Submission on a proposed Regulatory Standards Bill

To the Ministry for Regulation

13 January 2025

Submitter details

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Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Key points

- The case for the proposed bill is explained to be a need to improve productivity but this is not addressed in the proposed principles which take their inspiration from notions of a constitutional nature rooted in theories of rights and liberties.

- If the proposed bill is indeed about improving productivity, then its principles need to be focused on securing benefits in excess of costs. Where environmental regulation is concerned, any such cost benefit analysis should aim to include a valuation of ecosystem services.

- The proposed principles are, instead, narrowly focused on individuals' rights and interests. As such they have a more constitutional flavour and would be more appropriately addressed through amendments to statutes such as the New Zealand Bill of Rights Act and the Constitution Act.

- The claim that New Zealand's regulatory performance is declining as measured by international surveys is not borne out by careful analysis of the OECD survey cited in the discussion document. Notwithstanding that, the case for asking hard questions about the quality of regulation and being prepared to review and update yesterday's regulatory undertakings, is a sound one.

- If environmental regulation were to be considered under the proposed bill and assessed by a Regulatory Standards Board, then the principles need to be completely re-written to elaborate the limitations of private property rights as they relate to externalities and

the use of public goods and common pool resources, and to spell out their relationship with Te Tiriti o Waitangi. In terms of environmental regulation, it would be much better to make this a significant focus for any replacement to the Resource Management Act (RMA).

- The justification for promoting new legislation rather than improving elements of the existing system, has not been made. If it were to proceed, the bill itself would be unlikely to meet the standards that the discussion document proposes.

- A better way forward would be to improve existing regulatory processes and minimise the use of current parliamentary practices that truncate the time available for regulatory assessment and allow the passage of legislation under urgency.

Introduction

The discussion document on the proposed Regulatory Standards Bill cuts unevenly across economic, constitutional and ideological terrain. It opens with this assertion:

> *Most of New Zealand's problems can be traced to poor productivity, and poor productivity can be traced to poor regulations*.

New Zealand's 'problems' come in many shapes and sizes. Vulnerability to biological invasion, seismic instability, rising security tensions and trade protection are just a handful of challenges that cannot be linked to poor productivity. **Economic** problems might be more accurately traced to poor productivity; and if poor productivity means a failure to make efficient use of human, natural and financial capital to enhance the living standards of New Zealanders, then there is some merit in the opening claim. But whether even economic failures can all be attributed to poor regulation is a somewhat heroic leap. The size of the domestic economy and its distance from markets, levels of education in key skillsets and the health status of the population are just some of the many factors that impinge on a nation's productivity.

The discussion document (page 11) attempts to anchor the claim that "poor productivity can be traced to poor regulations" in international comparisons:

> *New Zealand's regulatory performance has also stagnated or worsened over time, according to results from recent international surveys. While those results are partly due to changes in the scope and methodology of surveys over time, or characteristics particular to New Zealand, such as its small size and relatively less formal constitutional arrangements, they indicate that there may be considerable room for improvement.*

This assertion references New Zealand's relative ranking in the OECD's Product Market Regulation Indicators survey, and its decline across the 2018 and 2023 results. In 2018, our score was 1.24, the OECD average was 1.38 – a lower score is better so New Zealand is better than the average. In 2023, New Zealand's score was 1.32 and the OECD average was 1.34. While still 'above average', New Zealand was closer to it. This may give the impression that our relative ranking has fallen.

However, direct comparisons are challenging because the indicators have changed between 2018 and 2023. Fortunately, in an appendix the OECD recalculated the 2018 ranking using the 2023 methodology.[1] This recalibrated New Zealand's 2018 score to 1.45 against an OECD

[1] See https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/product-market-regulation/OECD-PMR-Economy-wide-indicator-values_2023-2024.xlsx

average of 1.49. By applying a consistent methodology, it appears that regulatory quality has generally been improving both in New Zealand and around the OECD.

So, the assertion that New Zealand's regulatory performance has "stagnated or worsened over time" is questionable. Rather than deteriorating, New Zealand's regulatory performance appears to be generally improving at a similar pace to the rest of the OECD.

Whatever the trend, the OECD's advice specifies areas for improvement in these terms:

> *In New Zealand key areas for improvements include: simplifying the administrative and regulatory burden on businesses and involving stakeholders more regularly and transparently in the regulatory consultation process.*

Digging further into the criteria used for each of these areas for improvement, three key issues are highlighted:

1. The complexity of obtaining licenses and permits.
2. Adequate rules to manage lobbying; and
3. Reducing barriers to foreign direct investment.

While it is fair to say that "there may be considerable room for improvement", it is hard to see what the proposed bill would do that would improve any of these issues. For example, it seems unlikely to improve protections against lobbying (which have been potentially weakened by the enactment of legislation such as the Fast-track Approvals Act).

