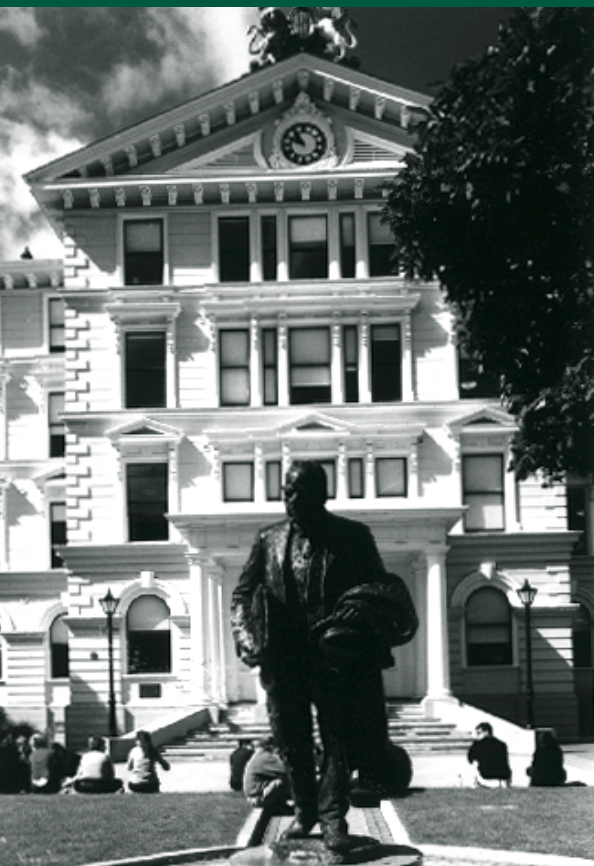


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Legislature v Executive-

The Struggle Continues

by Hon Doug Kidd

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LEGISLATURE V EXECUTIVE — THE STRUGGLE CONTINUES OBSERVATIONS ON THE WORK OF THE REGULATIONS REVIEW COMMITTEE

*Hon Doug Kidd**

I INTRODUCTION: THE GENERAL ROLE OF THE REGULATIONS REVIEW COMMITTEE

The Regulations Review Committee [“RRC”] was established by the New Zealand Parliament in 1985. Sixteen years on it is a well-established institution.¹ I had the honour of being the first Chairman and have returned to the Chair following the last election. The RRC has always been chaired by an Opposition MP. It is the only select committee regularly so chaired. With equal numbers of Government and Opposition members, it seeks to work by consensus, and generally succeeds.

Each year the RRC tables a report entitled “Activities of the Regulations Review Committee”. The index pages alone show the wide range of issues pursued in any year. The reports illustrate the important watchdog role of the RRC. They show the ongoing tendency of all Governments to stray from the paths of constitutional righteousness, seduced by the sirens of power, efficiency, and convenience. We are here to educate, guide, persuade, correct, chastise, and reform Government – a congenital sinner.

* DCNZM, LLB(VUW), MP. This address was given to the Faculty of Law and the New Zealand Centre for Public Law, Victoria University of Wellington, 18 May 2001.

¹ Incidentally, there are only 15 MPs who were in Parliament when the RRC was formed, and only 10 of us have served continually since.

Above all, we are here to protect and promote liberty and the rule of law.

The RRC is provided for and its powers and duties are set out in Standing Orders 380-383. The RRC has five substantive functions:

- to examine regulations (as defined in the Regulations (Disallowance) Act 1989);
- to consider draft regulations referred by a minister and reporting to the minister;
- to consider any regulation-making powers in a bill before another select committee and reporting to the committee;
- to consider any matter relating to regulations and reporting to the House; and
- to consider any complaint by a person or organisation aggrieved at the operation of a regulation and reporting to the House.

Aided by a small expert staff, the RRC examines approximately 300-400 regulations and 80 instruments deemed to be regulations every year. At times, the task of scrutiny might seem unremitting and unrewarding but never without purpose.

