

NOT THERE YET

The state of regulatory best practice
initiatives in South Africa



A DESKTOP STUDY

Conducted by the SBP for the UK Department
for International Development (DFID)

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ACRONYMS AND ABBREVIATIONS

RIA	Regulatory impact analysis
RBP	Regulatory best practice
BLCF	Business Linkage Challenge Fund
DA	Democratic Alliance
ANC	African National Congress
BEE	Black economic empowerment
IFP	Inkatha Freedom Party
NNP	New National Party
PMG	Parliamentary Monitoring Group
JCCI	Johannesburg Chamber of Commerce and Industry
COSATU	Congress of South African Trade Unions
SBP	Small Business Project
BSA	Business South Africa
BBC	Black Business Council
SME	Small and medium enterprises
DFID	Department for International Development
AAC	Anglo American Corporation
GEAR	Growth, employment, and redistribution strategy
MP	Member of parliament
BIS	British Investment in South Africa Grant Scheme

It's not the answer to pass more rules ... with all these bloody rules we've gone overboard, in my opinion ... directors should pursue principle rather than mindless compliance.

– Mervyn King, head of the King commission on corporate governance, quoted in G Ardé, Honest companies lure labour, *Natal Mercury*, 27 August 2003.

1 INTRODUCTION

The purpose of this study has been to assemble the most significant published documentation of regulatory best practice (RBP) policy debates in South Africa and, within the limits of a desktop survey, assess the state of play regarding this issue.

Much of the more significant discussion around RBP in South Africa stems directly from initiatives funded by the UK Department for International Development (DFID). While DFID funding has undoubtedly raised the profile of RBP, this notion has gained considerable momentum of its own, and an analysis of the current state of play necessarily has to go beyond DFID-related activities.

In fact, assessing the degree to which RBP has gained prominence in the South African policy arena requires an analysis that goes beyond donor-funded projects *per se*, and cannot be fully addressed by means of a desktop method alone. However, donors continue to play a key role in this area, an issue that will be addressed in the closing comments.

2 THE SIX THEMES

The material has been arranged under six themes, corresponding to six significant areas of policy advocacy. All the articles mentioned in the text appear in the appendices, which are also arranged in line with the six themes.

2.1 The general policy environment

The intervention that has done most to raise general awareness of RBP was the study of regulatory practice in 10 developing countries, funded by DFID, and conducted by Bannock Consulting, in collaboration with the SBP and other research organisations, in late 2001 and early 2002. The report was broadly disseminated in South and southern Africa. The findings were presented to top government and private sector representatives in Maseru (Lesotho), Windhoek (Namibia), and Gaborone (Botswana). In South Africa, presentations were held in Cape Town (focused on parliament), East London (provincial-level government and private sector actors), and Pretoria (government officials, especially from the department of trade and industry, or DTI, and its associated cluster of institutions, and representatives of organised business and donors).

A summary of the presentation of the 10-country study and a report on issues raised during the presentations are appended. A subsequent *Business Day* article entitled 'Suitable regula

tions are a must for growth’, written by Graham Bannock, former head of Bannock Consulting, and Chris Darroll, executive director of the SBP, is also appended.

Based partly on the 10-country study, the SBP produced an issue of its *SME Alert!* series entitled ‘An enabling environment for private sector growth: lessons from the international experience’, which was distributed to some 3 000 key decision-makers in government and business. The SBP has received so many queries and requests that it now needs to reprint this publication. An article by Chris Darroll based on it entitled ‘Lower the walls for the sake of SA growth’ appeared in *Business Day* on 28 November 2002, while *Business Report* and *Sowetan* carried reports on it by staff writers Lynda Loxton and Shadrack Mashalaba respectively. The SBP followed up by publishing a further *SME Alert!* entitled ‘Understanding regulatory impact assessments: key issues from the international experience’, which had a considerable impact on organised business (see section 2).

