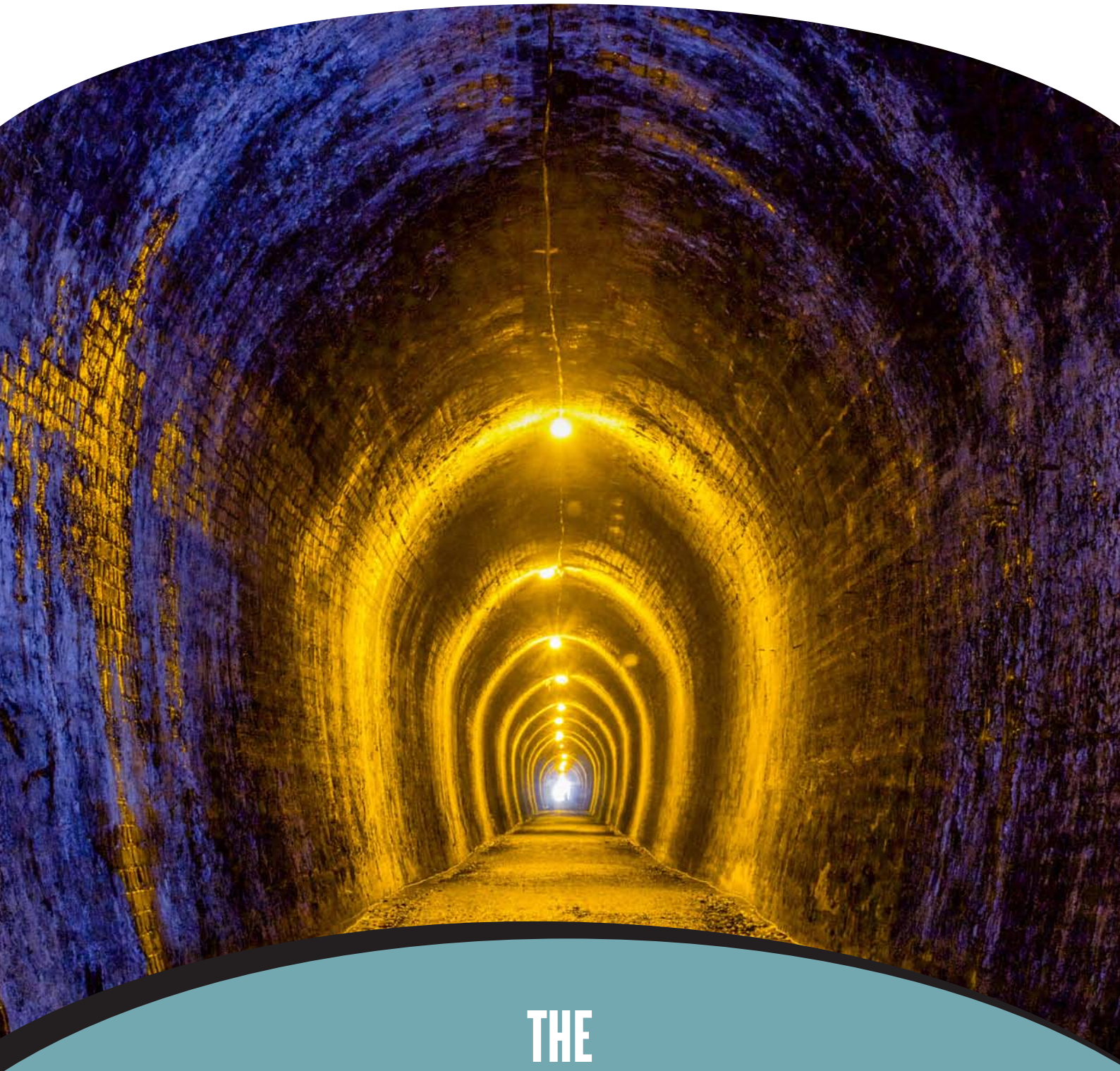
FROM RED TAPE TO GREEN GOLD

JASON KRUPP



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The New Zealand Initiative is an independent public policy think tank supported by chief executives of major New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

Our mission is to help build a better, stronger New Zealand. We are taking the initiative to promote a prosperous, free and fair society with a competitive, open and dynamic economy. We develop and contribute bold ideas that will have a profound, positive, long-term impact.

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Jason is a Research Fellow at The New Zealand Initiative, and has published reports on housing affordability, the impact of the compact planning ideology on cities, and resources. He is also a regular contributor to many of New Zealand's leading media titles. Before joining the Initiative, Jason was a business reporter at Fairfax Media, covering financial markets and the corporate sector for the *Dominion Post* and *Business Day*. He has also lived and worked in Hong Kong and South Africa.

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FOREWORD

For years we have been hearing about the need to make Auckland a world-class city. The claim is that if Auckland leads, all New Zealand will benefit. The reality is that New Zealand is a trading nation that has to pay its way in the world with exports. While Auckland may be heading towards 40% of the country's population, and it is very good at lattes and celebrities and has a great chunk of the country's GDP, it only contributes about 8% of our exports.

Without the wealth from the provinces, Auckland has no role as a service centre. This comment is not anti-Auckland. We do need a world class city, and to get that we need prosperous provinces producing increasing exports. We are all in this together.

Provinces like Buller are rich in minerals that the world wants and needs. Unfortunately the resources lie in wait. As we have seen with the Bathurst Resources debacle, the legislative framework is not fit for purpose. The RMA is an extraordinarily well-intentioned piece of legislation but it has developed in a skewed and almost self-defeating manner. Well-meaning people marched in the streets of Auckland and Wellington after being lead to believe that the Denniston Plateau was some sort of ancient lost world, when it fact it is a heavily modified landscape that has been mined for more than 100 years. Those same people contributed the funds that allowed a never-ending series of court battles that brought Bathurst to its knees. The message sent to any other potential investors was chilling.

Real people live in places like the West Coast. At the moment we are doing it hard. We know that prices will recover, but we have to ask if there will be an opportunity to benefit. We want to be more than a picture post card on an Auckland coffee table. We want a reasonable future alongside a responsible mining industry that knows that it must look after the environment that we actually live in every day. We want a fair go. New Zealand prides itself on a concept of fairness. Sadly that seems to have gone out the window where mining is proposed.

Jason Krupp's paper adroitly sums up the issues and the consequences, and offers ideas for a way forward. If the paper does nothing more than make New Zealanders realise that we are all affected by this ridiculous situation, he will have done well.

