Yearbook of New Zealand Jurisprudence

Editors
BRENDA MIDSON & GAY MORGAN

Editorial Assistance
JACQUELIN MACKINNON, AL GILLESPIE
Editors
Brenda Midson - Senior Lecturer at Law
Gay Morgan - Senior Lecturer at Law

Editorial Committee
Brenda Midson, Gay Morgan,
Jacquelin Mackinnon, Al Gillespie

The Yearbook of New Zealand Jurisprudence is published annually by the University of Waikato School of Law. Subscription to the Yearbook costs $NZ20 per year in New Zealand and $US40 (including postage) overseas. Advertising space is available at a cost of $NZ200 for a full page and $NZ100 for a half page. Back numbers are available.

Communications should be addressed to:
The Editor
Yearbook of New Zealand Jurisprudence
School of Law
University of Waikato
Private Bag 3105
Hamilton
NEW ZEALAND

North American readers should obtain subscriptions directly from the North American agents:
Gaunt Inc.
Gaunt Building
3011 Gulf Drive
Holmes Beach,
FLORIDA 34217-2199, USA

Telephone: 941-778-5211, Fax: 941-778-5252, Email: info@gaunt.com

This issue may be cited as (2002-2003) 6 Yearbook of New Zealand Jurisprudence.

All rights reserved ©. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act 1994, no part may be reproduced by any process without permission of the publisher.

ISSN No. 1174-4243
Yearbook of New Zealand Jurisprudence

Volume 6 Issue 1 2002 — 2003

CONTENTS

Editors’ Introduction

Articles
Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward

Robert Joseph and Tom Bennion

The Basic Principles of American Law As It Applies to American Indian Tribes

Robert Laurence

Power to the Provinces? England’s Regional Reforms

W John Hopkins

Guidelines for Small Claims Courts Hearing Individual Consumer Disputes

Peter Spiller

A Green Sales Law?

Thomas Wilhelmsson

Industry-Specific Regulation: The Case of Electricity

Barry Barton
Editors’ Introduction

The *Yearbook of New Zealand Jurisprudence* is an annual collection of papers contributed by participants in the Staff Seminar Series of the University of Waikato School of Law or by participants in colloquia hosted by the Centre for New Zealand Jurisprudence (CNZJ), and is published in conjunction with the CNZJ. The School of Law was founded in 1991 to provide a professional legal education, to develop a bicultural approach to legal education, and to teach law in the contexts in which it is made and applied. The *Yearbook of New Zealand Jurisprudence* aims to stimulate and to contribute to the development of a New Zealand jurisprudence by publishing articles, essays and other forms of analysis and comment which directly address or are relevant to New Zealand jurisprudence. The articles in this issue are contributed by members of the School of Law staff and by visiting scholars.

These articles canvas a broad range of contemporary issues, and a common theme discernible throughout is the sometimes uncomfortable interplay between the notions of citizenship, individual autonomy and justice — the tensions between regulation and freedom, between obtaining results and respecting process, and between viewing people as members of a cultural or a political community and viewing them as individual market participants.

Robert Joseph’s article focuses on the role of Maori tikanga as a source of governing norms within the Resource Management Act, and approaches this from the historical context of prior statutes envisioning Maori self-determination within the British conception of a unitary sovereign state. It considers the complexities inherent in attempting to incorporate the norms of one culture into the legal traditions of another, suggests some methods of reconciling the tensions arising from such an enterprise, and highlights the challenges to an attempted integration of differing communities’ aspirations for the development of a shared territory and nation-state. Joseph presents considered recommendations to aid government institutions in navigating those shoals.

Robert Laurence’s article explores the notions of both separate dependent sovereigns and separate independent sovereigns that are the underlying organizing principles governing the relations of the Native Americans with the American Federal government and the relations between recognized Tribal governments and the American
State governments. This article presents the complex layers of citizenship, native sovereignty, state sovereignty, federal sovereignty, and the overlapping but independent justice systems present in the American system's attempt to balance the ideals of cultural and communal self-definition and political self-determination of Native American sovereign peoples, the fact of colonial and military conquest, and the fact of political and physical location within a larger federated nation-state, the benefits of membership in a larger shared political enterprise, the tensions between individual tribal and state sovereigns, and the norms of individual choice and freedom. It is a fascinating overview of that system the author offers to New Zealanders for consideration within our own context of colonization and a desire to respect the norms and normative self-determination of Maori peoples.

