Chapter 1

Introduction

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1.1 Introduction

> [Regulation is] the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes.
>
> *Julia Black "Critical Reflections on Regulation"*[1]

> [T]he debates surrounding the future of regulation have become linked to a wider set of concerns with the problem solving capacities of the regulatory state – concerns that had emerged in the late 20th century across developed and lesser developed countries. These debates were shaped by an awareness of the limitation of traditional regulatory approach, on the one hand, and the realisation of the limitations of the supposedly high-intelligence 'new' regulatory approaches on the other hand….
>
> *Robert Baldwin, Martin Cave and Martin Lodge "The Future of Regulation"*[2]

> States can be thought of as providing, distributing and regulating. They bake cakes, slice them and proffer pieces as inducements to steer events. Regulation is conceived as that large subset of governance that is about steering the flow of events as opposed to providing and distributing. Of course, when regulators regulate, they often steer the providing and distributing that regulated actors supply.
>
> *John Braithwaite "Neoliberalism or Regulatory Capitalism"*[3]

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1 Julia Black "Critical Reflections on Regulation" (2002) *Australian Journal of Legal Philosophy* 1 at 27.

2 Robert Baldwin, Martin Cave and Martin Lodge *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) at 617.

This is a book about issues of regulatory reform. What are the relevant factors in deciding whether to regulate and how to regulate? How should the problem that spurs a need for regulation be measured and defined? How certain and predictable should the law be? What are the likely effects of choosing one method of regulation over another? Should any specialist bodies be created or dismantled? How much should be left to the courts? How does the regulation affect businesses, consumers and other stakeholders? How much say should the public have in decisions about regulation? To what extent are the options for regulation restrained by international agreements, such as trade agreements and other international obligations? If a decision is made to regulate should we create a New Zealand way or take advantage of already tested regulatory models from other parts of the world? Does the size and scale of New Zealand make a difference to the use of overseas models? Given the variables that affect regulation, is regulation frequently an experiment and should we recognise it as such? How should the success or otherwise of regulation be monitored?

Regulation takes many forms. Regulation includes legislation, legal rules, codes of practice (both formal and informal), and a combination of these. As such, it includes government regulation, regional and local government regulation and self-regulation. Any regulation must comply with domestic laws and international treaty commitments. Those commitments include multilateral agreements and free trade agreements. Regulation is an all pervasive part of any modern society. Its design and operation, therefore, is influential in the kind of lives citizens live, and their rights and reasonable expectations as consumers, including their safety. Regulation is also a key element in shaping the framework within which commercial activity takes place. The regulatory structure, therefore, is a vital factor in the well-being of all New Zealanders and consequently should be logical and effective.

All over the world governments, policy-makers, and even businesses and consumers all have great hope that effective regulation will contribute to economic growth and will improve peoples' lives. Although there is no single agreed cause of the worldwide financial crisis, the failure to regulate financial institutions adequately has been cited as a significant, if not dominant, factor. This might be seen as an instance of a paradigm: when a business sector fails or shows signs of performing in a less than effective manner and a significant portion of the pubic are directly affected, then the absence of regulation is often said to be a contributing factor; this motivates governments to regulate. A related, but distinct, motivation for regulation is that effective regulation is thought to save on the cost of government, and that a more efficiently regulated country is a cost-effective country and a country in which people want to do business. Trying to move from economic recession towards a time

[3] John Braithwaite *Regulatory Capitalism: How it works, ideas for making it work better* (Edward Elgar, Cheltenham, 2008) at 1.

of greater productivity provides an atmosphere within which considering how we regulate and how we could do it better is valuable.

Spawned by the OECD, best regulatory practices and guidelines about regulation proliferate. No matter how useful guidelines seem, they cannot answer many questions. No one would say that public goods, economic opportunities and people's well-being are not important; but how can regulation in any particular sector or area, factor in competing and broad principles and goals? And how can the collective force of regulation effectively achieve such aspirations?