Paul Wylie

Chief Executive
Buller District Council

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INTRODUCTION

Mining is a difficult industry at the best of times, caught as it is between constantly fluctuating commodity prices, increasing regulatory oversight, and a tainted legacy of environmental mismanagement. For many people, the concept of physically digging up, or drilling out, resources from the ground is incongruous with the idea of a clean, green economy. And yet it is an industry that is integral to every part of modern life. Nylon is widely used in textiles, rare earth metals are an essential component in modern computing, and the construction of wind turbines would be all-but-impossible without coking coal to make steel. Indeed, roading, house construction, and international trade are all activities that could not occur without high levels of input from the resource estate. The stark reality is that we live in a resource dependent age, and the majority of these non-renewable resources must come from the land or the sea.

Up until the last 50 years or so, the extraction of these resources came at the expense of the environment, with little thought given to the impact on life-sustaining ecosystems. However, with increased pressure from society and improving technologies, industry practice is changing, especially in the developed world. Mining companies are now acutely aware of the need to acquire a social licence to operate, which means avoiding or minimising environmental harm, ensuring the safety of workers, and generally embodying the principles of a good corporate citizen. The contribution that extractive industries make to the economy has also been reassessed in this period. Where a high resource endowment was previously thought to be a drag on economic development, economists now understand that extractive industries can make a positive, long-term contribution when coupled with a free and open economy. With the right policies, incentives and legislative balance in place, there is no reason why the minerals sector cannot be a green and productive contributor to economic growth. These are the Goldilocks projects that need to be encouraged in New Zealand.

Unfortunately, as shown in the previous report in this two-part series, *Poverty of Wealth: Why Minerals Need to be Part of the Rural Economy*, the current regulatory framework stacks the odds against such development in mining. The high cost, overly complex processes, and uncertainty of outcome associated with gaining the right to mine in New Zealand has made even the most desirable project a risky prospect. This serves to not only raise the cost of capital and discourage investment in the sector, but also to choke off a much-needed source of lifeblood for rural communities caught in a cycle of economic and population decline. This situation is not the outcome envisaged by policymakers when they drafted the *Resource Management Act 1991*(RMA), particularly the ability of "people and communities to provide for their social, economic, and cultural well-being and for their health and safety" while safeguarding the natural environment.[1]

This report proposes a number of remedies that, if implemented, will unblock the regulatory logjam that has stalled minerals development in New Zealand. These remedies can be grouped by investment period. The short-term remedies are aimed at addressing council resourcing to perform RMA duties. Over the medium term, central government needs to fulfil its RMA obligations by developing national policy statements and national environmental standards for mining, landscapes of national significance, and ecological offsets – a role that has been largely neglected until now. Long-term change is also needed to modernise resource legislation in New Zealand to bring it up to the standards of regulatory best practice, specifically in shifting to a risk management approach. Lastly, major reform of the

1 *Resource Management Act 1991*, section 5.

RMA must be cognisant of the competitive nature of the global economy, and the role of regulatory processes in raising or lowering New Zealand's profile in the eyes of international investors. In this respect, the adoption of a whole-of-government approach to resource permitting, consenting and land access arrangements is needed.

Although the policy recommendations in this report specifically address issues in the extractive sector, the proposed changes have wider implications for other sectors New Zealand. For too long, economic activity has been shackled by unnecessary 'green' tape that has at best only delivered a zero sum gain – an unacceptable outcome. This report aims to encourage policymakers and the public to be open to the idea that we can have mining development while simultaneously caring for the environment.

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CHAPTER ONE
CARROT, NOT STICK

One of the challenges for policymakers when designing a consenting regime is to ensure a fair process for all parties involved, while ensuring that decisions, at any level, can be challenged throughout the process. As shown in *Poverty of Wealth*, in New Zealand, government has opted to hand the primary consenting function to local councils under the guidance of the RMA and the various national policy and environmental standards guidelines developed by the Ministry for the Environment. Council consent decisions can be challenged in the Environment Court,[2] where the original consent is essentially voided, and the consent and the grounds for appeal are assessed again on a *de novo* or from-the-beginning basis. The Environment Court's ruling can be appealed to the High Court, Court of Appeal and Supreme Court, but only on points of law. Once these channels have been exhausted, either for or against the applicant and the appellant, the decision is considered final.

In theory, this structure strikes a fair balance. Councils largely determine the management of various consents, such as mining, as well as the level of community engagement, through their district plans. A low submission barrier at the Environment Court means any interested party can file an appeal to a consent decision. The hearings process, where expert testimony from both the applicant and the appellant is heard, ensures that any decision is assessed at the technical level by parties equipped with the skills to do so. The Environment Court's ruling itself is open to challenge in the higher courts if the various parties are unsatisfied with the outcome and believe the court has made a legal error. This generally requires a high level of legal expertise, and parties are generally represented by Queen's Council in the court; the high costs ensure that only the strongest arguments are presented, and spurious appeals abandoned.

As the Bathurst Resources case study shows (see *Poverty of Wealth*), it is questionable whether this balance is being struck correctly.[3] To recap, in August 2011 the Buller District Council granted Australian mining start-up Bathurst Resources various consents to mine coal in the Denniston Plateau. Within a month, the Royal Forest and Bird Protection Society of New Zealand, West Coast Environment Network, and the Fairdown Residents Association appealed the decision to the Environment Court on the grounds that the project would harm biodiversity, damage ecologically sensitive land, and increase carbon dioxide emissions. (The ecologically sensitive land appeal was withdrawn after mediation with the Fairdown Residents Association.) Of the remaining appeals:

- As part of a declaratory judgment sought by Bathurst, the Environment Court dismissed the claim that climate change was a relevant factor to the consents process. Forest & Bird and the West Coast Environment Network appealed to the High Court and later the Supreme Court, each of which upheld the Environment Court's decision.
- After the Environment Court, in a preliminary judgment, indicated that it was likely to uphold Bathurst's consents on the other appeals, the matter was taken to the High Court by the appellants on the grounds that 12 alleged errors of the law had been made. Pre-trial conferencing reduced the number of alleged

2 Ministry of Justice, "Environment Court" (Wellington: Ministry of Justice), Website.

3 Jason Krupp, *Poverty of Wealth: Why Minerals Need to be Part of the Rural Economy* (Wellington: The New Zealand Initiative, December 2014), p. 23.

breaches to eight, later reduced to five during the High Court hearing. Three of these were dismissed by the High Court, and two were referred back to the Environment Court.

- The appellants also filed a new appeal, claiming that the impact on the environment from the worked-out Sullivan mine in the same region as Bathurst's proposed project had not been factored into the original decision. The new appeal was heard by the High Court and dismissed. Undeterred, the appellants requested the case be heard before the Court of Appeal, but this too was rejected.
- The two remaining challenges were considered by the Environment Court, but ultimately, Bathurst was granted the required consents to mine in the Denniston Plateau in October 2013 contingent on various conditions.