John Hopkins offers an analysis of England's exploration of devolving significant authority to a tier of bodies at the regional level to develop and to implement policies affecting regional development and governance that are most suited to regional conditions. This again reflects the theme of nation-states searching to respect unique community aspirations and conditions and to facilitate their self-determination and self-management within the framework of an overarching unitary citizenship and a shared national destiny. He offers the revolutionary reforms in that jurisdiction for our consideration in our context of widely disparate regional conditions, geographies, and aspirations, with the resultant tensions arising from the disparate interests of those regions.

Peter Spiller, Thomas Wilhelmson, and Barry Barton offer articles exploring varying developments in consumer law arising from the ongoing trend in nation-states to transform the primary political conception of their constituent population from citizens of a political community to individual consumers of the products arising from cooperation and from living in community; products such as justice or fair dealing, access to reliable sources of energy, or an improved and sustainable standard of living. These articles arise from a CNZJ colloquium exploring the evolution of consumer law and market regulatory regimes into important both determinants and protections of fundamental rights as the economy has grown in complexity and as the role of citizens in the economy has become much deeper, more involuntary and an arguable non-negotiable necessity of life.
Peter Spiller considers the role of the Disputes Tribunal in assuring an accessible adjudication of economic conflicts which privileges fair outcomes or equity over formal legal rules, raising interesting questions as to the interface of the rule of law applicable to citizens and the low cost and efficacious resolution of economic conflicts required by people embedded in a social context of primarily contractual and economic relations. Thomas Wilhelmson, from the University of Helsinki, offers a fascinating analysis sure to be of great interest to a New Zealand community that aspires to leadership in global environmental affairs. He explores the possibilities of consumer law being used by citizen-consumers to recapture their role as responsible citizens in a community of shared long-term interests. Barry Barton examines the disutility of over-reliance on market mechanisms to govern the supply of important infrastructure and fundamental public goods, such as a reliable energy supply, in New Zealand’s context of a small economy, a small population and a large and difficult geography. His tracing of New Zealand’s experience with the restructuring and privatization of electricity production and supply illuminates the difficulties of transforming citizen into market participant and consumer, and considers the uses of regulation to mediate between those two roles.

This volume of the Yearbook, as the reader may have noted, is a joint 2002-2003 issue. This is due to the internal accounting structures within which the Yearbook is produced. We would like to signal that in 2004 a number of special editions will be forthcoming, arising out of various on and off campus conferences and colloquia exploring issues of interest to those pursuing the development of a New Zealand jurisprudence.

The Editors would like to thank the authors for their contributed articles and the referees to whom these articles were sent for their helpful contributions We would also like to thank Jacquelin Mackinnon and Al Gillespie for their assistance in editing and formatting of this volume, and to thank Geraldine Cook for her invaluable assistance in getting this edition print ready.

Brenda Midson & Gay Morgan
Editors - Yearbook of New Zealand Jurisprudence

Editors' Introduction
Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward

ROBERT JOSEPH² AND TOM BENNION³

INTRODUCTION – TIKANGA MĀORI LEGAL PRECEDENT

Historically, the New Zealand legal system acknowledged and accommodated the inclusion of Māori values, customary laws and institutions — commonly referred to as tikanga. The non-Māori legal authority for such actions is the common law doctrine of aboriginal rights, which is an acknowledgement and acceptance of Māori values and tikanga. The other authority is the Treaty of Waitangi which recognised tikanga Māori in Article II: ‘...te tino rangatiratanga...o ratou taonga katoa.’ The Waitangi Tribunal translated taonga katoa as ‘all their valued customs and possessions.’ William Colenso also described an incident prior to signing the Treaty where Governor Hobson agreed to protect Māori custom in the alleged fourth article.⁵

Consequently, official instructions were forwarded from London directing the Governor to respect and uphold tikanga Māori within the New Zealand legal system. In 1842, Lord Stanley suggested that certain Māori institutions such as tapu be incorporated into the