In New Zealand, at the time of writing, the Regulatory Standards Bill 2011 is before Parliament. That Bill states that its purpose is to improve the quality of legislation (defined to include all kinds of regulation). The Bill articulates principles that it advocates should be part of all aspects of the regulatory process, from making to enforcing regulation. This book is not only about that Bill; however, the Bill is discussed in several chapters because of its currency. The issues in this book, which the Bill also alludes to, include that regulation should be in accordance with the principles of the rule of law (including certainty and clarity), that regulation should not diminish liberties, that property should not be taken or impaired without consent or compensation, and that the role of the courts in determining the meaning of legislation should be authorative.[4] The Bill also includes some "principles" of good law making, including that legislation:[5]

> …[n]ot be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
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> not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of
>
> (i) the issue concerned; and
> (ii) the effectiveness of any relevant existing legislation and common law; and
> (iii) whether the public interest requires that the issue be addressed; and
> (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
> (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
> (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable:
>
> produce benefits that outweigh the costs of the legislation to the public or persons: and
>
> be the most effective, efficient, and proportionate response to the issue concerned that is available.

4 Regulatory Standards Bill 2011 (277-1), cl 7(1).

5 Regulatory Standards Bill 2011 (277-1), cl 7(1)(h)–(k).

On the face of it these seem to be sound principles, however, whether they should be part of an Act of Parliament is one question. Another question is how, in reality, this good law making is working and how will it work? That is part of the questions and themes that we address in this project.

The questions at the beginning of this introduction can be posed and answered everywhere in the world. No matter where you are similar issues can flow from these questions, but the answers are not the same because not all places, economies and societies are the same. Places have their own histories of development and their own needs, priorities, resources and institutions (including business and social norms). While regulatory reform is on the agenda of many governments worldwide the focus and manner of that reform will differ from country to country. This project addresses regulatory issues with international resonance in the New Zealand context. An important common theme of the chapters in this book is to look at regulation and the issues that arise in the New Zealand context. Each chapter draws on local and overseas literature, case law, and, in some instances, economic policy and experience to frame issues in the New Zealand context.

1.2 Regulatory themes and questions in a New Zealand setting

The variety of topics discussed in this volume is connected through common issues that are of importance to New Zealand to which we now turn.

1.2.1 *Small size and consequent issues of scale*

All New Zealanders are aware that the country's population is small. Our smallness is both our strength and a source of a number of difficulties. The strength is that regulation can be very effective because its impact can be direct and immediate, and tailored to the specifics of the case. The weaknesses include that world-class systems can be expensive to design, implement and maintain. We also have fewer test cases to calibrate detail and firmly establish what we have learnt.

These factors have contributed to New Zealand importing overseas regulatory regimes wholesale or with adaptations to fit New Zealand. However, these overseas systems are often premised on different populations and different economic strengths and so cannot necessarily be transplanted to a New Zealand environment without changes being made. The adoption and adaptation of overseas models has often been experimental, even if not formally characterised as such. In some areas of regulation overseas regimes have been adopted to New Zealand conditions with success, and at other times the transfer has not been so successful. In these instances, the changes that have been made to fit New Zealand have resulted in difficulties,

suggesting that the changes may not have been appropriate. In other situations the reverse phenomenon is found.

The fact that New Zealand is a small country means that regulation needs to be applied in a different manner compared to the type of regulation applied in large developed economies. In New Zealand, the scale of the economy reduces the scale of each market. In turn this means that (particularly mature) industries will often contain one or two larger players and a number of small- to medium-sized businesses. The size of our country emphasises the importance of regulation being proportional, practical and easy to implement. A related important part of regulatory policy and implementation is that it does not place New Zealand consumers in a position where goods and services are too expensive relative to incomes.

Another consequence of scale is the ability to be flexible and pragmatic in order to capture short-terms gains. Quick action often raises the question as to whether there has been a fair process and whether the process produces the best overall and long-term outcome.

It may, therefore, be that the best approach for New Zealand is to regulate to a point where the benefits are maximised. It may also be that in some circumstances no regulation has been and remains effective. Whether or not to regulate or how to regulate depends on the nature and particularities of problems that regulation might address. How significant a problem is there?

The issues of adoption, adaptation and sometimes even experimentation with overseas regimes arise in the chapters "Competition Law and Policy", "Consumer Law and Paternalism: A Framework for Policy Decision-Making", "Regulating the Building Industry – A Case of Regulatory Failure", "Networked Industries: Electricity and Communications" and "Trans-Tasman Intellectual Property Coordination". In "Regulatory Management in New Zealand: What, Why and How?" the possibility of recognising that some regulation is experimentation is considered as a management technique.