Not once in the two years in which the various appeals were heard by the Environment Court, High Court, Court of Appeal and Supreme Court, did a single decision go the way of Forest & Bird and the West Coast Environment Network. This suggests that at no point did the appellants feel compelled to restrict their appeals to the strongest arguments, as the legal system is supposed to do. Yet this period was very costly for Bathurst. Obviously both sides incurred legal costs, but the start-up firm was disproportionally affected because it was unable to bring revenue into the business from its operations while still having to pay operating costs out of capital. In addition, significant shareholder equity was also destroyed in the court process, with the firm's share price falling by 80% in the two years while the matter was before the courts.

This long-drawn legal process is a concern for New Zealand, particularly when central government is trying to encourage mining development in economically moribund regions. By not restricting the number of appeals that can be filed, consent decisions can be, and indeed are, delayed in court for years. This imposes substantial costs and creates uncertainty of outcomes of mining applications, such that current and future investment plans may be abandoned. The process may also force start-up firms to agree to onerous concessions simply to start revenue flowing into the business.

This creates a worrisome impression that highly motivated groups can wage a legal war of attrition to mining developments that they object to ideologically by endlessly filing appeals. Wayne Charles, a project manager at the start-up gold miner New Talisman Gold, said the Bathurst case hangs over New Zealand mining firms when they look to raise capital abroad, putting a risk premium on funding that many local firms struggle to return, often killing projects before they start.[4]

FIGHTING TEMPTATION

New Zealand's consenting system, and the appeals process that ensures the rigour of the decision-making, must be rebalanced if the country is to encourage mining as a source of economic development. That a project like Bathurst's Escarpment mine is allowed to be tied up in the courts for two years is a poor outcome regardless of who the decision favours in the end. This is particularly so when New Zealand is competing against other jurisdictions such as Australia for these investments, a jurisdiction where the full consenting process takes only six months on average.

There is a preference among many in the mining industry for the government to limit the ability of groups to vexatiously challenge developments. This could be done by requiring appellants to lodge a bond with the court before filing an appeal, which can be put towards the applicants costs should the appellant be unsuccessful. From an economic perspective this has some merit, as it forces the objecting party to carry some cost from their actions. This, in theory, would increase financial pressure on appellants to limit their

4 Wayne Charles (Project Manager, New Talisman Gold), interview by author (2 December 2014).

appeals to those with the strongest case. However, this remedy is problematic from a legal perspective. Maintaining a low appeals threshold at the Environment Court allows groups to legitimately verify that consents for development have been rightly issued. Drawing on the Bathurst example again, the concerns of the Fairdown Residents Association over the effects of a coal washing plan on the Denniston Plateau were valid and addressed through an appeal to the Environment Court. If a bond was required to lodge this appeal, an argument could be made that legitimate objectors had simply been priced out of the process. Furthermore, the *de novo* basis on which the Environment Court operates ensures that every decision is closely examined a second time through a transparent hearing process, adding certainty to the consenting process.

Attempts to remedy this by requiring appellants to only lodge bonds on appeals filed with the higher courts are also problematic. First, it would require appeals to the Environment Court to be treated differently from those lodged with the High Court, Court of Appeal or Supreme Court. This would require legislative changes to the way the courts operate, which could have spillover effects to other parts of the legal system. Indeed, the courts can already insist that appellants put up a bond to cover any legal costs they might impose on the applicant. It is, however, rarely used. Second, attempts to prevent vexatious action by tweaking the legal system are only likely to treat the symptoms of the problem, and not the cause: the RMA. It will be more effective in the long-term for policymakers to spend their limited political capital reforming the rules that govern resource use and the environment rather than trying to fix the unintended consequences of poor regulation. Details on how the RMA can be fixed will be discussed later in the report. However, there are policy remedies that can be implemented in the short-term to help level the playing field without resorting to changing the legal system.

A SLICE OF THE PIE

Creating incentives at a local government level is one way to bolster the minerals development consenting process. Under the RMA, local government is the primary interface with the legislation. It determines which activities can take place in an area through planning, and sets specific conditions under which resource developments can occur through consenting. However, councils are struggling to perform these functions efficiently. The Productivity Commission's recent survey of the sub-central governance tier found that councils are mired in the complexity of the 800-page RMA, a situation made worse by the lack of national direction from central government.[5] Officials in Wellington have effectively left it to councils to interpret the legislation as best they can; the only other contribution from Wellington has been to progressively tighten statutory timeframes on consent processes.

The only practical means by which councils can meet their statutory obligations is to hire specialists, such as planners, ecologists and lawyers. However, these skills are scarce, and councils – particularly smaller ones – struggle to attract and retain specialists.[6] Indeed, the Productivity Commission survey showed that the total costs of planning and consenting are a major challenge for most local bodies, with 80% of councils saying their inability to recoup regulatory expenses through fees was a hindrance to some degree.

But this does not capture the full quantum of costs faced by councils from the consenting and planning process. Appeals to the Environment Court and higher courts can substantially blow out consenting costs for councils as they are forced to defend their planning and consent decisions. As discussed earlier in this report, this can represent a significant drain on council balance sheets, and

5 Productivity Commission, *Towards Better Local Regulation: Data Compendium* (Wellington: Productivity Commission, 17 December 2012), p. 6.

6 Ibid., p. 12.

take years to fully resolve. Although the regions stand to gain from mining development in the form of jobs and increased economic activity in the long term, this alone does not act as a significant incentive because of the protracted period between when consenting costs are realised and when they are indirectly recouped in the form of rates revenue. Additionally, all the direct financial benefits from mining development flow directly to central government in the form of royalty payments and salary and profit taxes.

Outside the West Coast and Taranaki, where mineral resources have made a long-term contribution to the local economy, the factors discussed above create a clear bias against mining development. Why should any council champion a project that represents significant consenting costs and indirect gains at some uncertain point in time, particularly in the face of vocal opposition from environmental groups? This anti-development bias goes some way to explain why a country with such a high mineral endowment as New Zealand is so underdeveloped compared to jurisdictions like Australia and Norway.

ONSHORE VS OFFSHORE

A way of tackling the anti-development bias is to provide councils with a means of funding their mineral consenting and planning activities, and to allow the regions to share in the direct benefits that come from mining development. The idea of sharing mineral revenues is not a new one, but government has been resistant to the idea. Although no explicit reason has ever been put forth, it is easy to guess why the government remains resistant to change: the resource estate makes a significant contribution to the state's coffers. It is worthwhile exploring the resource estate in more detail as oil and gas and the more traditional onshore mining sector are essentially two different regimes.

From an economic development perspective, the oil and gas industry offers few forward and backward linkages to the economy, with a relatively low number of workers employed in the sector. It is, however, a major export earner, worth $1.4 billion in the year ending June 2014.[7] Royalties from petroleum were worth $343 million in 2013 (excluding profit taxes) and are payable to central government.[8] Offshore mineral extraction also falls outside the remit of the RMA, and the government has passed a number of regulatory reforms in recent years to streamline activity in this sector, particularly in the oil and gas space.