---

¹ This paper arose from a conference address delivered by Robert Joseph at the Inaugural Māori Legal Forum Conference, Te Papa Tongarewa, Wellington, 9 – 10 October 2002.
² Research Fellow, Te Matihauariki Institute and doctoral candidate in Jaw, University of Waikato. Ngāti Raukawa, Ngāti Tuwharetoa, Ngāti Kahungunu, Ngai Tahu, Ngāti Rangitane and Pakeha.
³ Barrister, and editor of the Māori Law Review.
⁴ Waitangi Tribunal Report Findings of the Waitangi Tribunal Relating to Te Reo Māori (WAI-11, Wellington, 29 April 1986) para. 4.2.4; 4.2.8, 4.2.3. 20.
⁵ Colenso, W The Authentic and Genuine History of the Signing of the Treaty of Waitangi (Capper Press, Reprint, 1890) at 31-32. The alleged fourth Article stated: ‘E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki e tiakina ngatuhitia e ia – The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori custom shall alike be protected by him.’ See also Orange, C The Treaty of Waitangi (Allen Unwin Press, Auckland, 1987) 53.
system. Stanley also directed that legislation be framed in some measure to meet Māori practices including punishment for desecrating wāhi tapu. One statutory example was the Native Exemption Ordinance 1844, which provided that in crimes between Māori, non-Māori interference depended on Māori request. In 'mixed culture' cases, Māori convicted of theft could pay up to four times the value of goods stolen in lieu of other punishment which could be used to compensate the victim of theft and was an obvious adaptation of the institution of muru.

Perhaps the most important yet overlooked constitutional provision for the inclusion of Māori values and tikanga was s 71 of the Constitution Act 1852. Section 71 stated:

And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

This section thus provided for the establishment of native districts where tikanga Māori would prevail between Māori inter se. The section was never implemented however and was subsequently repealed by the Constitution Act 1986.

---

6 Lord Stanley, Secretary of State for the Colonies, Memorandum, 23 August 1842.
8 'An Ordinance to exempt in certain cases Aboriginal Native Population of the Colony from the ordinary process and operation of the law.' Legislative Council, Ordinances, Session III, No. XVIII, 16 July 1844.
9 Ordinances of New Zealand, sess. III, no. XVII.
In *Wi Parata v Bishop of Wellington*\(^{11}\) Prendergast CJ erroneously held that Māori custom and usage, although included in s 4 of the Native Rights Act 1865, did not exist because ‘a phrase in a statute cannot call what is non-existent into being. No such body of law existed.’\(^{12}\) Prendergast CJ reinforced this finding in *Rira Peti v Ngaraihi Te Paku*\(^{13}\) when he held that native districts, pursuant to s 10 of the New Zealand Government Act 1846,\(^{14}\) were never appointed because Māori were British subjects governed by the laws of the land and not by their usages.\(^{15}\) Māori rights under the Treaty of Waitangi and many of their tikanga values were thus marginalised and lay legally dormant until the Treaty of Waitangi Act 1975 with the establishment of the Waitangi Tribunal. The Tribunal resurrected the acknowledgement and accommodation of Māori values and tikanga in the legal system.

**WAITANGI TRIBUNAL**

In 1985, in its Manukau Report,\(^{16}\) the Waitangi Tribunal considered the issue of taking water from the Waikato River at a point some miles from the sea and discharging it into the Manukau harbour, rather than allowing the water to reach the sea via the Waikato River mouth, some distance south of the Manukau harbour. The objection was entirely a ‘metaphysical’ one, that the *mauri* of the Waikato should not be mixed by human intervention in this way with the *mauri* of the Manukau harbour and ‘dead’ or ‘cooked’ water should not be discharged to living water that supplies seafood.

The tribunal first pointed out that ‘the values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin.’\(^{17}\) It continued:

---

\(^{11}\) *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) SC 79.
\(^{12}\) Ibid.
\(^{13}\) (1889) 7 NZLR 235.
\(^{14}\) The New Zealand Government Act 1846 was the forerunner to the New Zealand Constitution Act 1852. Governor Grey managed to have the former Act suspended, which was subsequently over-ridden by the latter. Section 10 was the equivalent to s 71 native districts in the former statute. Joseph (supra n 10).
\(^{15}\) *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.
\(^{17}\) Ibid, 78.
In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Māori values an equal place with British values, and a priority when the Māori interest in their taonga is adversely affected. The recognition of Māori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.18

The ‘current’ values of a community:

are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, ‘the heart has its reasons, reason knows not of.’ That view alone may validate a community’s stance.19

Later in the report the Tribunal noted that Māori values were not opposed to development. Rather, there was a difference of emphasis from European values:

Māori society...has tempered what might have been a fundamental religious bar with a basic pragmatism, enabling modifications to the environment after appropriate incantations or precautionary steps...