The SBP generated further momentum on this topic when an article by staff member Judi Hudson was carried in *Business Day* on 25 February 2003. Entitled ‘State must make it easy to do business’, it also pointed the way towards developing an awareness of regulatory impact assessments (RIAs) as a key component of RBP.

SBP staff have discussed RBP, especially in relation to the findings of the 10-country study, at numerous fora, including meetings with government officials, business people, and researchers/academics. On 7 July 2002 Chris Darroll presented the 10-country study to the World Economic Forum’s Africa Business Summit in Durban. The most recent SBP public presentation on RBP – by Chris Darroll, to the Africa Business Forum on 24 July 2003, an event organised by the *Financial Times* in collaboration with Deloitte & Touche – is attached. General RBP themes were again summarised in an article by Judi Hudson carried in the *Mail & Guardian* on 8-14 August 2002, and another by Judi Hudson and Chris Darroll entitled ‘Rather than support SMES, remove their barriers’, which appeared in *Business Day* on 18 August 2003.

The real momentum achieved was demonstrated when the *Financial Mail*, South Africa’s biggest selling business weekly, carried a cover story on RBP on 23 May 2003. Entitled ‘Now is the time: why SA must cut the cost of regulation’, the article, written by staff writer Jabulani Sikhakhane, was centrally concerned with RIAs. Besides this, the magazine called for appropriate regulation in the Editor’s Note and its first leader.

In the absence of a full survey, comments about the extent to which RBP has been placed on the public policy agenda must necessarily be speculative. However, the three main publications that the SBP has targeted for dissemination – *Business Day*, *Business Report* (which is included in the Independent Group’s daily newspapers in Johannesburg, Durban, and Cape Town), and the *Financial Mail* are undoubtedly the primary media vehicles for policy ideas in this country. These three publications are essential reading for decision-makers in government and business.

In a very significant development, the *Financial Mail* introduced, in July 2003, a regular weekly feature called 'Regulatory Watch'. The first three examples are appended. The magazine seems to have moved some distance towards incorporating an RBP perspective in its general approach, as illustrated by an article on the adverse affects of regulation on the financial services sector (S Theobald, Costs of compliance, *Financial Mail*, 15 August 2003).

Two further developments illustrate the extent to which ideas related to RBP are broadly understood and in circulation in the South African policy environment:

- Grant Thornton Kessel Feinstein recently released a study entitled 'The first international business owners' survey'. Based on a poll of 250 business owners in South Africa and 6 000 more in 18 other countries, it pinpoints regulation as one of the three most significant hurdles to business expansion in South Africa. Some 46 per cent of interviewees identified regulation as a major constraint, compared to a 'global average' of 35 per cent. (The other two were the high cost of finance and the shortage of skills.)
- In a recent speech at the Gordon Institute of Business Science in Johannesburg, the minister of finance, Trevor Manuel, stated that the South African government was 'so enamoured with its self-importance' that it had 'construct(ed) new channels of bureaucracy' which were 'obstacles to people trying to do business' (Q Wray, 'Manuel slams business "short-termism"', *Business Report*, 29 July 2003).

2.2 Organised business

Not surprisingly, organised business is more aware of RBP than either of its 'social partners', namely government and organised labour. This was clearly demonstrated during the processes surrounding the growth and development summit of June 2003.

The summit was a high-profile agenda-setting meeting between 'peak' representatives of government, business, and labour. Organised business was represented by an alliance of Business South Africa (BSA), itself made up of 18 member organisations, and the 11-member Black Business Council (BBC). The alliance decided that one of its points of advocacy would be RIAs, a crucial component of RBP.

In the planning process leading up to the summit, the planning committee commissioned Stefan Malherbe of the consultancy Genesis Analytics to draft a discussion document entitled 'Designing a regulatory impact assessment system for South Africa'. This document drew heavily on the SBP's *SME Alert!* entitled 'Understanding regulatory impact assessments: key issues from the international experience', and Malherbe acknowledged it as his primary source. As a result, SBP staffers Judi Hudson and Douglas Irvine were invited to address the planning committee on the subject. The profile of the RIA issue was further raised by two articles in *Business Day*: one by staff writer Tim Cohen entitled Cutting red

tape a worthy summit aim' (14 May 2003), and the other by Chris Darroll and Judi Hudson entitled 'Assess impact of new laws', (17 June 2003).