With the more traditional minerals sector, which involves the mining of onshore metals and hydrocarbons like coal, the situation is reversed. The various sub-industries (exploration, quarrying, gold mining, etc.) have numerous forward and backward linkages to the local economy, with government figures showing that 90% of the 6,400 people working in the extractive sector are employed in onshore operations.[9] And while the contribution to the economy is comparable with the oil and gas sector, at $1.2 billion for the year ending June 2014,[10] government revenue from onshore mining is relatively modest at $18.2 million for the year ending 2013, including the energy resource levy on coal.[11] This may explain the lack of resource sector-focused reform of the RMA.

The distinction is important. If government wants to spur economic activity in the rural regions, it should create incentives that encourage onshore as well as offshore activities. One means of achieving this is to boost local councils' consenting capacity, and incentivise local government to be pro-development. This can be done in a number of ways:

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7 Statistics New Zealand, "Balance of Payments and International Investment Position: June 2014 Quarter" (Wellington: Statistics New Zealand, 17 September 2014).

8 Spreadsheet from NZ Petroleum & Minerals.

9 Ministry of Business, Innovation and Employment, *New Zealand's Economy: Sector Reports Series: Petroleum and Minerals Report* (Wellington: Ministry of Business, Innovation and Employment), p. 33.

10 Statistics New Zealand, "Gross Domestic Product: June 2014 Quarter" (Wellington: Statistics New Zealand, 18 September 2014).

11 Spreadsheet from NZ Petroleum & Minerals.

- Leave onshore royalty and energy resource levy rates unchanged, but allocate these revenues to a separate development fund that can be used to compensate local communities for the costs they bear in mineral project consenting processes.
- Since the value of royalties in any given year will be insufficient to compensate all councils for the cost of consenting extraction projects, the development fund must be contestable so that only the projects that offer the greatest benefit have consenting costs refunded.
- Awarding of funds must be based on a clear process that encourages quick decision making with limited red tape. Any cost application must be benchmarked against similar consenting processes to prevent councils from padding the costs.
- Legal costs from appeals will be unknown at the point of the application process. Any council that successfully wins funding for its consenting costs must also be able to recoup legal costs related to appeals at a later date if the courts uphold the original consent decision.
- Although the development fund should be able to reimburse councils for any minerals consenting costs, only the significant projects will have a major drawdown on the facility, and these do not occur very often in New Zealand. To prevent funds accumulating for little benefit, once the facility is sufficient to cover two years of consenting costs, further royalties should be reimbursed into government's consolidated account.
- The development fund should be regarded as a stopgap measure while more permanent reforms to the RMA are put in place. The fund should be repealed once the changes proposed later in this report, or other appropriate reforms, are instituted, as this would remove many of the consenting costs faced by councils in the first place. Furthermore, a sunset clause should be written into the legislation, allowing it to be easily repealed should it fail to spur activity in the sector.

This arrangement will go a long way to eliminate the bias created by financial pressures in the consenting process. By increasing capacity, councils are more likely to make better informed decisions based on the merits of the application, rather than erring on the side of caution due to resource constraints. What is more, they will be better equipped to assess applications on a technical level due to increased resources, so decisions are likely to be more rigorous, and less open to challenge through the legal system.

Improved decision-making is likely to boost economic activity in New Zealand. While this is beneficial at a national level, the gains will be felt most at the local level in the form of increased employment and renewed activity, a welcome change to the protracted decline seen in many rural areas. This is not a free lunch, as government must forgo the onshore royalties and energy resource levies it would otherwise receive, but it is hardly a major revenue stream, and it is well within the scope of the state to absorb. It should also be viewed as an investment rather than as a cost, since direct profit and salary taxes are likely to grow proportionally with additional activity in the sector.

Reasonably, we expect this policy will only have an effect at the margin, and it is a second best solution to permanent reform. That said, the margin is important. Boosting the consenting capacity of small councils with little experience in the minerals sector, and giving them the financial security to defend their decisions, will help beneficial minerals projects proceed through the system that might otherwise have ended up in the "too hard/expensive" basket. Quarries are an excellent example of the kinds of projects that would benefit from better resourced councils. This in turn would offer gains to the wider economy in the form of jobs, cheaper building materials, and increased rates and tax revenues for local and central government. It could be argued that this is a mining subsidy in another form, but more practically it is actually a compensation mechanism for loss of natural capital. Finally, the sunset clauses attached to this policy ensure that it does not become a millstone around the neck of the taxpayer.

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CHAPTER TWO
BLACK AND WHITE

As shown in the previous report in this series, *Poverty of Wealth*, one of the major problems that firms have with the RMA is that it generates highly variable outcomes.[12] What is a non-notifiable activity in one district will require a consent in another, and indeed, could be a prohibited activity altogether in another – and all three can be adjacent. Even two similar mining projects in the same region can be required to follow widely different consenting paths. To some degree, this variability is designed into the system to allow communities to determine what, and how, mining development should occur in their region. But, by and large, the variability of the RMA is not a preference of communities but a function of regulatory structure, as highlighted in a recent report by the Ministry for the Environment.[13]

The variability problem originates with a lack of guidance from central government. The RMA, as it is written, is intended to act as a hierarchical framework that guides planning and environmental decisions at a regional and local council level. Central government, through the Ministry for the Environment, is supposed to set national direction across different levels of consenting authority through National Policy Statements (NPS) and National Environmental Standards (NES), ensuring consistency throughout the planning system.

Unfortunately, this vital piece of the RMA has failed to provide guidance across a wide range of issues that councils require to conduct the consenting process efficiently. Since the RMA was introduced, only four NPS have been put in place covering:

- electricity transmission;
- renewable electricity generation;
- coastal policy statement; and
- freshwater management.

There are five NES in place, providing guidance on:

- air quality;
- sources of human drinking water;
- telecommunication facilities;
- electricity transmission; and
- assessing and managing contaminants in soil to protect human health.

These series of policy guidance documents cover a significant amount of ground, but it is equally clear how limited the guidance is. Agriculture, particularly dairy, is one of the single biggest contributors to New Zealand's economy, and yet there is not one dedicated NPS or NES for the industry. Instead, councils must ensure that any consent application is processed in a manner that is consistent across several pieces of central policy guidance.