We consider that Māori values ought to be provided for in planning legislation. We do not think that they should predominate over other values but we do think they should be brought into account and given proper consideration when Māori interests are particularly affected. And if Māori interests are not exclusively affected then there might at least be a search for a practical alternative if there is one, or a reasonable compromise.20

18 Ibid. The halal reference recalls the period when New Zealand abattoirs killed meat in accordance with Muslim religious practices for export to Muslim countries.
19 Ibid, 124. Note the use of the word ‘current’ acknowledging the fluidic and dynamic nature of values generally and tikanga Māori.
TIKANGA MĀORI AND THE RESOURCE MANAGEMENT ACT 1991

Those provisions of the Resource Management Act 1991 (RMA) dealing with Māori issues, in particular the Māori trilogy key sections 6(e), 7(a) and 8 (see Appendix I), were enacted to enable that balancing exercise to occur.\(^2\) As recognised by Judge Whiting in the Environment Court, the Māori trilogy and related provisions:

...place the Court directly at the interface between the concepts of British common law (which has its genesis in Roman law) and the concepts of Māori customary law which is founded on tikanga Māori. The Treaty promised the protection of Māori customs and cultural values. The guarantee of Rangatiratanga [sic] in Article 2 was a promise to protect the right of Māori to possess and control that which is theirs:

‘in accordance with their customs and having regard to their own cultural preferences.’\(^22\)

Resource consent applicants and local authorities have generally avoided a ‘direct approach’ to confronting Māori under the RMA until recent times. There are a number of reasons for this change to a direct approach, including:

- A growing sophistication in the utilisation of the Māori provisions;

- The various RMA ‘successes’ achieved by Māori; and

- The increasing utilisation of Māori academics/cultural advisers by resource consent applicants and others.

From this direct approach, there is a growing judicial testing of the Māori spiritual and cultural paradigm including values and tikanga.

---


\(^22\) Land Air and Water Association v Waikato Regional Council, unreported, Environment Court, Auckland, 23 October 2001 (AI10/01). Whiting J. at 104 (hereinafter referred to as Hampton Downs). The Court considered a proposal to establish a large engineered land disposal facility at Hampton Downs north of Waikato. The proposal received considerable opposition from the local community including tangata whenua.
The result has been a significant increase in the resources and time local authorities have had to apply to Māori issues. This has led in many cases to resource management outcomes quite different from those that occurred prior to the enactment of the RMA, when Māori cultural and spiritual values could be safely ignored or sidelined. However, while Māori values may now have entered the system, there is evidence that the system may not yet have the tools, or have developed a sufficiently informed approach, to dealing appropriately with those values.

METHODOLOGY

The Environment Court has recognised the need to address tikanga Māori in its consideration of the RMA Māori provisions and has articulated a methodology of utilising the Waitangi Tribunal:

It is one thing for a Māori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Māori and Pakeha, for that purpose. Today, we have the benefit of anthropologists who provide just that...Moreover, today there are Māori who are able to clarify the meaning behind symbols and to impart knowledge of their customs in terms comprehensive to Europeans.

Judge Whiting commented on this methodology:

We feel it important to set out the above. It provides an appropriate methodology for this Court’s role in interpreting concepts of tikanga Māori. It answers the criticism which, at the outset of this case, was levelled by one of the parties, at the end of a lengthy hearing, by Ms Maxwell, that the Court, being a specialist Court, was without an expert in tikanga Māori. By applying the above methodology the Court can make a determination on the evidence just as it has to make determinations on many matters which are outside the professional expertise of its members.

23 Ibid, 105.
25 Hampton Downs (supra n 22) 105.
The RMA also recognises, in its definition of tikanga Māori that the relevant customary values and practices are those of the Māori people.

