

**Geoff Bertram interviewed by Staphanie Nelson on the Regulatory Standards Bill, June 6 2025.**

Nelson: Good morning, Geoff. Thanks so much for making the time to join me today and talk to Coherent about the Regulatory Standards Bill. I'll start with handing over to you to introduce yourself and give us a bit of a background about your work and your interest in this topic. Kia ora.

Bertram: Hi, I'm Geoff Bertram. I'm an economist. I spent most of my life teaching economics at Victoria University, and among the topics that I taught was the history of economic thought, which has a lot of relevance to what we're doing today, regulatory economics and industrial organisations. and macroeconomics. And all the way through my professional career, I've had an interest in the way government interacts with the economy and with the society, and in philosophical debates about the proper role of government. So I'm coming to the discussion about the Regulatory Standards Bill from a long engagement with the issues of how the constitution works, what the role of government should be, and how restraints on government operate.

So this is not my first rodeo, I guess you could say, on this issue.

Nelson: Very much not. And that's not the first time we've had this issue up before Parliament, is it? And you've been involved in following it and analysing it in previous attempts as well.

Bertram: I think it's important to recognise that this Regulatory Standards Bill is a project that came out of the Business Round Table back in the 1990s. It has failed over and over again to get through Parliament, and that has until now been because there was pretty general agreement among all the political parties - except for the ACT Party - that this was bad legislation. It's now been shoehorned into the Coalition agreement, so the government has committed itself to passing the bill. At the best, I hope that the Coalition agreement is broken and that they do not pass this bill, which is a really bad piece of law. Failing that, it would have to be massively amended to make it even marginally acceptable. I can hope for the select committee to come around on that.

Nelson: Yeah, and we've had some signals from National and New Zealand first that they are wanting changes and will be listening to the select committee. I think one of the things which hasn't been talked about much is that although the coalition agreement agrees to pass the Regulatory Standards Act, it has no detail at all on what should be in the Act. So they could still stick to the Coalition agreement, presumably, and pass an Act which has a very different set of values or criteria or could even, for example, legislate the LDAC manual. So there's a lot of room to move. It doesn't say that they will pass Act's ideological version of what good legislation is into the Act.

Bertram: No, but I think you have to be aware that this bill is very, very carefully constructed. It has not just one poison pill. It has a whole series of poison pills which are designed to cripple a project of good government. And that, I think, is why amending it is difficult.

You could take out the so-called “principles of responsible regulation” and replace them with some other set of principles. You would still be left with the extremely burdensome procedural requirements that are in the Bill – for example the threat of legal sanctions against non-government players who happen to be contractors in implementing some piece of legislation, and find themselves called up before what amounts to a Star Chamber (the Regulatory Standards Board), which has legal powers to compel the release of information and so on. There's a huge amount of fine detail built into this bill that would have to be taken out to make it acceptable.

Nelson: That was a great succinct summary. But looking at the big picture, you've called the RSB a deeply ideological and undemocratic attempt to hardwire a particular economic worldview into our legal system. So what are the core concerns that drive your critique of this bill?

Bertram: Well, the two keywords there are ideology and democracy. On the ideological front, there's a longstanding intellectual debate about what the proper role of government is in a market economy. And that's a debate in which there is an extremist fringe, as I see them anyway, of libertarians who really do believe that government should have only a very, very limited role at all, which is to defend the realm against external enemies, perhaps, but very definitely to protect property rights and the sanctity of contract within the economy. And at that point, there's a full stop. The government, in that way of thinking, has virtually no role beyond enforcing the sanctity of contract and of private property.

Democracy comes up against that because the other ideological - if you like, philosophical - position on government is much more expansive. It gives the government a whole series of roles in protecting the weak against the strong, which is one of Adam Smith's roles of the sovereign, and doing things that are in the public good but aren't profitable enough for the private sector to do them. That means not only public works, but a whole raft of things like running public education and health systems. And so democracy has tended to push government towards a more and more expansive role in the last 200 years.

The libertarians have been fighting what used to be a rearguard action against that. And then it became an offensive action driving forward to destroy the welfare state and to strip government of all the wide-ranging powers and activities that democratic elections have ratified over a long period of time.

And so now we have in New Zealand a government which is running a welfare state, but that welfare state is under siege. And it's running quite an expensive set of public activities, all of which are equally under siege from a frame of mind that believes government should be stripped back and stripped back to the minimal role of looking after property and contract.

This school of thought has quite a respectable pedigree in the economics literature. It's called constitutional political economy. That's one of the titles it goes under, which is designing rules that tie government's hands so it can't do things. Good examples of that are the Fiscal Responsibility Act, which is being used to keep government small and keep debt down and make ministers of finance continually say we can't afford things.

Another example is Section 4 of the State Owned Enterprises Act, which forces government activities to make a profit when, in fact, many of these things have always been done, or at least were set up to be done, precisely because they weren't profitable. So a really good postal service actually doesn't make a profit, but New Zealand Post is being destroyed by the requirement to make a profit. There's a whole raft of areas where the profit requirement has been imposed upon government agencies that forces them to behave in ways that aren't efficient. That's not what the democratic process actually set them up to do originally.

