paris: OECD
- Radaelli, C.M. (2007) 'Towards better research on better regulation', paper delivered to the Advanced Colloquium on Better Regulation, Centre for Regulatory Governance, University of Exeter, 25-26 January
- Radaelli, C.M. (2008) 'Evidence-based policy and political control: what does regulatory impact assessment tell us?', paper delivered to the European Consortium for Political Research – Joint Session of Workshops, University of Rennes, France, 11-16 April
- Scott, G. (2008) 'Productivity in New Zealand', speech to New Zealand Council for Economic Research AGM, 28 August
- Sunstein, C. (1996) 'Congress, constitutional moments and the cost-benefit state', *Stanford Law Review*, 48 (2), pp.247-309
- Toye, J. (1994) 'Comments', in J. Williamson (ed.), *The Political Economy of Policy Reform*, Washington: Institute for International Economics, p.38
- Wade, R. (2008) 'Financial regime change?', *New Left Review*, 53, pp.5-21
- Wilkinson, B. (2000) *Towards a Regulatory Constitution*, Wellington: New Zealand Business Roundtable
- Wilkinson, B. (2001) *Constraining Government Regulation*, Wellington: New Zealand Business Roundtable