WĀHI TAPU

Take, for example, the debate over wāhi tapu. Section 6(e) RMA provides that it is a matter of national importance to recognise and provide for 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.' In a number of cases, Māori opponents of developments have argued that they will affect wāhi tapu covering several hectares of land. The Environment Court appears to have taken two general approaches. The first is a three-stage inquiry for claims of wāhi tapu and relies heavily on a close examination of the etymology of wāhi tapu.

The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for. When, as in the case here, it is alleged that a site is waahi tapu, it is necessary: first to determine the meaning of waahi tapu; second to determine whether the evidence probatively establishes the existence of waahi tapu, and third, if it does, how is it to be provided for.26

In addressing these steps the Environment Court had regard to the following documentary sources:

• Dictionary definitions;

• Reports of the Waitangi Tribunal;

• Definitions of tikanga Māori values in relevant RMA instruments; and

• Other Acts forming part of the statutory scheme.27


27 For example, the Historic Places Act 1993.
Assertions of wāhi tapu have not only been met with evidence from Māori dictionaries but also Māori studies experts who claim that the term wāhi tapu applies to sites which are quite limited in area and associated with some religious or ceremonial event. For example, in Winstone Aggregates the Court recorded evidence of wāhi tapu by a Mr Mikaere who asserted that ‘waahi tapu are very small specified places.’ In response, Mr Rima Herbet, the manager of the Ngāti Naho Co-operative Society Limited, gave evidence defining wāhi tapu as:

...physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people. Waahi tapu as conceived by Māori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Māori earthworks and burial areas which are all of long-standing importance to the Māori people of our area.

Both Mr Wara and Mr Herbet, kaumatua involved in the case, rejected the narrower definition of Mr Mikaere during cross-examination. The reason given for rejecting Mr Mikaere’s interpretation was that he was not from the area. The Court however accepted Mr Mikaere’s definition.

In Hampton Downs, the Environment Court considered similar Māori academic evidence on the nature of wāhi tapu, which was paraphrased by the Court:

In traditional Māori society a waahi tapu was a specific place – usually very small – within the tribal rohe or boundary. They were, by definition, strictly set apart from daily life because the tapu or spiritual restriction contained within such places posed dangers to all. Nobody went there or used such places for any purposes. The most authoritative source on the Māori language, the Williams Dictionary, defines tapu as:

‘...under restriction or superstitious restriction; a condition affecting persons, places and things, and arising from innumerable causes. Anyone violating tapu contracted a hara, and was certain to be overtaken by calamity.’

28 Winstone Aggregates (supra n 26) 69-70.
29 Ibid.
The definition I [Mr Mikaere] have stated here lies behind the concept of waahi tapu and identifies them as places of high spiritual and religious danger. Because of the nature of their original use; old pa sites, fortifications, earthworks, cultivations and such like cannot be waahi tapu because they are associated with secular rather than religious activities.\textsuperscript{30}

This approach therefore finds that wāhi tapu refers essentially only to urupā (burial grounds) and ceremonial or spiritual sites, and that the term cannot usually cover places associated with purely secular rather than religious activities such as old pa sites, fortifications, earthworks and particularly cultivations.\textsuperscript{31} This approach applies standard evidential tests.\textsuperscript{32} In \textit{Hampton Downs} the Environment Court tested Māori academic evidence when a Mr Tukiri questioned Mr Mikaere:

Q: Would it be fair comment to say that your expertise comes more from tauiwi (foreigner) than from your own people?

A: Which particular area are we talking about?

Q: I am talking about your qualifications from university and qualifications on past mahi (occupation) that you’ve done.

A: The qualifications I hold are no different to qualifications any other Māori people hold issued by [the] same education institution. [I] don’t see why I should be singled out because I am lucky enough to get there. My qualifications in that particular area, if we’re talking about purely in [the] Māori world I’ve outlined my experience and how I obtained that experience in answer to questions put yesterday. I see no reasons to change those responses …

Q: [Is it] fair to assume [that the] position [you] currently occupied here on behalf of [the] applicant and in the tauiwi world would give evidence today and not as your Māori side?

---

\textsuperscript{30} \textit{Hampton Downs} (supra n 22) 111. This evidence sought, in part, to rebut the evidence of a Ngāti Naho kaumatua.