It is important to recall, and it must never be forgotten, that we were created in reaction to what was then known as *unbridled power*. The Rt Hon Sir Geoffrey Palmer made his reputation on it.² This was a period when the management of the economy by the Government using the regulation-making powers of the Economic Stabilisation Act 1948 reached a high water mark for executive power — and a low point for Parliament. We should tremble at the empowering provisions of that Act and the Public Safety Conservation Act 1932, and teach each generation to be alert lest they come again. The general purpose of the Economic Stabilisation Act was simply to “promote the economic stability of New Zealand”. Whatever that was, it was never defined. Under Section 11 the Governor-General could “from time to time by Order in Council make such regulations as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act and for the due administration of this Act.”

² See Geoffrey Palmer *Unbridled Power* (Oxford University Press, 1979).

That widest of powers enabled the Government/Cabinet/the Executive/the Prime Minister — at times all were included in the last mentioned — to do anything and in the end virtually everything, to the exclusion of Parliament and the Courts.

Speaking on the repeal of the Act in May 1987 the Minister in charge of the repeal bill, Hon David Caygill, said “any future government that thinks there is a need to control the economy through a wage, price, rent, dividend or interest rate freeze – let alone all of them at once – will have to bring such measures before the House for proper debate That safeguard, at the very least, ensures that in future ill-conceived measures will not be able to dreamt up . . . and established overnight”.

For an even longer period another monster lurked in New Zealand’s legislative thicket in the form of the Public Safety Conservation Act 1932. I understand its powers were invoked on two occasions. Its regulation empowering section stated that “if at any time it appears to the Governor-General that” (and I now paraphrase) anything has or might happen the Government can do anything or everything! During the repeal of that legislation the Rt Hon Geoffrey Palmer said in the House in July 1987 “that is not the way New Zealand should be governed. A government should not have powers of that magnitude, scope and lack of specificity”.

It was not as if the evil of unbridled executive power was not understood. Its source has always been, and can only be, in the empowering provisions for making regulations in statutes. As long ago as 1962, a standard form of empowering provision was recommended by the Algje Committee and adopted by the Government. The standard format sets out a list of these specific topics, followed by a general power that deals with subsidiary or incidental matters. The committee recommended that regulation-making powers in bills coming before the House should be drafted as closely as possible in accordance with the model fixed in 1962 to ensure that:

- the precise limits of a law making power conferred by Parliament are set down as clearly as possible in the enabling act; and
- the jurisdiction of the courts to review delegated legislation and to determine its validity should not be excluded or reduced and that as • opportunity offers, existing statutes be amended to conform to that principle.

A plain English version of that same format is still in use today. As a starting point, the RRC will look at whether a regulation-making power conforms to the standard format and the principles identified by the committee on delegated legislation.

In my view, the task of considering regulation-making powers in bills is the RRC's most important function in that it is atop of the cliff function and of enduring value. The fact that all regulation-making provisions in all bills introduced into the House stand referred to us without further action by Parliament is of great significance. When the RRC was first established it could only report on a regulation-making power in a bill at the request of the subject select committee which was considering the bill. The RRC, in 1986, believed it could not carry out its overall responsibility unless it was authorised on its own initiative to comment on and make suggestions on specific empowering provisions. The RRC's recommendation that the Standing Orders be amended was accepted. Since 1986 the RRC has regularly reported to subject select committees on regulation-making powers in bills. A typical year will involve reports on six bills. The committee's power is one of recommendation only. The legal adviser to the RRC may be (and in practice often is) invited to brief the subject committee during its consideration of the RRC reports. While the subject committee is not obliged to follow the recommendations of the RRC, our reports are given serious consideration in view of the committee's expertise on delegated legislation. They are almost invariably adopted wholly or substantially by subject committees.

As with the scrutiny of regulations, the RRC's examination of regulation-making powers in bills does not involve a consideration of the policy of the bill itself. The RRC is not confined to the scrutiny grounds under its Standing Orders, although these serve as a benchmark to consider whether, potentially, any regulations made under the empowering provision would infringe these grounds.

Some common themes have emerged in the RRC's examination of regulation-making powers. Most of the RRC's reports arise from the infringement of well-established principles such as:

- amendment of a Act of Parliament by regulation;
- matters of policy and substance being delegated to regulations; or
- delegation of a law-making power without providing for adequate scrutiny and control.

