

# Regulatory Impact Assessment under the spotlight

Labour has reacted to the introduction of government's Regulatory Impact Assessment seeing it as an attack on labour rights. **Kate Philip** explores another dimension to this issue and suggests that a well designed RIA process can play a useful role for labour.



greater labour market flexibility, and as part of private sector protest at the 'costs of compliance' with labour market regulation. Labour has seen this as an attack on rights, labour standards and worker benefits – and often correctly so.

There is another dimension to the issue, however. The task of transforming South Africa's legislative and regulatory frameworks has been huge and complex. In some areas, the new regulatory frameworks are simpler and more streamlined than the systems they replaced. However, not all new legislation adequately translates policy into effective procedure, and administrative systems are not always geared to play the new roles assigned to them. In some instances, old and new regulation remains entangled in complex ways; and there are overlaps between regulation in different spheres of government.

Where any of this creates inefficiencies, administrative delays and red tape, it creates extra costs. These extra costs matter for growth and job creation, and while the focus of the debate has been on the impacts of this on the costs of doing business, it is often labour, the unemployed and the poor who end up paying the price.

## ILLUSTRATING KEY ISSUES FOR RIA

The current furor over Environmental Impact Assessment (EIA) processes provides an example of this. The two to three year delays in housing development as a result of slow environmental approval processes was recently put in the spotlight by Minister of Housing Lindiwe Sisulu. The debate over EIA illustrates three key issues for the wider debate about RIA.

Firstly, it highlights that it is not only, or even primarily, in relation to labour market regulation that

In the media briefing of government's ASGISA (Accelerated Shared Growth Initiative) provided by Deputy President Phumzile Mlambo Ngcuka on 6 February 2006, she refers to the introduction of Regulatory Impact Assessment (RIA), and the intention to make this an ongoing process in government, focused initially on the employment effects of regulation.

In Cosatu general secretary, Zwelinzima Vavi's response, he raised concern at the inclusion of RIA in ASGISA. This concern is not surprising. Regulatory Impact Assessment has tended to come up in the same sentence as calls for



*President Phumzile Mlambo Ngcuka*

compliance costs are affecting business. In the context of ASGISA, where the aim of RIA is to look at regulatory constraints on expanded growth and employment, the EIA experience shows that a narrow focus on the impacts of labour market regulation alone would be misplaced.

Secondly, the EIA debate illustrates very clearly that RIA cannot look at regulation in relation only to the costs it imposes on business. Costs always have to be weighed against benefits, in relation to social, economic and environmental impacts, and in relation to the wider public good.

Thirdly, the EIA debate illustrates the problematic way in which debate on regulation tends to conflate different issues. In the case of EIAs, the challenge is to ensure that measures intended to protect the environment are effectively administered in ways that don't unreasonably hold up development of housing and other services for the poor. This does not have to place policies of environmental

protection under threat, yet the debate rapidly turned into an argument at this level. The same is typical of debate on labour market regulation.

In practice, laws and regulations are simply the mechanisms through which rights and policies are translated into practice. The hierarchy is illustrated by the pyramid on the left.

Policies need to reflect the rights framework; laws and regulations translate policy into practice, but depend, in turn, on effective administrative systems in order to be implemented. Debate on regulatory issues tends to conflate these different roles and functions. Too often, frustration at inefficient administration of regulation leads to calls for policy change – or even change in the rights base.

This is typical of debates over labour market regulation, which degenerate routinely into questions over whether key rights and labour standards are 'affordable'. This does not help in identifying either the problem or the solution. The issues need to be separated. But in order to achieve this separation, the issue of compliance costs needs to be taken more seriously as an issue in its own right.

#### **REDUCING COMPLIANCE COSTS: ISSUE FOR LABOUR?**

The ILO's core labour standards overlap with key human rights, and 'decent conditions of work' are associated with better productivity, increased human capital, social and economic stability, and the reduction of poverty. South Africa can't afford labour market regulation that fails to deliver these core rights and standards – but nor can SA afford to deliver them in

ways that are cumbersome and costly. This raises the cost of rights, reduces their accessibility, and in the process, gives them shallow roots in the society, making them more vulnerable to attack.

In addition, complex or bureaucratic procedures add to the costs of employment in ways that deliver no extra benefit to workers. At least part of the chorus of complaint from the private sector has been about efficiency issues, rather than rights or policies. Where these concerns are real, they may indeed be a factor incentivising more capital intensive forms of growth, casualisation and evasion of regulation.