However, RIAs were not included in the final agenda for discussion at the summit, following what a BSA representative described as 'resistance from the other parties'. The summit's final agreement simply states: 'Given the challenges that our country has inherited from its past, it would not be possible for the growth and development summit to address all priorities identified by constituencies.'

As a result, the BSA/BBC alliance tabled a notice that RIAs would be taken up as a policy issue in the future. In his plenary speech at the summit, Attie du Plessis, the main spokesperson for organised business, called for an RIA process (his speech is appended; see especially pages 6-8). See also C Paton, 'Three cheers for better social dialogue', *Financial Mail*, 13 June 2003; and M Pela, 'R145 billion to kick-start growth', *Business Report*, 9 June 2003. The chief executive officer (CEO) of the South Africa Foundation, Niel van Heerden, who was involved in the BSA's preparations for the summit, called for RIAs in an interview with the SABC presenter Freek Robinson on 8 June.

In an incidental outcome of the SBP's role in the summit process, it has received letters of endorsement from the Anglo American Corporation (AAC), the South Africa Foundation, and the BSA/BBC Alliance, which support an SBP proposal for further research on this topic, funded by the Business Linkage Challenge Fund (BLCF).

Further support for RBP came recently when the AAC, South Africa's largest corporate, released its results on 12 August 2003. Addressing the media, its chief executive, Tony Trahar, warned of the 'burdens of doing business in SA' (J Bain, 'Anglo rues cost of doing business in SA', *Business Day*, 11 August 2003). The newspaper's editorial for that day took up the theme, spelling out the problem in greater detail: 'The overall level of government intervention appears to be increasing at a rapid pace', it stated, and added that 'it is hard to argue that does not have a case that it is being overregulated'. It concluded by calling for RIAs ('Trahar's warning' *Business Day* editorial, 12 August 2003).

2.3 Political parties

The only major political party in South Africa that has officially taken up RBP is the official opposition, the Democratic Alliance (DA). The DA's discussion document on economic policy, *It's all about jobs! The DA's economic policy for growth, opportunity and equity*, is littered with references to RBP. The document identifies four obstacles to growth and job creation, one of which is 'an environment which is not enterprise-friendly'. (The other three obstacles are 'insufficient political commitment', 'inadequate fixed investment', and 'a shortage of skilled people'.) This theme is developed throughout the document. On page 29 the DA suggests 'removing unnecessary regulations', and on page 30 this argument is ex

tended to a call for a regulatory review and RIAs. The SBP publication *SME Alert!* is explicitly referenced with regard to RIAs. A copy of the document is attached.

In the course of developing its economic policy document, the DA drew particularly on liberally inclined individuals in the South African policy network. As regards RBP, specific inputs were provided by the SBP in discussions with the DA MP Ken Andrew held at his request, and in the form of an SBP paper on black economic empowerment (BEE), commissioned by the Friedrich Naumann Foundation, which specifically considers some of the implications of BEE for RBP. This paper has not been publicly released, but its salient points have appeared in an article by SBP staffer David Christianson entitled ‘Liberals can espouse black empowerment’, published in *Focus*, a quarterly journal produced by the Helen Suzman Foundation.

The DA’s thinking on RBP was publicly articulated by its leader, Tony Leon, in a speech to the South African-German Chamber of Commerce on 24 June 2003. Leon advanced ‘Five big ideas for job creation in South Africa’. The first is an explicit call for labour law reforms, in line with RBP, and including exemptions for smaller firms, and the second is to ‘get rid of old regulations and subject new ones to RIA’. A copy of this speech is appended.

