NEW ZEALAND BUSINESS ROUNDTABLE

Submission on the Regulatory Responsibility Bill

August 2007

1. Introduction

1.1 This submission is made by the New Zealand Business Roundtable, an organisation comprising mainly chief executives of major New Zealand business firms. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 The Business Roundtable supports the Regulatory Responsibility Bill (Bill), with the exception of clause 11 that attempts to exclude the courts. We also make a number of suggestions for minor improvements.

1.3 The problem of unsatisfactory regulation has been widely acknowledged for many years. Numerous attempts to deal with the problem have been ineffectual. As a consequence, the Ministry of Commerce convened an expert group in the late 1990s which considered, among other things, the concept of a regulatory responsibility bill. The Ministry subsequently reported in favour of it to the government of the day.

1.4 When that proposal did not proceed, the Business Roundtable, in conjunction with Federated Farmers and the Auckland and Wellington Chambers of Commerce, commissioned an in-depth study of the concept. The resulting report, *Constraining Government Regulation*, proposed legislating for sound regulatory disciplines using the model of the Fiscal Responsibility Act (now part of the Public Finance Act). The Bill follows a similar approach. A copy of *Constraining Government Regulation* is attached to this submission.

1.5 We acknowledge the government's awareness of regulatory excesses and support its efforts to reduce them. They have included the 2001 Ministerial Panel on Business Compliance Costs and the more recent Regulatory Frameworks Review. The latter has extended the requirements for regulatory impact statements (RISs) to accompany official discussion documents and government bills. We have also supported the Legislation Advisory Committee's (LAC)

Guidelines. However, such requirements and guidelines have not solved the problem. As the last report of the government's Small Business Advisory Group noted, "What is clear is that the government has not adhered to its own impact analysis rules, and has allowed perfunctory and superficial regulatory impact analyses and cost/benefit analyses to precede the imposition of new regulations." Legislation continues to be introduced to parliament without any adequate regulatory justification. For example, the latest major regulatory bill introduced into parliament, the Electoral Funding Bill, contained no RIS at all. Likewise the government failed to provide an RIS on key elements of the Budget's KiwiSaver measures. Other recent bills and discussion documents have been deficient.

1.6 The key weakness of the RIS process and the LAC Guidelines is that they have no statutory force. The pattern has been for the government and departments to disregard them at whim. In a submission on the Bill, the Law Commission favours non-legislative options to constrain regulation. The submission is academic in nature, ignoring the years of failure with non-legislative approaches, and reflects a triumph of hope over experience. Similar arguments were made against the Reserve Bank Act and the Fiscal Responsibility Act. The problems of regulation are real and pervasive. They have contributed to the dramatic slump in productivity growth and are reducing the potential living standards of New Zealanders. We believe the possibilities of non-legislative approaches have been exhausted and are convinced that a statutory framework for regulatory policy is necessary.

2. The problem of regulation

2.1 Poor quality regulation does not occur by accident; it is commonly a response to pressures on politicians to 'do something'. To assess the need for the Bill it is necessary to assess the nature and scale of the problem.

2.2 Some level of government regulation is necessary and desirable in the public interest. Core roles for government include protecting

individual security and property and overseeing the provision of national and local public goods, including essential infrastructure.[1] To perform their roles, governments may rely on public provision financed by taxes or user charges, or private provision regulated by state or private law. Measures to improve the overall quality of regulation should aim to preserve the government's ability to regulate effectively in the public interest while constraining regulation that does not meet a public-interest test.

2.3 The likelihood of unnecessarily restrictive, costly and wasteful regulation increases the more ambitious and expansive is the role of the state. Excessive regulation makes the economy less productive and flexible. Instead of facilitating prompt and efficient responses to changes in overseas or domestic markets, it engenders slow economic growth, unemployment, inflationary pressures and deficits in the balance of payments.