It is also worth noting that the OECD survey referenced in the discussion document is largely focussed on **regulatory barriers to firm entry and competition**. The proposed bill has a much wider focus extending to regulatory management of risks to the public and the environment. In short, whatever evidence may be available to support the sweeping reach of the bill that is proposed, it won't be found in the OECD survey.

That is not to say, however, that there is no problem or that there is no room for improvement. On the contrary, to the extent that poor regulation leads people to waste time and resources without adding much value or discourages people from being innovative and doing things differently, it is a worthy target of scrutiny. Few New Zealanders have not remarked on some regulatory labyrinth in which they have found themselves entangled. Even when the justification seems reasonable, the time and cost can seem disproportionate. And those brave enough to make the case for change often feel their efforts being swallowed by inertia.

If improved productivity is the Government's goal, then the case for asking hard questions about the quality of regulation and being prepared to review and update yesterday's regulatory undertakings, is a sound one. There is a strong economic case for much better regulation.

One would have expected any enhanced regulatory scrutiny regime to have focused on ensuring that the **costs** of regulation justify their claimed **benefits**. This could be achieved by bolstering the status of the existing Regulatory Impact Assessments. The key barrier to more effective cost benefit analysis in the environmental domain is improving valuations of natural capital and the ecosystem services they generate. This could be readily achieved by relevant government agencies being tasked by Ministers to do so.

But the discussion document's attention seems to be focused elsewhere, specifically, a focus on **individual** rights and liberties. The relevant principle is elaborated in these terms:

> *Legislation should not unduly diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person.*

This is a classic, libertarian formulation in which the individual's interests are prior to those of the state or the public collectively. As such, it is an assertion that is freighted with constitutional overtones and invites a profound reflection on the way people relate to one another in the sort of democracy we have today. The New Zealand Bill of Rights Act 1990 deals with some of these issues. This proposal seeks to add "rights to own, use and dispose of property", but would do so outside the context of that Act.

Whose rights, whose property?

The basis for asserting the proposed rights is left unstated. That is unsurprising because the entire notion of 'rights' is contentious. They can be claimed as springing from natural law. They can be claimed to be the inherited bundle of freedoms established by judicial reasoning over centuries. They can be the creature of parliamentary declarations in statute law. As a constitutional democracy with specifically British origins, elements of all these strands can be found in the fabric of our institutions.[2]

If we are to regard this exercise as one that is more constitutionally inspired than economically driven, a key question is whether we start from where we are or from some other place. In my view, we have no option but to start from where we are. To take the notion of property rights, we might recall that British settlers arrived in Aotearoa with a bundle of ideas about property that had evolved over centuries. They were certainly not shared by Māori. That collision has generated a unique set of contested 'rights' around property that continue to be argued in the context of Te Tiriti o Waitangi.

Whatever bundle of rights made sense in the mid-nineteenth century, the intervening 180 years has seen extensive statutory interventions that have modified those 'rights' and in some cases created entirely new expectations in the nature of 'rights'. Zoning is a case in point. Much of the push back against regulations requiring densification is rooted in the fact that changes to zoning are seen to be an interference with settled expectations about the rules governing a particular suburb – expectations that have been capitalised in property values. It was deemed economically advantageous to dismantle density rules, so the Government chose to over-ride those expectations (or 'rights'). It did so at the expense of settled private expectations.

Of course, not all property is individually owned, and many legislative and regulatory interventions deal with the relationship between property owners and publicly owned land and water and the relationship that Māori have with their land, waters and taonga. What 'rights' exist to use public resources or pollute them? Regulatory principles based on individual rights and liberties cannot exist in a vacuum that ignores these matters. I will have more to say about them in the context of environmental regulation. But the point should be made clearly, right at the outset, that individual rights and liberties cannot alone be the basis for defining the limits of regulation.

Having said that, the economic case for respecting individual rights and liberties is an important one. Predictable property rights are an essential element of productivity growth. They should not be lightly dismissed. But they are not absolute. A well-made case for regulations that enhance productivity and maintain the many ecological services on which productivity ultimately depends can (and should) under our constitutional arrangements be able to modify individual property rights.

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[2] For an instructive introduction to the conflicting origins of rights-based notions in political discourse, the reader is encouraged to review Jeremy Waldron's seminal 1987 essay, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* available and reissued by Routledge Revivals.

Knowing enough to regulate

Perhaps a better reason for protecting against legislative and regulatory over-reach is epistemological rather than rights based. Regulators should always be prepared to ask whether they know enough to regulate. The insight is unashamedly Hayekian. Even if a problem is well-appreciated, a solution may not be immediately evident, and the risk of unintended consequences may be high. Regulation will sometimes offer **a** solution at the expense of delaying the emergence of **other** solutions. There will be other cases where we know the risk of not acting is sufficiently high even if we do not yet know what an optimal solution might be. This is the rationale for adaptive management which might, in everyday language, be described as designing regulations in the knowledge that the facts will change and providing regulatory levers that can be triggered as the facts change, without the need for cumbersome reviews. Climate change will make this more important than ever.