\textsuperscript{31} \textit{Hampton Downs} (supra n 22); \textit{Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council}, unreported, Environment Court, Auckland, 17 April 2002 (A80/02). Whiting J.

\textsuperscript{32} See \textit{Winstone Aggregates} (supra n 26); \textit{Countdown Properties (Northland) Limited v Dunedin City Council} [1994] NZRMA 145 (HC); \textit{Te Kupenga o Ngāti Hako v Hauraki District Council} unreported, Environment Court, Auckland, 23 January 2001 (A 10/01). Bollard J.
A: [There are] several parts to that question, first is that this is a New Zealand rather than tauiewi institution, we are here before this institution because we support the processes of this country, when I am in this world I appear as part of this world so to speak. I cannot entirely put aside my Māori heritage of which I am extraordinarily proud. I believe in being present here, [I] can contribute by bringing some balance to the proceedings by appellants and s 274 interveners I believe that in a number of instances those views are incorrect, they are incorrect in terms of factual accuracy, incorrect in interpretation of traditional tikanga, they do demonstrate evolution and continued evolution of Māori conceptual thinking, somebody needs to bridge the gap and I see that as my role.33

The Court ultimately accepted Mr Mikaere’s evidence that the site was not a wāhi tapu and therefore it did not have any particular cultural significance.

LOCAL PEOPLE DECIDE

The other approach for claims of wāhi tapu is to leave it up to the local people to determine what the extent of their wāhi tapu is, but to reject any primacy for the concept of wāhi tapu, where to acknowledge it would have the effect of ‘sterilising’ areas of land and preventing development on them.34 In Winstone Aggregates the Court addressed the contention that ‘as a general principle the identification of wāhi tapu is a matter for the tangata whenua’:

As a general principle this may well be so. However, claims of waahi tapu must be objectively established, not merely asserted. There needs to be material of a prohibitive [sic] value which satisfies us on a balance of probabilities. We as a court need to feel persuaded that the assertion is correct.

33 Hampton Downs (supra n 22) 112-113.
In *Te Rohe Potae o Matangirau Trust v Northland Regional Council* Judge Bollard and his colleague Commissioners stated that evidence of kaumatua is frequently helpful, but if challenged, the question is not to be resolved simply by accepting an assertion or belief by kaumatua or anyone else. General evidence of wāhi tapu over a wide and undefined area was not probative of a claim that wāhi tapu existed on a specific site.\(^{35}\)

The recent litigation over the Ngawha prison site indicates that these problems are not going away. It suggests that, if anything, the incidence of these value arguments is likely to increase. That case involved substantial expert Māori witnesses both supporting and opposing the development and discussing the effects of the proposal on the ancient pathways of a taniwha.\(^{36}\)

**RESOURCE MANAGEMENT ACT AMENDMENTS**

It can also be noted that the Resource Management Amendment Bill, as currently drafted, would require decision-makers to recognise the need to protect historic heritage from inappropriate development, which includes ‘sites of significance to Māori, including wāhi tapu and ancestral landscapes.’\(^{37}\) This is an important issue, not just because of the requirements of the RMA 1991, but also because principles of natural justice require that people be given a fair hearing. Can that occur if the decision-making process (including decision-makers) has insufficient information about the Māori values and evidence presented?

Given such complex issues when attempting to define tikanga Māori and values in legislation generally, what are possible options to move towards a better understanding and treatment of these issues?

---

35 *Winstone Aggregates* (supra n 26) 63.
36 *Beadle & Wihongi v Minister of Corrections & Northland Regional Council*, unreported, Environment Court, Auckland, 8 April 2002 (A74/02). Sheppard J, PA Catchpole & OH Menzies.
37 Clauses 2 & 3.
CONSULTATION

One option is more effective consultation. The Environment Court noted that:

...the reason for consultation with Māori is their special cultural relationship with the natural resources of our environment.38

This is an area in which many councils are now ‘up to speed’ – at least in terms of the fundamentals. Many local authorities have entered into written memoranda or agreements with local iwi. These have been titled as ‘Partnership Agreement’, ‘Charter of Understanding’, ‘Memorandum of Understanding’, ‘Memorandum of Agreement’, ‘Memorandum of Partnership’, ‘Agreement of Understanding’ and ‘Operating Protocol.’ They have no particular legal status, but do indicate the intent of councils and iwi to work together and to exchange information about applications for resource consents at an early stage.39 That means that issues will be highlighted at an early stage and the potential for misunderstandings reduced. However, it still means leaving the local authority as the recipient of the ‘problem’ of Māori values, with Māori watching on as the Council attempts to resolve the issues.