2.4 New Zealand experienced all these problems after the sharp rise in world oil prices in the 1970s and early 1980s. Import protection and extensive controls on capital flows, interest rates, wages and prices created distortions and inflexibilities. The economic and political costs were severe, and it took many years of extensive deregulation, fiscal retrenchment and disinflation to correct the situation. On one measure, 28 countries had more flexible economies than New Zealand in 1985, but by 1995 New Zealand was in 3rd place.

2.5 Unfortunately, re-regulation of the economy in recent years has once again contributed to economic inflexibility in the form of a poor and deteriorating productivity performance, renewed inflationary pressures and a large balance of payments deficit. Section 2.2 of *Constraining Government Regulation* illustrated in detail the troublesome nature of the extensive regulation relating to areas such as taxation, employment, land use and safety by 2001. Subsequent regulations relating to minimum wages, holidays, KiwiSaver, securities laws, taxation, network industries, banking, competition

[1] The LAC Guidelines describe the essential functions of the state on p 41.

policy and product quality, to name a few, have added to the burdens. We are aware that other submitters will be providing specific examples of regulatory costs and will not duplicate them. Two indicators of the extent of the resumed regulatory drive are attached. Annex I has a chart showing the rise, decade-by-decade, in the number of pages of primary legislation introduced into parliament. It illustrates the recent regulatory surge. Annex II contains a chart showing that taxes and regulations are now among the greatest problems that small and medium-sized enterprises face. (The major problem, a lack of skilled staff, is partly a reflection of high employment levels and only indirectly a policy issue.) The Small Business Advisory Group noted that, "[t]he last two years have seen 312 new Acts and 875 new central government regulations (admittedly, not all of them are business-related). Keeping up, let alone complying, with this barrage of regulation is taking away the focus of businesses from more productive activities."

2.6 The problems of regulation are often wrongly interpreted as business compliance costs and described as problems of 'red tape'. However, compliance costs are only the tip of the iceberg of regulatory costs. The major costs relate to resource misallocation and disincentives to productive activity. For example, import licensing involved compliance costs to operate the import licensing system but the economic costs associated with highly protected industries were far larger (for example, resources were used inefficiently and the competitiveness of exporters suffered). Similarly, regulation such as the Resource Management Act, which can delay roading projects for several years, harms the community pervasively through prolonged congestion and pollution, even if road contractors bear little of the burden. An analogy is taxation, where the administration and compliance costs are significant but the overall 'deadweight' costs arising from disincentives to work, save and invest are far higher.[2] Government attempts to deal with regulation have often focused (without much success) on compliance costs. Studies cited in

[2] See Alex Robson (2007) *No Free Lunch: The Costs of Taxation*, New Zealand Business Roundtable (forthcoming).

Constraining Government Regulation suggest that the total (deadweight) costs of regulations to a New Zealand household probably amount to many thousands of dollars annually, and far exceed the benefits in many cases.

2.7 It would be too easy to blame politicians for the problem of inefficient regulation. It is important to understand that politicians are responding to the demand for more laws from regulatory agencies, reactive 'government-must-do-something' public opinion, and pressure from influential groups of voters who would benefit from government action at the expense of the public interest. It is harder for governments to resist ill-justified regulatory pressures when regulatory processes are not subject to firm disciplines and the effects of a proposed regulation are not transparent. As the explanatory note to the Bill states, far too many laws and regulations result from undue haste, poor quality processes and inadequate scrutiny. Moreover, once the regulatory privileges are in place, interest groups become entrenched, as the persistence of European Union subsidies for agriculture illustrates.

2.8 Well-designed statutes can make it easier for politicians to resist such pressures. The Reserve Bank Act made it easier for governments to resist pressures to use inflation to fund their spending. In part, it stopped the executive from changing the objective of monetary policy in non-transparent ways. It also made an independent central bank responsible and accountable for the implementation of monetary policy. If the executive wishes to intervene now, it must do so publicly and transparently. Similarly, the Fiscal Responsibility Act made it easier for politicians to resist pressures to borrow to fund current spending, or to hide looming deficits from the public during an election campaign. No problems of fiscal deficit 'blow-outs' or debt spirals have occurred since its implementation, although they were endemic in earlier years.