Understanding whether we know enough to regulate will depend very much on the problem at hand. This leads me to a further practical observation about the current exercise. While it may be philosophically attractive to talk about regulation generically and in the abstract, the decision to choose legislative and regulatory solutions will involve radically different substantive issues that require solutions tailored to the complex realities of very different real-world settings.

The particular challenges of environmental legislation

Regulations about workplace safety, managing public health and hazards, financial market disclosures, advertising and public speech, food safety, water quality – all involve quite distinct interferences with individual, corporate and community affairs and lend themselves to quite different solutions. What might philosophically appear homogeneous is, in reality, wildly heterodox.

One of my responsibilities under the Environment Act 1986 is to review the effectiveness of the environmental management system "with the objective of maintaining and improving the quality of the environment". That includes examining the extensive regulatory framework that has been developed to manage environmental pressures in both the public and private spheres. It is impossible to do that without considering the workability and cost of any such interventions, recognising that excessively costly regulations or those with perverse unintended consequences, will ultimately fail at a cost to both the economy and the environment. For that reason, I take the quality of environmental regulation very seriously and must ask whether the principles and procedures in this discussion document are likely to improve the effectiveness of the environmental management system.

Environmental management deals primarily with the interest New Zealanders have in **public** resources, goods and harm (e.g. air, freshwater, coastal-marine, biodiversity). Regulating environmental matters must take account of Māori interests, individual interests, public resources, current and future uses, and market interests. It must also grapple with resources where rights have not been, or cannot be, fully defined (due to their public good nature). Principles for regulation that do not reflect this complexity will fail to achieve the desired outcome of consistent, efficient, and effective regulatory frameworks. The remainder of this submission focuses on the particular challenges posed by environmental regulation and the deficiencies of the proposed principles as a basis for judging their worth.

Liberties, property, and the environment

Even a single environmental challenge can invite very different regulatory interventions. The discussion document defines regulation as "any government intervention that is intended to direct or influence people's behaviour, or how they interact with each other".

Regulation designed to limit greenhouse gas emissions provides a useful illustration of the complexity of trying to judge the efficacy of environmental regulations. The problem is well-defined, and the direction of travel is well-signalled in international agreements (which are a part of the "international obligations in relation to good regulation" to which the document refers). But the ways in which emitters' "behaviour or how they interact with one another" will be effectively and efficiently changed are plural.

It is commonplace to assert that putting a price on emissions can do the heavy lifting and overcome a lot of the information requirements that more prescriptive regulations might entail. This would be a reasonable assumption if the aim is to incite changes in the deployment of technologies that are available. The principal concern will be the price level and the distributional consequences of raising it over time.

But where there are currently no low or zero emission technologies available, relying on prices to stimulate investment in technologies could require raising them to ruinously expensive levels. Subsidising competing technical pathways might be a better way of filling the information gaps that are the real blockage to investment at scale. Here, the line drawn between prices and subsidies is not a simple question and certainly not one that can be read off from principles that are focused on liberties and property rights.

Public interests

Many of the problems addressed by environmental regulation lie beyond the practical reach of private property rights. But the proposed principles focus only on the protection of those rights. The boundaries of those private property rights and their intersection with public interests are assumed to be known and beyond contention. For example, the proposed principles headed "Liberties" and "Taking of property" appear to be absolute and are silent about any circumstances where it might be reasonable to curb those individual rights or to impinge on property rights without compensation.

Most environmental regulations concern public interests in the sense that publicly owned or managed resources are at stake. The proposed regulatory principles do not provide guidance on how to manage these resources and balance them against private rights. Environmental regulation can be conveniently broken down into three broad categories, two of which engage public interest issues and a third which involves frictions between private interests:

- **Externalities to the public sphere** arising from the use of private property.
- The management of **public goods and/or common pool resources** – what economists call resources with missing property rights, but might more commonly be understood as public property; and
- Resolving situations where there is **conflict between interests in property**.

Each of these categories raises slightly different challenges for the proposed regulatory principles. I address each of these issues and the associated challenge in turn although in practice these issues overlap. As a result, the examples are not mutually exclusive but are illustrative.

Externalities to the public sphere

To use the framing of economics, externalities exist when individuals do not face the full costs or benefits of their consumption and production decisions. As a result, they will tend to either do too much or too little of a certain activity compared to what is socially optimal.

Where externalities can be measured and attributed to their source, they can be managed via economic instruments (prices, taxes, trading schemes) rather than regulations in the strict sense of the word (although for the purposes of this proposal, 'regulation' has been extended to

all economic instruments such as taxes, levies and tradable permits as well). In practice, measuring and tracing externalities is not always possible, so regulation is necessary.