Compliance with regulation must also be made easier, as the consequence of non-compliance from a small number of large firms, could result in a significant cost to New Zealand businesses and ultimately for consumers. Finally there are large economies of scale in data gathering which work against small markets. New Zealand regulators are typically faced with severe information restrictions, which reduce their ability to manoeuvre.

1.2.2 *Rule of law and legitimacy*

New Zealand has a very strong tradition of concern for the rule of law. Transparency International's 2010 placing of New Zealand as the least corrupt

country in the world (equal place with Denmark and Singapore)[6] reflects a longer historical tradition that has been one of the key aspects of both the development of the New Zealand economy, but also of New Zealand society in general.

A key principle of the rule of law is that those affected by the law know what behaviour is expected of them. They have knowledge of the circumstances in which they act. However, how certain can any regulatory regime be when the future is unknown? The world is changing, underlying circumstances change and there continues to be innovation. In such circumstances complete certainty of application of regulation is unattainable because a degree of uncertainty will always persist. Regulation can make certain what is known and leave appropriate discretion and appropriate flexibility to address the unknown. Flexibility and appropriate discretion are as important as predictability. In some areas law makers and regulators can calibrate rules to detail, but not in all circumstances. The chapters "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study", "Competition Law and Policy" and "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" explore aspects of the tension between certainty and discretion, and just how certain can certain be or should we want certain to be.

For regulation to have legitimacy, not only should the process and management of regulation be well conducted, but also stakeholder and public participation should occur in appropriate circumstances. The chapters on "Regulatory Management in New Zealand: What, Why and How?", "Public Participation and Regulation" and "Rights and Regulation" analyse these issues. Another important feature of regulation is that there are accountability mechanisms. What role is there for accountability in the government regulatory management process? Political accountability for regulation may seem incongruous with a strong New Zealand tradition in establishing independent agencies at arm's length from the government. But how well do these agencies work? The chapters "Competition Law and Policy", "Networked Industries: Electricity and Telecommunications", and "The Regulation of Consumer Credit Products: An Examination of Baseline Assumptions", "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" and "Trans-Tasman Intellectual Property Coordination" explore aspects of these questions. The chapter "Regulating the Building Industry – A Case of Regulatory Failure" asks how a regulation should be designed.

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[6] Transparency International "Corruption Perceptions Index 2010 Results" (2010) www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last accessed 20 Sep 2011).

1.2.3 *Property and rights*

Rights to property are a controversial topic in New Zealand political and regulatory discourse. Property rights are key to the way New Zealanders think about the government's role in their affairs. There remains controversy over the government's taking of land for public works, and there is a growing awareness that some regulation might be burdensome on the rights of property owners. Regulatory reform may also raise issues of the partnership between Māori and the Crown and the consistency of any regulation with the Treaty of Waitangi. The chapter "Regulation and Property" explores these issues and looks at the unique and not so unique features of New Zealand property law. In a companion chapter, "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings", the law of regulatory takings is examined further. In "Networked Industries: Electricity and Telecommunications" issues of alleged properly rights of shareholders that some argue were affected in the restructuring of Telecom are raised for further analysis

Rights other than property rights also play an important consideration in the regulation debate. Regulation has often been justified to guarantee a minimum of socio-economic rights, such as the right to a minimum standard of living, including, for example, access to water and power and the right to work. Many of these rights are international in origin. The chapter "Rights and Regulation" examines some of these issues.

Along with these socio-economic rights are the concerns of consumers, including consumer protection. Unregulated monopolies and poor regulation pose a particular challenge in the regard to safeguarding of consumers rights. The chapters in this volume "Consumer Law and Paternalism: A Framework for Policy Decision-Making" and "The Regulation of Consumer Credit Products: An Examination of Baseline Assumptions" address respectively the policy framework for consumer law and the regulation of consumer credit.

1.2.4 *Market economy and dependence on international trade*

Many New Zealand exporters and importers will tell you that bureaucratic red tape is a barrier to success. Quality regulation, however, can be a way to maximise a business's competitive advantage. Any relevant industry regulation should assist in realising and sustaining any competitive advantage. An important aspect of the economy is foreign direct investment, and "Approaches to Regulating Foreign Investment in New Zealand" focuses on relevant regulatory issues.