II *THE REGULATION REVIEW COMMITTEE'S WORK DURING THE 46TH PARLIAMENT*

Some examples of the RRC's reports and the recommendations of the subject select committees in the current Parliament are outlined in this paper. The issues raised by the current RRC and the subject committee's recommendations are made public in the subject committee's report to the House.

A *Misuse of Drugs Amendment Bill*

The Misuse of Drugs Amendment Bill provided for the expeditious classification of controlled drugs to address concerns that illicit drugs were becoming established in New Zealand before legislative changes could be made to outlaw them. Prior to the Amendment, Class A, B, and C drugs were listed in a Schedule to the Act. Only minor modifications to the schedules could be made by an Order in Council. To add a prohibited substance to the schedules required an amendment to the Act. This could be a lengthy process that hampered the Government's ability to respond quickly to emerging drug threats. The bill proposed that the current schedules listing Class A, B and C drugs be removed from the Act and placed in regulations. New drugs would become classified and existing controlled drugs reclassified by regulations rather than legislative amendment. The bill also put in place a special procedure requiring that the regulations could not come into force unless the House of Representatives approved them by resolution. The regulations would then be exempt from disallowance.

The RRC raised serious concerns about the amendment procedure. The RRC's primary concern was that the bill offended the long established principle that matters of policy and substance should be dealt with by an Act of Parliament, while regulations should be confined to dealing with matters of technical detail necessary to implement the policy contained in the principal Act. By moving the schedules into regulations, the bill would allow regulations to define the magnitude of an offence committed under the principal Act.

The RRC considered that the most desirable way to amend an Act would be by an amendment Bill. A different approach to amending an Act should be taken only when a very strong justification for doing so can be offered. The RRC suggested alternative procedures to the Health Committee in its consideration of the Bill.

In its commentary on the Bill, the Health Committee recommended an alternative procedure whereby the schedules listing controlled drugs would be retained in the Act, and the Act would provide that the Governor-General may amend those schedules by an Order in Council. Parliamentary approval would be required before any such regulation came into force.³

The major advantage of this approach is that it is consistent with constitutional convention that matters of policy and substance should be dealt with in primary legislation. We note that it also had several precedents... . Sections 5 to 10 of the Regulations (Disallowance) Act 1989 would not apply to regulations made under this procedure, but the Regulations Review Committee would have the opportunity to scrutinise the Orders in Council under Standing Order 382(2). This scrutiny provides an additional check on the regulations being made.

While we accept that the most desirable and appropriate way to amend an Act of Parliament is by way of an amendment bill we consider that the approach we are recommending in this specific instance is justified. We consider it is vital that authorities are able to act rapidly in order to respond appropriately to dangerous and potentially harmful drugs.

As an additional procedural safeguard, the Health Committee also recommended that the House adopt procedures to allow for a substantial select committee scrutiny of any Order in Council. This step is in addition to the requirement that the House approves the regulation by resolution and would allow a committee to substantially consider any proposed regulations. The Health Committee recommended that the House adopt new sessional orders to implement this process and stated that it would not support the Bill's enactment unless such sessional orders were adopted.

The Health Committee's report on this Bill demonstrates the balancing process that takes place when the RRC reports to a subject committee.

³ Misuse of Drugs Amendment Bill (No 4) 1999 (2000 No 325-2) (26 June 2000 No 668) (the commentary), as reported from the Health Committee, 4.

On the one hand, there is a policy issue that must be resolved. On the other hand, there are constitutional principles at stake.

The Bill has now been enacted into law, with the schedules retained in the Act itself, but providing for amendment by Order in Council, after approval by a resolution of the House. The House has also adopted new sessional orders requiring any notice of motion to approve a controlled drug order to be referred to the Health Committee for examination. The Health Committee must report to the House within 28 days of the notice of motion being lodged. The motion to approve the order cannot be moved until either the Health Committee has reported or 28 days have elapsed.

This is a significant development providing for the examination of a regulation that amends an Act of Parliament, thereby creating a serious criminal offence. The end result will be a select committee examination of the policy of a regulation in order to determine whether it is appropriate for a substance to be classified as a controlled drug. Where previously a committee would have examined an amendment bill, now the Health Committee will consider a regulation that proposes to amend an Act of Parliament. As a further check, Parliament has an opportunity to debate the notice of motion approving the controlled drug order. Once the regulation is promulgated the RRC can still carry out its usual scrutiny under its Standing Order criteria.