Casualisation has been one of the biggest threats to labour standards and rights. While the link between regulation and casualisation is not always clear, the private sector certainly claims that regulatory costs and complexity are a key driver of the trend. But casualisation is also not without its costs. Labour brokers aren't free; and in practice, in some sectors, the pendulum seems to be swinging away from casualisation, as employers start to realise that the 'casual' relationship has its own set of disadvantages in relation to productivity, and skills development and retention.

In practise, employers make an ongoing assessment of the cost/benefits of different employment models. While there will always be some administrative costs associated with labour market regulation, the more these can be reduced and streamlined, the greater the potential to tip that cost/benefit balance in a different direction.

Even simply at a narrow tactical level – faced with pressure on the

costs of employment, 'red tape' compliance costs form a part of the total cost of employment that can be reduced with no associated reduction in wages or benefits for workers. Appropriately separated from the rights issues, this seems to be a rather good place to focus employers' attention.

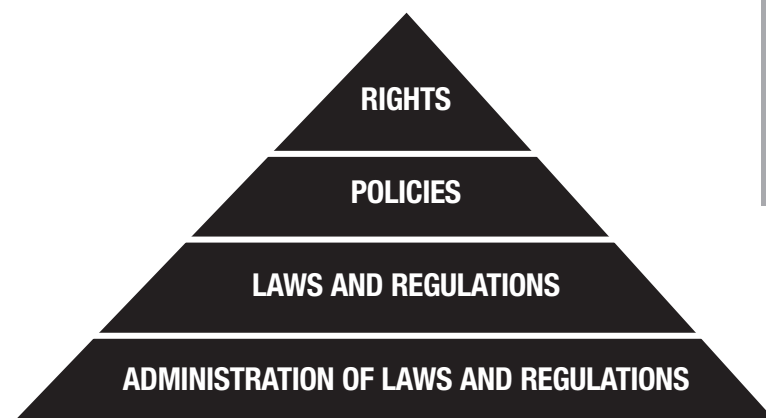
One-stop shops, single-portal interfaces with SARS, single-form registration processes with DTI, quick turnaround times in the CCMA, simplified claims procedures for the skills levy, effective high-level decision-making in Nedlac - none of these disadvantage labour, and may be key to the defence of gains won.

Given the tenor of much of the labour market debate so far, concern at the role intended for RIA is not surprising. However, a well-designed RIA process can provide the framework for a more evidence-based process of assessing the impacts of regulation, and whether regulatory frameworks are translating policy into practice in optimal ways. In order to do this, however, a baseline framework for RIA needs to be agreed upfront. In the South African context, such a framework needs to include the elements below.

#### A FRAMEWORK FOR RIA

##### 1. Ring fence the rights

The first principle in any RIA process needs to be that the rights framework is 'ring-fenced'. The role of RIA is to assess the extent to which regulation gives effect to rights and achieves the purpose of policies in optimal ways. RIA is not, and should not be, a mechanism to review or change either the rights framework or policy goals. To the extent that RIA is used as a Trojan



Horse for an attack on rights, there will be continued stalemate on regulatory issues.

However, if the rights framework is clearly ring-fenced, then the debate can focus instead on how to create regulatory frameworks that deliver rights and give effect to policies cost-effectively and efficiently, minimize unintended consequences, and broaden access to key rights and benefits.

For example, with the rights clearly ring-fenced, a discussion on the regulatory framework that governs the CCMA takes the principle of fairness in labour relations, and the need for a mechanism to regulate such fairness, as a given. The focus moves instead to whether there are more efficient and effective ways of achieving such fair outcomes, and of broadening access to fairness for workers in a wider set of forms of employment.

##### 2. Measure benefits as well as costs

The early calls for RIA focused on assessing the impacts of regulation on the costs to business. This is only one part of the picture. Regulatory Impact Assessment has

to weigh both costs and benefits across a spectrum of interests in society, and be informed by a wider assessment of the public good.

##### 3. Measure social as well as economic impacts

Assessment of the impact of regulation has to take account not only of economic costs and benefits, but of social and environmental costs and benefits into the future.

##### 4. Effective stakeholder processes

Processes in SA move forward when consultation is meaningful and inclusive. Regulation has different impacts on different groupings in society, and the role of effective RIAs is to fully understand and find ways to balance these with a bias towards the interests of the poor and to promoting shared growth.

Where these principles are accepted, RIA has the potential to provide a more structured, transparent and evidence-based framework for reviewing the impact of regulation, and as a result, to broaden the accessibility of rights rather than to undermine them. ■