2.9 After monetary and fiscal policy, regulation is the third major area of government economic management. A well-designed statute for

improving regulatory quality would complement the Reserve Bank Act and the Fiscal Responsibility Act by making it easier for politicians to resist pressures to introduce regulations that benefit some group at the expense of others, or that impose net costs on the community. All three may be seen as limited 'economic constitutions' whose main impact is persuasive and political, although they are open to court enforcement. While not entrenched in any way, they acquire standing over time. Section 3 assesses the key measures in the Bill from this perspective.

3. Structure of the Bill

3.1 Clause 6 of the Bill, which sets out the principles of responsible regulatory management, is central. It specifies key regulatory principles for testing the quality of an existing or proposed regulation. These principles are derived from the prime duties of the state to protect the realm and citizens' security in person and property. The Crown must have the power to tax and regulate in the public interest in order to perform these functions, as 6(4) provides, but these powers should not be used in an arbitrary and unprincipled manner. Clause 6 also specifies principles related to the rule of law, consent to taxation, and compensation for takings in the public interest that should be used to test the quality of a regulation.

3.2 Many of the principles in clause 6 reflect the LAC Guidelines, particularly chapter 3 that lists a number of fundamental common law principles. The principle in favour of liberty is principle 8 in the guidelines, the rule of law is referred to in principle 13, the non-delegation of the power to tax is principle 10, full compensation for expropriation of property is principle 11, and the non-retrospective principle is principle 5. The Guidelines separately ask whether vested rights have been altered and whether compensation mechanisms have been included. The Bill goes further to consider who should pay compensation and the proportional sharing of surpluses. The LAC Guidelines also endorse the concept of essentiality in requiring that the question as to whether a taking is essential is addressed.

3.3 Principles are worthless if they are not observed. Clause 6 also requires the Crown to produce (initially), and subsequently maintain, a detailed statement justifying the introduction or continuance of a law or regulation against these principles. Responsibility for these statements is clearly assigned in clause 7. The statements may not be superficial or ingenuous. Section 6(3) specifies in detail the issues that must be addressed in them. Subsections 6(3)(a) to 6(3)(f) would in essence make the current regulatory impact statement requirement a statutory obligation rather than just a Cabinet Manual directive.

3.4 Subsections 6(3)(g) to 6(3)(p) would apply with particular force to situations where a politically influential group wishes to gain a benefit at the expense of the legal rights of some other group. In the absence of government action, the first group would have to try to negotiate a *mutually* beneficial arrangement with the second group. Where the benefit to the first group was less than the costs to the other group, the negotiations would be unsuccessful, and properly so. However, through government regulation, the first group might try to obtain what it wants at the expense of the other group, without any proper regard to the question of whether the benefits it hopes to obtain exceed the costs imposed on others. In our view these subsections rightly guard against such partisan and self-serving pressures on politicians by requiring the statement to identify the likely winners and losers from the regulation, to assess whether legal rights have been taken, and to address the issue of compensation from winners to losers. These provisions can be seen as a generalisation of the takings provisions in the Public Works Act. It provides that if mutually agreed terms for acquiring land cannot be voluntarily negotiated, compulsory acquisition is permitted but compensation must be paid and courts can arbitrate over disputes. The betterment aspects of the Act recognise the winner/loser aspect. Many regulations involve takings in one way or another; the Resource Management Act and the foreshore and seabed legislation are cases in point. Regulatory takings may well be justified in the public interest but, as with the Public Works Act, the question of compensation should be addressed.