New Zealand has for a long time been a player in multilateral trade discussions, including relatively recently taking an active role in World Trade Organization (WTO) affairs. Many government agencies have often stated that

progress at the multilateral level is the most desirable, but free trade agreements (FTAs) are treated as the way forward when multilateral talks are slow or stalled. New Zealand's FTAs and the way in which they are carried out involve regulatory coordination and cooperation and this approach to regulation some say is a key to the success of FTAs.

In terms of regional groupings, this is not only about trans-Tasman cooperation, but also the Pacific and other regional groupings such as the ASEAN and the proposed Trans-Pacific Partnership. New Zealand integration in Asia is the subject of a chapter in this volume.

Trans-Tasman arrangements have involved a series of projects with the aim of harmonising business law and regulatory coordination in a single economic market (SEM). From this general intention to smooth business and trade between nations, has arisen the need to ensure that New Zealand has a thriving business community and is not wholly consumed by the larger trading partner. Efficiency suggests that similar, or combined, regulatory frameworks between the partners are an effective regulatory mechanism to support trade. Not all regulation is the same, however, and achieving complete harmonisation is not always in New Zealand's interest. Paul Conway, of the OECD has said:[7]

> An ongoing push for greater regulatory harmonisation, mutual recognition and integrated institutions, where appropriate, would continue to reduce spatial transaction costs between New Zealand and Australia and mitigate the negative impact of economic geography. As such, the recent Memorandum of Understanding between the New Zealand and Australian governments, which encourages more cooperation between regulators and policymakers and sets out a range of co-ordination initiatives to deepen business integration, is most welcome. The principles underlying these arrangements need to be broadened and extended to other potential trading partners, particularly in Asia, to reduce the additional compliance costs for firms doing business in offshore markets**.** *However, as with all significant regulatory changes, it is important that harmonisation initiatives be consistent with New Zealand's own objectives and circumstances.*

Trans-Tasman co-operation is particularly important, as Australia is New Zealand's largest trading partner. New Zealand is currently Australia's fifth largest trading partner and so the issues are arguably particularly acute for New Zealand. The chapters "Trade Agreements and Regulatory Autonomy: The Effect on National Interests", "Australia New Zealand Therapeutic Products Authority, Lessons from the Deep End of trans-Tasman Integration"

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7 Paul Conway "OECD Economics Department Working Papers No 880: How to Move Product Market Regulation in New Zealand Back Towards the Frontier" (2011) OECD Publishing available at www.oecd-ilibrary.org/economics/how-to-move-product-market-regulation-in-new-zealand-back-towards-the-frontier_5kg89j3gd2r8-en (last accessed 19 September 2011). [Emphasis added]

and "Trans-Tasman Intellectual Property Coordination" put the trans-Tasman relationship under the microscope.

1.3 The chapters

From the above themes a number of issues arise and the chapters in this book address these themes from a variety of angles.

In Part I, aspects of the rule of law, including issues over how certain regulation should be and public participation, are analysed. Mark Bennett and Joel Colón-Ríos examine the question of what level of public participation in the creation of regulation is desirable and possible in New Zealand. They examine the opportunities (and lack of opportunities) for public participation, and consider whether they meet the demands of different conceptions of democratically legitimate regulation and whether meeting those demands is desirable or possible in the New Zealand context. In the next stage of the project they will further examine the degree to which the reasons for and against participation apply in a variety of specific areas of regulation (for example, resource management, telecommunications, and fisheries) in New Zealand. In doing so, they will analyse what effect the context of a small, centralised nation-state has on these reasons.

Paul Scott looks at the success or otherwise of competition law after the government undertook significant deregulation during the 1980s and left the task of controlling the exercise of market power to the Commerce Act 1986. Businesses and the Commerce Commission were to rely on the Act's provisions to control firms with substantial market power for the ultimate benefit of consumers. In seeking access to a monopolist's goods or services parties could rely on the Act's provisions. Some thought this did not work and in some instances deregulated industries have been re-regulated. This chapter explores whether competition laws are sufficiently certain and how useful they are even if not certain. Parts of competition law are heavily reliant on counterfactual analysis, which while known overseas has a much greater role in New Zealand in assessing competitive effect. Paul analyses whether New Zealand's competition law experiment has been successful, so far, and what can be done to improve the law. The focus of this research going forward will be analysis of whether current competition law, particularly the substantial lessening of competition test, is the best fit for an economy like New Zealand's and how it might be improved.