During the committee stage of the bill the Hon. Annette King, Minister of Health described select committee process of the bill as follows:⁴

I think this is a very good example of a select committee, made up of people with experience and talent, going through the legislation and improving it for the benefit of New Zealanders...When I saw the changes that had been made, I could see that we had better legislation than we had started with, because the changes did address issues and concerns that had been raised.

B INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL COURT BILL

The International Crimes and International Criminal Court Bill implements the Rome Statute of the International Criminal Court and creates new international crimes in New Zealand law.

⁴ Hon A King (7 Nov 2000) 588 New Zealand Parliamentary Debates 6370.

The RRC made recommendations on this Bill to the Foreign Affairs, Defence and Trade Committee in respect of clauses 4(1) and 179(f). The RRC's concern related to the definition of "Statute" which meant the Rome Statute of the International Criminal Court, and including any amendments or substitutions of the Statute that are, or could become binding on New Zealand from time to time. As drafted, there was the possibility that amendments to the Statute could become incorporated automatically into New Zealand law by virtue of the use of the term "Statute" in the Act. The RRC considered that this was not what was intended and that the Bill should be clarified by amending the definition to encompass only those amendments to the Statute that are included in the Schedule.

The Foreign Affairs, Defence and Trade Committee accepted that the definition in clause 4(1) is intended to cover only those amendments to the Statute that have been included in the Schedule. That committee therefore recommended the amendments to this clause suggested by the RRC. The committee did not make any further recommendations in respect of clause 179(f) on the advice that similar provisions in existing statutes to implement treaty obligations do not differentiate between substantive and other amendments.

The RRC wrote to the Minister of Foreign Affairs and Trade expressing its ongoing concern about clause 179(f). The Bill then completed its remaining parliamentary stages. During the committee stage, the House agreed to an amendment promoted by a member to remove clause 179(f) to address the concerns raised by the RRC.

C *NEW ZEALAND PUBLIC HEALTH AND DISABILITY BILL*

The purpose of the New Zealand Public Health and Disability Bill was to repeal and replace the Health and Disability Services Act 1993, to create District Health Boards (DHBs) in place of Hospital and Health Services and to disestablish the Health Funding Authority (HFA). The DHBs will carry out many of the functions previously performed by the HFA. The RRC reported to the Health Committee on a number of matters of concern.

Certain schedules in the Act apply in respect of DHBs and various health committees. The Bill provided that some of the schedules may be amended by Order in Council. These schedules cover matters such as appointment and election of members (including the removal from office), appointment of chairpersons and deputies, notice of meetings, information relating to meetings,

the admission of the public to meetings, dealing with land, employees, borrowing and investment and tax status. These matters are fundamental to the establishment of DHBs and committees. In other legislation establishing Crown entities, these provisions are set out either in the body of the empowering legislation itself, or as a schedule to the Act. The RRC considered that this aspect of the Bill infringed the well-established principle that regulations should not override primary legislation.

Furthermore, the regulation-making power contained a number of very broad regulation-making powers that went beyond matters of implementation and detail. In the RRC's view some of the regulation-making powers should be more clearly defined so that the limits of the power being delegated are clearly prescribed. Other powers should be deleted and the subject matter of the regulation should be dealt with by the Act itself.

In reporting the Bill back to the House, the Health Committee recommended that the clause providing for the amendment of the schedules by Order in Council should be omitted, except where the amendments related to the functions of three statutory committees. The Health Committee also recommended amendments to all of the regulation-making powers referred to by the RRC, except for a regulation-making power concerning methods for conducting elections of board members and methods for voting at elections. This latter regulation-making power was the subject of a substantive Supplementary Order Paper introduced by the Minister at the committee stage of the Bill.

The Bill has now been enacted with many changes, made by the select committee and amendments at the committee stage.