3.5 Section 6(4) provides that these safeguards against ill-justified regulations do not limit a government's ability to act expeditiously in the public interest. Further, following the model of provisions in the Reserve Bank Act and the Fiscal Responsibility Act, section 6(5) explicitly provides that the government is free to override these principles, but it must do so transparently and conditionally and departures cannot be permanent. In the light of these clauses we do not accept any view that the Bill would unreasonably restrain the ability of a government to act in the public interest.

3.6 In summary, the measures in the Bill will make it easier for parliament to require the executive to inform it much more comprehensively than at present about the quality of new and existing regulations. There have been many complaints about unbridled executive power in New Zealand and past efforts to constrain it in respect of regulations have been unsuccessful. We now turn to a number of specific issues that have been raised in relation to the Bill.

4. Specific Issues

4.1 Many of the measures contained in the Bill have been extensively studied and discussed over a number of years in the context of the regulatory impact statement requirements, the LAC Guidelines and the work of the Regulations Review Committee of parliament. They do not break new ground. The key innovation introduced by the Bill is to combine these requirements and give them legislative authority. While the potential benefits from such an approach are clear, possible difficulties and undesirable effects should nevertheless be considered. We discuss a number of questions that have been raised about the Bill under the following headings:

- Exclusion of the courts (clause 11)
- Might it constrain parliament?
- Might it unduly constrain the executive?
- Takings and compensation issues

- Issues relating to equal treatment under the law (section 6(2)(f)(vi)

- Other issues.

– ***The Bill should not aim to exclude the courts***

4.2 The Law Commission has criticised clause 11 for attempting to exclude the courts, describing it as “inept and inapt”. We agree with this criticism; it is in fact highly desirable that the courts are involved. Politicians are not professionally expert in assessing legal arguments concerning whether a regulation takes a vested right. In addition, unlike courts, they are likely to be conflicted by party political considerations in considering such matters. Particularly when the Crown is a party to a dispute, justice cannot be seen to be done by having the Crown act as prosecutor and judge in its own cause. Clause 11 should be deleted.

4.3 Nor should an amended Bill attempt to limit judicial review to matters of process. Just as a taxpayer can dispute a tax assessment in a court, where the Crown takes private property without the consent of the owner and seeks to deny that it is a taking, the citizen's right to have the matter determined by a court must be preserved. No government should be able to take private property at will and refuse to address the issue of compensation simply on the grounds that it has expediently decided that the regulation is not taking a legal right.

4.4 We note in this context that the courts now have an accepted role in applying the provisions of the New Zealand Bill of Rights Act. We have submitted separately in favour of a member’s bill (MP Gordon Copeland’s New Zealand Bill of Rights (Private Property Rights) Amendment Bill) that would amend the New Zealand Bill of Rights Act so that it protects rights in private property. There is no principled basis for including rights to personal autonomy in the New Zealand Bill of Rights Act and not rights to security in possessions. Private property rights were not included in the Act because of the opposition of the current president of the Law Commission.

4.5 At a more general level, the Crown must be bound by the law like everyone else, otherwise it will be unable to commit credibly to legally binding contracts. It follows that when the Crown loses a case, constitutional arrangements should not be so loose as to permit parliament to pass a law that arbitrarily reverses the legal situation. If the Bill makes it harder for governments to take private property on an unprincipled basis, it will actually strengthen the ability of a government to achieve its public-interest goals. The point of the Bill is not to have the courts involved in regulatory decisions on a routine basis but to strengthen the disciplines on governments to make good regulatory decisions in the first place.

– ***The Bill does not constrain parliament***

4.6 The Bill would be an act that could be altered or repealed at any time by parliament; it would not be entrenched. Nothing in the Bill detracts from the sovereignty of parliament as the supreme law-making body. The foregoing argument that the Crown must comply with its own laws and the law of the land applies independently of the Bill.