A more useful set of principles to traverse in this legislation would be the question of who should pay for the management of externalities. Traditionally there are a number of options based on different perspectives about who should pay:

- Beneficiary pays – the entity benefiting from the management of the externality should pay.
- Exacerbator/ polluter pays – the entity creating the externality should pay.
- Public pays – the taxpayer should pay; and
- Ability-to-pay – who pays is based on a judgement of vertical equity.

The proposed principles for regulatory standards (particularly in the section on the "Taking of property") could – at the extreme – be interpreted as a statement of the 'beneficiary pays' principle. If so, this implies that the property owner has an unrestricted right to pollute and would need to be compensated for any curtailment of that right. This would impose a substantial cost on 'beneficiaries' and would need to be carefully elaborated in any further regulatory analysis done to support a bill, if one eventuates.

Again, the regulation of greenhouse gas emissions provides a useful illustration of the challenges that regulating externalities throw up. The externalities are, in this case, measurable and attributable thanks to international agreements New Zealand has entered into. That has made the use of an economic instrument – namely the New Zealand Emissions Trading Scheme – the logical regulatory intervention (although, curiously, agricultural emissions remain exempt).[3] The proposed principles imply that property owners have a right to emit carbon and should therefore be compensated to reduce those emissions. While the beneficiary in this case is the entire globe, the consequences of international treaties mean that the 'beneficiary' is in this case the national population which means, in practical terms, that taxpayers are likely be required to pick up this cost. Currently this is the case for energy intensive trade exposed industries to which the Government gives a large number of free units (NZUs) to cover their emissions. The remainder of emissions are paid for directly or indirectly through increased prices on goods and services; in other words, the exacerbator or polluter pays.

Not all externalities are as easy to measure or attribute as carbon emissions. The degradation of water quality is a good example. In the document that is credited as the inspiration for this Bill, *Constraining Regulation*[4]*,* its author Dr Bryce Wilkinson acknowledges that non-point source pollution and the issues confronting water more broadly justify regulation:

> *In cases of non-point source pollution, common law solutions may not work well if the victim cannot establish, to a court's satisfaction, who caused the common law harm. Water regulation is another example. Water regulation pre-dates the RMA.*

Since this was written, in 2001, we have witnessed the intensification of land use (for example, dairy conversions in Southland and Canterbury) and the resulting environmental damage to water quality created by non-point source pollution. Successive National Policy Statements and attempts by regional councils to regulate have largely failed to solve the problem. Part of the difficulty of regulating non-point source pollution is the difficulty of measuring and attributing externalities to the actions of individual landowners.

As I have explored in my report, *Going with the Grain: Changing land uses to fit a changing landscape* one of the complexities regulators face is a growing understanding that the

[3] This submission sets aside questions of design of the NZ ETS previously raised by this office.
[4] Ministry for Regulation (2024) *Have your say on the Proposed Regulatory Standards Bill*, page 3.

susceptibility of the underlying parcel of land can be at least as important for environmental outcomes as the land use itself. This leads to very complex spatial and temporal interplays between the actions of farmers and environmental outcomes making it very difficult to regulate environmental outcomes at the level of individual properties without resorting to blunt input controls. Freshwater farm plans are one attempt to deal with this issue but are unlikely to be successful without ways of connecting those plans to the context of the wider catchment. In many cases, instead of every farmer doing everything they can to reduce pollution on their own farm, it will be more cost effective to concentrate activity on hotspots at a catchment level. This issue will be explored more in the next section.

How would the proposed bill be implemented in the context of water quality externalities? By not defining the limits of private property rights, the discussion documents suggests that the beneficiaries of clean water – those using water as a source of drinking water or recreational users – would be required to pay for the imposition of farm plans or any other regulatory burdens on the assumed basis that property owners have a right to pollute. This would be a substantial cost which, for practical reasons, would have to be picked up by ratepayers or taxpayers. Most New Zealanders, however, would argue that there is no right to pollute water and that polluters should pay as they clearly benefit financially from the activity that is causing the pollution, even if their exact contribution, and therefore liability, cannot be (easily) measured or attributed.

The management of domestic wastewater and solid waste raises similar externalities. Some externalities are measurable and attributable such as the large point source environmental discharges generated by landfills and wastewater treatment plants. This is not the case for diffuse waste pollution (e.g. littering). However, the same questions linger when applying the proposed principles to these different situations. Should an individual be compensated to cross the road and put their litter in a bin? Should landfills be compensated for managing the flow of nitrates and other chemicals into local waterways and the ocean?