D INQUIRY INTO REGULATION-MAKING POWERS THAT AUTHORISE INTERNATIONAL TREATIES TO OVERRIDE PROVISIONS OF NEW ZEALAND ENACTMENTS

Recently, during our scrutiny of regulations, the RRC examined a regulation that gives effect to an international agreement between New Zealand and another government. The RRC raised a concern that the provisions in the international agreement have force and effect so far as they relate to New Zealand, notwithstanding anything in the enabling act or any other act. The wording in the regulation is the same as the wording of the regulation-making power in the enabling Act.

The RRC has ascertained that a number of acts contain similar regulation-making powers and the committee wishes to examine further the use of such powers. The RRC has initiated an inquiry into this matter and having invited public submissions to assist its investigation is now considering them. The terms of reference of the inquiry are, to examine:

- the circumstances in which regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments have been used;
- alternative means of implementing international treaties into New Zealand law by regulations that do not authorise the provisions of a treaty to override any provisions of New Zealand enactments;
- whether it is appropriate to enact regulation-making powers to implement international treaties into New Zealand law, notwithstanding the provisions of any other enactment;
- general principles for identifying if and when it is appropriate to enact regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments; and
- what limits should be imposed on prescribing regulations to implement international treaties by overriding any provisions of New Zealand enactments?

This inquiry will examine existing regulation-making powers in acts rather than those in bills. The outcome of the inquiry may, however, identify useful principles for when legislation is being developed or when a bill containing this type of provision is considered by a subject select committee.

E ELECTRICITY INDUSTRY BILL

As I come up to the 23rd anniversary of my entry into Parliament I find that I have been increasingly noticing that what has gone past in former times is tending to come around again.

During the mid-1980s, we saw a series of measures which led to the repeal of the Economic Stabilisation Act 1948 and the Public Safety Conservation Act 1932 and the establishment of the RRC as I have already mentioned.

Now in 2001 we see what, I think, can fairly be described as the first frontal assault by the Executive upon the ramparts of Parliament built up in the mid-1980s and carefully maintained since then. It comes in the form of the Electricity Industry Bill presently before the Commerce Select Committee.

The RRC has carefully examined the regulation-making powers of this Bill and has forwarded its report to the Commerce Committee. Our report will be available when that committee reports the bill to the House. In the meantime, what I say in no way reflects or represents the views of the RRC or the contents of the report. These views are entirely my own.

In the explanatory note, under the reassuring heading “Reserve Regulation-Making Powers” we are told that the Bill is designed to *encourage* the electricity industry to develop its *own solutions* to ensure that electricity is delivered in an efficient, fair, reliable and an environmentally sustainable manner to all consumers. The Bill provides Government with “regulation-making powers to be exercised if the industry *fails* to deliver these solutions”.

What a wonderfully constructive, interesting notion towards a highly desired goal – how could anyone oppose it?

Of course it is nothing of the kind. In the finest traditions of the two evil Acts referred to much earlier, the Governor-General may by Order in Council made on the recommendation of the Minister make regulations for “all or any of the purposes” of the Act – which are to do anything and almost everything by regulation or rule in connection with controlling and in effect running the electricity industry. All that the Minister has to do prior to using the sweeping powers to control the electricity system is to establish an Electricity Governance Board. On an initial reading this seems like a very real constraint on the Minister, until we plough through several more pages of empowering provisions to find that the Minister not only appoints the Board but he may direct them, so long as he tables the directions in Parliament. And to remove any doubt whatsoever as to who is running the place, the Minister may remove any or all of the Board members at any time without cause or compensation.

Lest there be any suggestion of constraint, the Minister can make regulations or rules, including rules for any purpose for which an electricity governance regulation may be made subject to the Minister having regard to some matters which do not really act as constraints on him.

Critically, a rule is not to be a regulation for the purposes of the Regulations (Disallowance) Act 1989 or the Acts and Regulations Publication Act 1989. Therefore, unlike most ministerial rules which have been brought within the purview of our RRC in recent years, these electricity governance rules will be kept out of our reach.

We could be consoled by the fact that the Regulations (Disallowance) Act 1989 applies to regulations made under the Act. But then we come to subclause 2 of clause 172J which is a bare faced attempt to usurp the role of Parliament and the RRC. It provides that no regulation made under the critical sections “may be disallowed under section 5 of the Regulations (Disallowance) Act 1989 on the ground that it contains matter more appropriate for parliamentary enactment or on any ground that corresponds to or is broadly equivalent to that ground”. On reading that, one first sounds the alarm, then buckles on weapons and rushes to defend the ramparts.