– ***The Bill does not improperly constrain the executive***

4.7 The Bill should, and does, aim to constrain arbitrary and unprincipled regulatory actions by the executive, but not actions that are principled and necessary in the public interest. We do not see that the Law Commission's concerns about constraining the executive are well founded (its president has rightly exposed the problems of 'unbridled power'). Nor do we believe that criticisms on the grounds that it lacks detail or that it does not accommodate the need for urgent action on occasions are justified.

4.8 Our response to such criticisms is that private entities have to deal with infringements of their legal rights, using the courts as appropriate, despite uncertainties about exactly what the law is and how it will be applied to a particular case. The Crown should be no different. The exceptional aspect arises in respect of the Crown's unique role in relation to taxing, police power (eg protecting against

terrorists who would violate the law) and eminent domain (the taking of private property for a public-interest reason, as in Public Works Act cases). The Bill is explicitly permissive in respect of such principled state actions. Even when the Crown takes private legal rights as a matter of urgency, any issue of compensation can be settled after the event, without impairing the ability of the state to act promptly in the public interest.

4.9 Section 6(5)(a) requires that departures from the specified principles be temporary. While sound principles are permanent (by definition) and should not be departed from permanently (ie overthrown), a decision in a particular case may be permanent. For example, a particular uncompensated taking in the public interest may be irreversible in practice. We consider as a practical matter that section 6(5)(a) should be interpreted as a requirement that rules that would otherwise create violations on an ongoing basis should be made subject to this requirement.

4.10 Another option would be to explicitly provide for permanent or open-ended departures in a particular case where (1) reasons for the departure are set out in detail, (2) a review date is set for reassessing the need for such a departure, and (3) parliament votes to approve the departure, perhaps by a supra-majority. We do not think parliament should delegate to the executive any powers to set these principles aside other than those already provided for in sections 6(4) and 6(5).

– ***Takings and compensation issues***

4.11 As noted, it is for the courts to adjudicate on a dispute as to whether an action by the Crown takes a legal right. A benchmark for deciding what would be a taking is whether a court would determine that the Crown action was illegal if undertaken by a private citizen. It is not improper or unreasonable to ask the Crown to be as careful to respect the rights of others as any law-abiding citizen. (Of course, private entities cannot tax but existing processes allow citizens to contest a tax ruling in the courts.)

4.12 The removal of a benefit or other privilege that is not a binding legal obligation is not a taking. For example, citizens do not have a legal right to stop a tariff being increased or reduced. We were astonished by a suggestion in the New Zealand Law Society's submission on the New Zealand Bill of Rights (Private Property Rights) Amendment Bill that it might prevent a government amending a benefit such as New Zealand Superannuation. No court would regard such an action as a taking of a property right.

4.13 Sections (6)(2)(c)(iii) and (iv) provide for compensation to be paid for takings of "property or other rights". Clause 4 refers to full compensation when "property is taken or other rights are impaired". In our view the term "other rights" should be interpreted as a safeguard against narrow interpretations of property that might otherwise exclude the need to compensate for takings of possessions or contractual legal rights, for example those relating to a contract with the Crown. Compensation is not appropriate for removing improper limitations on matters such as freedom of speech and freedom of movement. The correct response in such cases is to remove the offending limitation.

– ***Other issues***

4.14 **Treaty of Waitangi provisions.** We do not see that the Bill creates any difficulties with respect to the Treaty of Waitangi. It permits the Crown to contract with parties and requires it to honour those contracts. It obliges the Crown to protect Maori possessions and property. Those contracts in good part relate to protection of legal rights and securing the rule of law. Under the provisions in the Bill a government would have to establish that a taking of such rights was necessary for an essential public interest, and the question of compensation would have to be addressed. We consider that the legislative backing the Bill would give to the protection of property rights would strengthen the position of individuals and minority groups in such cases.