Another one is electricity. That's a favourite of mine. It's gone completely rampant in terms of making a profit by gouging the general population with exorbitantly high prices for electricity paid out as huge dividends. And that whole project drives Transpower's State-Owned Enterprise, for example, to behave like the worst sort of unregulated monopolist in a way.

Now the point about all these little bits that are built into our legislation is that they are designed, and quite openly designed, to tie the hands of government and therefore make it impossible for it to do the wide range of things that the populace at large seems to want it to do. And that's why democracy and ideology are counterpoints to each other in these debates.

I, of course, am on the other side of the intellectual divide. I'm a believer in fairly big government. I think there's a huge amount of stuff that's best done collectively rather than privately. The market has a place, but it is not a dominant place when it comes to the public good and working out how we should run our society.

So there is a very big picture debate in the background of all of this stuff, and the Regulatory Standards Bill is a piece of a much bigger jigsaw.

Nelson: That's a really interesting perspective. You mentioned the public good, and of course, the public good and the environment are totally absent from the RSB principles.

And they are currently a very strong part of our lawmaking processes and the legislation designs of the LDAT committee, for example.

So where would this bill leave the public good?

Bertram: Well, again, you need to go back to the intellectual foundations of the libertarian position. This is, in a sense, the whole neoliberal project in New Zealand, which is part of a big international project. It starts with Margaret Thatcher's suggestion that there is no such thing as society - there is no collective good to be pursued, there are only individual interests which can conflict with each other. The idea of an overarching public good to which individuals are subject, and which justifies the state controlling the actions of individuals and on occasion taking things away from them and so on, that's very alien to the libertarian frame of reference. They don't have a vision of the public good beyond the efficient working of a market system in which private property has an absolute right to operate.

And so a whole lot of things are in the Legislative Guidelines at present but are missing from the Regulatory Standards Bill. They range from the Treaty of Waitangi, which is our overarching constitutional document but does not fit the libertarian worldview, across to regulations to control the profitability of private firms - to stop monopolists from exploiting their power - across to interventions in the activities that can be undertaken: restrictions, for example, on the selling of tobacco and alcohol for profit.

There's a whole raft of areas where this bill is silent because it does not recognise, and the intellectual structure behind it doesn't recognise, a collective interest that overrides individuals.

Nelson: You mentioned regulatory economics earlier. And one of the things we do know from David Seymour's interview on Radio New Zealand earlier this year is that his intention is that the Regulatory Standards Board will have members on that will be regulatory economists. So what does that mean? I think that's not a concept that's familiar to most people.

Bertram: Well, there are lots of sorts of regulatory economists, and David Seymour will have in mind a very particular sort of regulatory economist, the sort that believes regulation should be absolutely minimal, should be light-handed, should not intrude upon property rights to more than the most minimal extent. That sort of regulatory economics is what New Zealand has been implementing since 1984, really, since Roger Douglas took control of economic policymaking and the proponents of Constitutional Political Economy got their hands on the regulatory machinery.

The Commerce Act 1986 is an example of the sort of regulatory economics view that I think David Seymour would want to see on the Regulatory Standards Board. I'm not one of the people whom he would put on that board, because I'm a believer in effective

regulation. And I think that the regulatory system in New Zealand has largely failed the public by being weak, lacking proper enforcement, stripped of the necessary resources to do the job well, and being done under statutes which are designed to cripple rather than to empower the regulator.

I would feel happier under the Act that was rescinded in 1986 when the Commerce Act 1986 was passed. That was the Commerce Act 1975, which came out of the Kirk Labor Government, but also picked up on plenty of previous legislation. And one of the things that the Commerce Act 1975 did was to give you a whole list of things that were illegal, that companies were not allowed to do. There were criminal sanctions for the managers of companies that gouged their customers, that engaged in clear anti-competitive conduct, that imposed bundling requirements and so on, and predatory pricing and all the rest of it. The Commerce Act 1986 took the shackles off and allowed those sorts of behaviour to take place.

So “regulatory economics” means very different things to different people, and so depending on who you staff the Regulatory Standards Board with, you'll get very different results.

Nelson: You've written that the RSB would impose a morass of new red tape. And that's despite it being framed as cutting it. So could you walk us through the paradox of how a Bill that claims to reduce regulation actually creates new layers of costly and obstructive process?

Bertram: Sure. I think you have to understand here that the libertarian project is to cripple the state to prevent it doing things that they don't want it to do. And so from their point of view, there are two major ways that you cut back the ability of the state to do what the democratic process may be asking it to do.

One of those is called “starve the beast”. It's an expression from the Reagan years in the United States, and it consists of endlessly cutting taxes and then saying we don't have the resources, so we can't do public services. We're engaged in another round of that particular exercise at the moment under Nicola Willis.