It is the same with the mining and energy extraction sector, which contributes up to 5% to GDP in any given year. Mining is a highly technical industry, and the impact of this activity on the environment is complex and requires input from highly specialised experts to assess whether the proposed mitigation measures will be successful. As the Productivity Commission's survey of local government revealed, many local councils are struggling to find adequately skilled staff to process consent applications, and are finding the costs

12 Jason Krupp, *Poverty of Wealth*, op. cit., pp. 18–20.

13 Ministry for the Environment, *Improving Our Resource Management System: A Discussion Document* (Wellington: Ministry for the Environment, February 2013), pp. 17–27.

burdensome. This is particularly so among smaller district councils and those where mining is not a significant contributor to the regional economy.[14] A case in point is acid rock drainage (ARD) or acid mine drainage (AMD), where sulphuric acid is created in the mining process by exposing underground sulphide minerals to air and water. Untreated, this acid can leech into waterways, destroying native fauna and flora, with the effects lasting decades in some cases.[15] Yet as a report by CRL Energy notes, outside the West Coast region, with its long history of coal mining, very few councils are aware of the full risks of AMD, or the efficacy of the various means of mitigating and remedying the problem.[16]

Councils are not entirely without support, and can refer consent applications to the EPA, as in the case of AMD. However, the high costs of this channel mean it is only open to large-scale operators. In addition, there are numerous mining activities, such as exploration and prospecting, which do not have a significant impact on the environment. Referring such an application to the EPA would be inappropriate, and add significant expense to a process that is already costly and highly speculative. The issue is that there is very little guidance from central government that councils can use to gauge what should or should not be referred to the EPA. Indeed, the general lack of guidance means that the 78 regional, city and district councils in New Zealand have been largely left to interpret the RMA for themselves, as noted by the Ministry for the Environment.[17] As a result, there are 170 resource management planning documents in use in New Zealand, covering 2,272 different zones, with widely differing applications of the RMA between the various local government bodies. This adds to the cost and complexity of consenting, and not just for mining firms.

The regulatory complexity and lack of central guidance has also meant that councils have become overly reliant on consenting and appeals to the Environment Court to resolve land use issues, effectively putting off what should have been proactively dealt with as part of the 10-year planning cycle requirements.[18] The effect of this is to delay consenting and significantly add to the cost, as applicants have to first proceed through the plan change process. A survey of local government conducted by the Ministry for the Environment in 2011 found that there were 119 plan changes in progress at the time, with an average completion time of almost four years.[19]

FILLING THE LEADERSHIP VACUUM

In an ideal world, separating the planning and environmental protection functions would be the most desirable outcome. However, amid the practicalities of the political economy, this is unlikely to happen. Major RMA reform has been on the agenda of various political parties almost since the legislation was introduced, but the net result has been a series of 18 reforms that have, to date, done little to resolve the planning and consenting logjam created by the RMA. The latest round of RMA reforms, initiated by Minister for the Environment Nick Smith in late 2014, are the most promising to date due to the focus on property rights. However, since little detail was available at the time this report was published, it is impossible to assess their impact on RMA processes. Still, since the resource space was not specifically mentioned when the project was announced, it is doubtful that any changes will bring much regulatory relief to mining companies.

14 Productivity Commission, *Towards Better Local Regulation: Data Compendium*, op. cit., pp. 6–17.

15 "What is Acid Rock Drainage?" MiningFacts.org, Website.

16 Dave Trumm, "Acid Mine Drainage in New Zealand," *Reclamation Matters* 1 (Christchurch: CRL Energy, 2007), p. 26.

17 Ministry for the Environment, *Improving Our Resource Management System*, op. cit., p. 17.

18 Ibid., p. 16.

19 Ministry for the Environment, *Resource Management Act: Two-yearly Survey of Local Authorities 2010/2011* (Wellington: Ministry for the Environment, September 2011).

However, as discussed above, the mechanisms to remedy many of the issues with the RMA already exist within the legislation, namely greater central guidance on nationally significant matters. Greater clarity across a number of areas will serve not only to strip uncertainty from the process, but also create a stronger delineation between where resource development can and cannot occur – a significant change to the status quo.

Specifically, the Ministry for the Environment should prepare national policy and national environmental standards for the extractive sector that:

- provide technical guidance on the various mining activities, and the potential impact thereof on the environment;
- benchmark environmental standards for the mining industry on global best practice; and
- set national baseline consenting standards for various mining activities that all councils must adhere to and can only be changed if councils can make a strong upfront case for why the guidance is inappropriate for the region.

IDENTIFYING THE OUTSTANDING

Looking beyond the development of mining-specific policies, central government must also provide greater guidance on landscapes of national significance, which would benefit numerous parts of the economy, not just the extractive sectors.

Under matters of national significance mentioned in the RMA (part 2, section 6), councils and planning authorities must give consideration to "the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development".[20] This consideration, like many other parts of the RMA, is poorly defined in the legislation, and it is left to the courts to determine what landscapes qualify as nationally significant. This benchmark was set by the Environment Court, as seen in *Wakatipu Environment Society and Others vs Queenstown Lakes District Council*.[21] This is more commonly known as the Amended Pigeon Bay criteria, and sets several factors that need to be taken into consideration when assessing whether a landscape is nationally significant. These include:

1. aesthetics;
2. legibility (expressiveness);
3. transient values;
4. shared and recognised values;
5. *tangata whenua (people of the land)* values; and
6. historical associations.

However, the landscape provisions in the RMA fall prey to the same structural weaknesses as other factors in the legislation. The Pigeon Bay criteria have been criticised for containing overlapping matters of consideration, which is why the New Zealand Institute of Landscape Architects has tried to simplify these criteria into three groups: 1) biophysical elements, patterns and processes; 2) associative meanings and values, including spiritual, cultural and social associations; and 3) sensory or perceptual qualities. Yet the specifics of each measure, weightings, methodologies and applications are left to councils to decide. The track record of councils has been very inconsistent, according to a stocktake of outstanding national landscape provisions in Regional Policy Statements prepared by LGNZ.[22] The research, conducted by examining 21 planning documents for 17 regions, found that by 2010 only seven councils had identified outstanding national landscapes in their plans. On measures of providing criteria for assessing landscapes, councils fared better, with 14 providing some guidance, but 13 provided this through policy instead of methods, assessment matters or explanatory text. Only three of the 21

20 *Resource Management Act 1991*, part 2, section 6.

21 Environment Court of New Zealand, *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*, C156/2005 [2005] NZEnvC 410 (20 October 2005), New Zealand Legal Information Institute.