4.15 **Non-discrimination.** Some legislation, in particular the Human Rights Act, prohibits discrimination on the basis of age, gender, colour and other factors. Section 6(2)(f)(vi) of the Bill invokes the principle of equality under the law which implies that the law should be general and apply equally to all, "whether on the basis of gender, race, creed, religion, time, place or otherwise." This implies that the government should not victimise some groups or privilege others. We support this section in part because it is important that laws and regulations do not victimise minorities. The provision for temporary measures in the Bill would allow official affirmative action programmes but the evidence suggests that programmes that are not time-bound do not effectively help those who most need assistance.

4.16 **Timing for compliance with statement requirements**. Section 9(1)(a)(ii) provides that statements of compliance for existing acts be made available "as soon as practicable after the introduction of the Bill". There is a concern that this might permit some agencies to defer compliance indefinitely. We suggest that the select committee consider closing down this potential loophole by amending the provision so that it reads "as soon as practicable, but in any case within 3 years after the introduction of the Bill". Section 9(1)(a)(iii) requires a statement on a regulation to be made available "on its making". For the avoidance of doubt, we suggest that this should read instead: "when interested parties are being consulted on the proposed regulation and when it is presented to the decision-making body".

4.17 **Coverage of rules.** For the avoidance of doubt, we consider that section 9(1)(a)(iii) should be amended to cover rules as well as regulations. An example would be the Electricity Governance Rules 2003.

4.18 **Scrutiny by the SSC or an independent body?** Clause 10 requires the State Services Commission to provide an annual assessment of compliance with the requirements in the Bill. Chief executives of departments responsible for regulatory policies need to be

accountable for their performance. The SSC is the appropriate body to handle performance appraisals. It could seek the assistance of an independent expert or body for this purpose. Alternatively, the task could be assigned in the first place to an independent body. The Australian Productivity Commission would be independent and it has a high reputation for regulatory analysis of an economic nature. We would support exploration of this option. However, the SSC is responsible for the performance of chief executives of government agencies and the measures in the Bill encompass both economic and legal/constitutional considerations. We support clause 10 as it stands but would encourage an examination of other ways of improving regulatory oversight, in particular by recourse to the Productivity Commission.

4.19 **Inconsistent to pass more law to reduce the law.** This criticism focuses on the wrong objective and makes an unjustified assumption that the executive can constrain itself without parliamentary disciplines. On the first point, the objective is to reduce poor quality laws; it is not to prevent good quality law-making. A narrower objection might be that the Bill will impose compliance costs on government agencies. However, to assert this is to assert that government agencies are not already ascertaining whether the regulations they are proposing or administering are serving the public interest.

4.20 **Referral to a special task force.** We do not agree with the suggestion by the Law Commission that the Bill should be referred to a task force for consideration. We think that the Law Commission is behind the play on these issues. They have been considered at length by government officials and business organisations over a number of years. The Bill effectively codifies long-established principles in regulatory impact statements and the LAC Guidelines and extends them in limited ways. We think it may be open to improvement on matters of detail but that the normal processes for developing legislation are adequate for this purpose.