“Starve the beast” is just a way of using austerity to shrink the state. The other one is “paralysis by analysis”. That's an expression that Norman Kirk used to use, in frustration sometimes. Paralysis by analysis consists of endlessly going through massively complicated analytical exercises, discussing and discussing and discussing, never reaching necessarily any particular conclusion, but using up huge amounts of resources and time and energy bound up in the analysis.

What the Regulatory Standards Bill does is to impose upon government the burden of proof that everything government does is right. So the ministers and the public servants involved in doing government activity are not in the position where they can make a

decision and get on and do it, while the burden of proof that it's the wrong decision lies with the opposition (and maybe with members of the public who want to campaign against it).

In this Bill, the burden of proof falls completely on the government. It has to provide massive amounts of justification for every detail of every Act and every regulation, and lay those before the House, and be subject to judicial review in the courts if it doesn't satisfy the detailed requirements of the Act. And while proponents of the Act say "oh, there's nothing enforceable in the courts in terms of people's rights", there is very definitely a lot of things that are enforceable in the courts in terms of judicial review of the way the government goes about its business.

So when you read the Regulatory Standards Bill, every time you find the word "must" your mind should turn to the courts. When it says the minister "must" do this, a judicial review case is immediately possible to say the minister's failed to do this. And so not only are the government departments to be forced to go through detailed reviews of not only new legislation, but all existing legislation - all the laws that they're operating under - are up for review, and they have to provide four yearly reports to the Minister of Regulation and can be called up before the Regulatory Standards Bill to answer for the quality of their analysis. There's endless avenues here to tie government servants up just in the red tape of writing these consistency measures and dealing with court cases where government will be forced to spend vast amounts of energy and money and time in defending decisions that should have been able to be taken as democratic decisions.

Instead of "here's our decision, you know, now we get on with doing it", with this bill in place you try to make your decision, you may put through a regulation or a piece of legislation, and then you spend your life in the courts because it's claimed that your defence of that has not been adequate. So it's a reversal of the burden of proof.

The burden of proof matters a huge amount in political debate and in judicial hearings, and the burden of proof has been here loaded entirely on government which means that vexatious and frivolous litigation from people like the Taxpayers Union can tie government in knots in the courts almost endlessly.

Nelson: So essentially the government will need to spend a lot of time and money also defending legislation outside of what David Seymour through the RSB has defined as good legislation. So things we currently take for granted that will be balanced as part of the process, like the public good or the environment, fairness, Te Tiriti, et cetera, will be abnormal - outside of what normal is. And the public pressure that's likely to also come, due to these various court and board and defence mechanisms for justifying things which are outside the norm could be quite significant and also have quite a chilling effect, couldn't it?

Bertram: It's really important to be careful not to use words like “the norm” and “normal”. The key word here is “responsibility”. That's the slogan that libertarians are using all the time. By setting up a set of principles of what is “responsible”, and excluding from those principles a terrific number of things that are involved in what good government is about, you create the implication that everything that pursues the public good, that worries about inequality, that tries to push forward proper regulation of monopoly, all that sort of stuff becomes “irresponsible”. And it's that image - that if you don't obey these principles you're being irresponsible – that really matters. It's not so much a question of what is normal, it's a question of what the legislation allows to claim the cloak of responsibility. And in my view, we are stuck already with major problems under the Fiscal Responsibility Act, with ministers of finance feeling completely trapped by the image that if they don't obey a whole narrow set of restrictions on government, they're being irresponsible.

Now, the same is going to apply with this Bill if it becomes an act. A whole lot of the things that government should be taking for granted - that the public expect, which are indeed the norm under a democratic system - suddenly become irresponsible. And that ability to label government action as irresponsible is what's being played for here with this Bill.

Nelson: The Bill's compensation rules for regulatory takings, including potential loss of profit, have sparked significant alarm. And you've given the example of monopoly pricing. So if governments try to, for example, regulate supermarket profits, consumers may end up having to pay the companies back. And the same perhaps applies to breaking up of monopolies. Could you walk us through how that would work and its implications?

Bertram: If you read the “principles” in the Bill, the key word is “and”. If the government does something that encroaches upon the value of some private property right - for example, regulating supermarket prices, which would be a clear case of reducing the value of the supermarket's assets by constraining their ability to take a profit - then the “principles” say it has to be in the public interest to do it (whatever that means), and so the minister has to make a statement saying why it is in the public interest. Then there's the word “and”, which means compensation must be paid even if it's in the public interest to control the monopolist or take the property or whatever it is. You can't say “or” - maybe you pay compensation. The principles say even the most justified taking of private property requires fair compensation to be paid without any exception.