John Prebble and Rebecca Prebble ask "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?" Through a comparative study they explore the impacts of the broadness and consequent lack of certainty of tax regulation, in particular, general anti-avoidance rules. They characterise New Zealand's general avoidance rule as a breach of the rule of law because it does not have core principles. Using rule of

law theory the chapter examines whether such a rule is acceptable and whether the state is justified in responding in a heavy handed manner so that the outcome for the state is more certain. The chapter concludes with framing a considerable number of issues that merit further exploration.

Many regard certainty as a key aspect of property rights. In Part 2, Richard Boast and Neil Quigley in "Regulatory Reform and Property Rights in New Zealand" provide the framework of what real property is, in fact, protected in New Zealand. They raise questions about whether extending property rights is merited in order to compensate owners when regulation affects property. A companion chapter "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings", by Russell Brown, analyses the law and practice as it relates to regulatory takings in Canada and compares the law to New Zealand. A key theme in this chapter is that on close examination of the Canadian situation the practicalities of takings law do not support the theory. This work will continue with exploring just how far, if at all, regulatory takings law is relevant in the New Zealand context.

In Part 3, aspects of the policy and the process of making and enforcing regulation are examined. Derek Gill in "Regulatory Management in New Zealand: What, Why and How?" explores regulatory management practices, which include the development of procedures, institutions and tools. While the spread of Regulatory Impact Analysis (RIA) has attracted most attention in the literature, RIAs are part of a wider process of the diffusion of regulatory management regimes. This diffusion is part of practitioner-driven attempts to achieve public sector reforms. The chapter explores what regulatory management is, the rationale for its adoption, and what regulatory management aims to solve. The chapter discusses whether the problem of regulatory quality may be better reframed to focus less on policy design and more on regulation as an emergent problem of policy learning and experimentation. The chapter concludes with detailed questions about regulatory experimentation, the gap between regulatory design and enforcement, regulatory management as a tool of greater government integration, regulation and experimentation, and the relationship between regulatory management and causes of poor quality regulation.

In "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance", Dean Knight and Rayner Thwaites analyse the role of judicial supervision of regulatory decisions. The chapter explores whether and when appellate review of such decisions is appropriate and, if it is appropriate, in what form. As a necessary part of that inquiry the authors examine the complementary (or, if no provision is made for appellate review, "default") judicial oversight mechanism: judicial review. The framework for judicial supervision, on the one hand, needs to provide adequate checks-and-balances on the exercise of regulatory power and, on the other hand, needs to remain faithful to, and not unduly interfere with, the policy objectives

underlying any particular area of regulation. Dean and Rayner consider whether generalised conclusions about the most appropriate form for supervision of regulatory decisions are possible, particularly the appropriateness of providing for an appeal on the merits. The authors' ongoing research will develop a principled analysis of the factors underlying the variable approaches which critically examines the factors relied on to justify reasons for supervisory restraint (such as relative expertise, administrative efficiency, time and cost, the need for finality, and the dangers of over-legalisation). The arguments advanced in favour of more vigilant supervision (such as the potential for "better" regulatory outcomes, increased trust and confidence in administration, and avoiding adverse economic costs, will also be assessed in the context of case studies.

Petra Butler looks at the relationship between rights and regulation. The chapter explains how regulatory processes take account of human rights, and asks in what circumstances an Act of Parliament is required to secure rights and in what circumstances an Act is not needed. Petra explores examples of when and how human rights have been taken into account and sets a framework to explore the issue of when an Act of Parliament is needed. In particular the ongoing research focuses on when, or if, an Act of Parliament is needed if the rights to communicate and to have access to information are affected by reregulation of the internet.