22 "Regional Policy Statements: Stocktake of Outstanding Natural Landscape Provisions" (Wellington: LGNZ, March 2010).

documents analysed provided any methodology on the matter at all. The report summarised the situation as follows:

> Based on the review, there appears a distinct lack of methodology in all the [regional policy statements]. While methodology may be provided in background landscape studies and assessments which inform the identification of [outstanding natural landscapes], such methodology has not been incorporated into the [regional policy statement] to inform/assist future assessments.[23]

This has increased the risk and cost for businesses applying for land use consents in rural locations, as seen in case of energy generator Meridian Energy's Project Hayes and the New Zealand King Salmon's application to extend its operations in the Marlborough Sounds. Meridian Energy was forced to abandon its plans to build a $2 billion wind farm in Otago after the Environment Court ruled, after $8.9 million and six years in the planning process, that the proposed site on the Lammermoor Range was a nationally significant landscape.[24] Had the site been designated a significant landscape as part of the planning process, it is reasonable to assume the firm would have chosen a different course. Similarly, one of New Zealand King Salmon's consents applications to start a salmon farm in the Marlborough Sounds was rejected on significant landscape grounds. Again, it is highly doubtful whether the firm would have proceeded with the costly consent application process had it been known that the site was considered an area of significant natural character. In the case of the Marlborough District Council and disclosure of significant landscape provisions in the regional policy statement, LGNZ's stocktake showed the council ranked among the worst performing regional government bodies in New Zealand. Specifically, the planning document does not pre-identify any of these nationally significant landscapes in the region, disclose a methodology for establishing whether a site qualifies for this status, or divulge any other assessment criteria such as weightings and guidance.[25] Otago fares only marginally better, fulfilling only two of the six measures assessed in the stocktake (stipulating criteria for identifying significant landscapes, and application of the criteria through policy).[26]

Although the above two examples are not mining industry examples, it is obvious how mineral extraction firms could benefit from a clearer and more consistent approach to landscape matters covered under the RMA. Both examples show how applying nationally significant landscape status after a consent application has been submitted allows ideologically motivated groups to claim that any site proposed for development is nationally significant.

Again, the remedy is clear. The Ministry for the Environment must:

- Develop a nationally consistent policy statement for nationally significant landscapes and require councils to proactively identify landscapes of national significance as part of the 10-year planning cycle.
- Limit pre-identification to a fixed percentage of total jurisdictional area, say 5%. Application can be made to increase this area, but it must be accompanied by a cost–benefit analysis to show that the economic impact of the decision has been considered.
- Develop a single methodology and policy toolset that councils can import into their respective plans. Exceptions to the methodology must be explicitly disclosed in regional policy statements.
- Stipulate that motions to designate nationally significant landscapes are open to public submission.

23 Ibid., p. 4.

24 Lynda van Kempen, "Meridian ditches Project Hayes," *Otago Daily Times* (20 January 2012).

25 "Regional Policy Statements: Stocktake of Outstanding Natural Landscape Provisions," op. cit., p. 68.

26 Ibid., p. 40.

TERMS OF EXCHANGE

Ecological compensation is another area where the absence of national guidance is proving to be a hand brake on the mining sector. It is widely recognised by business and environmental groups that although the modern economy is reliant on natural resources, the extraction of these resources has a negative impact on ecosystems, often permanently. Ecological compensation is a mechanism by which losses in one area can be offset by investments in another, providing a positive outcome for conservation. In New Zealand, compensation is implemented under the RMA and the *Conservation Act 1987*, typically as a condition attached to a resource consent.[27] Following a standard devolution of responsibilities, the legislation tasks regional, city and district councils with the duty of determining appropriate ecological compensation mechanisms.

But, as noted in the significant landscapes discussion, the lack of central government guidance means compensatory measures are inconsistently applied. This was noted by Marie A. Brown, et al., who examined 110 cases of ecological compensation in New Zealand, and showed that almost 90% of these cases had no objective quantification of the compensation needed to ameliorate the impact of resource development.[28] The authors concluded:

> The level of compensation seems to be determined primarily by the resourcing[,] by and willingness of the applicant, and the council specifying and insisting on a minimum standard. Financial payments were typically determined via negotiation, rather than an objective assessment of the magnitude of effects, or against a consistent and transparent scale.[29]

In other research, Brown, et al. examined 245 conditions relating to ecological compensation across 81 case studies in New Zealand, and found that 32% of all requirements are not being achieved in the absence of a consistent and robust decision-making framework.[30]

In summary, this research, which represents the first attempt to quantify ecological compensation under the RMA, shows offsets are inconsistently applied, often fail to set criteria for a robust regime, and the imposed conditions are only achieved two-thirds of the time.

This is an important point to consider. Ecological offsets are becoming an increasingly popular tool both in New Zealand and abroad as a means of resolving the tension between economic development and environmental considerations. If communities and environmental groups have little confidence that compensation measures are effective, there is no incentive for them to cede any ground when objecting to resource development. From their perspective, any development represents a permanent threat to the environment even where ecological offsets are proposed – this is because there is no robust policy framework to regulate and assess the effectiveness of offsets. And where the costs of an appeals process are greater for the developer than the objector, as noted in Chapter 1, this creates a situation where environmental groups are incentivised to fight their case all the way through the legal system.

As with nationally significant landscapes and mining-specific NES and NPS, there is significant scope for central government to provide policy direction on ecological compensation tool sets. The Ministry for the Environment must:

- provide a single national instrument that councils can adopt to provide consistency to ecological compensation schemes through the NPS;

27 Marie A. Brown, Bruce D. Clarkson, R.T. Theo Stephens and Barry J. Barton, "Compensating for Ecological Harm: The State of Play in New Zealand," *New Zealand Journal of Ecology* 38:1 (2014), pp. 139–146.

28 Ibid.

29 Ibid., p. 145.

30 Marie A. Brown, Bruce D. Clarkson, Barry J. Barton and Chaitanya Joshi, "Ecological Compensation: An Evaluation of Regulatory Compliance in New Zealand," *Impact Assessment and Project Appraisal* 1–11 (2013), p. 7.

- benchmark the scheme on a "no net loss to the environment" basis, recognising that compensation arrangements must be proportional to the development's impact on the local environment;
- task the Department of Conservation with managing the ecological offset scheme so that the compensation arrangements can achieve the greatest scale;
- migrate existing compensation arrangements to the new compensation framework where applicable; and
- extend ongoing monitoring operations of compensation schemes, and impose penalties on firms that have negligently failed to meet their compensation obligations.

The recommendations in this chapter will take time to implement as it takes almost four years to produce an NPS or NES, which is a medium-term policy solution. However, the dividends from this work will be reaped over the long term as greater guidance reduces the amount of money wasted by unnecessary bureaucratic processes. Clearer and more consistent rules will also remove the regulatory uncertainty that has stifled development to date. It also has the further advantage of having positive spillovers for other sectors of the economy, such as agriculture, that will benefit from clarity on nationally significant landscapes and a robust ecological offset regime.

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CHAPTER THREE
A DISCUSSION OF FUTURE LEGISLATION

The changes proposed in the first three chapters of this report, if implemented, will provide much-needed impetus to free mineral development from onerous regulation that produces little net benefit for regional economies, the environment and the country as a whole. These changes can be executed within the current RMA framework; put another way, these changes will help implement the RMA as it was intended when enacted in 1991. The changes do not address the question of whether the regulatory approaches prescribed in the legislation are still the best means of governing planning activities.

