Tenure Matters

A column by Sue Slater, Senior Advisor Petroleum, RLMS

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Welcome back. The topic this month is "the conundrum of well-regulated". Striking the balance between adequate regulation and compliance with too much or too little regulation is no easy task. So what does "well-regulated" really mean? And why am I asking this question? I mentioned in a recent issue[1] that I would address this hoary chestnut so here we go. First of all, let's start with a definition of regulation[2] – which can be defined as "*any rule endorsed by government where there is an expectation of compliance*".[3]

I have written earlier[4] about hydraulic fracturing, and the common theme across the outcome of all the (many) reviews, that the activity is safe, and can be safely managed, if it is "well-regulated". **Precisely though, what is well-regulated?** For hydraulic fracturing I would hazard a guess that the spectrum range is enormous depending on your perspective. For those sitting in the anti-fraccing camp driven by environmental groups, no amount of regulation, no matter how draconian, will ever be enough. Basically, these groups want the activity stopped – forever – everywhere; and I suggest that they will continue their campaign until they get the result they really want. Basically, if everyone accepts that an activity is "well-regulated" the government has improved the social licence to undertake that activity. This has clearly not happened for hydraulic fracturing.

But government, even if it resists these calls – difficult given the current politics in most States – must also resist the urge to over-regulate. Over-regulation leads not only to increased costs, but also, in some cases, can become a default moratorium, by making the conditions so onerous that companies have difficulty in complying, or the approval process so lengthy, that projects never make it off the drawing board.

We also hear the words "risk-based" a lot these days with respect to regulation. Regulation must be appropriate to the risk level of the activity. Lower risk activities should be subject to less regulation; be self-assessable for example in some cases; and higher risk activities should be subject to more

[1] Tenure Matters No. 27 August 2016
[2] And I am sure there are others we could use.
[3] https://cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf
[4] Tenure Matters No. 19 September 2015

rigourous assessment, or, indeed, not approved if the risk is deemed too high. This means government must have sufficient technical knowledge to make informed decisions, must be able to sort the dross from the real concerns in any consultation processes and be resourced sufficiently to make timely decisions so that projects do not fail to start due to missed opportunities.

Government needs to make decisions that exempt lower risk activities from high levels of assessment, or else both government and industry will grind to a halt under bureaucratic processes. A good example of this having been achieved is the ERA standards for petroleum exploration, petroleum surveys and petroleum pipelines[5], which were importantly developed by a joint industry and DEHP[6] team, and commenced on 31 May 2013. These eligibility criteria and standard conditions arose from the changes introduced by the green-tape reduction legislation[7] – and although not all aspects of this Act have reduced green-tape – these standard conditions certainly did break the bottle-neck in negotiating appropriate EA conditions for what are relatively low-risk exploration or petroleum survey activities.

What well-regulated does not mean is ever increasing requirements – often across jurisdictions – that often serve no real purpose other than to "tick an assessment box" to appease those who oppose the particular activity in question. It does not mean duplicative requirements between, or even within, government departments. And it does not mean that each time the activity is proposed, the proponent has to undertake the same risk assessment process, unless there is a demonstrable change in the expected impacts. Pre-activity risk assessment is, of course, a very necessary component of many projects, but it should not be used as a substitute for an informed and well-educated regulator, or as an attempt to divert responsibility, or appease protestors.

Post-activity monitoring, especially for excessive time frames – again should be commensurate with the risk – may not always be appropriate either, but is often used to assuage concerns of stakeholders in lieu perhaps of better processes to educate and inform the public.

Complex processes that add another time delay to the equation will not help any project in a cost-constrained environment. And critically, NONE of it actually manages to allay the fears or concerns of stakeholders. The protestors continue to obfuscate and delay projects as much as possible. Winning court cases is not really the objective here – rather the increased time and cost burden to bring a project to fruition is the objective, and it can be replayed over and over again.

The Australian government has published, in 2014, its "*The Australian Government Guide to Regulation*"[8]. Whilst this document is aimed at Commonwealth regulators, there is no reason to believe that the same principles should not equally apply at the State level.

The 10 principles for Australian Government policy makers[9] are:

1. Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option;
2. Regulation should be imposed only when it can be shown to offer an overall net benefit;
3. The cost burden of new regulation must be fully offset by reductions in existing regulatory burden;

[5] https://www.ehp.qld.gov.au/management/non-mining/environmental-authority.html
[6] Department of Environment and Heritage Protection
[7] *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012*
[8] https://cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf
[9] https://cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers

4. Every substantive regulatory policy change must be the subject of a Regulation Impact Statement;
5. Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals;
6. Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens;
7. The information upon which policy makers base their decisions must be published at the earliest opportunity;
8. Regulators must implement regulation with common sense, empathy and respect;
9. All regulation must be periodically reviewed to test its continuing relevance;
10. Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.