That may change however, if the Local Government Bill 2002 is passed in its present form. A key objective of the new legislation is to clarify the relevance of the Treaty of Waitangi to the work of local government. The legislation avoids a general reference to the Treaty of Waitangi, such as in s 8 of the RMA 1991.40 Instead, the proposal is to set out the situations in which consultation with Māori communities is required, and provides the opportunity for Māori seats on local authorities. Key provisions in this regard are:

- Clause 4 which provides that parts 2 and 5 of the Act (concerned with the role and structure of local government and planning, decision-making and accountability) ‘provide principles and mechanisms to facilitate participation by Māori in local authority decision-making.’ This has been done to ‘recognise and respect

38 Hampton Downs (supra n 22) 120.
39 Twenty-five of them are analysed in an interesting article by Grant Hewison, a Manukau City Council officer. See: Hewison G “Agreements Between Māori and Local Authorities” Māori Law Review (December 1999/January 2000) 1.
40 In this respect it follows the New Zealand Public Health and Disabilities Act 2000. See also Palmer, M ‘The Treaty of Waitangi in Legislation’ [2001] NZLJ 207.
the principles of the Treaty of Waitangi, and with a view to maintaining and improving opportunities for Māori to contribute to local government decision-making processes' (cl 4).

- Part 2 which provides that, among other matters, local authorities must endeavour to ‘provide appropriate opportunities for Māori to contribute to decision-making processes’ (cl 12(e)).

- Part 5 which provides that, in making any decisions, including a decision not to take action, local authorities must follow ‘principles of decision-making’ which include:

  ‘In making significant decisions relating to land and bodies of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga’ (cl 62).

Local authorities must also ‘establish and maintain’ processes to enable Māori to contribute to local authority decision-making processes, and ‘consider’ ways of fostering the Māori capacity to make such a contribution, and provide ‘relevant information’ to Māori for this purpose (cl 63). When undertaking any consultation, local authorities must, among other things, ‘have in place appropriate processes for consulting Māori’ (cl 66(1)(c)). While patiently waiting for this legislation, other avenues exist under the RMA 1991 to obtain a better understanding of Māori values and better ways of dealing with them.

**IWI MANAGEMENT PLANS**

Iwi management plans are another source of information about values held by Māori communities. These plans however do not seem to have had the impact that was possibly expected when the RMA 1991 was passed. One sign of this is that there is almost no case law on the issue. The requirements of iwi management plans are that regional councils in preparing regional policy statements, regional councils in preparing regional plans, territorial authorities preparing district

---

41 There appears to be, for example, only one case in which the Environment Court has suggested that an iwi management plan might be appropriate — and that is in an area entirely owned by Māori — Whakarewarewa Village Charitable Trust v Rotorua District Council, unreported. Planning Tribunal, 25 July 1994 (W61/94). Kenderdine J.


43 Ibid, s 66(2)(c)(ii).
plans," or changes to such documents 'shall have regard to' '[a]ny...relevant planning document recognised by an iwi authority affected by the [regional policy statement/regional plan/district plan].' This has been given the shorthand of 'iwi management plan.' There is no definition of that term in the Act however.

'Iwi authority' means 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so.' It is arguable that iwi includes hapu. The Act defines 'mana whenua' as 'customary authority exercised by an iwi or hapu over an identified area.' And 'tangata whenua' means 'in relation to a particular area...the iwi, or hapu, that holds mana whenua over that area.' The Te Puni Kokiri document on iwi management plans, Mauriora Ki Te Ao, also recognises that 'it is often hapu who deal with environmental issues within iwi.'

The original proposal for these plans was that they would generally provide guidance to authorities on the meaning of kaitiakitanga and the law could require them to be taken into account where plans or policy statements were made or where resource consents were granted. It was also envisaged that they would provide detailed guidance on preferences for the use of iwi land in each district and would in effect become a district plan for iwi land, and would be treated as a proposal for a plan change. It also seems that the reference to 'any...relevant planning document recognised by an iwi authority,' rather than a stricter definition, was an attempt to recognise that such plans could be created in different ways and take different forms from district to district.