5. Concluding comments and recommendations

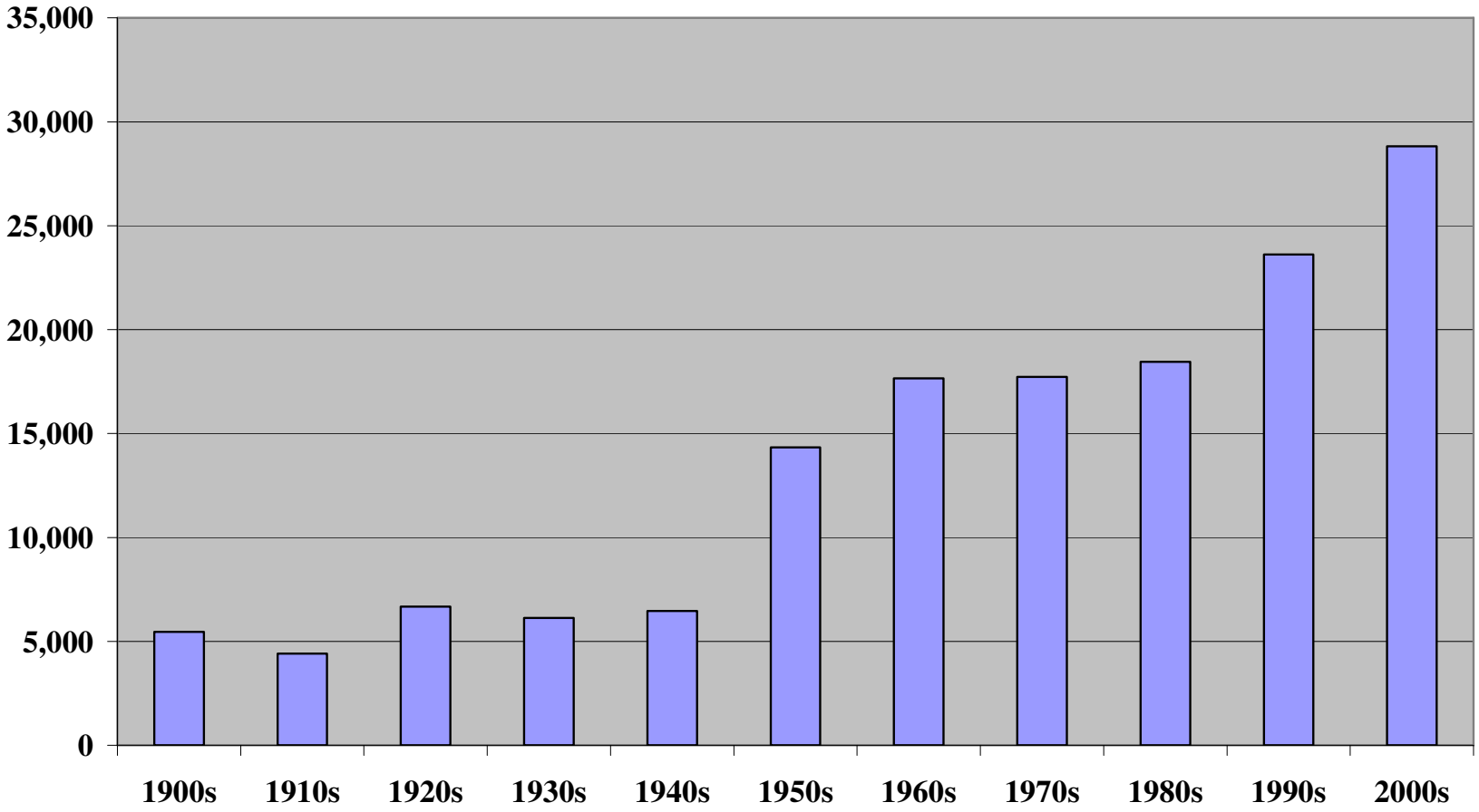
5.1 The Business Roundtable strongly supports the Bill and hopes it will be supported by all parties. It has the potential to bring about improvements to regulatory policy comparable to those in monetary and fiscal policy that have resulted from the Reserve Bank Act and the Fiscal Responsibility Act.

5.2 We recommend that the Commerce Committee consider the following modifications to the Bill:

- delete clause 11;
- amend section 9(1)(a)(ii) to require initial statements of compliance to be prepared "as soon as practicable, but in any case within 3 years after the introduction of the Bill"; and
- amend section 9(1)(a)(iii) to cover rules (in addition to regulations) and to require the statement on a rule or regulation to be available "when interested parties are being consulted on the proposed regulation and when it is presented to the decision-making body".

