REDUCING UNNECESSARY REGULATORY COSTS

RESPONDING TO THE PRIME MINISTER'S CHALLENGE

BY MEMBERS OF
THE NEW ZEALAND INITIATIVE

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The New Zealand Initiative is an independent public policy think tank supported by chief executives of major New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

Our mission is to help build a better, stronger New Zealand. We are taking the initiative to promote a prosperous, free and fair society with a competitive, open and dynamic economy. We develop and contribute bold ideas that will have a profound, positive, long-term impact.

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1 INTRODUCTION

On 13 March this year, the Prime Minister spoke at The New Zealand Initiative's (TNZI's) Retreat in Auckland. Members took the opportunity to express concerns about specific regulatory imposts for which there seemed to be inadequate justification.

In response the Prime Minister invited members to provide a list of regulations that they considered needed to be modified or scrapped. This report responds to that invitation.

Section 2 lists the regulations identified by members' submissions, along with a brief statement of the specific concern. Members' full submissions are in the Appendix.

Section 3 identifies two general points that underlie the specific concerns.

Several members commented specifically on the need for better disciplines (processes) generally at the policy formation stage. They identified the need for a general overview statement that assessed the nature and extent of the current problem and raised nine options for improving regulatory outcomes. Section 4 contains this general assessment.

Section 5 suggests that the government needs to do more to ensure that government agencies are consistently giving it the quality of regulatory analysis it committed itself to receiving in its 2009 Government Statement: Better Regulation, Less Regulation. The ongoing inadequate overall quality of agency regulatory impact statements is surely unacceptable. At the very least government agencies need to do a much better job of assessing the costs and benefits of regulatory proposals, and demonstrating greater respect for property rights.

2 SUMMARY TABLE OF REGULATIONS SINGLED OUT

The following table lists the laws or regulations that members' responses have specifically singled out for attention, along with a brief indication of the specific aspect of concern. Deloitte has made a detailed submission covering 10 specific aspects of tax legislation. These are grouped together under the heading: "Tax legislation generally".

In total the concerns raised in members' submissions relate to 11 tax matters (which include the issue of GST on imports of less than $400) and 12 non-tax matters.

Table 1: Laws and regulations raising specific concerns

Law or regulation	Specific concern	Refer to Appendix
Anti-Money Laundering and Countering Financing of Terrorism Act 2009	Unnecessary replication of already screened funds. One remedy would be to exempt all transactions coming from NZ registered banks	A.1
Commerce (Cartels and Other Matters) Amendment Bill	The Bill's proposed removal of exemptions for shipping will adversely affect New Zealand consumers through higher prices and may reduce shipping services to New Zealand	A.2
Companies Act, section 209 notices	The shift to online documentation is making this requirement redundant. It is also a significant cost and environmental burden on large companies	A.3
Consumer Guarantees Act 1993	A 2003 amendment invidiously makes someone lending generally to a wholesaler or retailer responsible to consumers for specific goods sold. The remedy is to narrow the definition of a supplier	A.4
Copyright Act 1994	The current static list of exemptions gives an 'automatic no' to some new technologies. A more flexible regime is needed. It should be informed by developments in Singapore, the UK and Australia	A.5
Credit Contracts and Consumer Finance Act 2003	In a nutshell an enforcement issue with loan sharks has cost mainstream lenders millions without dealing effectively with the actual problem. All water under the bridge now, better regulatory processes needed in future	A.6
Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004	Industry changes have made this regulation an inefficient and ill-targeted measure. Recommend a review by Officials including consideration of three replacement options	A.7
Goods and Services Tax Act 1985	The de minimis rule exempting foreign imports from GST and duty (in general goods worth under $400) is creating costly distortions. Action is needed to reduce them	A.8
Holidays Act 2003, section 16(2)(ii)	This measure raises costs unduly and is unfair as between employees. Repeal recommended	A.9
Parental Leave & Employment Protection Act 1987, sections 42(2)(a) and 42(2)(c)	Interaction with s 21 of the Holidays Act is unfair to those taking annual leave within 12 months of taking parental leave. Repeal recommended	A.10
KiwiSaver Act 2006, section 65	The Act unduly limits the range of employee contribution rates to 3%, 4% or 8%	A.11
Resource Management Act (council control of hazardous substances and new organisms)	Conflicts between the regulatory roles of councils and the EPA. Recommend removing this control function from councils leaving EPA as the sole regulator	A.12
Tax legislation generally	Member firm Deloitte's stand-alone submission on this specialist area identifies ten specific concerning aspects broken into two categories: (1) barriers to capital markets/costs associated with raising funds in New Zealand; and (2) tax simplification measures	A.13-22
Telecommunications Act 2001, sections 120/121, sections 155A-1551	The current deemed consent regime for connecting customers to UFB is unduly cumbersome and holding back the provision of UFB. Rescindment or modifications are recommended	A.23

3 TWO GENERAL POINTS ARISING FROM THE SUBMISSIONS

This list excludes an appreciable number of other regulatory issues which the government is aware of and is already addressing to such a degree that it was unnecessary to include them here. It also excludes 'big picture' reform proposals such as reform of the RMA or of restrictive labour market laws, where numbers in the House might be a major constraint.

One member commended the government for arranging mutual visa recognition between Australia and New Zealand during the jointly-held Rugby World Cup. Options for repeating or extending that regulatory relaxation should be kept in mind, but no specific proposal was developed for this report.

The issues raised by members' submissions illustrate:

- the ongoing difficulties of keeping prescriptive legislation up to date in a dynamic world (see for example, the submissions in A.5, A.7, A.8, A.11, A.12 and A.23), and
- the costly unintended and apparently unnecessary consequences that can result from legislation or regulations that might not have been given due consideration at the time or might have arisen subsequently (see for example, the submissions in A.1, A.3, A.4, A.6, A.9 and A.10 and many of the tax submissions numbered A.13-A.22).

(Submission A.2 relates to a Bill that is currently being debated.)

Indeed, several members independently commented that the specific deficiencies they identified in their submissions appeared to reflect systemic shortcomings with regulatory processes, such as a tendency to inadequately assess costs relative to benefits or to be over-prescriptive in primary legislation.

Members variously referred to the New Zealand Productivity Commission's (NZPC) 2014 report on regulatory institutions and practices[1], the Regulatory Responsibility Taskforce's 2009 proposal[2], and the Australian Government's recent Regulator Performance Framework[3] approaches.

These observations induced members to under-take the following broader analysis of the shortcomings in current regulatory arrangements.

1 http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf

2 http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport/rrt-report-sep09.pdf

3 https://www.cuttingredtape.gov.au/sites/default/files/documents/regulator_performance_framework.pdf

4 IMPROVING REGULATORY QUALITY AND PRACTICE MORE GENERALLY

WHAT IS GOING WRONG?

In a nutshell, too much regulation in New Zealand was ill-justified when it was introduced and has remained in that state. Regulatory processes need to be strengthened and compliance better enforced. Thoroughgoing reviews of existing regulations are necessary due to the accumulating undue regulatory burdens.

The NZPC's 2014 report observed that in 2009-2014 New Zealand produced almost four times more statutes than the United Kingdom.[4] New Zealand now has 1,934 statutes on the statute book (NZ Legislation). The pipeline is still busy. As of 22 July there were 35 Government Bills on the Order Paper.[5]

Although adding to the existing volume of legislation may offer temporary relief from political pressure, it makes New Zealand a less predictable place to do business. This would be justifiable if the benefits exceeded the costs, but the evidence for this is discouraging.

Castalia's 2013 assessment of 65 agency regulatory impact statements in 2012 found that just over one-third of them (37%) met its (reasonable) standard. We submit that this is not nearly good enough.

The New Zealand Initiative's report[6] on WorkSafe NZ's regulation of falls from heights in home construction showed that the costs to New Zealanders were likely to be well in excess of $1 billion yet officials had not attempted to even quantify them in advance, let alone establish greater benefits.

The Productivity Commission's 2014 report listed some of the symptoms of malaise as follows:[7]

- Lack of role clarity as between policy aims, decision making and implementation by other bodies;
- Regulation in legislation easily becoming obsolete and failing to keep up with technology or public expectations, partly due to heavy reliance on primary legislation and inadequate review;
- Regulation is a major piece of government infrastructure, and is as significant as the tax and spending systems in terms of its impact on the lives of New Zealanders carrying significant risks if we get it wrong. However, it isn't given the same systemic attention;
- Weak governance including highly variable structures of institutions and departmental appointment processes to regulators, (including variable assessments of the skill needed), poor planning, and patchy induction;
- Weak leadership with inadequate attention to culture and survey evidence of gaps between the leaders and staff of the organisations; and
- Weak monitoring, oversight and accountability.

4 http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-infographic.pdf

5 http://www.parliament.nz/en-nz/pb/business/order-paper/00HOHOrderPaper_20150722/final-order-paper-for-wednesday-22-july-2015

6 http://nzinitiative.org.nz/site/nzinitiative/files/A%20-Matter%20of%20Balance_final.pdf

7 http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report-summary.pdf

The Treasury's subsequent October 2014 *Briefing for the Incoming Minister of Regulatory Reform*[8] implicitly endorsed the Commission's "clear room for improvement" assessment. It also independently observed that 24 reviews have been completed under the government's Regulatory Review Programme and that:

"The **PIF Reviews** *have regularly highlighted that departments have a patchy understanding of whether regimes are achieving their purpose* **and incomplete systems for monitoring and evaluating regimes** *and for feeding this information through to improve performance."* [Emphasis is in the original.]

The Treasury's briefing paper saw that the main opportunities for lifting performance "on all fronts" could be grouped into the following three headings:

- Adopt a more systematic approach to prioritising policy effort and the legislative programme;
- Embed the Expectations for Regulatory Stewardship and continue to support agencies to discharge their stewardship roles; and
- Improve the capability and performance of regulators.

The paper characterised the *Expectations for Regulatory Stewardship*[9] as "the foundation of the government's regulatory management system".

However its list of what was expected did not include the need to quantify costs or benefits of new or existing regulations where possible.

[8] http://www.treasury.govt.nz/publications/briefings/2014-regulatory-reform/bim-14-reg-reform.pdf

[9] http://www.treasury.govt.nz/publications/guidance/regulatory/systemreport/04.htm

We even wonder about the extent to which senior management in The Treasury, the control department responsible for the quality of regulatory impact assessments is focused on the job. For example, Treasury's Living Standards Framework, proposes a range of "motherhood is good" general considerations for evaluating proposals with no guidance as to how to determine trade-offs. It thereby appears to want to be all things to all people. A Treasury that demanded rigorous cost-benefit assessments of regulatory proposals would not be attempting to be all things to all people.

Perhaps if Treasury lacks adequate focus it is because the government is not adequately driving that focus?

CRITICAL AREAS FOR IMPROVING REGULATORY OUTCOMES

Members offer the following suggestions for where government could be focusing its efforts.

Over reliance on primary legislation

A prevalent feature in New Zealand, while not so common in other comparable jurisdictions, is a high level of prescription in primary legislation. This creates rules that are difficult to change, turning regulatory implementation into a laborious and political process. Sometimes, inflexible rules that are so entrenched and must be implemented to a changing environment can lead to more regulatory failure, which then consequentially requires further legislative change to remedy. This "cycle" does not promote or set paths for sustainable policy that matters for the long term.

The Treasury 2014 briefing acknowledged that there should be consideration given to greater use of secondary and tertiary legislation – but this was only in the long term.

Ministerial leadership

Policy and implementation are not just about legislation and the legislative processes. High quality thinking and change requires great attention to governance, leadership and culture from creation to implementation and performance assessments.

Quality ministerial leadership, oversight and monitoring of governance and incentive arrangements are critical. If ministers do not demand quality policy analysis and regulatory performance they are unlikely to get it.

Ministers should be encouraged to make the most of existing tools to solve policy problems. A tighter focus on practical ways to implement laws and policy would be useful.

Policy formation processes

Like strategy in a corporate, policy making fails if it fails to consider ability to execute policy. This is not just a prioritisation issue but goes to governance, monitoring, accountability and culture. It is an issue of striving to enhance the way the private and public sector think about policy making and implementation, with a strong eye to the stimulation of innovation and investment looking at tomorrow.

If the policy thinking in the first place has been too narrow, too experimental, too disconnected from the real world or too vague on policy outcomes and roles – and the wheel is being reinvented each time – then the starting position carries more risk than it ideally needs to.

Regulatory agencies are naturally biased towards proposing solutions to problems that give primacy to their own area of expertise and perspective.

For example, an official agency dominated by legal expertise may propose a new law to address a problem when more effective implementation of existing law might be more efficient. It is unusual for a regulator to propose a diminution of its own budget and powers. Yet there is a great need to ensure that non-regulatory options are identified and considered in accordance with their real merits.

Contestability of ideas and wider thinking must be encouraged in the public sector (whether in those designing policy or those implementing it), and with business, if New Zealand is to maximise the benefits of innovation and investment in an increasingly global and digital economy for the well-being of New Zealanders.

Defining the scope of a regulator's powers

Good delegation principles need to be kept in mind when regulatory bodies are given powers and decision making. Ensuring join up between policy aims and execution of them is about objective performance and accountability reviews. This is particularly important where the impacts of regulatory institutions can have a massive impact on end users in markets and where governance, leadership and culture at the "front end" might be an issue. This does not interfere with independence – it is about performance and it is about achieving outcomes for the country.

Regulatory appointments

The best designed frameworks will produce disappointing outcomes without well designed, governed and led organisations implementing them.

Quality implementation and enforcement of regulations requires quality regulatory appointments. Appointments to regulatory authorities should acknowledge the need for leaders to have commercial experience along with subject matter expertise. This helps ensure a good understanding of the context of their decisions, the risks associated with regulation, and the most effective method of implementation.

Regulators' incentives

Many regulators perform well when measured against their statement of intent (SOI). However, many SOIs have strong incentives to articulate risk rather than innovation. This may be entirely appropriate given the role of the regulatory agency but it is important to recognize that there is often no equivalent 'voice for innovation' to balance the 'voice for risk' - particularly in policy debates. A 'don't rock the boat' culture can create a bias towards risk aversion and away from innovation. One remedy (where appropriate) would be for regulatory SOIs to have equal incentives to balance innovation and risk.

THE IMPORTANCE OF DOING BETTER

If we are serious in New Zealand about innovation, investment, cost efficiency and improving the ability to design sustainable policy and have it implemented to achieve its aims, it is important to continue to challenge old mindsets, to consider opportunities that may be lost and negative impacts due to outdated or poorly crafted regulation or implementation.

Change does need to be carefully managed and thought through. However, having no change, or being slow to change, can in itself be damaging – leaving unfit regimes to be implemented causing lost opportunities and lower NZ productivity.

GOVERNMENT'S ACKNOWLEDGEMENT OF THE PROBLEM

Members appreciate that your government has acknowledged the problem from the very start. Its 2009 Government Statement: Better regulation, less regulation expressed its commitments as follows:

> **Our Commitments**
>
> We will introduce new regulation only when we are satisfied that it is required, reasonable, and robust. We will review existing regulation in order to identify and remove requirements that are unnecessary, ineffective or excessively costly.

In the same statement the government laudably committed itself to ensuring, before taking a regulatory decision, 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."

Such a focus is obviously essential and fundamental to consistently good law-making. But is the government doing a good enough job of ensuring that the advice it is getting meets this standard? Are ministers truly applying this in practice? Are central agencies including the Treasury and the Department of the Prime Minister and Cabinet actively testing advice from other departments on this basis?

Members' experiences and the above expert assessments are indicating that too often government agencies have failed to fully absorb the message.

In the same statement the government also committed itself to:

"Require there to be a particularly strong case made for any 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)."

That is also a very laudable commitment from a business community perspective. We applaud the government for its determination to recognise property rights in the RMA and understand the difficulties of doing so following the recent by-election.

We also acknowledge that the government's 2013 Expectations of Regulatory Stewardship, usefully set out Cabinet's expectation that departments should take a proactive, lifecycle approach to the monitoring and care of their regulatory regimes, including identifying areas suitable for reform.

In addition, we appreciate the government's very favourable response on 28 July 2015 to the NZPC's recommendations for improving regulatory institutions and practices. The proposed greater emphasis on ensuring that government departments systematically monitor and review their regulatory regimes and upgrade their capabilities is clearly desirable in principle. But what is needed in practice is government to act effectively when material defects in the existing stock of regulation are identified.

The government's moves to set up an expert cross-agency departmental group led by the Ministry of Business, Innovation and Employment to pay greater attention to regulatory performance in SSC and Performance Improvement Framework (PIF) reviews also look useful, although much depends on implementation and follow-up actions.

Nevertheless, it is a concern that six years have elapsed since the government's 2009 statement and the need for additional measures reflects the fact that the earlier commitments and requirements have not been met and observed with sufficient consistency for so long.

SUGGESTIONS FOR GETTING BETTER OUTCOMES[10]

In order to improve our regulatory policy environment further, matters that can be considered range from non-legislative through to legislative opportunities. Improvement in New Zealand's regulatory policy environment would enhance the ability to attract, retain and develop the good talent that is needed in roles that can have so much influence in private markets.

[10] These suggestions were developed prior to the Government's release of its response to the NZPC's recommendations for improving regulatory institutions and practices. We note overlaps between them and the Government's response.

Options that might be explored individually or as part of a Ministerial review might include:

1. Less reliance on primary legislation and highly prescriptive legislation such that it becomes out of date quickly. Greater consideration of principle-based regulation and the use of secondary or tertiary instruments to support appropriate flexibility and enable continuous improvement.[11]

2. Ensuring that agency statements under the Expectations for Regulatory Stewardship requirement do not become process only or "tick the boxes" exercises. Clear agreements or statements of expectations between a regulatory institution and a relevant minister should enhance expectations, set out certain criteria which in turn enable monitoring and performance assessments.

3. Increased transparency around what regulatory bodies are expected to achieve in their implementation roles to get policy outcomes for NZ and from which quality (rather than just process) performance reviews can occur.

4. Ministries face PIF reviews often undertaken by outside persons. Regulatory institutions often have great responsibility of power but in the past have not seemed to face the same performance assessments. We welcome the government's statement that stewardship expectations have now been incorporated into the regulatory element of these reviews. Expert external reviews of regulatory institutions' governance arrangements and, operational and cultural performance should help.

5. Building guidance for officials on aligning policy outcomes, frameworks and institutions (vs reinventing the wheel each time potentially adding to the wide range of approaches in New Zealand that the NZPC commented on) and looking for efficiencies in public sector operations and skill development as a result. Guidance should be kept under active review.[12]

6. Independently-led and designed surveys of regulatory institutions, cultures and perceptions might add value, particularly where surveys today are created and led by institutions themselves.

7. Increase the use of Boards and governance which should include a number of independent part time non-executive members and increase diversity of thinking – they would not be involved in the day-to-day functions of a regulatory institution. In the alternative, or in addition, provide for an Advisory Board comprising non-executive members from a range of experiences.

8. Asking the Minister for Regulatory Reform to seek advice on how to enhance the quality of appointments to regulatory authorities, particularly with respect to relevant commercial experience.

9. Investigating mechanisms for ensuring, where appropriate, that the new cross-agency department group systematically consults with representatives from NZPC, end users and business.

10. Assessing options for increasing the independence of assessments of the degree of compliance with the 2009 Government Statement.

[11] We note that the government's response to the NZPC expresses its intention to establish an expert committee to advise Ministers and departments on key legislative design issues, including advice on the appropriate allocation of material between primary and delegated legislation.

[12] The proposed Ministry of Business Innovation and Employment-led expert group might fill this role.

5 CONCLUDING OBSERVATIONS

We acknowledge that the struggle to improve the quality of government regulation has no end. We acknowledge that the government is seriously concerned about the problem and is taking steps to address it. We appreciate that the invitation to submit this report reflected its openness to suggestions from the business community about what might be done.

In this report we have responded to the Prime Minister's request for specific cases of undue regulatory costs of a relatively minor nature.

In addition, members have turned their minds to the underlying causes of such problems. Their comments are in considerable accord with the government's own thinking–from its 2009 Statement: *Better Regulation, Less Regulation* to its July 2015 responses to the NZPCs recommendations for improving regulatory institutions and practices.

However, despite the efforts of the last six years, a large gap remains between what is desired and what exists. It would take many years of diligent and consistent ministerial determination to close it. The three-yearly election cycle and MMP politics make sustained determination a real challenge.

We suggest that ministers could ease the burden on themselves of improving regulatory quality by giving more effective 'voice' to those being regulated. One option would be to give those being regulated greater recourse to remedies for ill-justified regulatory imposts. The government's intentions for RMA reform announced in January this year included providing for greater protection for property rights.[13] That is something that we suggest government should keep at the forefront of its regulatory review considerations generally.

The Minister of Regulatory Reform's 28 July press release drew attention to a complementary means of giving more voice to those being regulated. It highlighted the government's desire for "a more productive and collaborative approach between regulators and their stakeholders".[14]

Members endorse that call. The New Zealand Initiative was formed to play a role in public life and contribute to public debates. It is committed to developing policies that work for all New Zealanders in the belief that such policies are also in the long-run interests of members.

We would be more than happy to discuss ways in which the Initiative could contribute constructively to a more productive and collaborative arrangement. One suggestion is that a private sector expert group or forum might be set up, perhaps to interface with the proposed MBIE-led expert public sector group.

[13] "Nick Smith announces 10 dramatic changes to Resource Management Act", http://www.nzherald.co.nz/property/news/article.cfm?c_id=8&objectid=11389827

[14] https://www.beehive.govt.nz/release/government-drive-lift-regulatory-quality

A.1 ANTI-MONEY-LAUNDERING REGULATION

EXECUTIVE SUMMARY

- The Anti-Money Laundering and Countering of Financing of Terrorism Act 2009 is being implemented in an onerous and ineffective way.
- Requiring SME businesses to perform customer verification processes to customers already verified by NZ Banks is senseless duplication.
- Further exempting Government Departments such as Inland Revenue that handles $billions leaves a gaping hole in NZ security framework.
- The recommended change is to exempt reporting by NZ SME entities to the extent that funds are received from NZ Registered Trading Banks that are fully complying with AML legislation.

INTRODUCTION

This submission has been prepared by Ian Kuperus in response to the Prime Minister's challenge at The New Zealand Initiative's March 2015 retreat for members to provide him with a list of regulations which we consider need to be modified or scrapped.

In this submission we recommend that the following regulation be modified in its implementation: The Anti-Money Laundering and Countering of Financing of Terrorism Act 2009.

What were these regulations intended to achieve?

The purposes of this Act are —

(a) to detect and deter money laundering and the financing of terrorism; and

(b) to maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Task Force; and

(c) to contribute to public confidence in the financial system. To my knowledge there was no cost benefit analysis associated with this legislation.

What is going wrong – what they are actually achieving?

The general purpose – to restrict money laundering is not disputed but the way this is implemented is onerous and does not make good commercial sense.

1. The Tax Pooling industry only accepts payments from NZ registered banks. NZ banks must vet all their customers and transactions. So having an amount deposited to us and then withdrawn does not materially alter the status of the funds. Why can't we just give an undertaking that we will only ever accept deposits from NZ banks? Why the need for further customer ID?

2. The majority 80%+ of our deposits go straight to IRD. The IRD is exempt from the regime. This is ridiculous. Someone who wants to "launder 'can go straight to IRD. This is the mentality of the Maginot line – if you leave a great gaping hole for terrorists to exploit they will do that.

3. The officials who are implementing this do not give any coherent explanation of how the compliance costs will protect New Zealanders.

Options for getting better outcomes

The regulations allow officials to exempt parties from complying. One way to significantly reduce the compliance burden would be to exempt all transactions that come from NZ registered trading banks. Banks can more effectively vet their customers and this will save SME business significant compliance cost. If officials are able to justify exempting the IRD then they can surely exempt SMEs.

CONCLUDING COMMENT

The recommended exemption aims to increase the efficiency of NZ business without loss of security.

A.2 COMMERCE (CARTELS AND OTHER MATTERS) AMENDMENT BILL

The Warehouse Group (TWG) is concerned about removing Commerce Act exemptions for shipping contained in the Shipping Act 1987, as the Commerce (Cartels and Other Matters) Amendment Bill (the Bill) proposes. Removing these exemptions will lead to increased costs for shipping operators serving this country, which will inevitably be passed on to their customers or result in shipping operators with-drawing services to New Zealand. Ultimately, this will adversely affect New Zealand consumers through higher prices.

The Bill will do this by:

- requiring shippers to pursue regulatory clearance, and exposing shippers to possible criminal penalties for breaches of the Commerce Act;
- thereby making it more difficult and costly to enter the efficient vessel-sharing arrangements that shipping lines currently enter into; and
- creating a regulatory environment for shipping in this country at odds with our major trading partners in Asia and the Pacific (in particular Australia and China) who will still allow vessel-sharing arrangements and other co-operation between shipping lines.

While the Bill incorporates a two year leeway period for shippers to comply with the new Commerce Act requirements, this will not solve the problem of ongoing uncertainty and increased costs that the new regime will create for shippers and their customers. Nor will the two year leeway period resolve the mis-alignment that the Bill creates between New Zealand shipping laws and those of our trading partners, which will make operating in and out of this country less attractive for shipping lines, potentially leading to a reduction in shipping operators servicing New Zealand.

On the other hand, The Warehouse does not see that the proposal provides any benefit. Our experience as a major customer of shipping lines is that shipping to New Zealand is highly competitive and efficient. We imported 13,000 TEU in 2014, making the company New Zealand's largest importer.

These concerns have been raised by interested parties (including shipping industry participants and TWG) repeatedly since 2013. As recently as 12 March 2015 the Minister of Commerce and Consumer Affairs advised that, on the basis of advice received by officials, he does not intend to substantially change this aspect of the Bill, instead encouraging industry participants to constructively engage with officials on the transition to the new regime.

TWG and shipping industry participants are concerned that the adverse effects caused by the proposed changes will not be able to be mitigated by assisting the transition to the new regime as TWG believes the new regime is fundamentally flawed.

A.3 COMPANIES ACT: NOTICE REQUIREMENT UNDER SECTION 209(1)(B)

EXECUTIVE SUMMARY

- Under the Companies Act 1993 companies must send to all their shareholders each year:
  - a hard copy of their annual report; or
  - a notice in accordance with section 209(1)(b) of that Act asking if shareholders would like to receive a hard copy of the annual report (s209 Notice).
- The requirement to send a s209 Notice is redundant in the digital age.
- It imposes costs on companies which provide little or no benefit to shareholders and represents a significant environmental burden.
- The requirement for listed and other issuers of financial products to send a s209 Notice should be removed.

INTRODUCTION

This submission has been prepared by Chorus in response to the Prime Minister's challenge at The New Zealand Initiative's March 2015 retreat for members to provide a list of regulations which need to be modified or scrapped.

In this submission we recommend that section 209(1), and associated provisions, of the Companies Act 1993 be amended so that listed and other issuers are no longer required to automatically send to all their shareholders each year:

- a hard copy of their annual report; or
- a notice in accordance with section 209(1)(b) of that Act (s209 Notice), provided they maintain a copy of the annual report on their websites and send a copy to shareholders on request.

What were these regulations intended to achieve?

Section 209 was intended to ensure shareholders have access to information contained in a company's annual report.

What is going wrong – what they are actually achieving?

Since the introduction of section 209, however, digital communications have become the primary means by which investors in listed, and many other issuers, obtain information about a company. Digital communications also enable much broader, deeper and richer information to be conveyed more quickly, cost effectively and with little environmental footprint (e.g. via websites).

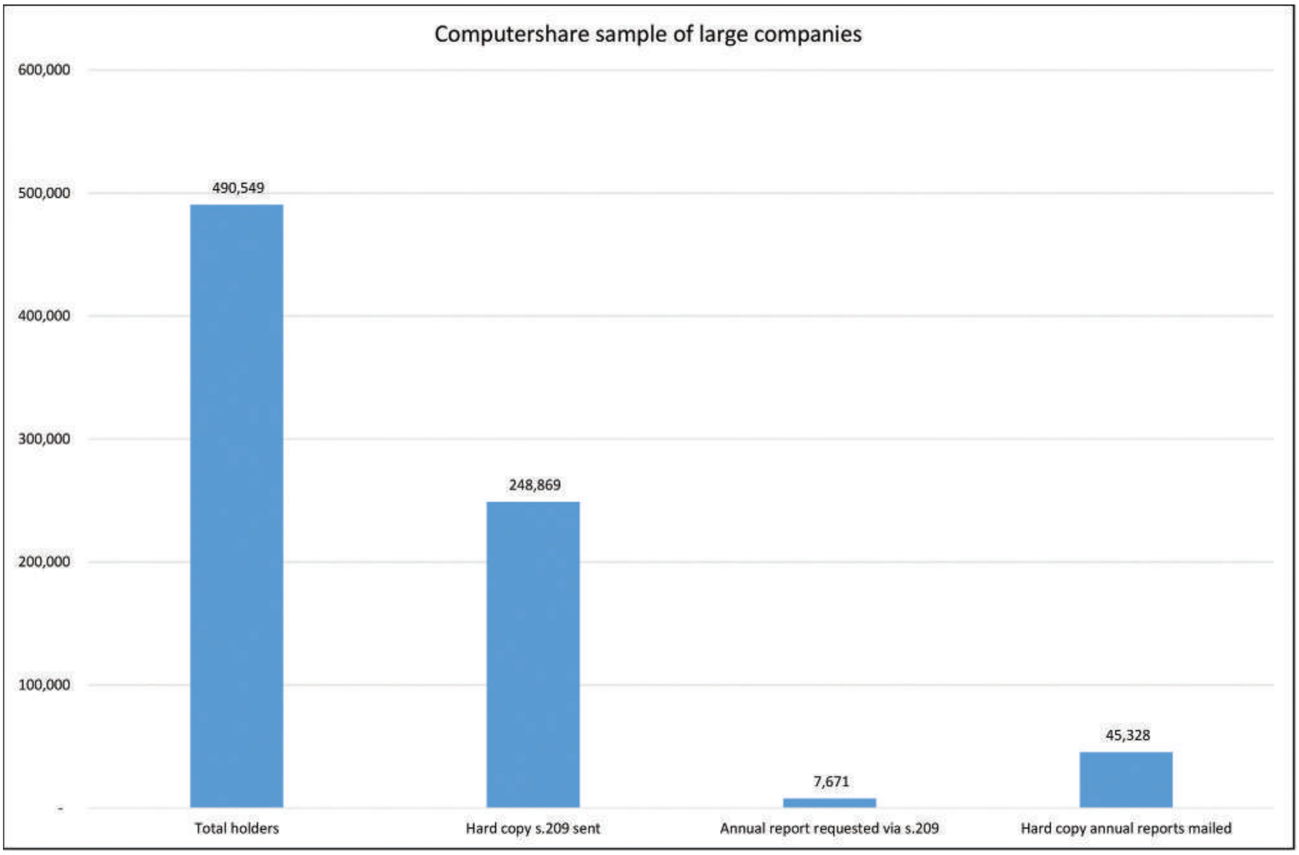
For listed issuers, annual reports are available on company websites to download and, for those shareholders who request email communications, a link to the annual report is sent to them directly.

This shift to digital communications generally means that the s209 Notice is increasingly redundant. In 2014, for example, Chorus was required to post 22,540 notices with just 378 recipients (1.7%) responding to request a hard copy of the annual report.

The analysis below is from an initial sample of larger companies provided by Computershare. It shows that while a large proportion of printed s209 Notices are posted (the remainder being emailed), just 3% of shareholders actually respond to the notices and request a hard copy of the annual report. The 250,000 s209 notices sent by the companies in this sample alone would equate to about 100 boxes of A4 copy paper. Almost 85% of shareholders who were sent a hard copy of the annual report had already registered their request with the company. The continuing shift to online communications would suggest that the proportion of people requesting annual reports via the s209 process will only diminish further. Recent changes to legislation have also removed the requirement to record the names of substantial holders on the s209 notice, thereby diminishing its purpose further.

Options for getting better outcomes

Accordingly, we think the requirement to send a "section 209 notice" or annual report should be removed, provided listed and other issuers are required to maintain a copy of the annual report on their websites send a copy on request.



A.4 CONSUMER GUARANTEES ACT

As a financial institution, Heartland Bank Limited is subject to a considerable volume of legislation and regulation, which has increased in recent times because of regulatory trends. In some cases, the effect of that legislation may have unintended consequences. One example is as follows:

The definition of "supplier" in the Consumer Guarantees Act (CGA) has been broadened to capture not only the seller of the relevant goods, but also the lender financing them. (In particular, "*… a creditor within the meaning of the Credit Contracts and Consumer Finance Act 2003 who has lent money on the security of goods supplied to a consumer, if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who, in trade, supplied the goods….*" The effect of this is that a lender – who finances the goods that their client wishes to purchase, but is ultimately ambivalent as to what those goods actually are and has little or no commercial interest in them – becomes responsible to the consumer for them under the CGA. In our submission, this is unprincipled.

This amendment was included following a suggestion by the Commerce Commission on the Credit Contracts and Consumer Finance Bill 2003, but there appears to have been no debate around the consequences of that inclusion. That being the case, it is unclear what the consequences actually are – though, at face value, they would appear to be that the various statutory protections conferred on consumers by the persons actually supplying goods are essentially underwritten by those consumers' financiers. This risk is something that those financiers are not placed to manage and is, in our submission, inappropriate.

A.5 COPYRIGHT ACT 1994

Copyright law reform to spur innovation in New Zealand

- Copyright law is playing an increasingly important role in innovation policy - virtually every use of the digital technologies that drive innovation involves the making of copies. Getting the copyright balance right is critical for innovation and investment.
- New Zealand's current set of purpose based copyright exceptions have not kept pace with developments in technological innovation. They are increasingly ill-equipped to deal with cloud-based technologies and other innovative digital technologies. They are also putting New Zealand at a comparative disadvantage to jurisdictions with more flexible copyright laws.
- New Zealand needs flexible and future proofed copyright laws to support new forms of innovation, as well as investment in, and adoption of, digital technologies.

A flexible exception or set of exceptions would provide the necessary breathing room for technical innovation, while still protecting copyright owners.

Why getting the copyright balance right is critical for innovation and investment

Virtually every online or digital activity - from browsing on the internet to the use of cloud storage services - involves the making of copies. This puts copyright law front and centre of innovation policy. It means that getting copyright policy right is critical to enable all innovators - start-ups, researchers, academics, local and international businesses - to be able to invest in new technology without unreasonable risk of legal challenge.

The nature of innovation is that it is dynamic, not static. It is simply not possible to predict in advance the range of new transformative uses of technology that may be possible in the future. That is why any analysis of whether copyright exceptions are adequate and appropriate for the digital environment must not be confined to a consideration as to whether copyright exceptions are appropriate for the digital environment as it exists *today*. It is imperative to future proof copyright law to ensure that New Zealand is well placed to take advantage of not only the next wave of innovation, but also the one after that. Flexible copyright exceptions provide a framework for considering new and innovative uses, as and when they emerge, without the need to go back to the legislative drawing board.

The existing copyright exceptions are no longer fit for purpose in a digital environment

New Zealand's existing static list of purpose-based exceptions are no longer fit for purpose in a digital environment. Technologies that use copyright in ways that do not fall within the technical confines of an existing exception (such as new data mining research technologies or innovative cloud-based technologies) are automatically ruled out, no matter how strong the public interest in enabling that new use may be.

New Zealand's current law means that a new technology is given an 'automatic no' to the question of whether it would be lawful in New Zealand, unless it falls within one of the existing technology-specific exceptions. In contrast, a flexible exception would allow innovation to occur, as long as it is fair and does not unduly harm copyright owners.

Increasingly, this is putting New Zealand at a comparative disadvantage to jurisdictions - such as the US, Singapore, Israel, South Korea and Canada - that have flexible copyright exceptions. A 2015 report[15] published by Brussels think tank, the Lisbon Council, measured the impact of copyright exceptions on economic growth, jobs and prosperity. It found a positive correlation between flexible copyright exceptions and better economic outcomes, not only in the IT sector, but also across the economy generally.

In 2006 Singapore implemented flexible copyright exceptions into its copyright act. Prior to that, private copying technology industries experienced about 2% annual growth. After the changes were introduced, the same industries enjoyed a 10% average annual growth rate (Ghafele & Gibert, 2012).

Getting to yes - how to introduce flexibility, and future-proof copyright law

How can New Zealand move from a situation where entrepreneurs receive an automatic 'no' to a situation where a new technology or use of copyright works can be permitted if it is considered to be in the public interest (after balancing the interests of copyright owners and other relevant factors)?

The best way to achieve this is to enact an open-ended flexible exception, or set of exceptions, to enable new uses of copyright materials to be assessed against a set of prescribed criteria to determine whether a new use is 'fair'. This would enable entrepreneurs to go to market with new technologies without the need for further law making. It would also allow copyright owners to challenge those technologies if they believed that they were not fair and resulted in undue harm. The courts would then be able to determine the appropriateness of the technologies by applying a clearly articulated set of factors. This regime should also be device and technology agnostic wherever possible.

Reform options include:

- replacing some or all of the existing purpose based exceptions with an open-ended flexible exception; or
- keeping the existing exceptions (after review to ensure technological neutral operation) and introducing a supplementary flexible exception.

The Australian Law Reform Commission recently recommended that Australia update its copyright laws to introduce a flexible exception, noting that flexible exceptions are something that "technologically ambitious small countries might adopt".[16]

This approach is broadly consistent with the copyright reforms recommended in the United Kingdom's Hargreaves Report (2011) which the UK Government has committed to implementing in full.

Some critics of flexible exceptions have suggested that a regime of this kind is inherently uncertain. But flexibility is not the same as unpredictability. Overseas experience shows it is possible to develop guidelines that provide both rights holders and technological innovators a great degree of day to day certainty. An environment that is pro-innovation would benefit copyright owners, consumers and innovators alike.

[15] The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity, Benjamin Gibert, Lisbon Council

[16] Australian Law Reform Commission Copyright and the Digital Economy Summary Report p15.

A.6 CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2014

EXECUTIVE SUMMARY

Reforms to the Credit Contracts and Consumer Finance Act were introduced with the admirable objective of protecting vulnerable consumers and targeting unscrupulous lenders who prey on them. For this reason the changes were quickly labelled the 'loan shark' bill.

Regrettably, best practice wasn't applied during the policy and regulatory development process, resulting in reforms that fail to address the very real harm of loan sharks and their unethical lending practices. Instead it created undesirable and unintended consequences and imposed unnecessary compliance costs on responsible lenders, with flow on costs and inconvenience to consumers.

The Government recognises that better and less regulation is essential to boost productivity, international competitiveness, innovation and living standards. In its Statement on Regulation it committed to only introducing new regulation when satisfied that it is *"required, reasonable, and robust."*[17] This approach obviously has wide support of the business community.

The following is an example of what can happen when principles of good policy and regulatory reform, as outlined in the Government's Statement on Regulation, aren't adequately followed. The key message is that it is vital that the principles are followed in the future to avoid similar situations reoccurring again to the detriment of many, if not all, parties.

INTRODUCTION

The origins of the reforms began with a 2009 review of the Act[18] carried out by the Ministry of Consumer Affairs. Notably, this review found that the general principles of the Act were sound and there was a relatively good level of compliance.[19] The Financial Summit held in August 2011, which primarily looked at ways to tackle irresponsible lending, also played a significant role in creating the reforms.

The reforms officially kicked off with the Credit Contracts and Financial Services Law Amendment Bill being tabled at Parliament in April 2013 by the then Minister of Consumer Affairs.

WHAT WERE THESE REGULATIONS INTENDED TO ACHIEVE?

The stated objective of the reforms was to protect vulnerable consumers from the unscrupulous lending practices of loan sharks and third tier lenders, such as high interest rate and pay day lenders.

The Bill was designed to govern credit contracts from before inception until termination or enforcement. The reforms included amendments to lender registration, product disclosure, unreasonable fee tests, hardship and repossession, as well making changes to the infringement and penalty regime. Furthermore, the concept of responsible lending was introduced, with an accompanying Responsible Lending Code that was designed to provide guidance and elaborate on lender responsibility principles.

17 Government's Statement on Regulation Better Regulation, Less Regulation (2012)

18 Credit Contracts and Consumer Finance Act 2003

19 Review of the operation of the Credit Contracts and Consumer Finance Act, Sept 2009, page 5

What is going wrong – what they are actually achieving?

There is no doubt that the protection of vulnerable consumers, targeting unscrupulous lenders and strengthening responsible lending are worthy objectives and this sentiment continues to receive widespread support. However, for the reasons outlined below, the reforms fail to address the identified problem and are instead arguably counter-productive to the objectives of the regime.

The changes were not subject to rigorous regulatory cost/benefit analysis, resulting in significant compliance costs and undesirable consequences across the entire lending market. Despite no clear evidence being produced of systemic market failure (i.e. outside of loan sharks), a one size fits all approach was taken, which did not reflect the vastly different lending practices of market participants. The result was that the proposed reforms were disproportionate and overly inclusive, significantly affecting all lenders rather than the intended third tier segment of the market.

Crucially, the reforms did not take into account that there were no fundamental issues with the existing provisions and further, that the majority of lenders were already acting responsibly. The reforms went much further than what was required and failed to provide a fair balance between consumer protection and the need to ensure legitimate and already well regulated lenders do not incur substantial additional compliance costs.

In a nutshell, what was an enforcement issue was instead addressed by introducing new regulatory obligations.

Ironically, despite massive regulatory change, both consumer protection and industry experts agree that these reforms will not make a difference to the practices and behaviours of unscrupulous lenders. Recently, Darryl Evans of Mangere Budgeting Services Trust was quoted as saying that the Responsible Lending Code would not help those most at risk.[20] Instant Finance chief executive Richard de Lautour noted *"The ratbags continue as usual"*.[21] The changes will lead to poorer outcomes for the market as a whole, which will unfortunately negatively impact on all consumers of credit. A flow-on undesirable consequence is the potential to further restrict access to mainstream credit providers for those very consumers the law is trying to protect, further proliferating the market for loan sharks.

Further, there is a real risk that innovation will be stifled and customers inconvenienced by the reforms, for example, online lending is set to become more problematic. This in turn restricts choice, reduces efficiencies and removes opportunities to decrease lending costs.

[20] Unscrupulous money lenders likely to face 'please explain' investigations. NZ Herald Apr 19, 2015

[21] Unscrupulous money lenders likely to face 'please explain' investigations. NZ Herald Apr 19, 2015

BETTER REGULATION, LESS REGULATION

The reforms should be viewed in light of the Government's commitment to quality regulation. The government's 2012 statement on better regulation, less regulation states that they will be looking for significant changes in the approach both Ministers and government agencies take to regulation. To this end they agreed to:

Resist the temptation or pressure to take a regulatory decision until we have considered the evidence, advice and consultation feed-back, and fully satisfied ourselves that:

- ...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 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.

Require there to be a particularly strong case made for any regulatory proposals that are likely to:

- impose additional costs on business during the current economic recession; and
- impair private property rights, market competition, or the incentives on businesses to innovate and invest.

Ensure that Cabinet's requirements for assuring regulatory quality are treated as an integral part of policy development, and built into the policy process from the beginning;

Unfortunately the amendments fail to meet these stated commitments in a number of areas, including:

- no thorough problem analysis and definition;
- insufficient exploration of alternative options available to address the problem;
- insufficient assessment of the implementation issues, costs and risks vs. benefits;
- not adequately implementing a solution that targeted the identified problem. Instead, a one-size-fits-all approach was constructed that poorly targeted the identified market failure;
- failure to take into account that responsible lenders already have other significant regulatory obligations in place to protect consumers; and
- a lack of Ministerial or Official will and no mechanism to get the regime back on track once it had strayed off course.

Options for getting better outcomes

The regime has been fully in force since 6 June 2015. The lending industry has spent many millions of dollars responding to and bedding down the reforms, and with the changes just around the corner we are not suggesting that it is realistic or logical to unwind them. The industry has spent considerable time and effort lobbying and then implementing these changes and the purpose of this commentary is not to re-litigate the past. Rather we are raising this as a tangible example of the importance of strictly following the best practice principles of good regulation, and it clearly demonstrates how something that started off with the right intentions can easily stray off course.

Right from the beginning, responsible lenders argued that this was an enforcement issue, rather than there being a clear case for regulatory change. Proactive and targeted enforcement from an appropriately resourced regulator coupled with enhanced enforcement powers would have more effectively achieved the desired outcomes. This, along with the introduction of a lender registration regime, would have adequately addressed the identified deficiencies of the existing framework and better targeted the behaviour of unscrupulous lenders and protected vulnerable consumers, without introducing massive compliance costs on responsible lenders.

In addition, what was not considered was how poor financial literacy and a lack of personal responsibility contribute to the problem, and unless these matters are adequately addressed, no amount of regulation will effectively protect vulnerable consumers.

CONCLUDING COMMENTS

The lending industry is obviously supportive of the intent of the Act, which is to protect vulnerable New Zealanders, to target unscrupulous lenders and support responsible lending,

Unfortunately, despite the best of intentions, the reforms have landed in a completely different place and will not address the problem that is trying to be resolved.

Whilst certainly not the only example that the industry can point to, it is one that highlights how regulatory reform can easily go off track if principles of good regulation aren't adequately followed.

A.7 ELECTRICITY (LOW FIXED CHARGE TARIFF OPTION FOR DOMESTIC CONSUMERS) REGULATIONS 2004

EXECUTIVE SUMMARY

Under the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 (Regulations), all electricity retailers are required to offer customers consuming electricity at, or below, 8,000 KWh (9,000 KWh in the lower South Island) per year a low fixed charge (LFC) tariff which is set at a maximum rate of 30 cents per day.

In Contact's view, the Regulations are poorly targeted and create additional complexity in an already complex industry.

Contact recommends that the Regulations are removed and replaced with a more targeted subsidy to assist the most vulnerable.

INTRODUCTION

In 2002 the Government proposed that low-use domestic electricity consumers should be offered a LFC tariff option, with the objective being to:

> *"ensure that electricity retailers offer a low fixed charge tariff option or options for the delivered electricity to domestic consumers at their principal place of residence that will assist low-use consumers and encourage energy conservation".*

As a result, in 2004 it became compulsory for retailers to offer consumers the LFC tariff by way of the Regulations.

Specifically, under the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 (Regulations), all electricity retailers are required to offer customers consuming electricity at, or below, 8,000 KWh (9,000 KWh in the lower South Island) per year a low fixed charge (LFC) tariff which is set at a maximum rate of 30 cents per day.

What is going wrong – what they are actually achieving?

From Contact's observations, the Regulations:

1. are ill-targeted, with more than half of all electricity consumers in New Zealand's electricity consumption now classified as low-use consumers. The decrease in annual electricity consumption by consumers since 2004 means the average consumer now consumes less than the threshold level each year;
2. cause large low-income households to subsidise wealthier low-user households. The Regulations most strongly benefit those consumers who are not necessarily the households most in need of assistance – instead, they are dual fuel customers, apartment dwellers, and houses with fewer than two people. Conversely, many of the larger consumers who use more electricity out of necessity are lower income households who can least afford their own consumption, let alone effectively subsidise those other consumers on LFC tariffs;

3. fail those consumers in greatest need of assistance while rewarding (gas and electricity) domestic consumers. Domestic consumers using gas for hot water heating and space heating consume about half the electricity of an all-electric domestic consumer. Those domestic consumers who can afford to have gas appliances installed will be able to receive the benefit of the Regulations simply because they are dual fuel users. This is also the case for consumers who use other alternative fuel such as solar heating or, as is common on the West Coast and Otago/Southland, coal;

4. are stifling more efficient pricing innovations, thereby impairing outcomes for consumers. Currently, prices are set with reference to a fixed daily charge per connection, essentially mandating a prescriptive pricing methodology. But for the Regulations, retailers like Contact could offer an all-inclusive tariff, for example $150 per month. Under the current Regulations a retailer would need to offer the same package for LFC consumers at the maximum charge of 30 cents per day;

5. impair competition due to the significant amount of complexity they create for a potential new entrant. The LFC requires retailers to develop a LFC and standard charge option for every available tariff, meaning two tariffs need to be developed for any single retail offering; and

6. are not materially encouraging energy conservation or more efficient use of energy. Awareness of the LFC tariff is low, neither the rate nor the threshold have been changed since introduction in 2004, yet the tariff could impede incentives to shift from carbon to electricity (eg electric cars).

Neither the maximum fixed charge nor the 8,000kWh threshold has been adjusted since the Regulations came into effect more than 10 years ago.

ANALYSIS

In Contact's view, the policy's objectives need to be re-thought. Low-use consumers are not necessarily those most in need of assistance. The Regulations take no account of household income or housing quality, nor do they take account of the fact some consumers may be a 'low-use domestic consumer' because they are dual fuel customers.

As a result, the Regulations have failed to focus assistance on the most vulnerable and have created additional complexity in an already complex industry.

In Contact's view, a comprehensive understanding of the problem is a prerequisite for effective targeting.

CONCLUDING COMMENTS

Contact supports the Government's intention to assist consumers in need, and to encourage energy conservation.

However, Contact recommends the regulations be reviewed by the appropriate Government representatives, and that more suitable and effective alternatives are considered, for example a targeted social tariff, a general welfare payment targeted specifically at energy vulnerability and/or making greater funding available for insulation and efficient heating.

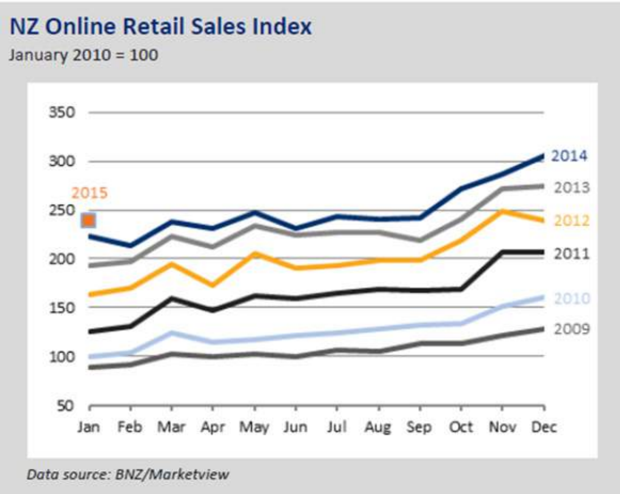
Higher profile and better targeted measures, such as the 'warm up New Zealand' grants, could be used as a way of encouraging energy conservation.

A.8 GOODS & SERVICES TAX ACT 1985 (THE WAREHOUSE GROUP)

The Warehouse Group - Concerns Regarding the Goods and Services Tax Act 1985

The Warehouse Group is New Zealand's largest general merchandise retailer, employing more than 12,000 people across our 242 retail stores and 13 online stores. We are also New Zealand's largest online retailer, second only to TradeMe in terms of site traffic.

We are all for competition in the marketplace - we accept it, we encourage it and we thrive on it. However, competition must be fair and on an even playing field. The current de minimis rule exempting foreign imports from GST and duty (in general goods worth under $400) has created an uneven playing field that in effect has given international online retailers a 15% price advantage funded by New Zealand taxpayers. The effect of this goes further than just lost GST revenues. In fact, it is likely to have far-reaching macro-economic impacts.



GST was supposed to make taxation more progressive and efficient, i.e., tax consumption. Its role is being undermined as the 'revenue hole' caused by offshore online shopping grows. It is estimated that the Crown is foregoing between $200m and $500m in lost revenue.[22]

Currently New Zealanders are spending approximately $1.5 billion with international online retailers each year. That is the equivalent to a business twice the size of Farmers Trading Company and equates to a loss of approximately $225 million in GST each year. However, the impact of lost tax revenues goes further than Goods and Services Tax.

To the degree that domestic supply by firms paying tax in New Zealand replaced foreign supply without any reduction in other New Zealand-sourced supplies, government would also benefit from greater revenues from company tax. In the extreme case of complete replacement, it could be of the order of $25 million.

[22] Booksellers NZ/NZISCR – A proposed pathway toward future reform of New Zealand's de minimis threshold

In addition, a business of this size would employ about 6,000 people with a wage bill of about $150 million. PAYE tax from these employees would total about $37 million.

New Zealand's online spending with international retailers is currently increasing at a faster rate than the growth of domestic online sales. Due to our country's size and location, we are even more susceptible to a steeper incline in this trend due to the broader range that international online shopping provides.

Impact on Infrastructure

The de minimis rule gives a competitive advantage to the online channel which is likely to impact the commercial development of shopping malls in New Zealand. The uneven playing field is having a greater effect on small speciality retailers, who are either struggling to remain afloat, choosing to close their bricks and mortar operations or going online only. Small retailers are the cornerstone of mall developments as they pay a higher rent per square metre than large retailers who attract shoppers to the mall. A reduction in demand for retail space by small specialty retailers would mean that the development of new retail spaces would be affected. This would have a negative flow-on effect to the construction industry.

Impact on Employment

The 15% price advantage enjoyed by international online retailers is taking growth out of the market and making domestic retailers uncompetitive. Free shipping also encourages consumers to split purchases into smaller bundles to bring the value down to within the $400 threshold. This price advantage is likely to lead to a decline in New Zealand based retail businesses, costing jobs in this sector as well as in the manufacturing and construction sectors.

Ultimately, the loss in tax revenues and impact on employment could adversely affect New Zealand's GDP.

International Comparison

The de minimis level in New Zealand and Australia is significantly higher than in other countries (UK £15, Canada C$20), therefore the impact on our country is greater than on other OECD members. These countries must have found a workable solutions to the administration and collection of GST at these lower thresholds.

International literature shows that tax has a distortionary effect on the growth of e-commerce. Changes to state sales tax in the US saw a 45-60% fall in purchases from offshore internet retailers, offset by a 27% increase in demand at domestic online retailers.[23] The de minimis is also creating a disincentive for foreign businesses considering a physical presence in New Zealand.

Conclusion

We believe that the government needs to urgently take action to remedy this situation as the impacts are greater than tax revenues alone. Key principles we think should guide a change to the de minimis rule are:

- provide a level playing field to ensure true competition;
- avoid New Zealand taxpayers subsidising offshore retailers;
- provide government with the tax revenue it is entitled to; and
- ensure New Zealanders who choose to shop with international online retailers have a positive impact on New Zealand's social and economic development.

[23] Booksellers NZ/NZISCR – A proposed pathway toward future reform of New Zealand's de minimis threshold

A.9 HOLIDAYS ACT 2003 –ANNUAL (PARENTAL) LEAVE ENTITLEMENT AND HOLIDAY PAY

Annual Leave Entitlement

The issue here is that a person that takes a full 52 weeks extended parental leave earns a full year's annual leave and also a full year's entitlement to sick/domestic leave, while not working. This person is immediately entitled to four weeks annual leave and five days sick/domestic leave, possibly more depending on contractual arrangements. While the employer may not have to pay much holiday pay if the annual leave is taken immediately, they still need to arrange replacement labour which incurs a cost. If the employee elects to wait 12 months before taking the annual leave they will then receive "full holiday pay" and effectively have two years' entitlement in one.

Aside from the additional costs imposed on employers, the policy raises real issues of equity between employees. We would like the Government review the fairness of this entitlement and consider ending the accruals for annual and sick/domestic leave during parental leave absences.

The issue would be resolved by the repeal s 16(2)(ii) of the Holidays Act 2003.

A.10 PARENTAL LEAVE AND EMPLOYMENT PROTECTION ACT 1987

Calculation of Holiday Pay for those returning from Parental Leave

An associated issue is that those returning from parental leave have their holiday pay calculated on a different basis to other employees. Section 42 (2) of the Parental Leave and Employment Protection Act 1987 requires the calculation of holiday pay to be based on the employee's average earnings over the preceding 12 months, whereas other employees' holiday pay is to be calculated *at the greater of average or ordinary pay* (s21 of the Holidays Act 2003). As a consequence, those taking annual leave in the 12 months after returning from parental leave receive reduced holiday pay, which may cause financial stress. The impact is illustrated in the following example:

Jane Citizen

Salary employee - paid monthly on parental leave for 9 months - 31/12/2013 to 1/8/2014 (inclusive)

Ordinary Hourly Rate	$43.4861		
Ordinary Daily hours	8		
Ordinary Daily Rate	**$347.8888**		
Period counter	Month PE date	Earnings per month	Details
1	30/11/2013	$7,537.45	last month of work
2	31/12/2013	$-	1st month on PL
3	31/01/2014	$-	PL
4	28/02/2014	$-	PL
5	31/03/2014	$-	PL
6	30/04/2014	$-	PL
7	31/05/2014	$-	PL
8	30/06/2014	$-	PL
9	31/07/2014	$-	PL
10	31/08/2014	$-	PL
11	30/09/2014	$1,036.27	returned PT (3 days/24 hrs week)
12	31/10/2014	$1,036.27	returned PT (3 days/24 hrs week)
		$9,609.99	earnings previous 12 months
		52	***weeks***
		$184.81	average ***weekly*** value
		3	days per week
		$61.60	**average daily rate**
		-$286.29	difference between 'ordinary daily rate' v's 'average daily rate'

We submit that on returning to work after a period of parental leave, employees' holiday pay should be calculated in line with normal annual leave calculations for other employees i.e. the employee should receive the *greater of average or ordinary pay*. This would be achieved by repealing s42(2)(a) and 42(2)(c) of the Parental Leave and Employment Protection Act.

A.11 KIWISAVER (CONTRIBUTION RATES)

Problem Definition

Under current rules employees who are members of KiwiSaver can choose a contribution rate of either 3%, 4%, or 8%. These contributions are deducted by the employer through the PAYE system and forwarded to the IR who in turn forwards the contribution to the employee's chosen KiwiSaver provider, or a default provider if a preferred provider has not been chosen. If the employee wants to make a contribution at some other percentage – 5%, 6%, 7% or greater than 8% – they need to make arrangements to pay the additional contribution direct to the IR or the Scheme provider; they are not able to organise this to be deducted from their pay and forwarded by the employer with their default contribution. This gives rise to additional compliance costs and reduces the likelihood of employees making additional contributions.

Background

The employee contribution rate is set out in s64 of the KiwiSaver Act 2006. This requires a contribution of 3%, 4%, or 8%. Employees may make voluntary contributions over and above the default rate but this has to be organised independently and cannot be organised with the employer.

The compulsory employer contribution rate is 3% of the employee's gross salary or wages. An employer can make an additional contribution to their employee's superannuation scheme via the PAYE system.

It is unclear why an employer can make voluntary contributions via the PAYE system, but not employees. The need to make separate arrangements is likely to be a deterrent to making additional contributions.

Historically, many employers have agreed to contribute to their employees' superannuation by matching employee contributions on a dollar for dollar basis, up to a cap, most commonly 5%. Where employees make separate voluntary contributions direct to their Scheme Provider there is a reduced likelihood of their employer making a matching contribution. Accordingly, overall contributions are likely to be lower than they might otherwise be.

Solution

Section 65 of the KiwiSaver Act 2006 provides for additional rates at which employees may contribute to their KiwiSaver scheme being made by Order in Council.

An Order in Council should be made to permit employee contributions via PAYE deduction at the following additional rates: 5%, 6%, 7%, 9% and 10%. Alternatively, the Act could be amended to allow employees to contribute not less than 3% and up to a maximum percentage deemed an appropriate ceiling.

A.12 RESOURCE MANAGEMENT ACT (REMOVAL OF GMO RESTRICTIONS)

EXECUTIVE SUMMARY

- It is recommended that the Government remove the ability for councils to control hazardous substances and new organisms (GMOs) from the RMA;
- The Environmental Protection Authority has a national role to manage GMOs under the HSNO Act. A national level approach to managing GMOs ensures consistency throughout New Zealand;
- By making this change to the legislation, duplication will be prevented. This has a number of advantages including reducing cost burdens on tax and rate payers, and avoiding confusion on different rules being applied form a national and regional basis.

INTRODUCTION

This submission has been prepared in response to the Prime Minister's challenge at The New Zealand Initiative's March 2015 retreat for members to provide a list of regulations which we need to be modified or scrapped.

In this submission we recommend that the following regulation be modified or rescinded:

Removal of the explicit function for councils to control hazardous substances and new organisms (GMOs) from the RMA.

What were these regulations intended to achieve?

In the August 2013 Resource Management Act (RMA) reforms it was proposed by the Minister for the Environment that the explicit function for councils to control hazardous substances, and the ability for councils to control new organisms (GMOs) through the RMA, would be removed. The Government at the time considered that GMOs should only be managed under the Hazardous Substances and New Organisms Act (HSNO) via the Environmental Protection Authority (EPA).

The RMA requires local government to promote sustainable management of natural and physical resources. 'Natural and physical resources' includes all plants and animals; genetically modified plants or animals are not specifically excluded.

In this Act, *sustainable management* means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while:

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA is regarded as New Zealand's main piece of legislation that sets out how we should manage our environment.

What is going wrong – what they are actually achieving?
When the two Acts were drafted the intention was for the HSNO to be exclusive in its application to GMOs. It is noted that former Part 13 of the RMA applied to the management of GMOs, but was repealed by the HSNO, which is supportive of this contention.

Various legal opinions point to the problems with the Acts' intentions. As a general comment the absence of express reference to GMOs in the RMA is not necessarily an indicator that GMOs were intended to be outside the RMA's jurisdiction. As an effects-based piece of legislation, the RMA does not need to refer to particular substances or activities before it will apply to them.

For example, the definition of "contaminant" in the RMA, in relation to discharges to water, refers generally to substances that can alter certain properties of water, rather than applying to particular named substances. Furthermore, although the RMA and the HSNO have similar purpose provisions, the Court has observed that the RMA allows for consideration of matters on a regional and district basis, including the preferences of particular communities, in a manner that the HSNO consenting process is prevented from managing.

The scope of a council's function under the RMA theoretically includes addressing the environmental risks arising from the development of GMOs in its region. However, the RMA does not specifically require councils to manage GMOs' environmental effects.

The recent decision before the Environment Court (Federated Farmers vs Northland Regional Council) found that there is power under the RMA for regional councils to make provisions for control of the use of GMOs through regional policy statements and plans.

In this instance the inability of the HSNO Act to preclude the Northland Regional Council from making such rules, highlights the lack of precision in the current legislation for it to control GMOs.

OPTIONS FOR GETTING BETTER OUTCOMES

As highlighted by MfE in the 2013 proposed RMA reforms, the recommended solution is to remove the explicit function for councils to control hazardous substances and new organisms (GMOs) from the RMA. This will enable the EPA to manage GMOs under the HSNO Act, thus bringing national consistency.

A national level approach to managing GMOs ensures consistency throughout New Zealand and, given the technical complexity of assessing GMO applications, ensures that one agency (the EPA) is adequately resourced to provide this service. The EPA has the necessary risk assessment, legal, policy and scientific expertise required to consider GMO applications.

By making this change duplication will be prevented. This has a number of advantages including preventing duplication, reducing cost burdens on tax and rate payers, and avoiding confusion on different rules being applied form a national and regional basis.

CONCLUDING COMMENTS

It is recommended that the Government proceed with the HSNO amendment to the RMA as a means of removing the ability of councils to control GMOs and new organisms. This will enable the EPA to become the sole responsible agency for controlling hazardous substances and new organisms (GMOs).

A.13-22 TAX LEGISLATION GENERALLY (SUBMISSION BY DELOITTE)

INTRODUCTION

This submission has been prepared by Deloitte in response to the Prime Minister's challenge at the New Zealand Initiative's March 2015 retreat for members to provide a list of regulations that we consider need to be modified or scrapped.

We have identified ten specific examples where we believe existing tax law (largely contained in the Income Tax Act 2007) is providing an inappropriate policy outcome or is creating unnecessary compliance costs for taxpayers. These examples can be broadly broken down into two categories:

A. Barriers to capital markets/costs associated with raising funds in New Zealand; and

B. Tax simplification measures to enhance the ease of doing business.

A. Barriers to capital markets/costs associated with fund raising in New Zealand

1.1 Strong capital markets are fundamental to the ongoing development of our economy and generating economic growth. Tax policy can impact capital markets and the attractiveness of New Zealand as a destination for foreign investment, but also investment from within New Zealand. New Zealand currently holds a preference for investment in property, which can hamper businesses' ability to raise capital for investment and growth. It is essential that the New Zealand tax system strives for certainty and practicality if it wishes to help facilitate investment into New Zealand in the long run. Some of the current regulations governing New Zealand taxation lack these two vital features and have the potential to make New Zealand an unattractive place for businesses to operate from or through.

A.13 NON-RESIDENT WITHHOLDING TAX ON FOREIGN SOURCED INCOME

1.2 New Zealand's tax system is built on the concepts of source and residency. Residents of New Zealand will be taxed on their worldwide income and non-residents will be taxed only on income sourced in New Zealand.

1.3 Currently the Income Tax Act 2007 imposes non-resident withholding tax ("NRWT") on dividends derived from New Zealand by non-residents on the premise that it has its source in New Zealand. However, this provision will also apply to profits that flow through New Zealand to an overseas shareholder. This is best illustrated by way of example:

NZ Co is a New Zealand head-quartered corporate with foreign shareholders. It holds interests in a number of foreign subsidiaries. NZ Co receives dividend revenue from its foreign subsidiaries. NZ Co intends to return those profits to its foreign shareholders by way of dividend. That dividend is subject to a 15 percent NRWT "clip". In this scenario the New Zealand tax base is simply an intermediary and the income has not been sourced in New Zealand in an economic sense.

1.4 This NRWT "clip" acts as a disincentive to multinational companies using New Zealand as the base of their operations. This has a direct impact on the New Zealand economy through reduced jobs and economic activity.

1.5 We believe that foreign taxed and untaxed income in such a context should be able to flow through to foreign shareholders without a further New Zealand tax. If New Zealand is perceived as an unattractive hub for multinational corporations then corporations will actively avoid New Zealand leading to a negative impact on the wider New Zealand economy through reduced GDP (growth) and employment levels.

1.6 While a double tax agreement ("DTA") may mitigate the amount of tax payable to an extent, it can still lead to tax being paid on income that is not related to New Zealand in any way other than the passage the income takes, and double taxation occurring. Further, it relies on the corporation having domicile in a country that New Zealand has formed a DTA with.

A.14 THE GST COST OF RAISING MONEY IN NEW ZEALAND

1.7 Goods and Services Tax (“GST”) is an indirect tax levied on the sale of most goods and services in New Zealand. In order to ensure that GST is only levied once, it is ultimately only paid by the end users as businesses (registered persons) are usually able to claim back GST on inputs into their business (known as an ‘input tax deduction’). However, Inland Revenue takes the view that GST on capital raising costs (i.e. costs incurred to raise either debt or equity) cannot be claimed back from Inland Revenue even if that money is used in a business that only makes supplies, which are subject to GST.

1.8 Without going into the technical analysis of how this outcome arises, we view this as an inappropriate policy outcome for New Zealand because fund raising is ultimately part of the business process and is not the final output purchased by the end consumer. In the instances of capital-raising and debt-raising costs, based on the Inland Revenue view, companies are currently unable to claim back the GST incurred on costs associated with fund raising, including items such as legal costs and broker costs. This is the wrong outcome because in this scenario GST becomes a business cost.

1.9 Where an entity is largely making supplies, which are subject to GST then we believe it is entirely appropriate that an input tax deduction is available for GST incurred on capital raising costs.

A.15 UNSUCCESSFUL DEBT-RAISING COSTS

1.10 There is currently an anomaly in relation to deductions associated with debt raising. The anomaly exists because a deduction is only available if the debt raising is successful, yet if it is unsuccessful the costs associated with fund raising are non-deductible.

1.11 This is a bizarre policy outcome which creates a disincentive to raise funds for business expansion. It serves as a barrier to developing our capital markets. Even though the debt raising may ultimately be unsuccessful, the costs are still incurred by the business with the intention of employing that debt to create income. There is no logical reason in practice for the distinction between successful and unsuccessful debt raising. We believe that this provision should be amended to allow deductions for debt raising that is ultimately unsuccessful.

A.16 DUE DILIGENCE COSTS

1.12 The tax treatment of costs associated with due diligence vary depending on whether the acquisition is ultimately successful or unsuccessful, and whether the share capital or assets are sought to be acquired. This is illustrated in the following four situations:

- successful acquisition of share capital is non-deductible;
- unsuccessful acquisition of share capital is non-deductible;
- successful acquisition of the assets of a business is deductible (as the costs can be capitalised to the fixed assets of the business and depreciated); and
- unsuccessful acquisition of the assets of a business is non-deductible.

1.13 The reason the above costs are generally not deductible is because they are regarded as capital in nature (because they are intended to generate long term benefits) and therefore in the absence of a specific provision that allows a deduction, these costs are non-deductible for tax purposes.

1.14 We believe that some form of tax relief should be available for due diligence costs. The inability to deduct due diligence costs for tax purposes discourages this type of activity. Merger and acquisition activity is important for New Zealand's economic growth and in insuring efficient allocation of resources across markets. Tax should not be a barrier to this type of activity.

1.15 Further, it is also not appropriate from a policy perspective that a different tax outcome exists between successfully acquiring shares and successfully acquiring assets. Tax should not create a preference for the way in which a business is acquired; this should instead be driven by the appropriate commercial factors.

B. Tax Simplification

2.1 Tax is a complex and technical area of law and often significant business resources must be allocated to ensure an entity is compliant with its tax obligations. Undue compliance and administrative burdens lead to the misallocation of resources within businesses, resulting in inefficiency. The proposed regulation changes outlined below require only minor alterations but if amended we believe, would have a positive impact on the efficiency of businesses within New Zealand.

A.17 EMPLOYEE SHARE SCHEMES

2.2 The Income Tax Act 2007 contains the concept of a "Commissioner approved employee share scheme". The key advantage of such a scheme is that the employee can purchase shares at a discount and no tax is payable on the discount on the market value.[24] This provides an efficient mechanism for employers to build share ownership with staff as a means of aligning the interests of the business and staff.

2.3 The threshold that an employee is allowed to spend on buying shares under a Commissioner approved share purchase scheme was set in the 1980s and is only $2,340. Other strict criteria also apply, including the need for the employer to loan funds to the employee to purchase the shares. The effect of these criteria can be to deter employers from establishing an employee share scheme.

2.4 We believe that the criteria required to be satisfied in order to have a "Commissioner approved employee share scheme" should be relaxed. Employee shares schemes have been proven to deliver a number of economic benefits:

- employees with a vested interest in the company they work for are generally more productive, have lower rates of absenteeism and are less likely to leave their current employment;
- they allow companies to reward staff, while also retaining cash for investments; and
- they encourage savings and investment and build the financial literacy of the individuals who participate in the scheme.

2.5 Given the significant economic benefits arising from employee share schemes, it is vital that tax is not seen as a barrier to the establishment and operation of these schemes. In our view the following changes should be considered:

- the threshold should be raised to at least $5,000 (the $2,340 limit would be over $10,000 if it had been indexed to inflation) this will give employers the ability to provide meaningful reward to employees; and
- the need for other criteria should be reviewed, in particular the need to have a lending arrangement.

[24] If an employee share scheme does not meet the criteria for a "Commissioner approved employee share scheme" then any discount received by the employee is taxable income to them.

A.18 SELF-ASSESSMENT AND CORRECTION OF MINOR ERRORS

2.6 New Zealand operates a self-assessment tax system where each taxpayer is required to assess their own taxable income and income tax liability. This is the foundation of our tax system.

2.7 Currently, the taxpayer is able to amend minor errors by 'washing the error through' subsequent income tax returns. Section 113A of the Tax Administration Act 1994 permits this. However, in order to do this the error must be less than $500. If the error is greater than $500 the taxpayer must approach Inland Revenue and seek an amendment of their assessment.

2.8 The issue with the current threshold is that the cost associated with seeking amendments with Inland Revenue may be greater than the tax error that leads to an unwarranted cost and inefficient use of time for businesses. Approaching Inland Revenue to amend a prior assessment can be a costly exercise from a compliance cost perspective, particularly where Inland Revenue is not willing to accept the request without delving into the merits of the request. We note that this runs contrary to our self-assessment system. Often a formal letter will need to be written to Inland Revenue and this can take several weeks to be processed.

2.9 We believe that the current minor corrections threshold be increased to at least $5,000. This should be a material compliance cost saver for both Inland Revenue and the taxpayer (and we particularly say so for SMEs). In our view, this would encourage taxpayers to correct errors. We would not expect this measure to have a significant fiscal cost to the Government as errors over $500 would be allowed under the current law once processed by Inland Revenue (i.e. this simply removes the processing costs). Further, many taxpayers are likely to already apply a 'wash up' approach to amounts over $500, and this would simply bless this practice.

A.19 STATUTE BAR

2.10 A statutory bar exists to prevent the Commissioner of Inland Revenue from challenging income tax and GST returns that have been filed more than four years previously, except in situations such as a fraudulent or wilfully misleading return. This is vital to the operation of our tax system as it provides certainty to taxpayers as to their tax position. Without the statute bar, taxpayers/businesses would be subject to tax risk, in that historic returns could always be re-opened.

2.11 This statutory limit on challenges only applies to income tax and GST returns and is not available for ancillary taxes, such as non-resident withholding taxes, fringe benefit tax and payroll taxes.

2.12 There is no policy rationale for this distinction and we believe that this regulation should be amended so that the statutory bar applies consistently across all forms of tax. A consistent application will not be detrimental to New Zealand as the statutory bar is waived for fraudulent or wilfully misleading returns, instead it will help create certainty for taxpayers. This measure should not have a fiscal cost as we would expect that it is only in rare circumstances that the Commissioner would pursue ancillary taxes dating back greater than four years.

A.20 NON-RESIDENT CONTRACTOR TAX

2.13 Non-resident contractor tax ("NRCT") is required to be withheld on certain payments made to non-resident contractors for services performed in New Zealand or the use of personal property in New Zealand. NRCT acts as a safeguard on payments to non-residents to ensure that the New Zealand tax base receives its share. The standard NRCT withholding tax rate is 15 percent.

2.14 The requirement to withhold NRCT also applies on contract payments made to the New Zealand branch of a non-resident entity. This is because the branch is technically non-resident, even though it may have a substantial presence in New Zealand. We note that a branch of an overseas company will be registered with the Companies Office, have an IRD number and will also have an obligation to file New Zealand income tax returns.

2.15 The requirement to withhold NRCT in these circumstances should be removed, on the basis that the New Zealand branch is required to file an income tax return, so the revenue is already being retained in New Zealand, negating the need for corporations to withhold from payment. We note in particular that withholding NRCT can create significant cash flow issues for the payee. Further, commercial contracts will often contain a gross up clause which means that the New Zealand payer will bear the cost of the NRCT.[25]

2.16 The existing regulation is simply a compliance cost for the business (both the business receiving the payment and the business making the payment) with no safeguard or benefit to the New Zealand tax base and therefore should be amended.

[25] For completeness we note that there are ways to eliminate or reduce the NRCT withholding, which are discussed further below.

A.21 TIME PERIOD FOR CERTIFICATE OF EXEMPTION

2.17 A non-resident taxpayer may apply for a certificate of exemption from NRCT in certain circumstances, which means that the payer is not required to withhold on contract payments made to the non-resident taxpayer. These certificates are only applicable for 12 month terms, so every 12 months the taxpayer must write to Inland Revenue and re-explain their situation in order to be granted a certificate of exemption. This creates significant compliance costs for both Inland Revenue and the taxpayer.

2.18 We believe that the period for a certificate of exemption should be increased from 12 months to at least 36 months. The rationale behind our position is that a 12 month period is too short and the administrative and compliance burden is too great, which leads to an inefficient outcome. By lengthening the period this burden will be eased somewhat.

A.22 RESIDENT WITHHOLDING TAX ON DIVIDENDS

2.19 The current resident withholding tax ("RWT") rate on all dividends is 33 percent. This rate will apply to the extent a dividend has not been 'imputed' with imputation credits.[26] This withholding rate applies regardless of the shareholder's marginal tax rate.

2.20 The maximum rate that dividends can be imputed at is 28 percent, being the corporate tax rate. Therefore corporations are required to withhold on 5 percent RWT on dividends paid to resident shareholders, being the difference between the RWT for dividends and the imputation credits attached to the dividends. Where the shareholder's marginal tax rate is 33 percent this withholding tax rate makes sense because overall the shareholder will have paid the correct amount of tax on income arising from the dividend. However, where the shareholder's marginal tax rate is less than 33 percent (for example if the shareholder is a company or is an individual who earns less than $70,000) this withholding tax rate is too high and the taxpayer will need to file an income tax return to seek a refund of the overpaid tax. This is a cash flow issue for some shareholders and it also creates additional compliance costs for those who would not otherwise have to file income tax returns.

2.21 This could be remedied by allowing taxpayers to elect their withholding tax rate (and therefore enabling taxpayers to align the rate with their marginal income tax rate) as they are able to do with RWT on interest. This should mean that overall a more correct amount of tax is being withheld on dividends paid. Alternatively, a very low compliance cost measure would be to make all fully imputed dividends paid from widely held companies to resident shareholders subject to a final maximum tax rate of 28 percent and thereby eliminating further administrative and compliance costs on Inland Revenue, shareholders and the corporations that withhold tax. The later suggestion would have a fiscal cost in that reduced tax would be collected from those on a marginal tax rate of greater than 28 percent; however, we believe this is outweighed by the positive economic effects from reduced compliance costs.

CONCLUSION

2.22 This submission outlines some major compliance burdens, taxation rule irregularities and the perverse outcomes that current regulations produce. All of the issues raised in this submission require little legislative reform but would have a big impact on the efficiency of businesses and capital markets.

2.23 Deloitte appreciates the opportunity to provide a submission on points of taxation reform and would be happy to discuss any of the above with you further.[27]

[26] Imputation credits essentially allow a company to pass on the benefit of the income tax they have paid to shareholders to ensure that the profits of the company are not taxed twice (once in the hands of the company and once in the hands of the shareholder).

[27] Contact is: Patrick McCalman, Partner, Tax Advisory Services

A.23 TELECOMMUNICATIONS ACT (DEEMED CONSENT REGIME)

Deemed consent regime for connecting customers to UFB

EXECUTIVE SUMMARY

Telecommunications is a vital cornerstone of the NZ economy. As noted by MBIE in its 2014 Briefing to the Incoming Minister, the use of communications services has the ability to lift productivity across all sectors of the economy. The Productivity Commission stated that: "ICT is catalysing social and economic change on a scale comparable to those resulting from previous breakthrough technologies such as steam power, the internal combustion engine, and electricity.... Such breakthrough technologies occur rarely – perhaps less than once in a generation."[28] Recent research notes that if firms currently making low use of internet services became more like high use firms, it could be worth an additional $34 billion in productivity impacts to the economy.[29]

In many cases it is necessary to get consent from third parties to connect end users to UFB network infrastructure. Refusal and delays, resulting in cancellation of orders, means that there are a large number of individuals and businesses who are unable to obtain the benefits that access to fibre can bring.

[28] NZ Productivity Commission (January 2014). Boosting productivity in the services sector. 2nd interim report Competition and ICT topics. Pp89.

[29] http://www.innovationpartnership.co.nz/wp-content/uploads/2014/03/Sapere-Google-INZ-The-value-of-internet-services-to-New-Zealand-Businesses_-_Report-31-March-2014.pdf

[30] Land Access for Telecommunications: Discussion Document dated June 2015

The industry (through the TCF) has been advocating strongly for reform to enable a more efficient deployment of ultrafast broadband and remove barriers to uptake. The desired outcome is a hybrid model (with legislated automatic rights of installation for low impact activities and a "deemed consent" regime for high impact activities), which facilitates fibre connections, whilst still ensuring that property rights are respected. A key feature of any efficient regime will be a simple process for dealing with any disputes.

The Minister, MBIE and industry have been engaging constructively on these issues and the Minister has recently released a discussion paper addressing them and providing possible solutions.[30]

INTRODUCTION

This paper has been prepared by Chorus in response to the Prime Minister's challenge at The New Zealand Initiative's March 2015 retreat for members to provide a list of regulations which we consider need to be modified or scrapped.

In this submission we recommend that the following regulations be modified or rescinded:

- Telecommunications Act 2001 (Act): ss120/121 (rights of entry to land in respect of lines); ss 155A-155I); and
- the Code for Access to Multi-Unit Complexes (MUC Code).

What were these regulations intended to achieve?

Sections 120 and 121 of the Act allow network operators to apply to the District Court for an order permitting them to enter land for the purpose of constructing, erecting, laying or maintaining any line, provided that it's necessary for the purpose of telecommunications, the network operator has taken reasonable steps to negotiate an agreement and there's no practical alternative route.

Sections 155A-155I and the MUC Code provide a more detailed regime for access to Multi-Unit Complexes (which could be large office blocks, or unit-titled properties). This regime was intended to facilitate access to such buildings, without the need to have recourse to the District Court.

What is going wrong – what are they actually achieving?

The rights under ss 121/122 do not actually facilitate the connection of customers to the UFB Network. It is not practicable to take third parties to the District Court so that their neighbours can get connected – this would be costly, uncertain and time consuming, as well as potentially damaging to the network operator's reputation.

The MUC regime, which was designed to make access easier has never really been used by the industry as it is unwieldy, costly and uncertain. Chorus has recently conducted a small MUC trial in response to MBIE's request for evidence of the regime's limitations from a practical and operational perspective. As far as we are aware, we are the only network operator to have used the MUC regime in any capacity to date.

The impact is as follows:

- A significant proportion of UFB orders require consent from third party property owners.
- Many orders that require consent fail because:
    - consent is withheld for commercial reasons;
    - consent is withheld for other reasons, such as neighbour disputes; or
    - there is no response from the third party property owner.
- The third party can be single or multiple owners.
- The NPV of the cost to the industry, through to 2020, is estimated to likely be in the tens of millions of dollars.

Options for getting better outcomes

Chorus has been working with other network operators and retail service providers through the TCF to define the issues and to come up with potential solutions.

The TCF favours:

- a hybrid regime for access to third party land for connecting end users to UFB (applying for Rights of Way, Private Roads and MUCs):
    - an automatic legislative right of installation regarding low impact installations. Under such a regime the network operator would be required to give notice of intention to enter land to install infrastructure and would be automatically entitled to commence installation at the end of a prescribed notice period. This is similar to the Low Impact Facilities Regime in Australia;

  - a "deemed consent" regime regarding high impact installations. Under such a regime the network operator would be required to give notice of intention to enter land to install infrastructure, the land owner has the right to decline or opt-out of such access but in the absence of a response the network operator may proceed;

- ongoing rights of access to installed fibre infrastructure – similar to the rights of access to existing lines under the Act;
- an expanded and more accessible dispute resolution mechanism for land access disputes.

CONCLUDING COMMENTS

The current process and response from the Minister and MBIE on this issue has been progressing in a constructive and timely manner, and Chorus is satisfied that the issues are being addressed adequately. We will be participating with the industry in a response to MBIE's discussion document.

THE NEW ZEALAND INITIATIVE

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The New Zealand Initiative is an independent public policy think tank supported by chief executives of major New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

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