Disallowance of regulations under section 5 of the Regulations (Disallowance) Act 1989 is effected by a resolution of the House. The notice of motion can be given by any member. Under section 6, a notice given by a member of the RRC must come on for debate and be dealt with within 21 sitting days. If the Government does not provide for that then the regulations will lapse. It is important to note this process. No grounds are required to be stated in the motion. Therefore, the attempt in the bill to prevent disallowance is misconceived and must surely fail. The RRC may very well report to the House that a regulation which might be made under the bill when enacted offends against one or more of the nine grounds set out in Standing Order 382(2). Even if one of the grounds for referral to the House is that such a regulation “contains matter more appropriate for parliamentary enactment” that is irrelevant to the motion for disallowance procedure. There is, in short, no correspondence between the two procedures ie reporting to the House on the one hand under Standing Order 382 and giving notice under section 6 of the Regulations (Disallowance) Act 1989 on the other.

Clause 172J is objectionable on another ground regardless of its effectiveness. It purports to mandate an enquiry into why members support a resolution in the House. This would be a major inroad into the protection that the House enjoys under the Bill of Rights 1688 which forbids the courts inquiring into proceedings in Parliament. The House, on the recommendation of the Privileges Committee, has recently instructed counsel to appear in a case involving Owen Jennings to protect this principle.

Another case involving Janet Mackey has just been referred to the Privileges Committee on this ground. I recently supported Honourable Richard Prebble when he appeared in the High Court across the road. There an instrument of the Executive Government of New Zealand, namely New Zealand Post Limited, was blatantly seeking to make a major inroad into that protection which the House enjoys and asserts so fiercely whenever it is threatened. The Judge did Parliament, the constitution, and the people proud in his oral judgment which I note has not been appealed. When the Government, in whatever guise, seeks to undermine the very foundations of Parliament we can be comforted that at the end of the day it is the Courts that are the guardians of all our liberties.

If this provision is not removed from the Bill when it is reported back, then we will be back in the darkest of the dark days of the early 1980s in terms of the struggle between Executive and Legislature.

Returning to the broader issues of the regulation-making powers in this bill, I recall the passage I quoted from the explanatory note which indicates that these regulation-making powers are designed to encourage the industry to find its own solution lest they be regulated because they failed. This is an extraordinary concept for both legislation and Government. Day by day and year by year, those involved in the industry have continually to endeavour to divine whether or not they are meeting the Minister's and the Government's expectations. All the while they know that if they fail the axe might descend in the form of a torrent of rules and regulations which could put the Government effectively in charge of their assets, financial viability and future. The accountability of management to directors, and directors to shareholders under the Companies Act and the State Owned Enterprises Act will be thrown into turmoil.

Huge efforts will have to be made by the industry to divine the Minister's mood and interpret his words. This is a whole new kind of law making. It strikes at the heart of the rule of law itself. The winner of the prize for unmitigated gall must surely be the statement in the explanatory notes regarding the offending subclause of clause 172J. The notes justifying this attempt to prevent disallowance state that the provision proceeds on the basis that "if Parliament passes the bill it has decided that the regulations they empower are appropriate as secondary legislation".

Parliament will be deemed to have approved in advance of regulations of huge impact and effect which have not been written and of which Parliament has not the slightest knowledge. The statement is as astonishing as it is outrageous.

All of this of course could become academic in the face of 172F(5) which says that a rule is not a regulation for the purpose of the Regulations (Disallowance) Act 1989. The virtual takeover of the electricity industry can be accomplished by rules — under clause 172F(1) the minister may make a rule for all or any of the purposes for which an electricity governance regulation might be made. The matters which he must have regard to in making the choice to move to rules act at least as much by way of justification as limitation.

The RRC has shown over several years that it is perfectly capable of dealing with rules involving complex technical topics such as those relating to Civil Aviation. Technical complexity and the need for frequent change were the original arguments to move to the flexibility of rule making from the relatively constrained process of regulation-making. Our job is to see through the technical detail and apply the proper principles to uphold the legislative supremacy of Parliament and the rule of law.