The "*Queensland Government Guide to Better Regulation*"[10] was published in August 2016, and in this document the government has stated that the regulatory processes in Queensland would be consistent with the Council of Australian Governments (COAG) 2007 "*Best Practice Principles for Regulation Making*"[11]. In particular the Regulatory Impact Analysis (or RIA) key steps essentially mimic the seven questions below from "*The Australian Government Guide to Regulation*".

These seven questions for Regulatory Impact Statements are[12]:

1. What is the problem you are trying to solve?
2. Why is government action needed?
3. What policy options are you considering?
4. What is the likely net benefit of each option?
5. Who will you consult about these options and how will you consult them?
6. What is the best option from those you have considered?
7. How will you implement and evaluate your chosen option?

Most of us in Queensland would agree that over the last several years we have seen a lot of policy and regulatory reform impacting our industry – and I would argue that at least some of it does not meet all the principles outlined above. We have seen duplicated requirements; poor consultation practices (including limiting the distribution of documents for consultation and giving unreasonable timeframes for responses); increasing costs of compliance with increasing regulation; increasing complexity of processes and across the Departments our industry deals with, an overall increase in red-tape. However, even if the principles were assiduously followed – there is still no guarantee that an aspect, such as hydraulic fracturing, ends up being **well-regulated**. And this is fundamentally because this will almost always mean different things to different stakeholder groups.

I would like to think well-regulated means that:

- the regulatory measures are appropriate to the activity being carried out, and take into account, for example, the location where this is relevant to the risk (e.g. hydraulically fracturing a deep shale versus a shallower formation much closer to a water source) – i.e. not a one-size-fits-all approach;

[10] http://www.qpc.qld.gov.au/files/uploads/2016/08/FINAL-guide-to-better-regulation-august-2016.pdf
[11] http://www.coag.gov.au/sites/default/files/coag_documents/COAG_best_practice_guide_2007.pdf
[12] https://cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf

- the impacts of the measures are assessed to ensure that the stated objectives are met by the regulation/s without undue cost and time imposition on the industry or the regulator;
- if the outcome of that assessment is that the objectives are not met, or the cost and time is prohibitive, then the regulator addresses this promptly in (proper) consultation with the industry;
- the measures are flexible enough to accommodate technological advances where these improve safety or environmental outcomes;
- the implementation of the regulatory measures has been adequately addressed in consultation with the group who will ultimately be responsible for delivery of outcomes; and
- decisions are made promptly by the regulator so that delays do not inhibit project development and create uncertainty for industry.

There is often a failure to look back at regulatory changes and properly assess whether the change has addressed the problem it sought to resolve. There is also often a failure to properly think about the implementation of changes made – which will always be carried out by a different group than the one writing the regulation. Changes made in good faith to reduce regulatory burden without proper implementation plans will still not meet the objective sought.

So, in general, here are some more industry specific thoughts:

- Exploration should have a different level of assessment and regulation than production, which is commensurate with the duration and scale of the activity and the impact of the activity;
- Areas where the geological target is well-separated from aquifers should have a different level of assessment than areas where the target itself, for example, may be in use as a water source;
- Triggers to undertake modelling or reporting should be reasonable. For example, the current trigger for having to meet rather onerous requirements under the *Water Act 2000* is any production testing at all. There is no relationship to actually producing water which is frankly somewhat bizarre;
- Government has some responsibility to ensure that the information it provides to industry's stakeholders about regulatory changes (i.e. primarily landowners) is readily accessible, easily understood and promotes the benefits of the industry –social licence is not just the responsibility of the tenure holder.

I am happy to hear suggestions about topics you would like covered. Feel free to email me at sue.slater@rlms.com.au with the subject heading Tenure Matters.

In the meantime, remember "Tenures make the Project; the Project doesn't make the Tenures".

RLMS covers the project spectrum from planning through to State and Federal government approvals, including land access, compensation, environmental impact statements and work schedules for clients ranging from entrepreneurs to major corporations, from start-ups to government agencies, and state significant projects such as Queensland's LNG giants. Contact RLMS at:

Level 14, 10 Eagle St
BRISBANE QLD 4000
P. +61 7 3229 8472
E. rlms@rlms.com.au

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