So the question then is what is fair compensation and who pays it? And remarkably, this bill sets up a procedure which with respect to market profits, would run as follows. The government might pass legislation or bring in a regulation to say we're going to control supermarket pricing to prevent them from taking excessive profits. They would enforce that. and as a result, supermarkets would make less profit and their asset value would

go down. They would be entitled to be compensated for the loss of asset value and profits. So government would have to pay them the profits they would otherwise have been getting. Then the bill requires that that payment is recovered from whoever benefited from the policy. So government has to work out who is the beneficiary if we regulate supermarkets. The answer is customers at the supermarket. Well, they're the people who have to pay compensation to the supermarket companies for regulating their profits. So government will then have to charge the supermarket's customers for the amount of profit that's been taken away from the supermarket owners. So the supermarket owners can be paid back the profits that they lost with the regulation. And if you get the sense that the whole point of this is to make regulation effectively impossible, you'd be absolutely right. That's the intention of this. It's clearly designed to make monopoly profits untouchable, because if you regulate monopoly, the benefits go to the consumers who were previously being fleeced. And if they have to pay full compensation to the regulated monopolist, there's no point in regulating in the first place.

That is, I think, quite transparently and clearly the intention of the way that section is worded: it is an extremist defence of the absolute right of private property owners to do what they wish with their property at the expense of other members of the community.

It's intriguing that tucked away in the libertarian idea of justice is the idea that no individual should really act at the expense of other individuals in the use of their property. But this bill has set aside even that, which I have always regarded as one of the most unshakable bottom lines in theories of justice and property. Certainly, if you've read Robert Nozick's *Anarchy State and Utopia* (which is one of the bibles of the libertarian right when you're talking about philosophy and serious intellectual engagement with the issues), Nozick is very clear that there are circumstances where private property rights must be subordinate to the public good. But this Bill doesn't seem to allow any space for that.

Nelson: You could perhaps give us a brief example for electricity. Would that also be a situation that this would apply?

Bertram: Yes, very much so. The New Zealand electricity system has been put into an arrangement since the 1980s under which electricity is priced at exorbitantly high rates to households. To give relief to households is very straightforward in principle. There's no difficulty whatever in government stepping in, acquiring a big chunk of electricity at a much lower price, then passing it on to households. We've known how to do that from day one of the electricity reforms. I was one of the co-authors of a report on how to do that back in 1992. There's no reason why households need to be charged very high prices.

But if prices to households for electricity were brought down to reasonable levels, then the profits and the asset values of the generator companies would fall, and that would be (in the views of the libertarian people) a “taking” which would have to be compensated. So Government could go about giving households their cheap power, but because this would have hurt the profits of electricity generators, government would then have to charge households a fee on top of their electricity price to put them back up to the situation where they were being fleeced in the first place. In other words, there is a closed-circle loop that kills regulation of monopoly at birth.

The attempt to defend a regulatory intervention, given the sort of Star Chamber of the Regulatory Standards Board looking over your work all the time, the requirement to report to Parliament in fine detail about costs and benefits, the time and energy spent identifying all the beneficiaries and charging them for the compensation, I mean, the whole thing becomes ridiculous.

This is what I mean by tying government up in red tape. It's using detailed red tape and the threat of being taken endlessly to court that drives this.

It's ironic. If you watch how Trump is running into difficulty in the United States at the moment, it's interesting that there is a right-wing government pursuing many of the goals that I think ACT in New Zealand has in mind, but running into massive problems with the courts, because in the United States, they have actually more secure legal protection for some things than we have in New Zealand, and the courts keep on saying to Trump, no, you can't do this. You're not allowed to arrest people on the street on suspicion of being an undocumented migrant, and export them from the country on a secret flight without any due process, and the courts have been pulling him up on that.

And so interestingly enough the Trump government in the United States which I have no brief for whatever is being tied up in precisely the sort of procedural red tape that David Seymour wants to impose on the New Zealand Government

Nelson: You've talked a bit here about this fair compensation clause, and it creates a framework where property rights are really prioritised and compensation may be expected for public interest regulation, which could set up property rights as nearly untouchable. Looking more broadly, what sort of society does this framework lead us toward and what does it leave out?

Bertram: Well, everything depends on the definitions, and one of the things you notice about the Bill is that it does not define who is a “person” and it does not define what fairness is.

Fairness eventually would, under this Bill (if it becomes an Act) be a matter for the courts to determine. So every piece of compensation that government paid would be claimed by the recipient, the regulated party, to be unfair. They would say, that's not

enough, and they could then race off to court and have the court decide whether or not they've been paid fair compensation.

This is a well-worn tactic of big corporates trying to kill regulation. There's a very important example in New Zealand about a decade ago where this happened. It's fine detail and many people aren't aware of this, but in 2008 the Commerce Act was amended by Parliament to allow companies who were being regulated by the Commerce Commission to go to court to appeal against the Commerce Commission on the merits of the case. Previously, they'd been allowed to take judicial review cases about the procedure, but they couldn't argue the merits of the decision. The Commerce Commission was allowed to make a decision and that would be binding. The 2008 Amendment made merits appeal possible.

And the next thing that you know, all the big monopolists in New Zealand, infrastructure utilities, the airports, the electricity companies, the gas companies, all got together and rushed off to the High Court and a massive legal fight ensued, which was finally decided in 2013. And the fight was over the asset values that the Commerce Commission was going to use under Part 4 of the Commerce Act to regulate prices and revenues of these infrastructure companies.