We truly have arrived at a new all time low when it is conceived that a major part of the economy and a function critical to society can be ordered and controlled by rules made by a minister, triggered when he, subjectively decides. How the sector ever gets out of this regulatory headlock, once it has been triggered, is not apparent on the face of the bill.

Clause 172F(5) must go. It comes after some years of work leading to the endorsement by Government of policies and processes designed to reinforce the inclusion of parliamentary scrutiny through our committee of deemed regulations. Subclause (5) is a break out to tyranny. I am appalled but not discouraged.

III EXECUTIVE V LEGISLATURE—OTHER DIMENSIONS OF THE STRUGGLE

The struggle between Executive and Legislature continues across a much wider front than just the RRC.

A THE RISE OF COMMITTEES GENERALLY

Since I was elected in 1978, Parliament has been evolving rapidly. At that time, it was very much under the control of the Minister in charge of the Legislative Department, usually the Prime Minister. So much so that one of my predecessors as Speaker had to go to the Prime Minister to seek funding approval to host a lunch for a visiting delegation – and was refused. Any notions of the separation of powers between the Executive-Cabinet and the Legislature were difficult to discern.

By 1979, members had secured the reference of all bills, except “money bills”, to select committees. By 1980, members of the “Alternative Caucus” comprising the 1978 National intake were insisting to Ministers that select committees had the right to consider amendments to bills not incompatible with the broad policy direction of the bill. Members on both sides were also asserting the right of select committees to initiate inquiries. Some of the earliest examples of economic deregulation can be traced to the work of the Public Expenditure Committee in inquiring into the New Zealand Forest Service. It found, among other things, that the State forests were in the books (such as they were) as a liability. Such inquiries were not welcomed by the Government. Cabinet even went to the extent of diverting bills to other select committees to avoid the Public Expenditure Committee. I recall a Banking Bill that was diverted because the Minister of Finance feared that it would be amended to remove the provision as to when banks were permitted to be open.

The presumption of members and select committees was also spreading elsewhere. By 1982, the Commerce Committee (which I chaired) flatly refused to progress a bill for the Minister of Civil Aviation which proposed a carte blanche for tertiary legislation. It died. Parliament was starting to assert itself. Today, select committees are a powerful force in determining the final content of most legislation. They also play a far greater role in overseeing the operations and spending of government departments and other bodies funded or owned by the Crown.

Following the change of government in 1984, the new shoots emerging around the place put on a growth spurt. This led to the enactment of the Parliamentary Service Act 1985 and the Clerk of the House of Representatives Act in 1988. The role of the Speaker of the House began to develop.

The Parliamentary Service Commission, chaired by the Speaker, appeared. The Legislative Department is no more. The Business Committee, chaired by the Speaker, came with the re-writing of the Standing Orders at the beginning of 1996, in anticipation of MMP. It is a rapidly developing institution impacting on what the Government can do to and with the House.

B *CONSTRAINING THE POWER TO MAKE WAR*

Since time immemorial the Crown (first in the form of the Sovereign in person and most recently in the form of Cabinet) has reserved unto itself, to the exclusion of Parliament the right to make war and deploy armed forces abroad. I would suggest to you that things are now different between the contending forces as a result of events during the 1990s. Following the withdrawal of troops from the Vietnam War at the end of 1972, the involvement of New Zealand forces on operations abroad effectively ended. With the exception of the Battalion based in Singapore and a few United Nations military observers here and there, our forces quietly declined at home. Things changed with the invasion and conquering of Kuwait by Iraq. Although Andover aircraft were despatched to the Gulf to move civilians and carry relief supplies under the direction of the United Nations prior to the 1990 election, the first warlike commitment in over twenty five years came with the decision of the new National Government to send two C130 Hercules aircraft and a military medical team at the beginning of December 1990. The Government simply made the announcement following the Cabinet decision. There was no ministerial statement in the House. There was a suggestion that Government backbenchers were not informed of the decision directly. An application for an urgent debate was sought by the Opposition and granted by the Speaker. The speeches on both sides showed deep divisions. The deployment went ahead.