Public goods, common pool resources, and 'missing' property rights

Individual property rights are one way to incentivise the efficient stewardship of resources. However, it is not straightforward to impose individual property rights on all resources. Missing property rights occur when it is impossible to exclude people from using a resource (it is non-excludable). Pure public goods are non-excludable **and** not diminished when more people access the resource (non-rival). As a result, public goods will be highly demanded by the population but tend to be undersupplied by the market. An example might be the use of water for non-consumptive purposes such as recreation. Common pool resources on the other hand are non-excludable but rival – the actions of one individual can deplete the resource for another. An example here might be the use of water for consumptive commercial purposes such as irrigation. As illustrated by these two examples, the same resource can exhibit different missing property right qualities depending on the context.

The proposed principles for regulatory standards provide no guidance on how to deal with missing property rights. As a result, it might be implied that when private property rights come into conflict with missing property rights, they always trump them. The question here is whether – in addition to property rights and individual liberties – people have a legitimate interest in a clean, healthy, and sustainable environment that they look to the Government to protect? These things might be termed public goods.

Biodiversity supplies a classic and exceptionally challenging example of a public good. Scientific understanding of biodiversity and the ecosystems they support has increased in recent years and these insights underline its public good characteristics. The existence of biodiversity provides many public goods. By their very existence, ecosystems generate

ecosystem services from which it is impossible to exclude people. For example, ecosystems support all life by recycling nutrients and help underwrite the productive capacity of the biotic economy, as well as regulating the impact of shocks such as weather events (floods and droughts) or disease.

Ecosystems do not exist as individual flora and fauna in isolation. They are complex systems with high levels of interconnection and interdependence. A large part of their value comes from the variety of species present in a given area. Evidence suggests that maintaining a representative minimum sample of 15-20% of the original ecosystem within any given bioregion is the minimum necessary to maintain viable levels of biodiversity.[5] In New Zealand, the wholescale conversion of land to exotic pasture and forestry means that many of the remnants of lowland ecosystems that remain are found on private land. While no one owns biodiversity, the fact that it exists on private land, and for some ecosystems almost exclusively on private land, sets up tensions between a public good and private property rights.

Like much of the environment, the value of the existence of a particular species or ecosystem is highly contextual. Assuming that, as a society, we do not wish to worsen an already disastrous record of species extinction, a conservation planning approach suggests that the most cost-effective way to achieve that goal will involve protecting a representative sample of ecosystems, some of which will be on private land.

For example, in New Zealand, over 90% of lowland wetland ecosystems have been destroyed since the arrival of humans, making the remaining ones very valuable from an ecosystem services perspective. Wetlands generate many benefits, most notably including purifying and storing water for drinking, smoothing out the impacts of extreme events on water flows and recycling waste into nutrients. When quantified in dollar terms the value of these ecosystem services per hectare are far higher than the revenue from draining the wetland and using the land for livestock farming. The problem is that the ecosystem services delivered by the wetland benefit the general public (i.e. they are non-excludable). Conversely the benefits from dairy farming are excludable and accrue entirely to the owner of the land. As a result, draining the wetland is often the landowner's optimal choice, but it comes at a public cost.

The protection of biodiversity has to date depended on a mixture of private conservation (e.g. landowners wanting to preserve values for future generations and the public at large) and regulation, such as identification of significant natural areas (SNAs) sometimes coupled with incentives. Regulation is effectively an input control that limits property rights at little cost to the Crown. If biodiversity is not regarded as something 'owned' by the landowner, then the extent of any loss by the landowner is limited.

But if, as could plausibly be claimed under the current proposal, the right to destroy biodiversity is part of the bundle of a landowner's property rights, then the proposed compensation principle would make the protection of any public good values something that beneficiaries – the public at large – would have to pay for.

The desired biodiversity outcome could be achieved by either means. The point to note here is that if we assume society doesn't want species eradicated but wants to assert that property owners have a compensable right to destroy biodiversity, then logically taxes must rise to generate the compensation demanded. This effectively amounts to a transfer from taxpayers to

[5] Eco-index (2024). *Rationale for a minimum 15% ecosystem land cover goal*. https://static1.squarespace.com/static/615b84b611f5da2a28a03126/t/6716c4970e00c021fdcf7c0a/1729545530128/15+percent+goal+rationale.pdf

property owners. If this is intention of the current proposal, it should be clearly stated and thoroughly analysed in the context of any bill that is drafted.

Of course, one way to deal with missing property rights is, where possible, to allocate them. The right to use water is not technically a property right currently, although in practice it is often tied to properties through consents and the benefits access to water provides are reflected in property values. It would be entirely possible for consumptive water use rights to be allocated (there are overseas precedents) provided that a number of hurdles could be overcome in the New Zealand context.

First, the public good aspects of water bodies would need to be recognised. This means allocating minimum flows to ensure that the biodiversity, recreational and cultural values of the water body are maintained. The value of allocating drinking water is also usually placed above commercial use. The remainder of the water in a water body could then be allocated for commercial consumptive use. The challenge here is that some water bodies are already overallocated beyond the minimum flow, and this allocation would need to be clawed back. Under the proposed principles, it appears that property owning consent holders would need to be compensated for retiring access to something conferred on them as a 'right' by regulation. If so, who would fund this?