Under Part 4 the Commerce Commission was given the job of regulating how much revenue they're allowed to collect. A large part of the revenue for a big airport or an electricity lines company or a gas pipeline lies in the asset value, because they're allowed a percentage return on their assets. And so the name of the game is to write your asset values up right through the roof and then claim a huge return as your cost of capital. This court case was designed to force the Commerce Commission to write very big asset numbers under the regulations, and never come back to revisit them afterwards. And so in the case of electricity lines companies, the Commerce Commission finally was reduced to rubble in the High Court saying, we're going to "draw a line in the sand". They draw a "line in the sand" at asset values that the companies were absolutely delighted with, and that line in the sand has remained unchallenged ever since. If you submit to the Commerce Commission about their latest price hike in electricity fixed charges (because of lines-company revenue needs), the Commerce Commission will tell you: well, you can argue about the weighted average cost of capital, you can argue about the detail of how many people they hire, but you're not allowed to touch the asset base which is what drives these huge fixed charges because that is a line in the sand and it is sacrosanct, because an enormous High Court case in 2013 ruled out any revisiting of that.

That court case effectively killed all ability of the Commerce Commission to squeeze the profits of electricity, lines companies, gas pipelines, and airports for the subsequent decade or so. And we're still up against that problem, that the Commerce Commission,

because of its line in the sand drawn in that court case, cannot write down the asset value of companies that should be written down.

Parliament could always come in and override that, I suppose, but then if Parliament comes and overrides it and they've passed this Bill, all this compensation will have to be paid. The whole thing becomes pointless. This is how regulation becomes chilled. The whole intent of this is to make regulators stop before they start, because the costs are just inordinately high and there are legal obstacles all the way down the track.

Good government done well - which is one of my slogans - good government done well does require that regulators can't be crippled and sidetracked and dropped into heffalump traps at the whim of the regulated party. It's an essential part of good government that there is genuine enforcement as possible without getting into ridiculous levels of legal hassle.

Nelson: If you cast your mind 10, 20 years down the track, if the RSB passes and is maintained and implemented, as its proponents would hope, what do you think our society would look like then?

Bertram: Well, one thing we will have is a very feeble, incompetent government. We'll have a government that really good people don't want to work for, for the start. The quality of public service will steadily go down because being a public servant will be so endlessly frustrating, as you are forced to go through all these hoops and are continually called to account by this Regulatory Standards Board, which is a sort of Star Chamber within government that can summon chief executives of government departments to appear before it.

Incidentally, one of the things that the bill does is quite important: it overrides section 52 of the Public Service Act. Section 52 of the Public Service Act says effectively that the head of a government department is responsible to the Minister who runs the department. So, you know, the head of Treasury is responsible to the Minister of Finance and so on. This Bill overrides that. It says all heads of government departments are accountable to the Minister of Regulation. And all of a sudden, it's completely destroyed the lines of accountability within the New Zealand Government.

That, in turn, means that being a chief executive in a government department becomes a far more onerous and less attractive proposition, because instead of running a department to achieve the outcomes that government is supposed to be there to achieve, you're going to spend your life getting ready to appear before the Star Chamber, to be subjected to deep inquiry into your actions and reviewing every single piece of legislation for which your department is responsible. I mean, this is a morass. So one of the things that our society will have 10 years from now, with this sort of thing going on, is a government which is not only probably smaller, but far less capable and far less

attuned to meeting the desires that governments are elected to fulfil, and much more attuned to the fine print of procedure.

That's why I describe this as just binding government up in red tape. When you go and bind governments in red tape, the whole enterprise of government itself becomes frustrating and frustrated. And so in the long run, in 10 years' time, I guess I'll give you a direct prediction: if this Bill becomes an Act and we see the consequences play out fully, in 10 years' time the Act will have been conclusively repealed and government will have got back to the business of governing properly, reviving the idea of a quality public service staffed by people who are motivated by the public good and whose hands are not tied by petty internal regulatory requirements. So I'm optimistic. I just don't think this stuff can survive very long if you see it in the light of day. It's nonsense.

Nelson: You've argued that under this bill, even modest attempts to redistribute wealth, like progressive taxation or welfare, could be challenged as unjustified "takings". So is it likely that income and wealth would be viewed as property under the RSB? And along with the principles on taxes and levies, how does the RSB threaten the foundational logic of the welfare state?

Bertram: Well, the libertarian project threatens the foundational logic of the welfare state. They basically will not admit that inequality is something that needs to be dealt with in the public good. They have, over the last two or three decades, written that idea into more and more of our legislation and regulation.