Wind forward to May 1994 when in response to requests from the United Nations the Government considered a commitment to Bosnia. Following extensive consideration by Cabinet a force was agreed upon. A ministerial statement was made in the House. An adjournment debate was arrangement and the subject debated. All parties, with the exception of the Alliance, agreed to the deployment and it went ahead. A reinforced infantry company group of around 250 soldiers and their heavy equipment, enhanced by gear from abroad, went forth. That deployment was, in size, heading towards the number we had on the

ground in Vietnam during some years of our engagement in that unhappy conflict.

Come September 1999, following weeks of intense interest by both Parliament and people, the United Nations Security Council called for “all necessary means to restore peace and order in East Timor” to be taken by willing states. This was not a United Nations deployment but mandated by it. The Government had been considering the matter for some time and quickly announced that up to 1000 armed forces personnel would be despatched to East Timor to “restore order and peace” – they were not peacekeepers – there was no peace to keep at the time of the decision.

Parliament was brought back from recess following discussions between the Prime Minister, Rt Hon Jenny Shipley, and the leaders of the other parties. An adjournment debate was held running over the whole Friday afternoon (not normally a sitting day). Following the debate, Parliament adjourned again to see out the rest of the recess. In this case, Parliament was unanimous concerning the deployment.

While the Government still does not require the consent of Parliament to deploy armed forces abroad, I think it can be stated with some confidence that no Government will now deploy significant numbers of armed forces personnel abroad, particularly to a zone of any significant danger, without arranging for the matter to be debated in the House. To persist with a deployment in the face of the declared opposition of a number of parties, even if not a majority, would seriously undermine both the force to be deployed and the conduct of New Zealand’s international relations. The balance as between Crown and Parliament is shifting in favour of Parliament.

C APPROVAL OF INTERNATIONAL TREATIES

From the beginning of organised States and everywhere where there are constitutional monarchies, Governments have reserved to themselves the right to make international treaties. Here, Parliament has been kept at arms length except to the extent that its co-operation was needed to enact all or part of a treaty into New Zealand statute law.

Over recent decades, but particularly over the last dozen years or so, dissatisfaction amongst Members of Parliament has increased to the point where

important changes were made by way of amendment to the Standing Orders starting with a trial in 1998. Standing Orders 384-387 now set out what is to be done with international treaties. The Government is required to present most multilateral treaties to the House prior to taking any binding treaty action, from which they automatically stand referred to the Foreign Affairs, Defence and Trade Select Committee for consideration. A national interest analysis has to be prepared and accompanies the tabled treaty. The committee can refer the treaty on to another committee if the subject matter of the treaty is within the jurisdiction of that other committee. Officials and ministers will be called and of course the committee has power to seek evidence and participation on a wide front. The Government has agreed not to take action for 15 sitting days on a treaty presented to the House.

The Foreign Affairs Committee must report to the House on any treaty that has been referred to it and, in reporting to the House, can draw the attention of the House to matters covered in the national interest analysis or for any other reason. Reports are not normally debated and, like the general reports of the RRC and other select committees, eventually fall off the Order Paper after 15 sitting days. One report has been debated, that concerning the New Zealand-Singapore Closer Economic Relations Treaty.

Whilst these provisions seem mild they are a huge departure from how things were previously. I see them as steps on the way to parliamentary supervision of treaty making, leading eventually to the exercise of a function not dissimilar from that exercised by the Senate of the United States Congress. It is only a question of time. Progress is inevitable whether we are under the umbrella of a continuing constitutional monarchy or a republic. It may only be a straw in the wind but last weekend the Lower North Island Regional Conference of the National Party passed a remit in this lecture theatre urging that *before* the Government becomes a signatory to international treaties the proposals be first debated in Parliament.

IV CONCLUSION

So the struggle continues. Over my time it has moved strongly in the direction of the Executive and then strongly in favour of the Legislature. No one should assume it will not reverse again. I have pointed to both encouraging and discouraging signs so far as the Legislature is concerned. The struggle will never end except in the triumph of tyranny. For the foreseeable future you can rely on

the Regulations Review Committee to continue to do the parliamentary equivalent of God's work.