HAZARD VS RISK

At the time the RMA was drafted, a hazards-based framework was seen as the best means to promote sustainable management of natural and physical resources.[31] A common feature in health and safety practices,[32] this framework involves an applicant identifying any potential damage or harm that may occur from a resource development activity, as well as measures to avoid, remedy or mitigate these effects, before an activity can be allowed to proceed. This was a common regulatory approach used in many countries before the 1990s, and forms the basis of the RMA process. In the case of a proposed mining project, it is up to the applicant to establish the environmental baselines and show how the project will maintain this threshold before the project can proceed. Where baselines are likely to be breached beyond an acceptable level, applicants must also show how they intend to mitigate or remedy the environmental effect of mining projects. It is, in effect, an assessment of all potential harms.

Critics of this approach see it as over-regulation. This is characterised by an over-reliance on the legal system to resolve disputes, inflexible rules, and little consideration to the costs imposed by regulation.[33] Although this criticism will resonate with people who have dealt with the RMA, systematically assessing the success of a hazards-based approach of the legislation is open to debate, particularly given the lack of central government guidance. What is more certain is that in the 24 years since it was introduced, the RMA has lagged behind international best practice. Countries such as the United States and the United Kingdom have increasingly shifted the state's regulatory focus to a risk-based approach commonly used in the corporate world.[34] Much like the hazard approach, the risk-based approach not only considers the potential harm from a given activity, but also considers the likelihood of the harm occurring, and the severity of the potential harm. This allows the risks to be analysed, controlled, communicated and monitored on an objective basis that is transparent using tool sets such as a cost–benefit analysis.[35] Perhaps the most common example of a risk-based approach is in the pharmaceutical industry, where the negative side-effects of a drug (a hazard) are weighed against the chance of these effects occurring as well as the severity of the effects. This allows for a more informed decision to be made when assessing the potential benefits of allowing a particular medication to enter the market.

31 *Resource Management Act 1991*, part 2, section 5.

32 Ministry of Business, Innovation and Employment, *Manage Hazards* (Wellington: Ministry of Business, Innovation and Employment).

33 Bridget M. Hutter, *The Attractions of Risk-based Regulation: Accounting for the Emergence of Risk Ideas in Regulation*, London School of Economics and Political Science (London: 2005), p. 1.

34 Ibid., p. 2.

35 Ibid.

This assessment is typically done through a cost-benefit analysis, but other tools can be used where it is difficult to quantify benefits in dollar terms, as is often the case with the environment. Regardless of the method used, the advantage of risk-based assessment is that it considers the effect of an activity, with greater use of subject matter experts and scientifically supported standards, whereas hazard assessments are less rigorous.[36] The importance of incorporating risk into a resource use decision can be seen in the Bathurst case. The firm's consents were subject to numerous appeals from environmental groups, such as the mine's contribution to greenhouse gas emissions and impact on biodiversity and local ecology. However, one of the biggest risks from coal mining operations is acid mine drainage (AMD) – this risk was ignored by the objectors to the Bathurst project despite representing a significant environmental hazard. Of course, no mining operation should be allowed to start unless it can address AMD, but the example illustrates the shortfalls of a hazards-based approach.

Risk-based structures have the advantage of focusing attention on the critical environmental elements of a project that miners have to get right, and managing these elements through various operational management systems, plans and performance indicators, as seen in leading jurisdictions such as Canada.[37] Clearly, it is beyond the scope of this report to dictate the path of RMA reform, but it is evident that resource legislation in New Zealand must be modernised and brought up to international best practice. The starting place for such reform would include:

- benchmarking risk-based resource legislation against Australia's leading regimes due to the similarity of legislative environments;
- development of several overlapping risk assessment toolsets to overcome potential weaknesses in any one method; and
- using existing risk management standards, such as AS/NZS ISO 31000:2009 Risk Management, as developed by Standards New Zealand.[38]

ONE-STOP SHOP

Any regulatory reform of the RMA must also consider revising the overall structure of the consents process. The system, as it stands, involves a long sequential process, where any regulatory decision can scupper an application no matter how long it has taken to get to that point. Take, for example, a mining company that wants to harvest a known gold deposit. The firm would first have to acquire a permit from New Zealand Petroleum and Minerals to mine the ore. This only gives the mining company permission to pursue its project, not the right to mine. The firm must then apply to the local council for consent to undertake this activity, an expensive and time-consuming process, especially if it faces an appeal at the Environment Court. Having received the consent to start the project, the mining company has to apply for land access rights from the Department of Conservation if the ore is situated on Crown-owned land, which covers some 32% of New Zealand. Projects must also gain clearance from Heritage New Zealand, an autonomous Crown entity tasked with protecting sites of historical and cultural significance. Collectively, not only do all these processes add to regulatory cost, but the sequential nature of the process also means that a decision against a mining company can block the entire project. The sequential process adds a risk premium to any project, and raises the cost of capital for mining companies in New Zealand.

New Zealand's regulatory process contrasts with other international jurisdictions where a lead agency or whole-of-government approach is used. In South Australia, the Department of

36 Sweta Chakraborty, "The Risk Versus Hazard Debate: Reconciling Inconsistencies in Health and Safety Regulation within the UK and across the EU," *FLJS Policy Brief* (Oxford: Foundation for Law, Justice and Society, 2012).

37 "Environmental Code of Practice for Metal Mines," Environment Canada, Website.

38 Standards New Zealand, "Risk management," Website.

State Development acts as the lead assessor, and appoints a case manager to each application to guide firms through relevant regulatory requirements. Unlike New Zealand, the relevant departments in Australia, such as the Environment Protection Authority of South Australia, assess projects against publicly available criteria as part of one-stop shop process.[39]

Western Australia uses a different whole-of-government approach, with the Department of Premier and Cabinet in the role of Central Coordinating Agency assigning a specific department to act as the lead agent based on the particulars of an application. The support of other government departments within the state is secured through Memoranda of Understanding to facilitate the consenting process.[40] Both whole-of-government approaches are considered mature, and other states in Australia are adopting similar approaches. The major benefit from a whole-of-government approach is that it greatly speeds up applications; for example, South Australia's permitting regime has a six-month turnaround deadline on any application, including public consultation. In New Zealand, an applicant must deal with each regulatory body independently, which takes considerably longer.