Secondly, formally allocating water in the form of tradable rights would run up against another hurdle – that of Māori rights and interests, including those under Article 2 of Te Tiriti. These have been acknowledged in the past by Ministers of the Crown but have not been articulated or operationalised.[6] If the principles proposed in the current proposal are to effectively confer property over water, this issue cannot be dodged. A settlement could be envisaged in which Māori were given a water allocation in under-allocated catchments. In over-allocated catchments, resolving rights and interests would add to the challenge of clawing back consents already noted above. This brings the issues raised by the proposed regulatory standards into sharp relief. Where there are missing property rights over public resources, who can claim them? Existing users which are tied to property rights? Or Māori? Or do they remain in public 'ownership' subject to regulatory control?

The Fish Quota Management System provides a case study of the challenges of allocating property rights over common pool resources. The system has had a number of successes but has also thrown up many pitfalls (many of which are relevant to water allocation) and continues to face many challenges.[7] As Elinor Ostrom demonstrated, there are a number of alternative ways to manage common pool resources without allocating property rights.[8]

In *Going with the Grain* I acknowledge the difficulties placed on landowners and kaitiaki by the current approach to environmental regulation. I suggested an alternative way to manage these issues by taking a collective approach at a catchment or sub-catchment level (e.g. through catchment groups).

Exactly how the governance of such an approach would work requires further thought, but the basic proposition is that if, collectively, a community can find a low-cost way to improve

[6] New Zealand Māori Council v Attorney General [2013] NZSC 6, [2013] 3 NZLR 31 at [145].
[7] The creation of the New Zealand Quota Management System rapidly revealed two oversights in the design: the lack of consideration of Māori rights over fisheries, as well as insufficient science leading to the overallocation of Orange Roughy quota. More recent issues include the conflict between the rights of inshore quota owners and those of recreational fishers, and the lack of investment in understanding and managing the wider ecosystem impacts of fishing (e.g. on sea birds and sea lions).
[8] Ostrom, Elinor (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge University Press.

environmental outcomes in their catchment, they should be empowered to do so. Otherwise, a more punitive regulatory backstop would need to apply.

Resolving conflicts between interests in property

The final category of issues that environmental regulation deals with relates to conflict between property rights. This includes tensions that arise between purely private proprietors and between private owners and public entities. The need to reconcile conflicting interests is recognised in the proposed principle of 'Liberties':

> *Legislation should not unduly diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property,* ***except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person*** *[emphasis added].*

However, while the potential for conflict is acknowledged, no guidance is given on how to navigate such situations. Again, a lot of environmental regulation is dedicated to resolving these situations and the proposal does not add anything new or useful to help resolve them. The RMA has for thirty years been the principal mechanism for dealing with such conflicts. While the Act has come under attack for being overly restrictive in curtailing private property rights, there has been no serious attempt to analyse the extent to which relying on the purely private resolution of individual property disputes through legal action might be better or worse. In many instances it could be much more expensive, burdensome, and inefficient both for individuals, the government, and the public at large.

Urban areas, where people live and work in close proximity, provide ample instances in which the exercise of private property rights come into conflict with the rights of others. One person's use of their property can adversely impact on another's enjoyment of theirs. Impacts include noise, structures or vegetation blocking natural light, or the positioning of windows that allow oversight into an adjoining property affecting privacy.

The current proposal could be understood to imply that these are purely private issues that should be resolved between neighbours. In some instances, they could be. But the effectiveness and fairness of taking such an approach depends on the relative ability of each neighbour to enter into negotiations and take enforcement action. Disparities of income, educational status and sheer willpower mean that those negotiations could be lopsided. The problem would be exacerbated if negotiations are required between multiple neighbours.

The RMA, in common with many planning systems, seeks to reduce the potential for legal and financial burdens through pre-determined rules and standards for things such as acceptable noise levels, building heights, building setbacks etc. When developed in consultation with the local community, these rules create some shared understandings of how far private property rights extend and how the standard rules might be varied. The ACT Party's policy proposal for neighbourhoods to determine whether or not density restrictions should be lifted represents a pragmatic approach to rulemaking, recognising that property rights are as much the creation of regulation as they are spectres of judicial or philosophical conception.

The planning system also provides mechanisms to prevent predictable conflict between private property rights through spatial separation of uses and zoning. By dividing an urban area into different types of residential, commercial and industrial zones it can allow for variations in the rules around things such as noise, building height, bulk and location so that owners know what to expect and can enjoy their property safe in the knowledge that others who purchase later accept existing externalities.