The fundamental idea that the libertarians have is that a dollar is a dollar, and there's no difference between a dollar for me and a dollar for you. So there can be no reason for shifting a dollar from me to a dollar for you. The welfare state is based upon the original idea that a dollar for somebody who's very rich is not nearly as important as a dollar for somebody who's very poor, and so there's a strong case for actually shifting money and wealth from the rich to the poor, simply in the name of justice and of promoting equality as a public good, promoting inclusiveness, improving the functioning of society by lifting people out of poverty and therefore enabling them to act in full citizenship. None of that is allowed in the libertarian framework because a dollar from one person is considered just a one-for-one transfer.

Here's an example of how they've already managed to put this into New Zealand practice. When the Commerce Commission looks at mergers and acquisitions, where companies maybe are joining together to form a stronger monopoly, and the Commerce Commission is looking at whether this is a good or a bad thing, one of the issues that arises is whether a stronger monopoly, which takes money from the consumers and puts it in the pocket of the monopolists, is a bad idea or a good idea. And the Commerce Commission's position, which is written into its rules of operation, is that they don't care if a dollar is taken from a New Zealand consumer for the benefit of a New

Zealand monopolist, because that's just a transfer within the New Zealand community, and New Zealand as a whole is neither better off nor worse off when a consumer is fleeced by a monopolist. And the opposite holds too. When you take a dollar away from a monopolist and give it to a consumer, there's no gain. It's just a dollar, and it moves within the New Zealand community.

So the libertarian position is that the “public good” recognises no benefit from cutting back monopoly.

Similarly, the welfare state as a whole always rested upon the proposition that those who had plenty should pay into the public purse, and those who had not enough should receive from the public purse. and the outcome of that would be a more equal, more functional society in which life is better for the general mass of citizens. Most importantly, the life of people at the bottom of the heap is sustained at a level that enables them to be full citizens and participate in the community.

The libertarian position does not allow that to be a legitimate view, a legitimate goal of public policy. The poor, in the libertarian view, are to blame for their own poverty, and should be left to it. I know that's a brutal sort of way of putting it.

Democracy doesn't really allow such a complete reversion to feudalism without quite a lot of resistance. An awful lot of the voting population are in the lower part of the income distribution, and I think it's well recognised that you can't completely kill the welfare state off as an enterprise as a whole. That's democratically not a goer. You either have to move to a dictatorship and then push it through, or you just have to work at the fringes, and that's what the libertarians have done with the welfare state. They nibble and nibble and nibble to try to cripple the redistributive mechanism.

The most recent example of this is school lunches, which have been put in the hands of David Seymour, who has declared openly that he doesn't believe in school lunches, and he's only running school lunches because he's been told to. He's running them absolutely rock bottom cheap. He's not really concerned about the quality. The whole school lunch program is gradually going down the tubes, and that's because it's been put in the hands of somebody who does not believe in the government objective.

It's always the case that you should not put people in charge of government who don't believe in government. Government should be done by people who believe in the project and the enterprise of governing well.

Nelson: How would the RSB specifically approach taxes and the redistribution of wealth? And how could that be seen as unjustified takings, as you've suggested?

Bertram: The RSB steers very carefully around that issue by excluding certain sorts of legislation. Bills to appropriate revenue have been set aside mainly, I think, because they recognise that that's a bridge too far. And so there are some exclusions, and they're

not claiming directly in this Bill that taxes are a taking. But if you go and look at the libertarian writings, if you read the Constitutional Political Economy journal literature, they clearly are of the view that taxes are a taking. And effectively, if they had their way, you wouldn't be able to tax at all, or taxation would be only voluntarily paid by individuals who consent to it.

The idea of “no taxation without representation” has always been operationally that the voting public elects a parliament, which then approves taxation, and then individuals are bound to pay the taxation that the legislature has agreed upon. And that's a collective act of consent to being taxed by the sovereign. But ideally, in the libertarian framework, taxes would be paid voluntarily by individuals who saw benefit to themselves from the payment of those taxes, and no other taxes would be collected. And so all the rich people would pay a subscription effectively for the government to run a police force to stop the poor people coming and ripping off the rich, and that would be the extent of it.

And so taxation itself is very contested country as to whether it is a taking or not. There is a very eminent professor in the United States, Richard Epstein, a lawyer, who argues that indeed taxes are takings. And it's noticeable that Epstein, with this view that all taxes are takings, was invited to New Zealand by the Business Round Table back in the days when the Regulatory Standards Bill was being designed, and he promoted quite strongly here the idea that all taxes are takings. which amounts to saying really the taxing power of the state is illegitimate, except to the extent that individual taxpayers each agree that their tax is fair and paid voluntarily.

Nelson: I know libertarians sometimes use the language of “equality before the law” to talk about the concept that each person should be the same in how they are taxed. And we do have that phrase in the RSB, under the rule of law. Do you think that it could be used to argue for legislation and regulation to head more towards a flat tax rate?