Evidence from Australia suggests the efficiency of the one-stop shop approach does not come at the expense of environmental protection. South Australia, for example, is rated as the best performing regulatory regime in Australasia, according to an independent study commissioned by the Minerals Council of Australia. This includes business-specific and environmental criteria.[41]

Indeed, the merits of the single agent approach are being extended across state borders in Australia. The Commonwealth of Australia and the Northern Territory recently signed a bilateral agreement on environmental assessments, setting up a one-stop shop approach for mining projects in the territory to reduce the regulatory burden on firms while maintaining environmental standards.[42] By contrast, the Minerals Council of Australia report found that in practice, New Zealand's regulations consistently lagged behind South Australia on measures of environmental assessment processes, native vegetation management, biodiversity offsets, noise pollution, and fauna management.[43]

For a similar regulatory structure to be successful in New Zealand, it would require:

- the EPA to play a more active role in the mining consents process, rather than the status quo of only assessing projects of national significance;
- the Ministry of Business, Innovation and Employment to play the lead agency role between the various assessment bodies such as Department of Conservation and Heritage New Zealand; and
- high levels of transparency and recourse to the courts to test the fairness of the process.

Both changes are not to be taken lightly, but are necessary if New Zealand wants to compete internationally for mining projects, revitalise rural economies, and tackle the perception that "New Zealand would be close to the hardest jurisdiction [in which to mine] anywhere".[44]

39 Minerals Council of Australia, "Update of National Audit of Regulations Influencing Mining Exploration and Approval Processes," Final Report (Forrest, ACT: Minerals Council of Australia, 31 May 2013), p. 178.

40 Ibid., p. 177.

41 Minerals Council of Australia, "Scorecard of Mining Project Approval Processes" (Forrest, ACT: Minerals Council of Australia, 2013), pp. 9–20.

42 Minerals Council of Australia, "One-Stop Shop Assessments: A National Success Story Statement from Brendan Pearson, Chief Executive, Minerals Council of Australia," Media release (Forrest, ACT: Minerals Council of Australia, 19 December 2014).

43 Minerals Council of Australia, "Scorecard of Mining Project Approval Processes," op. cit., pp. 9–20.

44 Miguel Cervantes, Kenneth P. Green and Alana Wilson, *Survey of Mining Companies 2013* (Vancouver: Fraser Institute, 3 March 2013).

GRASP THE NETTLE

Whether the modernisation and move to a risk-based framework is best tackled by further changes to the RMA or by starting afresh is for the government of the day to decide. Whatever the outcome, those who undertake this process must exercise extreme discipline to ensure that technical and apolitical matters that relate to resource development and environmental protection do not get mired in short-term considerations, as noted by the Minerals Council of Australia.[45] The consequences of not establishing an efficient and effective long-term framework are that it makes the whole country poorer, not just the rural regions. Policymakers must grasp the nettle and undertake this long-term reform.

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45 Minerals Council of Australia, "Scorecard of Mining Project Approval Processes," op. cit., pp. 9–20.

CONCLUSION

This report has outlined an array of policy recommendations that, if implemented either in part or as a complete package of reforms, will significantly aid mineral development in New Zealand while upholding environmental conservation. But it is equally important to remember why these changes need to be made: for the well-being of New Zealanders.

As the previous report in this series showed, the minerals estate of New Zealand already makes a significant contribution to the economy in the form of export earnings as well as royalties and taxes, which pay for government spending programmes like education and healthcare. There is also significant scope to lift this contribution by prudently developing the country's rich mineral endowment. This will be a welcome boost to the economy as a whole, but the main beneficiaries of higher levels of mining activity will be rural communities.

And rural New Zealand needs help. Competitive pressure from global firms, increased use of technology in manufacturing, and shifting trends in market demand have seen many heartland industries consolidate and restructure their operations, making it harder to find employment in the provinces. This phenomenon makes it easier for economically active people in the provinces to succumb to the allure of higher wages offered in the cities. The resultant deleterious demographic effects concentrate ageing in the provinces, while also diminishing the ability of rural communities and local government to support those left behind.

Mining as an industry is resistant to these pressures, since firms must come to the ore. Extractive industries are highly capital intensive and make sustained contributions to the communities in which they operate; these contributions can be measured in terms of decades. Changing global business practices also mean that onshore mining companies are likely to have more forward and backward linkages to the local economy – a key ingredient to establishing sustainable local economies once the mineral deposit is exhausted. Miners are also acutely aware of the need to protect and respect the environment in which they operate.

It is for these reasons that we should reform the existing regulatory structure of the RMA.

In the short term, this can be done by providing a funding stream for local consenting costs. This will act as an incentive for councils to welcome development because it does not represent a significant risk to their balance sheets.

Central government needs to develop national policy statements and national environmental standards for the mining industry if it wants to lift output from the sector. Clearer central government guidance on landscapes of national significance and ecological compensation frameworks would also go a long way in resolving disputes over land use. Too often, councils, firms and communities are left to interpret the complexity of the RMA by themselves amid a notable lack of guidance from Wellington. This delays decisions, needlessly adds to cost, and creates uncertainty in a sector that is already highly speculative and riddled with risk.

Lastly, there needs to be a long-term commitment from government to modernise the RMA. The hazard-based approach may have been appropriate when the Act was introduced in 1991, but international best practice has shifted to a risk-based approach, which delivers better outcomes for the economy and the environment. In addition, the consents process must be made more efficient to attract mining investments to New Zealand. A two-year period to decide whether a project can proceed is too long when jurisdictions like Australia assess similar applications in six months or fewer – and with the same rigour.

These changes have the potential to transform the nature of the dialogue that New Zealanders are

conducting over mineral extraction. If the rules are clear and efficient, the environmental protections high, and the mining activity respectful, what rational basis is there to object to efforts to increase mining activity in the rural regions? There are also benefits for New Zealand from these changes that extend beyond the mining sector.

If successfully implemented, regulatory reforms will show that development and environmental protection need not be competing outcomes, a lesson that can be extrapolated and applied to many other areas of the economy where there are tensions over how the country's natural resources are to be developed.

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As a country with one of the highest natural capital endowments per person, New Zealand is not just sitting on a gold mine, but oilfields, iron ore deposits, high grade coking coal seams, and numerous other industrial minerals. Yet much of this mineral endowment is likely to remain untapped if the onerous and overly complex regulatory structure is not reformed.

The process of seeking planning permission under the *Resource Management Act* is widely recognised to be costly, time consuming, and complicated, with little predictability of outcome. This is particularly concerning for mining ventures – capital-intensive projects that are inherently risky even before a high degree of regulatory uncertainty is added to the process.

New Zealand can reverse its anti-development mindset and improve ecological outcomes in the mining sector, but only if central government will share royalties with local communities, fulfil its obligations to set national policy direction, and modernise the ageing *Resource Management Act.*

These are the key policy recommendations of *From Red Tape to Green Gold*, the second in a series of two reports on New Zealand's minerals sector, authored by Research Fellow Jason Krupp.

Implemented piecemeal or as a package of reforms, the policy recommendations in this report have the potential to redefine the terms under which New Zealanders discuss resource extraction, steering the dialogue from "economic development or the environment" to "economic development and the environment".

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