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POWERING A BETTER NEW ZEALAND TOGETHER

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Ministry for Regulation

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Submission on proposed Regulatory Standards Bill

Introduction

1. Energy Resources Aotearoa is New Zealand's peak energy sector advocacy organisation. We represent participants from across the energy system, providing a strategic sector perspective on energy issues and their adjacent portfolios. We enable constructive collaboration to bring coherence across the energy sector through and beyond New Zealand's journey to net zero carbon emissions by 2050.

2. This document constitutes our submission on the Ministry for Regulation's (the Ministry) proposed Regulatory Standards Bill ('the Bill'). We thank the Ministry for the opportunity to submit on this most important of issues.

Key messages

3. We strongly support steps to improve the quality of new and existing regulation in New Zealand. We support the introduction of the Bill as it is broadly described in the discussion document. We believe that there is a problem to be addressed, and that taking a Bill to the public for consultation and further scrutiny and evaluation via the Select Committee process is a prudent opportunity to assist with ensuring that it is as robust as possible.

4. We think the Bill should focus on bringing together and co-ordinating the high-quality but scattered existing public policy principles into a coherent body. It should also clarify roles and responsibilities of those working on regulatory stewardship and bringing clarity and coherence to the law-making process.

5. We provide examples from the energy and resources sector where regulatory processes severely let down the industry and New Zealanders, with harmful and long-lasting results.

6. In addition to some discussion on market and regulatory failures, we suggest ways to improve upon the list of principles in the discussion document drawing on public policy frameworks.

Submission

7. We are not convinced by claims made over the course of the last decade or so that it would be a time intensive and expensive process to deliver on the objectives of the Bill. In our view, such statements are a self-limiting indictment of the public sector's current state and its delivery of high-quality public policy relative to the proposed standards. Neither should we be distracted by overseas practices. These are at best interesting, but not necessarily informative to our domestic circumstances.

8. Putting aside the arguments for and against the Bill we look to the experience of the Public Finance Act 1989 and the groundbreaking shift in improvements since its passage into law (including its amendment to include core elements of the Fiscal Responsibility Act 1994). We see no reason why the Bill should not herald a similar groundbreaking lift in our regulatory performance and productivity.

Our sector has been let down by poor process and political interference, damaging property rights

9. Energy providers, including fuel importers and natural gas producers, have in recent years been subjected to rash decisions resulting in significant investment uncertainty and delays. These regulatory stressors have undermined private property rights and risked, or actually led to, firms exiting the New Zealand economy or decreasing their output or participation.[1] As an effect of this deindustrialisation, consumers have faced rising prices, and the economy has felt the repercussions.

10. We provide a list of examples below:

    a **the oil and gas ban of 2018 ('the 2018 ban') –** hasty decision making with no consultation, and predetermined policy process outcome;

    b **the Crown Minerals Act amendments –** frustrating policy processes and blinkered decision-making, severely limiting investor confidence; and

    c **the Fuel Industry Act 2020 and its amendments –** multiple revisions of legislation and some overly zealous regulations imposing unnecessary costs.

11. Too often, lately, law has been made under urgency. This limits the ability to properly consult the public and makes it too easy to bypass processes such as the Regulatory Impact Assessments.

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1 By way of example, when the then Labour Government introduced restrictions on the allocation of future petroleum exploration acreage there was about 100,000km^2 of permitted offshore exploration acreage. In the wake of the ban only about 5% remains as of today.

Compensation for government taking of property rights and restrictions on use

12. The 2018 ban is a most egregious example of rash and naïve regulation, which clearly demonstrates what happens when private property rights are not respected. Property rights are at the core of an economy and are the basis for an exchange economy between willing buyers and sellers.

13. The 2018 ban led to investor flight (of the 25 investors active in 2018 only 9 remain). Unaffected permits were handed back, effectively permanently sterilising any unexplored resources. Permit holders faced a massive discontinuity in their operating context; fundamentally altering the economics of their investments. The ban also affected non-permit holders, like Schlumberger, because no new permits were available to leverage the massive investment it had made in seismic studies.

14. Due to the lack of respect of private property rights, as a petroleum investment destination, New Zealand now faces the perception of having high sovereign risk.[2]

15. Furthermore, we believe that compensation is a necessary twin of property rights in an open and transparent economy. A government should never knowingly and deliberately derogate private property rights, or regulatory takings, without compensation. The Public Works Act 1981 generally covers the taking of private property. However, in other instances, when the government limits how property can be used there is seldom any compensation. This means that businesses experience a serious decrease in the value of their assets. This situation needs to be addressed and rectified.