Bertram: Very much so, yes. The flat tax is a sort of halfway house towards the libertarian ideal. When you hear about people being equal before the law, it's important to bear in mind that individuals appear before the law in very unequal circumstances. The idea that they're equal is just nonsense. A rich company coming up against a poor individual in court has a massive advantage that can never be overcome by slogans about equality before the law. And I think we should be in no doubt whatever that the capture of agencies by rich and powerful corporate interests and the winning of court cases by the deep-pocketed who can pay the best lawyers and are up against unfunded NGOs struggling to make ends meet, is a fundamental injustice. Equality before the law taken to the libertarian extreme is a recipe for injustice, not for justice.

Nelson: Economists often use cost-benefit analysis as a tool for policymaking, but you've warned against its misuse. So what are the limits on cost-benefit analysis and

that type of thinking when it comes to legislation? And how does the RSB elevate this tool into a kind of dogma?

Bertram: Well, the RSB requires that the costs and benefits of every piece of legislation be evaluated to the greatest extent possible. We can argue about how much is possible, but it's clear that the intent is that everything is to be subject to a cost-benefit analysis, which will be done under the rubric of impartial economic analysis, and we'll come up with a dollar number that will be treated as if it's gospel.

But cost-benefit analysis is actually a small tool to be used very sparingly where it is appropriate, and it's certainly not to be made a dominant principle of policymaking.

There are two reasons why cost-benefit analysis does not work as a policy-making tool when it's allowed to dominate.

One of them is simply that an awful lot of things can't be quantified. You just cannot put a dollar value on clean rivers and clean air and thriving forests and biodiversity and all of these things. People try to put dollar values on and the results are enormous numbers that nobody believes because everybody knows that this is a fiction. The value of these things is not in money. The value of these things is in human experience and in the quality of human existence, and so the quality of the society you live in; the quality of respect for cultures and ways of life that differ from your own, the value of living in a community where there is tolerance, in the New Zealand case respect for Te Tiriti o Waitangi, the value of being in a world where nations behave in ways that are reasonable towards each other rather than engaging in pub fights all the time. These things you can't put a number on.

There is a very important concept called "spheres of human activity". One philosopher who writes about this is Michael Waltzer. He emphasizes that there is a sphere in which monetary values do work. Markets do have a place. But there are spheres where money has no place whatever, and one of those is the making of political decisions. Government is not for sale, and should not be for sale. And government decisions are not for sale and should not be for sale, and should not be priced. Putting a price on government decisions in the way that cost-benefit tries to do is fundamentally illegitimate.

So that's the first criticism.

The second criticism is about cost-benefit itself. Now, I was at Oxford University back in the days when the cost-benefit manuals were being written by economists like Ian Little and James Mirlees, Partha Dasgupta and David Pearce. And these are the manuals, the textbooks to which Treasury and others hark back when they do cost-benefit analysis. There were extensive discussions back at that time, and I was there while these discussions went on. And there was a fundamental issue: if you are in a world where

injustice prevails, where there is gross inequality, where as a result of that some people have far more money and power than others, and then you have a set of prices that come out of markets in that world, you cannot use those prices as the true value of things because those prices are hugely distorted by the structure of power and the distribution of wealth and income in the economy.

And so all the cost-benefit textbooks ended up saying, well, the politicians will have to fix the income distribution before they use any of the prevailing prices in markets as a guide to the real value of things. And you'll find that paragraph is in all the manuals. It's just tucked away. And it's forgotten all the time, but it's fundamental. You cannot do cost-benefit analysis using prices that are formed in a world of gross injustice and inequality because those prices are false prices and they do not reflect true human values. And so any cost-benefit analysis using prices that are picked up from the markets as they currently operate is illegitimate.

Nelson: As we touched on before, in the past New Zealand tried light-handed regulation, and we saw the consequences with electricity, telecommunications, gas. So what lessons should we have learned from that era and how do you see this Bill repeating some of those same mistakes?

Bertram: Well, here we go back to Enlightenment philosophy. Some hundreds of years ago Thomas Hobbes wrote a book which is very famous called *Leviathan*. And it is about the reason why you have government, the role which the government performs in a society. It is to take us away from the "state of nature" where dog eats dog, you know, everybody is against everybody else and anarchy prevails. No property is secure, all of that sort of stuff. The state of nature in Hobbes is an unpleasant state, from which we want to escape by organising society in ways that are sensible and just.

Hobbes has two concepts. He has the Covenant, which is the rules of the game, the social contract, if you like, the way we agree to organise our society, the constitutional rules. And the Sword is the other part of it. The Sword is the ability of the sovereign to actually come and cut the head off anybody who refuses to abide by the Covenant. And Hobbes has a very strong line. He says, the Covenant without the Sword is of no value.

In other words, no amount of fine words matters if the idea is not enforced. It has to be enforced by an agent who has a monopoly of force, and that is the state. It's no longer a matter of literally cutting the heads off people who run monopolies. It's a matter of having a regulatory agency that can, with the law behind it, restrict them in the ways that they go about exploiting their fellow human beings. In New Zealand, what we did when we moved to light-handed regulation, was we stuck with the Covenant. All the fine words are there about no anti-competitive conduct and monopolists to be restricted in their excess profits and so on and so on.