Kate Tokeley in "Consumer Law and Paternalism: A Framework for Policy Decision-making" discusses when it is permissible for policymakers to intervene in the marketplace in order to protect consumers from themselves. These interventions are often labelled as forms of paternalism. The term "paternalism" describes regulation that has the purpose of changing or restricting consumers' behaviour in order to prevent or discourage consumers from harming themselves. Examples of paternalistic consumer laws include laws designed to reduce obesity, discourage tobacco or alcohol consumption or dissuade consumers from taking on dangerous levels of debt. The chapter examines under what circumstances paternalistic regulation might be legitimate. What limits should there be on paternalistic intervention and how should policy-makers decide what kind of intervention is going to be most effective in any given situation? The goal is to develop a decision-making framework to inform the debate about the appropriateness of paternalism in New Zealand consumer law. The chapter suggests that the best approach might be a multi-factorial one, where competing values and factors are weighed up in order to determine if a paternalistic measure to protect consumers might be legitimate and, if so, whether it should be soft or hard paternalism. Continuing research is likely to further develop this multi-factorial approach and examine the issue of when the regulator might be justified in coercing rather than nudging consumers into altering their behaviour.

In Part 4, some examples of sector specific regulation are examined. Graeme Austin in "The Regulation of Consumer Credit Products: An

Examination of Baseline Assumptions" analyses how regulators have thought about the problems of consumer debt and what frames the debate. Consumer debt has predominantly been regulated through a disclosure model. However, consumer debt often involves risk and so has parallels to regulation that aims to address wider social concerns, such as safety. Austin examines the question – what would the regulation of consumer debt look like if safety concerns were central? This looks towards how regulation should be structured in order to achieve the most effective social outcome. The next stages of this research will analyse how the questions explored in the chapter might provide a basis for challenging some of the key baseline assumptions that exist in the consumer credit area. In particular, the research will explore whether a consumer safety approach might encourage greater attention to the reality that when consumers make decisions about purchasing credit products, deliberative risk analysis can be displaced by a range of different factors. The research will also examine whether it is important to consider how the codification of soft law self-regulation fits within the regulatory scheme.

"Regulating the Building Industry – A Case of Regulatory Failure", by Brent Layton, explores the leaky homes crisis by examining the trade-off between costs and possible benefits of different models of regulation. His chapter suggests that some of the choices made about changing the relevant regulatory framework may have been reasonable, but that a missing element in enacting the regulatory changes has been an articulated understanding of the purpose of the regulation. Layton asks whether the regimes can be looked at as regulatory experiments that have repeatedly gone wrong and looks for possible solutions. He asks whether the outcome of the various regulatory regimes has culminated socialising the loss. The chapter also asks how the design of the regulator should be decided and the relationship between the regulator and the solutions. These issues will be further explored in the next stage of the project in order to detail what we can learn from the troubled history and present regulation of the building industry.

In "Networked Industries: Electricity and Telecommunications", Alec Mladenovic explains how the regulatory settings in both the electricity and telecommunications sectors have swung from one extreme to another in our recent past. The chapter suggests we should be asking what drove these significant changes in policy settings, and looking to understand the degree to which major regulatory changes are evidence based. He highlights the need for regular reviews to understand whether major regulatory changes have had the desired effects in the market, and suggests further analysis of the cost of major regulatory change would be helpful. The regulatory changes in these sectors have also challenged some sacred cows – the need for regulatory certainty and related stability and the integrity of property rights chief among them. The chapter suggests we take a hard look at whether we should be more explicit as to the relative importance of these considerations in our regulatory decision-making and identifies three key issues which will be the focus of future research: regulatory change and the effects of constant reviews

of the regulatory regime; regulatory uncertainty; and the relationship between regulation and property rights in the electricity and telecommunications sector.

Part 5 looks closely at issues arising in trade and investment. Chris Nixon and John Yeabsley in "The Challenges and Opportunities of Conformity in the Wider Asia – Pacific Context: Tiny Steps on a Long Road" discuss the possibility of setting up open regulatory cooperative frameworks that could potentially be used to more tightly integrate the wider Asian economic region. Members of a community that are at different stages of economic development have institutions of uneven strength set in different political systems. The chapter explores how these differences can exist even with integration. This investigation throws up the strengths and weaknesses of various broad approaches that could be employed to more closely integrate ASEAN + 6 economies. The focus for continuing analysis is how can New Zealand effectively look towards a set of conditions under which such international cooperation would be positive overall for New Zealand and the conditions under which it would be negative.