16. There needs to be a compensation clause in legislation (such as the amended RMA) to compensate for the government taking property *and* restricting its use beyond what is reasonable risk that a business can internalise. Not compensating leads to decreased economic activity, a loss of productivity, job losses or simply increased costs for consumers.

17. Using the 2018 ban as an example once more, the sector faces the consequences of a massive policy failure that *only* government intervention can now rectify. Repealing restrictions on access to exploration acreage in the Crown Minerals Act Amendment Bill 2024 was always going to be a necessary, but insufficient condition, to revitalising the natural gas sector. All investors, but especially new investors, will want to know that their investment today will be kept whole tomorrow should the government change.

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[2] Sovereign risk arises from breaking the promise under which businesses invest – that today's investment will be kept whole tomorrow. While a generic business risk, the 2018 ban created strain in the energy sector which is exacerbated by pronouncements from the current opposition of reinstating the ban on resuming government. A change in government policy tomorrow can bring changes that would frustrate any investments made in the Crown Minerals estate, making long-term investments now harder to justify. Productivity suffers as a result.

18. New Zealand now faces the circumstances where new international investors will need to see investment conditions that are commensurate with the regulatory and geological risks now faced by exploring in New Zealand.[3] Simply matching other jurisdictions is no longer an option for New Zealand.[4] In order to ensure New Zealand's energy security the Key Government adopted pro-New Zealand Crown Minerals settings.

Poor energy sector regulation has resulted in poor outcomes and productivity for New Zealand

19. Our interests lie in the ability of the law-making system to provide for investment that can deliver energy security and affordability while also reducing emissions. Energy underpins a flourishing economy. The sector needs stable and predictable regulatory settings, regulation that caters to its specific needs, and adjacent sector regulation, such as climate and forestry, that *supports* rather than *undermines* energy sector needs. Of critical importance in recent years is security of supply.

20. Poor regulation has left New Zealand with an energy shortage, the likes of which has not been seen in several decades (with around 80PJs of unmet demand[5]). We only survived massive disruption last winter due to planned demand response measures from industry, to avoid blackouts. This is no way to run an energy system, and our energy insecurity is now a barrier to offshore investors.

21. Energy is the lifeblood of the economy. It is essential that we can safely, reliably, and affordably meet our energy needs while increasing our productivity and economic wellbeing. Effective and efficient regulation for energy is essential to this being possible.

Matters in the proposed Bill

We are not starting from scratch

22. The new Ministry for Regulation ('the Ministry') is one of the central agencies. Among their roles, these agencies tend to have more of an internal focus looking at quality control and providing overarching regulatory stewardship. An important role these agencies have is to lead and bring coherence to public

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3 Such mechanisms are not unfamiliar to governments. They range from the guarantee used for Genesis Energy's E3p power plant under the Clark Government, contractual termination clauses, the Hipkins Government for the electrification of the Glenbrook steel mill furnace which gave protections against adverse regulatory changes, and more recently the underwrite provided by this government to the residential developers:https://www.beehive.govt.nz/release/new-government-support-residential-construction-market-announced.

4 If this is the goal, in light of our now unique risk profile, capital will flow to those other jurisdictions. We now must be more than just 'internationally competitive' but actively tilt settings to be more favourable in New Zealand.

5 For context 1 PJ is equivalent to around the electricity to power 40,000 homes, and this energy deficit is more than our largest gas producer (indeed New Zealand's largest *energy* producer) produces in an entire year.

policy making, with an enduring outlook that is not easily swayed by changing political leanings.

23. In our view, the Bill could provide areas of focus (roles and functions) for agencies working on regulatory stewardship, including the newly established Ministry. Some of this role was previously undertaken by The Treasury.

24. Law making, like policy making, is a craft. There is already a large body of public policy and law-making materials that guide us, such as those mentioned in the discussion document. We recommend that the Ministry does not start from scratch but brings these materials into focus, makes them easily accessible and provides a function of coherence and coordination across them.

25. We support the idea behind principles guiding the making of regulation. They should provide for a balanced system of law, with each law having a specific purpose and only that purpose.

26. Every part of the system needs to have clearly defined (and easy to understand) roles and responsibilities. This includes the continued upholding and respect for our 'holy trinity' of the balancing of powers between the legislature, the executive and the judiciary.

27. Good regulatory stewardship also scans for gaps in regulation and addresses blurred lines of accountability and unclear objectives.

Defining the problem – market failures and government failures

Market failures and light-touch government interventions

28. The 'problem definition' is the most important stage of good regulation. Markets typically work well when government intervention is used sparingly and predictably. Problem definitions should be justified by evidence and the problem must be bad enough to warrant a regulatory response.

29. First; do no harm – regulatory measures must avoid permanent or widespread market distortion and mitigate the risk of unintended consequences. There is an array of things a government can do before deciding that regulation is the most appropriate course of action. These include cost benefit analyses, light-touch non-regulatory options, and regulating only where the public interest test has been met, such as significant market failure. However, we must not forget the counter risk of government failure.

The risk of government failure

30. We believe it is worthwhile briefly canvassing the concept of government failure in the context of market interventions by government because of the experiences outlined above in managing the Crown Minerals Estate.

31. Alongside market failure, policy makers must consider the risk of policy failure, also known as government failure in the language of public administration. Extreme care must be exercised when considering regulation, specifically, the weaknesses of political and bureaucratic institutions must be recognised and carefully considered. Too often the costs of government regulations are assessed simply in terms of direct administrative and compliance costs, but this is far too narrow. In addition to considering direct costs, transaction costs and opportunity costs of resources spent on compliance, it is crucial to consider the risks of government failure, which can occur because of:

    a *political failure*: legislation responds to interest groups at the expense of the general public;

    b *bureaucratic failure*: government agencies tend to advance their own interests (e.g., expanding budgets and influence) rather than addressing the original problem that warranted intervention in the first place;

    c *judicial failure*: slow, costly and uncertain legal processes can arise from new regulations;

    d *regulatory capture*: regulatory agencies can end up captured by stakeholders in the regulated industry; and

    e *regulatory creep*: where additional costly regulations are needed to manage unintended consequences of the original policy.

32. Too often, consultation documents assume that additional policies are needed and appropriate without recognising and engaging with the risks of government failure which could compromise its own preferred path of regulation.

33. As discussed above, if there are market failures, it must be demonstrated that these are residual and material following the primary intervention focussed on externalities. The problem definition must be clearly articulated and then the marginal costs and benefits of intervention must be clearly demonstrated.

34. Even if there are instances where further measures are justified, this is not carte blanche justification for interventions across the economy – each must be clearly justified on its merits with a high degree of confidence that net public benefits will arise. In particular, it must be demonstrated that the net benefits of government intervention are greater than any cost incurred by not intervening (in other words the cure not being worse than the illness). In other words, poorly conceived interventions will result in a net-public cost.

It is important the system is not made more complex or political

35. Some of the proposals potentially add complexity to the system, with new roles, extra costs and time. The proposed Board is one example of additional complexity whose functions can be met through existing mechanisms, with

improvements. The starting point should be to ask – what is working, what is not working, what can be taken away – then address what might need to be put back in with improvements.

36. A 'Regulatory Standards Board' (the Board), if introduced, would need to be introduced in such a way that it does not create further complexity or time delays. It must be kept free of political influence. Given the intention in the discussion document is that appointees will be politically appointed, we recommend a cross-party process, akin to the Climate Change Commission process. It would also be prudent to consider how such a board might be dissolved in future if that is decided to be the best outcome.

37. Any risk that the Board could potentially interfere with the balance of powers between the executive, the legislature and the judiciary must be managed.

The Bill's principles are sound but should also reflect public policy principles at the outset

38. Principles listed in the draft proposals largely make sense but are not fulsome or reflective of basic principles of public policy. For example, alongside other legislative design principes, such as 'the law should be clear and accessible', we would expect to see principles that provide for regulation that:

    a is efficient and effective (see our note on least cost);

    b is flexible and technology neutral;

    c addresses a specific problem and fills gaps;

    d is timely, targeted and commensurate with the nature of the problem;

    e provides clarity of investment opportunities;

    f is temporary and removable if it is a market intervention; and

    g addresses limitations of resourcing, capacity and capability, national and local variation.

Remove blurred lines of accountability and conflicting objectives

39. The Bill can clarify the roles and objectives of regulation, especially where there are risks or real-life examples of overlap and confusion. We give three examples of blurred lines and conflicting objectives that have impacted the energy and resources sector.

Amendments to the Crown Minerals Act 2018 - 2023

40. Recent reforms of the Crown Minerals Act 1991 (the 'CMA') provide a clear example of how, without regulatory stewardship, lines of responsibility can be

blurred. CMA reforms to manage the Crown's financial risk of having to undertake and fund another upstream decommissioning project drew land use and property rights issues into legislative design to manage the rights and royalties associated with the exploration and development of Crown owned minerals.

41. These changes, particularly in respect of financial security arrangements, require the Minister of Resources to presume any landowner preferences and set *de facto* environmental standards when determining the amount of financial security. This also had the effect of singling out the upstream oil and gas sector for decommissioning and remediation, absent of supporting evidence of a systemic issue.

Resource Management Act reforms 2020-2023

42. The Resource Management Act reforms of the last government stepped unfavourably on the toes of development in favour of environmental outcomes. The purpose of the RMA ought to be about enabling development and putting in place systems and hierarchies to mitigate its effects.

43. Development is not just building more, it often means maintenance and renewal, and increasingly, it has come to mean building back better. Development should not be seen as a threat to environment

44. Energy development takes years to plan, design and execute. There is much riding on the ability of New Zealand to build more energy generation. With a fuel agnostic lens, this could be renewables (e.g., solar, wind, hydro, clean fuel technologies) and will likely include some fossil fuel development also (e.g., natural gas, fuel storage, new technologies for biofuels and biogases). The current state of the RMA has actively hampered the ability of the sector to keep pace with demand.

45. We mentioned above the need for compensation clauses in the RMA, and this should be considered alongside the purpose of the Act, which is to manage the effects of development and property use (not to take the starting point of stymying it).

New Zealand's First Emissions Reduction Plan 2022

46. The primary regulatory mechanism for reducing carbon emissions in the energy sector is the New Zealand Emissions Trading Scheme (the 'NZETS'). This was undermined by 'complementary' policies from the previous government that focused on gross reductions. We cover much of this – including the 'waterbed effect' that rendered such policies largely unnecessary – in our submission on the

Climate Change Commission's draft advice on the second Emissions Reduction Plan.[6]

47. An unrelenting focus on climate change mitigation through gross emissions reductions in particular sectors and technologies, rather than least cost net reductions across the economy, meant New Zealand took a high-cost pathway to reducing emissions and delayed both investment in energy generation and advancing our thinking on climate change adaptation. See our submission on the inquiry into climate adaptation here.

Overseas practices are interesting but not necessarily informative

48. Comparative jurisdictional institutional analyses are highly problematic. While it is always interesting to understand what practices are being followed in other jurisdictions which on their face, may contain useful lessons for New Zealand, often such comparisons are rendered inadequate due to the specific contextual factors at play at the time of the decisions being made (such as local politics, economic and social circumstances etc). This means that we should observe and understand regulatory developments overseas but not necessarily apply them directly. Instead, our goal should be best practice for New Zealand circumstances.

49. It is also worthwhile noting that regulatory practices around the world are not static but constantly shifting. As recently as last week,[7] the President of France, Emmanuel Macron said:

> "When it comes to regulations, these are often passed with good intentions, but when the rest of the world doesn't follow, the result is a less competitive Europe, Macron said.
>
> We invest less, we innovate less, but we over-legislate. Instead, [w]e need a massive regulatory pause, but we also need to go back on those regulations, including recent ones, which hinder our ability to innovate."

50. The point is that what might be considered international regulatory best practice at one point of time, is unlikely to remain so. New Zealand is in a regulatory best practice race and simply looking to match what others are doing is a static world view when a dynamic one that suits New Zealand's unique circumstances is required.

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6 Our submission is available here: https://www.energyresources.org.nz/dmsdocument/288

7 Sciencebusiness.net, 9 January, 2025.

Good regulatory stewardship identifies and addresses gaps – for example, an Energy Security Act?

51. As an example of regulatory stewardship identifying a gap or where something is out of balance, and where current laws and practices are not improved, the issues that face the energy sector have caused us to give thought to a legislative device that would appropriately prioritise energy security. Such a tool could help refocus the energy conversation to beyond the immediate system stress.

52. The Climate Change Response Act 2002 has dominated energy policy in recent years, perhaps with a political lean, and has inadvertently put our country's energy security in a weak position. An Energy Security Act would re-establish an appropriate balance, effectively doing for energy security what the Climate Change Response Act does for sustainability.

53. Such a legislative devise could:

    a have the objective of ensuring a secure supply of energy for all New Zealanders at an affordable cost and to facilitate greater accountability for its delivery;

    b be used as a transparency tool to measure the achievement of energy security and facilitate a public conversation about it and the extent to which there are acceptable tolerances around its delivery; and

    c act as a focal point for energy security, bringing together the diffuse obligations currently scattered across various pieces of energy-related legislation, fuel-types and agencies.

Concluding comments

54. Steps to improve New Zealand's regulatory standards and performance are required. The Bill, as outlined, is an overdue opportunity to interrogate the past performance of our regulatory system and make justifiable improvements. We are not starting with a blank sheet, and we recognise the many valuable and intelligent resources we already have. We encourage the Ministry to draw upon these and coordinate them for system users in the context of the Bill.

55. We thank the Ministry for this opportunity to engage and we welcome the opportunity to discuss our feedback further.