That's fine words, until the cows come home. But when it comes to enforcement, which is the Sword, our regulators are toothless. And they've been found to be toothless over and over again, in Privy Council cases, Supreme Court cases, High Court cases. Case after case, the courts have come back and said, no, this bit of anti-competitive conduct is perfectly OK because it's not prohibited explicitly under law. Section 36 of the Commerce Act is just a little hand-waving about anti-competitive conduct. It has no teeth.

The lack of teeth in our regulatory apparatus is the crucial problem in New Zealand. And I really would like us to see some teeth put back. In other words, the Covenant and the Sword need to go hand in hand.

Nelson: And that presumably is not happening through the RSB. How should that happen?

Bertram: The RS is subverting the Covenant. And in the process, removing the ability of the Sword to actually do good work. And they're keeping the Sword for things that I think are basically malicious.

Nelson: Such as?

Bertram: Well, such as protecting monopoly. protecting the rich against wealth taxes and intervention in their affairs, providing protection for people who want to use private property rights to destroy the environment and to destroy communities. I mean, the rich have a whole series of privately enjoyable and profitable projects that they will be pursuing, and attempts by the collective will of the population, or by the Government, to put some checks on those behaviours is being systematically crippled here.

Nelson: Finally, if we're serious about building fair, effective and future-ready regulation, what principles should we be turning to instead, or what processes? And who should be trusted to make those calls? How do we ensure that there's a non-partisan approach to regulation that's future-proofed?

Bertram: Start with the problem: because the libertarian philosophy is so extreme, and so alien to the ideas that made the 20th century welfare state, there is no non-partisan position available. If you are libertarian, you do not have space in your thinking for the public-policy concerns that motivate those who believe in the public good and in collective activity and in lifting the poor out of poverty and in making society inclusive and honouring the Treaty and all of those fundamental values which motivate a lot of New Zealand society. To defend those values, unfortunately, is now a partisan activity.

And this partisanisation of things that ought to be shared among all of us is a real problem for Western society in general at the moment. So what first step could we take towards trying to make it less of a problem? One important step we could take is to stop surrendering to one extremist partisan position. And one way to do that is basically to

reject this Regulatory Standards Bill right now, chuck it out, have nothing more to do with it, never let it come back into Parliament, recognise it for a poison pill being inserted into the body politic and get rid of it. That's a hugely positive thing to do.

Calling it non-partisan, alas, is stretching things.

Nelson: What could we do in terms of heading forward beyond this to help things stay in a more balanced state and make our regulation ready for a better kind of future?

Bertram: Well, collectively, obviously, we should be organising better, especially at local level, and should be insisting on the ability of communities to do their thing without finding themselves subject to the sort of interventions and problems that the libertarians place upon them. So collective action, both locally and nationally, is really important. That's what democracy is about.

Democracy, ideally, is an inclusive process where decisions are made collectively for the good of all, and particularly for the good of those who are worst off - the weak, the poor, the vulnerable. So on the one hand, that's a charter for active citizenry engaging with each other and with issues of the day. At the legislative level, there's a really important programme required of repealing the poison pills that the libertarians have put into our statute book.

That means, for example, we need to repeal Section 4 of the State-Owned Enterprises Act. We should allow government-owned enterprises to operate at a loss where that is for the public good, because there are non-monetary values to be served.

We should repeal Section 26 of the Public Finance Act, which labels as irresponsible any government that increases the public debt. This is nonsense. There are common sense principles of how to run a budget, but the Public Finance Act is much more extreme than the commonsense principles would make it, it is tying the hands of our Ministers of Finance who are trapping themselves in a completely false narrative of government being unable to do anything.

We should be amending the Commerce Act to make merits appeals against the Commerce Commission's regulatory decisions no longer possible, so that the courts can't be used to stifle regulatory action. We should, indeed, be repealing the whole 1986 Commerce Act and going back to the previous legislation which dealt with regulatory issues directly and explicitly.

We should be massively revisiting the Public Service Act 1989 which has destroyed a lot of the quality of our public service by putting career managers in place of people who knew what the business of government is all about.

We should be abolishing the so-called "funder-provider split" that has government hiring contractors to do the business of government, that government should be doing for itself.

I could go on. There's a very long list of legislative actions and regulatory changes that are needed to unwind the huge damage that rogernomics and ruthanasia did to this economy. And it's not just that it was Roger Douglas and Ruth Richardson doing these things. There's an enormous intellectual structure behind the actions of these people, which I think have been destructive of New Zealand, and which, from an economist's point of view, explain why we have low productivity and poor growth and are struggling to make ends meet as a community, and why we have private communities and individuals carrying such a huge level of indebtedness. A lot of that is because government has abdicated from the proper role of government, and dumped all the costs of that onto the private sector and particularly onto the poor and the vulnerable. And I guess the bottom line is, when you come to a slogan for reconstructing New Zealand, honour the treaty - Toitū Te Tiriti - happens to be, to my mind, number one on the list.