There is no public evidence that any other party has seriously considered adopting RBP as a policy position. But RBP is by no means out of line with economic ideas advocated by the Inkatha Freedom Party (IFP) and the New National Party (NNP) in recent years. Of course, first prize would be the adoption of RBP by the ruling African National Congress (ANC). Within that party, debate over economic policy is deliberately dampened – some would go so far as to say manipulated or suppressed – in order to avoid mobilising the latent divisions that exist over macroeconomic policy, specifically the growth, employment, and redistribution (GEAR) strategy. This trend has marginalised party activists and thinkers in economic policy formulation in favour of ANC members of the executive, especially those located in the state president’s office. The state of play regarding RBP in this crucial policy nexus is unknown. The statement referred to in section 1 by the minister of finance, Trevor Manuel – who is not generally considered to be part of the ANC’s inner circle – is one of the few pieces of evidence that RBP has been considered by senior ANC people.

Generally, while having the ANC explicitly adopt RBP would be a very significant step, the sporadic nature of real policy debate within that organisation makes it less important as a site of advocacy than a number of others. And even if an RBP policy plank were added to the ANC’s platform, there would be doubts about the depth and significance of the organisation’s commitment to that policy.

2.4 Parliament

In South Africa, the importance of parliament as a general focal point for policy advocacy has traditionally been somewhat limited. This trend has continued, and perhaps even accel

erated, under the presidency of Thabo Mbeki. Nevertheless, parliament remains a key advocacy target, for several reasons. First, as a democratic institution, its openness to the media, and consequently its role as a mechanism for putting issues on the public agenda, arguably makes it the most important mechanism of this sort in the country. Second, parliament is an essential component of the regulatory process, and thus a point at which specific inputs are requested and RBP inputs can be made. About 1 000 pieces of new legislation have been passed since 1994 (see the articles by P McLaughlin). An important trend is that much of this legislation grants ministers very wide powers to formulate regulations. Such practice is generally 'bad' from a RBP perspective. It might be suggested that increasing awareness of the importance of RBP among members of parliament would provide a sharper focus to their activities – especially in committee – and reinvigorate their role in improving the quality of legislation.

The activities of Patrick McLaughlin, the parliamentary correspondent/representative of the British Chamber of Business, provides some indication of the possibilities inherent in this line of activity. McLaughlin, whose activities are partly funded by DFID, combines an RBP advocacy role with reporting for the British Chamber Newsletter, the Johannesburg Chamber of Commerce and Industry (JCCI), and the Parliamentary Monitoring Group (PMG). His RBP starting point is clearly evident in an appended article, 'Working together', written for the British Chamber of Business Newsletter in July 2003. It refers to the successful application of RBP principles in the debate over the recent Liquor Bill.

McLaughlin reports some success in inculcating an RBP ethos, especially among members of the parliamentary portfolio committee on trade and industry. A key figure is the committee's chairperson, ANC MP Rob Davies, who, earlier this year, was instrumental in having some of the proposed wider executive powers removed from the draft Black Economic Empowerment Bill. McLaughlin's article on the bill for the British Chamber Newsletter is appended, as are several other McLaughlin reports and briefings.

SBP has also targeted this portfolio committee, alongside the portfolio committees for finance and labour. All members receive *SME Alert!*. The September 2001 edition entitled 'South African industrial strategy: a small business perspective' (appended) explicitly calls for a regulatory review. The SBP reiterated this call in a presentation to the portfolio committee on trade and industry on 18 April (appended). During the presentation, several committee members referred to and quoted from the *SME Alert!* The publication was also disseminated to a wider audience through via e-mail newsletter *Cutting Edge*, produced by the Assessment College of South Africa.

2.5 Organised labour

Leading representatives of organised labour are by no means ignorant of RBP, having been bombarded with information about the concept by both organised business and the SBP's advocacy processes. However, as RBP can be perceived as threatening 'workers' rights' and

thus the political power base of this constituency, opposition from the major trade unions is considerable.

