

Recalibrating Behaviour:  
Smarter Regulation in a Global World

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# Recalibrating Behaviour: Smarter Regulation in a Global World

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Edited  
by  
Susy Frankel and Deborah Ryder

The New Zealand Law Foundation  
Regulatory Reform Project

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# Foreword

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In its second publication of papers, prepared during the course of the New Zealand Law Foundation's Regulatory Reform Project, Professor Susy Frankel, of Victoria University of Wellington, and her team have developed their thinking on the factors to be taken into account when policy makers are deciding whether reform of the law is desirable. The title to this volume, *Recalibrating Behaviour: Smarter Regulation in a Global World*, is indicative of the need to review domestic regulation, with global (as well as domestic) considerations in mind.

The four parts, in which the publication analyses 14 different topics, demonstrate the need for policy makers to take account of the interests of all persons who might be affected by regulation, both at a macro and micro level.

Part 1 considers the impact of bilateral (or multilateral) trading arrangements and the relevance of them to decisions that must be taken when reviewing New Zealand domestic law and entering into trade agreements (such as the current Trans-Pacific Partnership). The regulation of foreign investment into New Zealand; the synthesis of intellectual property law for trans-Tasman regulatory purposes provide instructive illustrations of the impact of a global approach; and competition law and policy. Foreign direct investment has topical importance, following the debate about whether the receivers of Crafer Farms should be able to sell to Chinese interests, in preference to a New Zealand bidder.

Part 2 deals with the need for those affected by proposed regulation, such as consumers and the public generally (as opposed to those responsible for its development and implementation) to be consulted about its content. All three papers provide insight into the way in which that is currently occurring and identify means by which the process might be improved.

Part 3 is concerned with the problem of unintended consequences. A number of examples are used to explain the type of problems that can arise. One of those reflects another topical issue: namely, the weathertightness problems that arose out of changes made to the Building Act in 1991.

Part 4 deals with regulatory institutions and considers the best way in which regulation can be imposed and implemented in our society.

The chapters contained in this publication demonstrate the careful analysis that has been undertaken, in respect of problems identified in the initial publication: *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand*.

On behalf of the Law Foundation's Advisory Review Committee, I congratulate Professor Frankel and her team for the considered and thought-provoking chapters that they have produced. These chapters provide the intellectual framework to inform the way in which the ultimate object of the project can be secured: namely, the provision of a toolkit for policy makers and the public that is designed to identify the public policy concerns at play, and to ensure both that

relevant public policy considerations are not overlooked and irrelevant considerations are not incorrectly applied.

The quality of the research published to date has underscored the need for a project of this type. The Foundation must be congratulated for its foresight in providing funding for this purpose. Not only will there be inestimable benefits in this country, but we are aware that the fruits of the research team's labours are keenly awaited in other jurisdictions.

Paul Heath

Chairman

New Zealand Law Foundation Regulatory Reform Project Advisory

Review Committee

Judges' Chambers

High Court Auckland

December 2012

# From the New Zealand Law Foundation

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This volume brings together the second collection of essays from the Law Foundation's multiyear, multidisciplinary study on regulatory reform in New Zealand.

These studies comprise the research platform for the regulatory toolkit that will be the project team's ultimate output.

The Law Foundation is encouraged that its initial vision for this project is now near fruition. Following review and debate at a special conference of experts, the refined themes and conclusions from these studies will become an intellectual basis and practical guide for the future shape of regulation in this country.

The Foundation instigated this project because of its potential to make a significant long-term contribution to the New Zealand economy. Regulation affects the cost, quality and safety of much of what we do, use and consume in our everyday lives.

Regulation is all-pervasive, but very challenging to design and implement well. The recent Royal Commission report into the Pike River mining tragedy is a timely reminder of how good regulation requires a rules framework and monitoring oversight that matches the level of risk.

The Law Foundation is uniquely well placed to take on the challenge of designing a regulatory framework tailored for the New Zealand environment. The Foundation is the country's only truly independent funder of legal research – we exist to support new legal thinking that is not driven by political or commercial agendas.

Substantial study on the complex challenges around regulatory reform was long overdue, but lacked an obvious funder. The Foundation had the resources and mandate to bring together relevant academics, economists and practitioners and support their work over a sustained period.

In late 2011, the research team, led by Professor Susy Frankel at Victoria University, produced its initial essay collection titled *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand*. This collection builds on that initial foundation, including insights from a series of thought provoking and well-attended workshops involving government agencies, sector representatives and major corporates.

The Regulatory Reform Project team includes researchers from Victoria's Law Faculty, working with research partners from Chapman Tripp and the New Zealand Institute of Economic Research.

This latest volume confirms the excellent progress that the team is making in coming to grips with the complexities of this subject. I thank them for the quality of thinking evident in this collection, and I look forward to seeing it transformed into

the basis for the toolkit during 2013.

I also again thank the Advisory Review Committee for their oversight of the Project, Chaired by Justice Paul Heath and including corporate lawyer Debra Blackett, Professor John Burrows QC, FRSNZ (former Law Commissioner and New Zealand Law Foundation Trustee), Dr Andrew Butler (Partner, Russell McVeagh and New Zealand Law Foundation Trustee), David Goddard QC (Barrister), Ivan Kwok (Principal Advisor, The Treasury), Rory McLeod (Director of Competition, Trade and Investment Branch, Ministry of Business, Innovation and Employment), Emeritus Professor Frank Mathewson (University of Toronto), and Andrew Sellars (Principal Legal Officer, Insolvency and Trustee Service, Australia).

Finally, I again thank Law Foundation Executive Director, Lynda Hagen and her team in Wellington for their dedication and commitment to this project and to the Foundation's wider work.

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# Preface

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