In "Trade Agreements and Regulatory Autonomy: The Effect on National Interests", Susy Frankel and Meredith Kolsky Lewis explain how New Zealand's regulatory autonomy is constrained through trade agreements. They contrast the top-down, predominantly negative integration approach of multilateral trade agreements and some aspects of FTAs, with the bottom up harmonisation approach. The chapter also looks at how the FTAs of which New Zealand is party directly affect our regulatory autonomy and associated national interest. The chapter explains the indirect effects of the FTAs of New Zealand's trading partners, particularly Australia, where New Zealand is not a party. The chapter draws together the ways in which national regulatory autonomy is constrained and assesses that constraining effect using two case studies: food safety; and aspects of pharmaceutical regulation. Using these case studies the chapter lays the foundation for analysing in what circumstances one approach may be more favourable than the other for New Zealand. The next stages of this research will explore these issues further using a more detailed analysis of trade law demands about the patent term of pharmaceuticals to illustrate the pitfalls of the top-down FTA approach in circumstances where New Zealand arguably has a distinct national interest (different from its trading partners). The research will contrast the process that is affecting the regulation of pharmaceuticals with the process that led to the foods standards and safety regime and, using these examples, further analyse whether more regulatory autonomy is more probable or possible in one framework rather than the other.

Daniel Kalderimis in "Approaches to Regulating Foreign Investment in New Zealand" describes the current regulatory regime that controls and regulates inward foreign direct investment (FDI), including the relevant international agreements that impact on New Zealand's regulatory space in

this area. The chapter identifies the various underlying policy objectives and incentives of New Zealand's present FDI screening regime, how well markets absorb inward FDI, and whether FDI lives up to the expectation of increasing the GDP, labour productivity and prosperity. Daniel analyses the economic and political challenges the regulatory regime faces and evaluates whether the current screening restrictions deter foreign investment in New Zealand. He examines the merits of inward FDI incentives and outlines the spectrum of different regulatory approaches. The chapter frames three broad questions (all with sub-questions detailed in the chapter) for future research: (1) What economic contribution does New Zealand require from inward FDI? (2) What direct restrictions on FDI, if any, are desirable? (3) What direct incentives for FDI, if any, are desirable?

Part 6 of this volume puts aspects of the trans-Tasman relationship under close scrutiny. Chris Nixon and John Yeabsley in "Australia New Zealand Therapeutic Products Authority: Lessons from the Deep End of Trans-Tasman Integration" examines the negotiations to set up a therapeutics agency (ANZTPA) as a supranational regulator of medicines in New Zealand and Australia, which started in 2003. The proposed agency (that did not come into being), was intended to ensure that alternative medicines, over-the-counter, and some prescription medicines, and food supplements met safety standards that consumers could rely on. This chapter examines the course of the ANZPTA initiative in the light of other more successful integration efforts and examines the factors that contributed to the failure to establish the agency. Using the ANZTPA example, the chapter looks toward developing a set of approaches that could be applied more generally to trans-Tasman integration. This is particularly pertinent as the ANZTPA negotiations have at the time of writing begun again. The next stage of the project will test those suggested set of approaches further.

In the chapter "Trans-Tasman Intellectual Property Coordination", Susy Frankel and Megan Richardson examine the similarities and differences between Australian and New Zealand intellectual property law and discuss when and how the law might be harmonised and when they probably ought to be different because of national interests. Part of the trans-Tasman SEM programme includes the regulatory coordination of certain parts of intellectual property registration. This includes moving towards one trade mark regime, and one application and common examination of patents, between the two countries. This chapter discusses those initiatives and whether the administrative savings will lead to harmonisation. The authors question whether these goals are in New Zealand's interests. Using specific examples in intellectual property law the chapter examines whether harmonisation and the SEM goals are in fact worthwhile. The next stages of research will further examine, including cost-benefit analysis ("CBA"), what the effects of the two countries different approaches to the parallel importation of books, what a single trans-Tasman trade mark regime and shared patent application and

examination process might look like, and the related difficulties of such regulatory co-ordination.