Consider, for example, an airport or industrial park located well away from an urban area. Over time the city may expand bringing residential units closer to these activities. Residents might quite reasonably think that aircraft and industrial noise or odours curtail their enjoyment of their private property rights (known as reverse sensitivity). Yet the airport or industrial area were there first. It would generate enormous investment uncertainty if the airport or industries had to curtail their operations. By providing zones with specific rules that codify expectations of future use, planners can manage those expectations and help to separate potentially incompatible uses. Plans can evolve over time to allow the city to evolve.

Another benefit of zoning is that it allows for better forward planning for infrastructure development. If city managers know roughly how many residential or commercial units are likely in an area, they can look to prepurchase the relevant land (reducing the need to appropriate land under the Public Works Act 1981) and ensure that roads and pipes of appropriate capacity are built in the right sequence. This allows for more efficient and effective use of ratepayers' and taxpayers' money. It may come at some degree of cost to private property owners but is arguably better from a public perspective.

These examples are all instances where regulation operates to reduce the individual and public burden that would exist if a pure property rights approach was instead applied. There is no question that current regulation could be improved to make it more efficient and effective. What should be resisted is the view that environmental management based on the strict enforcement of claimed property rights is necessarily more flexible and less costly. At least where the environment is concerned, the choice of regulatory tools should be based on evidence of the costs and benefits both to individuals and to society at large.

Which brings us back to my opening observations: that a reform that is justified by the need to improve productivity is best served by principles rooted in an assessment of costs and benefits (broadly defined) rather than an ideological attachment to particular 'rights'. Both 'rights' and evidence for costs and benefits can be contentious but the metaphysical nature of the former seem less suited to New Zealand's constitutional arrangements than the empirical nature of the latter.

Two difficult cases where demands for public compensation arise

There are two areas where public compensation currently rears its head and where elements of what is proposed in the discussion document could be useful in resolving public-private tensions: public infrastructure and heritage protection.

Provision of public infrastructure is a public good. Sometimes, it must be built through private land. Land appropriation clearly impacts on private property rights, yet we have no difficulty arguing that there is a wider public good at stake. For those whose land is to be appropriated, we take a regulatory approach to that compensation through the Public Works Act 1981. Not everyone whose land is to be taken under that Act feels that the compensation that is offered is fair, but Parliament has looked to find the balance between private right and public good.

A more problematic area from both a private property and a public good perspective, is the protection of built heritage. Here, it is claimed that there are positive externalities of a cultural and visual nature that should be protected. Using a private rights-based framework, one would argue that the owner of a building can do whatever they like with it, yet many district plans have protections for certain buildings and heritage sites that limit what their owners can do. They do this because there is an assumed, but debateable, public benefit from retaining that heritage.

Heritage protection proponents might argue that where existing heritage protections are in place, owners bought the buildings in full knowledge of the limits on what they could do with that property. That argument becomes harder to sustain, however, where the limitations and

responsibilities placed on heritage owners change over time (e.g. earthquake strengthening) bringing sometimes significant unexpected or unplanned, costs. There may be a good case for some degree of publicly funded compensation in some cases. The question becomes one of how much and where it fits within the general public's priorities for the use of tax and rate monies.

Much the same issues arise where widely enjoyed positive externalities are protected by view shafts. I would simply observe that none of these cases are 'easy' and appealing to rights doesn't make them easier to resolve.

Improving regulatory standards using existing processes and institutions

As presented in the discussion document, the proposal raises some important questions about the way in which Parliament and the Executive go about their business. Many of these issues have been addressed by Professor Jonathan Boston[9] and deserve much closer attention than is provided in the discussion document. These are properly matters for experts in constitutional arrangements, bills of rights, and regulatory design. I would, however, like to make two observations.

The first is that the discussion document fails to make the case for why a new Act and a new statutory body should be added to the scenery rather than putting some effort into leveraging, or improving, the rather large list of existing mechanisms that could be used to improve regulatory quality.

The Government has only recently created, at significant public expense, a brand-new Ministry for Regulation whose job it is to provide oversight of the quality of regulation. Whether it needed to be a Ministry or not, I am supportive of the Government maintaining a dedicated team of expert skills in regulatory and institutional economics. Such a team should be capable of addressing the highly heterogeneous demands and challenges of regulation in many different fields of which the environment is just one. It seems extraordinary that the Government should ignore the advice of its own newly established Ministry **against** advancing the proposed bill.

I support the Ministry's preferred option of building on the current disclosure requirements set out in Part 4 of the Legislation Act 2019 (which are yet to be brought into effect). This would achieve the procedural improvements that the proposed bill attempts to replicate, without the expense and inefficiency of pursuing new legislation.

The second, is that many of the causes of poor-quality regulation lie directly in the hands of Parliament and the Executive itself. New Zealand has a political tradition of legislating for everything and at speed, no doubt spurred on by our three-year election cycle. It is very unlikely that the proposed statute and review board will alter the speed demanded of policy processes, select committee behaviours, or the use of urgency in the House.