The department of labour seems to be one of the least receptive to ideas about RBP, perhaps because of its engagement with organised labour. During a media briefing in parliament in February 2003, the minister of labour, Membathisi Mdladlana, insisted that 'South Africa has almost perfect labour laws. What we have to do is apply them more rigorously.' Mdladlana's views are consistent with those of labour-aligned researchers who insist that labour regulation is a minor problem for small business (see the article by Claire Horton, Kieran Honderich, and Keolebogile Modise entitled 'Small Business: What's Holding it Back?' in *Indicator SA* in March 2000).

Despite this general reluctance, there is some evidence for the claim that RBP is sufficiently established on the public policy agenda for organised labour to feel that it has to respond to the issue.

In an article based on an in-depth interview in *Enterprise* magazine in February 2002, COSATU's general secretary, Zwelinzima Vavi, showed that he was well aware of this issue. But the COSATU 'line' at that stage was a fudge at best: Vavi was quoted as saying that 'Competition must be regulated by a strong state. The market rules, OK? But the state regulates.' While there is no evidence here of an acceptance of RBP, this awareness may indicate the existence of fertile ground for further advocacy. Further evidence for this is provided by the position paper prepared by organised labour for the Growth and Development Summit, which states (p 8): 'All legislation and regulations should be accompanied by a report on the likely (non-tax) impact on employment and investment.' This certainly does not constitute an outright rejection of the RIA mechanism.

The SBP has conducted a survey on the government's skills development levy among 40 South African companies associated with the British Investment in South Africa (BIS) grant scheme. A report on the research, which confirmed the prediction that small business would experience the levy as 'just another tax', was published in the *BIS Newsletter* in 2002. The article was translated and carried in *Rapport*, a major Afrikaans Sunday newspaper, on 19 January 2003.

2.6 Other

Various studies, articles, and other documents have been attached to give some indication of other local and regional processes around RBP.

3 CLOSING COMMENTS

RBP has clearly made it on to the public policy agenda in South Africa. However, acceptance of this approach in key areas is at best uneven, and implementation still seems distant.

Little is known about the status of the issue within the ANC, the state president's office, and the civil service.

The article by Patrick Wadula of *Business Day* (appendix 6) does indicate some acceptance of RBP ideas within the DTI. It refers to an announcement by Mpumi Johnson, director of the DTI's enterprise development unit, that the department would commission a study 'to investigate regulations that impose disproportionately high costs on small, medium, and micro enterprises'. A contract was recently awarded. In addition, the SBP knows, through advocacy contact, that there is some support for the concept not only within the DTI but also the national treasury.

Organised business and the financial media have picked up on RBP issues with some zeal. BSA has reportedly commissioned a second draft of Stefan Malherbe's document on RIAs. However, there is still considerable scope for advocating not only this but other RBP ideas as well. There is also a need to inject more of a small business perspective. BSA is sometimes accused of neglecting issues that impact more heavily on small business, a claim with some credibility given the preponderance of corporate power in the organisation.

Besides the *Financial Mail's* Regulatory Watch, a number of reporters, including Patrick Wadula and Carli Louwens of *Business Day*, and Lynda Loxton of *Business Report*, follow and regularly write on RBP issues. This is evidence that certain media channels for advocating RBP ideas have recently been opened.

In summary, it seems that organised business, the financial media, and one political party, the DA, are most focused on RBP issues. Progress has been made in parliament as well. But the positions and awareness of key decision-making actors – the presidency, the ANC, and the relevant government departments – are much more ambiguous. The black business component of organised business is probably crucial to communicating the RBP message to these actors. But this caucus has been distracted by protracted in-fighting, particularly over the composition of its own leadership, for at least the past two years. There thus appears to be a need to consolidate awareness of RBP among the black component of organised business. It is further suggested that the small business perspective on this issue will need to be continuously reinforced as the main business representative policy advocates tend to have a big-business bias.

While RBP has clearly made it on to the public policy agenda in South Africa, little has been registered in terms of concrete outputs. If the moment is allowed to slip, the issue, instead of leading to concerted action, may once again disappear into obscurity. It seems that more resources and more steady work are required.