1.4 The future of the New Zealand Law Foundation Regulatory Reform Project

Regulation is complex and in order to shine light on all of its relevant aspects we have encouraged contributors to this volume to adopt a variety of different topics and approaches. The advantage of this approach is that it engages with the expertise of the researchers to follow research trails without being limited by constraints of prior definition and premature conclusion. Importantly, as we have progressed this project we have framed and continue to develop common themes and threads which emerge from the research and associated chapters in this volume.

Above we have identified some specific issues that will be analysed further in the next stages of this project. We will use this research and analysis to advance our understanding of the most effective approaches to regulatory reform in New Zealand. In order to progress our research we have identified some cross-cutting issues and common threads between the chapters that echo the questions posed at the beginning of this introduction. These cross-cutting issues and common threads emerge from the New Zealand based setting of this project, discussed above, and will be further developed in that context. They are:

1. What are the relevant factors in deciding whether to regulate and how to regulate?
2. It is important to identify, with some precision, the problem before any decision to regulate or not to regulate is made. If the problem is not properly identified then regulating may not improve the situation and may create more difficulties. Also, when a problem is identified it may or may not require regulatory intervention.
3. What are the likely effects of choosing one method of regulation over another? Should any specialist bodies be involved/created/dismantled? How much should be left to the courts?
4. Who decides who is affected (for example, consumers, businesses) and how? How much is public participation relevant? To what extent are the options for regulation restrained by international agreements, such as trade agreements and other international obligations?
5. If a decision is made to regulate should we create a New Zealand way or use the advantages of the resources of other parts of the world that have tested regulatory models? Does the size/scale of New Zealand make a difference to use of overseas models?
6. Given the size of New Zealand and the scale of regulatory issues, what are the practicalities of regulating in a particular field? How valuable are

New Zealand-based experiments? How should they be monitored? How should the success or otherwise of regulation be monitored more generally?

7. How much regulation should be rules and how much should be left to discretion? What role for the 'rule of law'? Does there need to be a completeness or wholeness to the law? How certain should the law be? Is new language better than old?
8. How well do existing mechanisms work in assuring quality regulation?
9. What are the benefits and limitations of an overarching set of principles or guidelines?

We predict, perhaps boldly, that in order to achieve the anticipated benefits of regulatory reform in New Zealand the path forward does not lie in looking at isolated regulatory outcomes and proximate causes in specific areas. Rather, those specific areas can be the basis from which we learn about regulatory techniques and devise improved regulatory systems. The issues we draw from the chapters in this book are about the regulatory system and all of its branches, rather than its individual outputs. Thus, as well as developing and answering the questions posed in each chapter in this volume we will produce papers which look at the cross-cutting themes and common threads. For example, New Zealand's size and consequent issues of scale are relevant in many areas and will be addressed in those as well as in a paper where size is the central theme of the paper's discussion.

The next stages of our research will develop our engagement with our international collaborators and progress the interdisciplinary research. In particular, there will be cost-benefit analysis (CBA) and computable general equilibrium (CGE) analyses and discussion of their relevance and effectiveness. An important part of this project is to generate quality inter-disciplinary work. In many ways the different disciplines involved in the regulatory reform process sometimes speak past each other. Part of our goal, and the New Zealand Law Foundation's aims, is to improve the interdisciplinary discussion between lawyers (academic and practising) and economists. We plan to address the process of interdisciplinary research, the pitfalls and the mountain-tops, as an output of this project.

In order to attain the goal of better regulation in and for New Zealand we must have a detailed understanding of the regulatory system that has brought us to 2011. To achieve good regulatory outcomes in the future the experiment that is the past is something to learn from. What has been successful and what has not can inform how to improve the toolkit for the regulation of the future. The chapters in this volume and the next outputs developed from those chapters and the cross-cutting issues common threads will lead us to the final project output which we call the regulator's toolkit. That is a toolkit for regulators and other stakeholders, including those who challenge regulation, involved in the regulatory process.

The New Zealand Law Foundation Regulatory Reform Project is an interdisciplinary research project at Victoria University of Wellington Law School in association with the New Zealand Institute of Economic Research and with practitioner contributions from Chapman Tripp. We invite you to read this volume and to visit our project website at www.victoria.ac.nz/law/research/research-projects/regulatory-reform/default.aspx.