The fact that the proposed bill would leave a large measure of discretion in the hands of the Executive to exempt areas of regulatory activity from the bill's purchase is not a promising sign. It suggests that the fundamental structure of the bill's principles and processes sit uncomfortably with an ambition that is designed in such an open-ended way. It is hard to imagine any activity by central or local government that is not "intended to direct or influence people's behaviour, or how they interact with each other". The Executive opt-out seems to be a tacit admission that governments will only have the time, the resources and (most importantly) the political motivation to worry about a subset of regulatory interventions.

[9] Jonathan Boston, "Comments on the Proposed Regulatory Standards Bill – Discussion Document", 16 December 2024.

A more practical way forward would be for the Government to identify the particular areas of regulation that it wants to re-examine, and if existing mechanisms are not delivering regulation of a quality consistent with improved productivity, seek to amend those mechanisms. In the environmental area, the Government has already signalled a wholesale replacement of the RMA.[10] The Government has also tasked the new Ministry for Regulation to look at the rationale and effectiveness of regulations for agrichemicals and early childhood education. There may be other regulatory domains that have been identified as a drag on productivity that are also worthy of examination. The OECD analysis gives some indication of where the greatest gains could be made.

Subjecting such areas to sustained attention would be a better use of scarce resources than what is proposed. For example, replacing the RMA will provide an opportunity for the Government to spell out what bundles of rights it considers accrue to property owners, what rights it claims in respect of Crown-owned or managed resources, and what externalities people should be protected from or told they have to put up with. In doing so, it will have to take stock of public expectations about what public interests are worthy of regulatory intervention.

Recommendations

Before yet another piece of legislation is enacted and another statutory body brought into existence, there should be a thorough, ongoing attempt to improve the utility of existing mechanisms that bear on the development of regulation and regulatory stewardship. I suggest:

- Bringing into force Part 4 of the Legislation Act 2019. This would introduce disclosure requirements and consistency notices (including any relevant Ministerial directions), which appear to address many of the same regulation making process outcomes intended by the proposal.
- Consider bolstering the role of the Legislation Design and Advisory Committee. For example, the Law Commission already exists as an independent Crown entity, responsible for promoting the systematic review, reform, and development of the law of New Zealand. Consideration could be given to including the Committee within the responsibilities and design of the Law Commission.
- Consider tightening the rules regarding the use of urgency in the House.
- Review statutory duties regarding regulatory stewardship. Consideration could be given to enhancing these with incentives or sanctions such as spelling out timeframes for responsible agencies to review regulation and provide a status report to their Ministers, and requiring responsible Ministers to report to the House on any regulations identified as being unnecessary, inefficient, or requiring detailed review.
- If there is a desire to legislate for new rights and liberties, these should be advanced as amendments the New Zealand Bill of Rights Act, the Constitution Act, or other relevant existing legislation. This would ensure that analysis and consultation appropriate to the constitutional nature of the proposal is undertaken.

If new legislation on regulatory standards is intended to extend to the environmental arena, significant amendments to the schema proposed in the discussion document should be considered. Explicitly:

- **Both private** and **public** property rights should be defined and delineated.
- Public resources should be defined as all water (fresh and coastal marine), air, biodiversity and any publicly owned land.

[10] Perhaps significantly, the Government has stressed a particular concern for property rights rather than productivity in making the case for reform.

- A principle should be added that no person should use, alter or destroy any public resource without providing compensation (to the public or Māori) unless the action is explicitly allowed by regulation.

The framing of any such principles would need to be considered in the light of the following matters:

- The extent to which the basic needs of all people for access to environmental resources, and their interests in a healthy and sustainable environment, can be met.
- Te Tiriti o Waitangi.
- The interests of future generations.
- Managing risks under conditions of uncertainty; and
- Any obligations at international law.

If the purpose of the proposed Bill is to enhance the economy's productivity, then the principles should reflect that. Some principles for consideration might include:

- Requiring that the benefits of any regulation should exceed the costs from a societal perspective. Implementing this effectively in the environmental domain will require an investment by relevant agencies in the valuation of natural capital and ecosystem services.
- Ensuring that decisions are based on good environmental information. The main benefit of a lot of environmental regulation is to manage risk, and in the absence of good information decision makers are understandably risk averse. Providing better information would help. Much of this information already exists but is not readily shared or accessible.
- Taking an adaptive approach to managing risk. As previously mentioned, much environmental regulation seeks to manage risk under uncertainty. While better information will help, uncertainty will remain. A lot of the variance in decision making around the country can be explained by different attitudes to risk. This could be helped by having some consistent principles about how to deal with risk and uncertainty.
- Requiring central and local government agencies to work together to arrive at an integrated view of how different regulations practically interact with the regulated party. In my opinion, in the environmental domain individual regulations are rarely the problem. Rather, it is often their collective weight and how they interact with one another that causes problems for regulated parties.

Rt Hon Simon Upton

Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata