

Learning from the Past, Adapting for the Future:

Regulatory Reform in New Zealand



# Learning From the Past, Adapting for the Future

Regulatory Reform in New Zealand

Edited  
by  
Susy Frankel

The New Zealand Law Foundation  
Regulatory Reform Project

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# Foreword

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New Zealand is a small country. With a population of not much more than 4 million people, its tax base is necessarily small. Yet, New Zealand has much the same social and economic problems to address as those manifested in larger countries with greater financial and human resources.

Despite its size (or perhaps because of it) New Zealand has led the world in many regulatory reforms. A framework for the protection of those in vulnerable employment positions was provided by the Industrial, Conciliation and Arbitration Acts of the late 19th century and beyond. Many aspects of the Welfare State were first introduced in New Zealand. As time went on, economic and political philosophies changed and reforms of that type were replaced by those more influenced by notions of individual freedom than the collective public good. Examples, in the 1980s and 1990s, were the passage of the Employment Contracts Act 1991 and the privatisation of public institutions, such as the creation of Telecom New Zealand Ltd to undertake privately the services previously provided by the Post Office.

A degree of experimentation is inherent in any form of regulatory mechanism designed to deal with changing social and economic conditions. For example, in recent times changes to the regulation of the building industry have led to concerns about the standard of building practices, in light of the experiences of many homeowners whose dwellings have been found not to be weathertight. Physical safety is also an issue. Light-handed regulation is argued by some to have led to a reduction in safety standards. The present inquiry into the tragic deaths of miners at the Pike River complex, near Greymouth, is likely to provide important information about issues of that type.

Against that background, the New Zealand Law Foundation has commissioned a team of academics and practitioners from various disciplines to undertake a ground-breaking study into the way in which regulatory reform should be undertaken. The team is ably led by Professor Susy Frankel from Victoria University of Wellington. This volume is a collection of papers prepared under her leadership which provide a solid foundation for the more rigorous analysis of the issues that will follow. The individual papers will form the basis of a multi-disciplinary approach in the following stages of the project

that will provide, from emerging common themes, differing perspectives on the particular problems identified.

The Foundation's objectives involve the identification of all public policy factors to be taken into account whenever regulatory reform is contemplated; in effect, a "toolkit" for policy-makers designed to ensure relevant public policy considerations are not overlooked. While that aim takes account of the need for political considerations to be taken into account and judgment exercised when decisions of this type are taken, it also recognises the need for a framework for analysis which incorporates lessons learnt from experiences of the past. For example, whenever regulatory failure is suggested, it remains necessary to identify whether the reform itself has failed or the people undertaking the intended tasks have acted badly.

On behalf of the Foundation's Advisory Review Committee, I thank Professor Frankel and her team for the excellent start to this project and express the hope that public responses to these thought-provoking papers will assist in the development of many of the ideas. In that way, the Foundation's objectives can be achieved.

I congratulate the Foundation for its decision to finance an inspiring project, the result of which will be a world-class study for use in this and other countries. We are confident that such an outcome has the potential, if implemented, to provide enormous benefit to all New Zealanders.

Paul Heath  
Chairman  
NZ Law Foundation Regulatory Reform Project Advisory Review Committee  
Judges' Chambers  
High Court  
Auckland  
October 2011

# From the New Zealand Law Foundation

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This publication is the first instalment of the New Zealand Law Foundation's ground-breaking study into issues around regulatory reform in New Zealand.

I congratulate the study team, led by Professor Susy Frankel at Victoria University of Wellington, for bringing together this useful series of papers on key features of New Zealand's regulatory frameworks and the issues and concerns that those frameworks give rise to. It provides an information platform from which reform recommendations will be derived.

The Law Foundation's main reason for being is to back independent legal research into the major legal challenges facing our country. No other organisation occupies this vital niche in the evolution of good law in New Zealand.

Our research is truly independent – we are not tied to any political or commercial agendas, nor to any public institutions – but of course, it is also important that our research contributes materially to good public policy development.

The Law Foundation decided to take on regulatory reform as a major multi-year project precisely because it is so difficult, yet so important.

Regulation is a complex, topical and important area of public policy. It affects everyone in society, in ways we perhaps don't always appreciate.

Regulatory decisions impact on the cost, quality and safety of many everyday things we use, consume and take part in. The consequences of bad regulation can be spectacular – recent high profile crises of regulatory failure include the global financial meltdown and, closer to home, leaky buildings.

Good regulatory practice poses special challenges for New Zealand. We aspire to first world standards in areas like food and product safety, for example, but our smaller size, resources and talent pool compared to larger first world countries means that New Zealand can face real challenges in managing the complex regulatory regimes around them in the same way as those other countries.

In looking to regulatory solutions, we need to learn from experience here and elsewhere without imposing or unthinkingly adopting overseas models that might be wrong for New Zealand conditions.

Then again, as a small, open and trade-dependent economy, we need regulation that is efficient and flexible enough for our own needs, but is also compatible with overseas regimes.

The Law Foundation consulted widely with academics, practising lawyers and officials before choosing regulatory reform as its second major, multi-year research project. This followed the conclusion in 2009 of the Law Foundation's Human Genome Research Project at Otago University.

The Regulatory Reform project is being carried out by researchers from Victoria's Law Faculty, working with research partners from Chapman Tripp and the New Zealand Institute of Economic Research. This project mix reflects the Foundation's belief that large scale research projects of this type benefit from the input of academics and practitioners, and from the interaction between researchers in different disciplines.

This volume is evidence of the excellent progress being made by the team in unravelling the complexities of the topic.

I would also like to thank the project's Advisory Review Committee for their oversight and advice, ably chaired by Justice Paul Heath.

Finally, I thank the Law Foundation's Executive Director, Lynda Hagen, and her team in Wellington for their excellent contribution to this project.

Warwick Deuchrass  
Chairman  
New Zealand Law Foundation



# Preface

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The New Zealand Law Foundation Regulatory Reform Project is a research project conducted at the Law Faculty of Victoria University of Wellington, in association with project partners, the New Zealand Institute of Economic Research and Chapman Tripp.

This book was edited with the assistance of Bianca Mueller, Project Manager.

The chapters in this volume are the fruit of research, analysis, workshops and continuous discussion and debate. We thank the many participants in those workshops for their contribution to the discussion. In particular we thank the Treasury and the Ministry of Economic Development staff, many of whom have actively contributed to the project.

Thank you to the New Zealand Law Foundation, and its Director Lynda Hagen, for the initiative and foresight in establishing this project and for their continuing support of the research and the research team. Thanks also to the Law Foundation Advisory Review Committee:

- Justice Paul Heath (Chair);
- Debra Blackett (Corporate Lawyer);
- Professor John Burrows QC, FRSNZ (Law Commissioner and NZ Law Foundation Trustee);
- Dr Andrew Butler (Partner, Russell McVeagh and NZ Law Foundation Trustee);
- David Goddard QC (Barrister);
- Ivan Kwok (Principal Advisor, The Treasury);
- Rory McLeod (Director; Competition, Trade and Investment Branch; Ministry of Economic Development);
- Emeritus Professor Frank Mathewson (University of Toronto); and
- Andrew Sellars (Principal Legal Officer, Insolvency and Trustee Service, Australia).

We also thank the reviewers of the papers who remain nameless for reasons of academic integrity and the practitioner workshop participation and feedback from Chapman Tripp partners and staff, including Andy Nicholls, Kelly McFadzien, Jack Hodder SC, Daniel Kalderimis, Casey Plunket and Tim Smith.

Projects of this nature are not possible without the support of research assistants and at Victoria University we provide opportunities for students to develop their legal skills as research assistants. Thanks to student research assistants Laura Blumenthal, Sarah Cates, Ruth Upperton and Sarah Wilson.

The editor and authors extend particular thanks to Christine Gibson, Project Administrator, for her enormous and much valued contribution to bringing this book to fruition.

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October, 2011

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