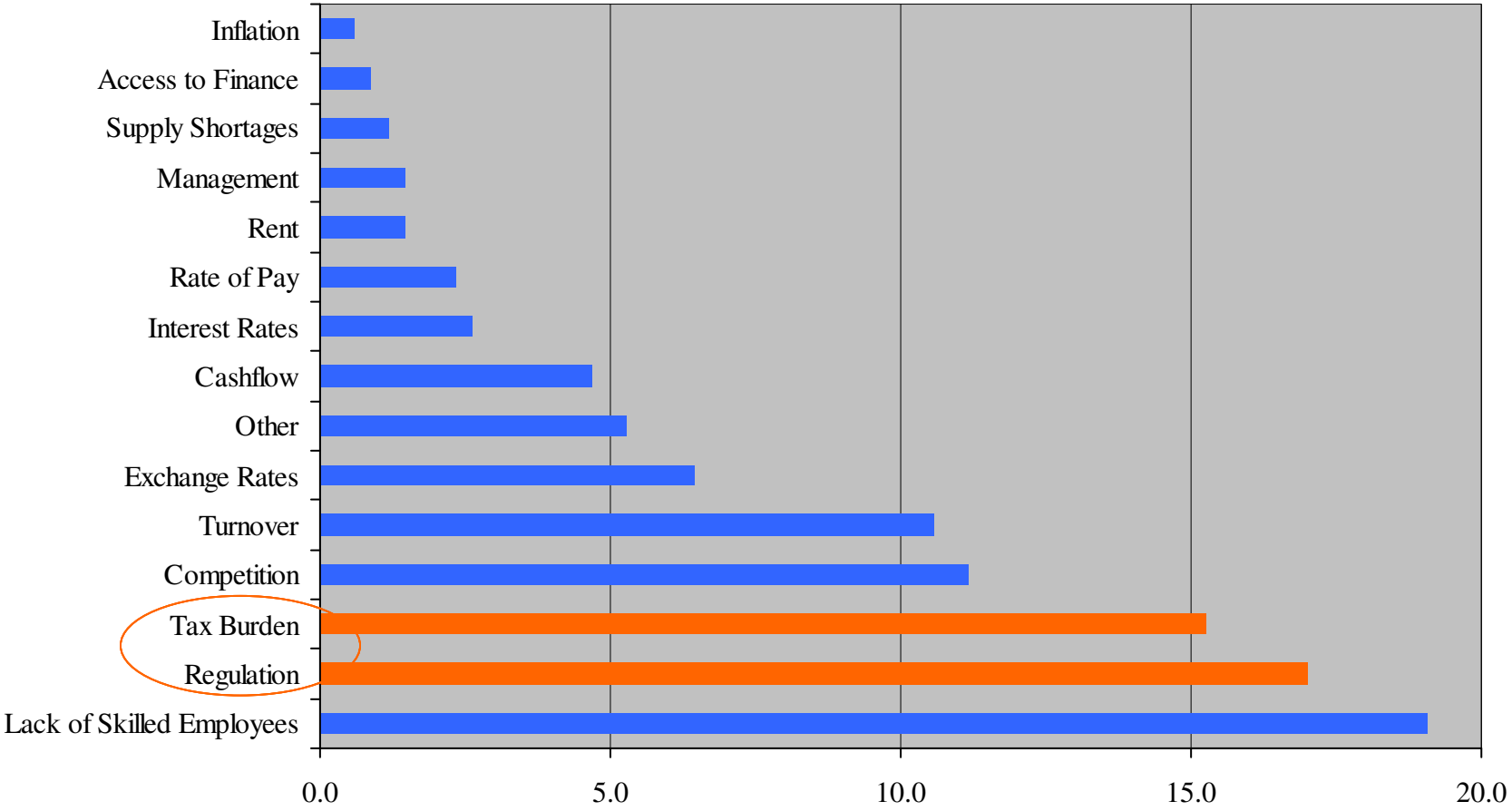
Number of Pages of New Primary Legislation by Decade

1900s to 2000s



Source: Parliamentary Library

The biggest problem facing small business (2005)



Source: ANZ National Bank