There are several reasons why they have not perhaps been as prominent as might have been expected:

44 Ibid, s 74(2)(b)(ii).
46 Ibid.
47 Ibid.
There is no procedure set out in the Act for producing such plans. This is in contrast to the extensive procedures for producing district and regional plans and policy statements. This alone would make the courts cautious about placing great weight on iwi management plans.

While regional policy statements and plans and district plans must not be ‘inconsistent’ with other plans, there is no similar provision regarding iwi management plans. Consequently, a district plan can be inconsistent with an iwi management plan.

The phrase ‘shall have regard to’ means that iwi management plans must be given consideration, but any rules and policies in the document do not necessarily have to be followed. A local authority does not have to consult until a consensus is reached with an iwi over any planning matter. In the event of any direct inconsistency between a regional policy statement or plan or a district plan and an iwi management plan, the former would win out.

Iwi management plans inform the statutory planning process, but beyond that are not referred to in the legislation. There is for example no requirement to consider an iwi management plan when determining whether a resource consent should be issued. (Although consent authorities may consider ‘Any other matters the consent authority considers relevant and reasonably necessary to determine the application – s. 104(1)(i)). Nor is there any requirement to consider iwi management plans when a notice of requirement of a designation is being considered.

There is a proposal in the Resource Management Amendment Bill to change the requirement to ‘have regard to’ iwi management plans in each instance to ‘take into account’ – which would definitely give them greater status as planning documents. However, on controversial topics (i.e. where they conflict with district or regional plans) one can still imagine that they will be treated with caution, as not coming through the full planning processes in terms of participation.

50 Marlborough Ridge Ltd v Marlborough DC (1997) 3 ELRNZ 483; Winstone Aggregates Ltd v Papakura DC, unreported, Environment Court. Auckland, 14 August 1998 (A96/98). Whiting J.
51 Ngāti Kahu v Tauranga DC [1994] NZRMA 481 Bollard J, Dr AH Hackett & IG McIntyre.
**MĀORI HEARING COMMISSIONERS**

One obvious way to better inform decision-making where Māori values are raised is through the use of Māori commissioners. Commissioners are generally used when the Council has a particular interest in the application and the specialist environmental subcommittee of the Council is not suitable. Legislative requirements may also require a commissioner hearing (e.g. s 223CA Local Government Act 1974 dealing with water permits required by the council’s water supply body). They may also be used where a council believes that specialist knowledge is required, or sometimes on request from an applicant for resource consents who perceives a possible council conflict over the project.

One issue that has limited the use of Māori commissioners until now has been a concern about actual or perceived bias. The dilemma is how to obtain the most knowledgeable people in a region without picking people whose local tribal links and knowledge are such that they may appear to be biased. The very expertise for which a Māori commissioner might be sought will often consist of their close links to and understanding of iwi, hapu or whanau of the area. People of standing who might be used as Māori commissioners usually have significant kinship or whakapapa links to several iwi in the region – this is partly how their standing arises. Among iwi/hapu/whanau themselves there may be a concern about apparent bias.

In terms of practice, the Wellington Regional Council has used Māori commissioners when it was considering water supply issues on the Kapiti Coast and on the Whanganui River. Most recently, a Māori commissioner was one of the commissioners who turned down discharge consents for the Ngawha prison, which was subsequently overturned.\(^{53}\)

**SECTION 33 TRANSFERS OF POWERS**

Section 33 RMA was hailed as a significant section when it was introduced. A sign of this is the fact that the New Zealand Coastal Policy Statement 1994 noted that, where characteristics have been identified of special value to tangata whenua, the local authority should consider:

\(^{53}\) See *Beadle & Wihongi v Minister Of Corrections & Northland Regional Council*, supra n 36.
a) The transfer of its functions, powers and duties to iwi authorities in relation to the management of those characteristics of the coastal environment in terms of s. 33...and/or

b) The delegation of its functions, powers and duties to a committee of the local authority representing and comprising representatives of the relevant tangata whenua...in terms of s. 34.54

However, to date, no transfers have occurred (at least in the North Island as far as the authors are aware). A reason for this situation is because of the requirements of the legislation, which set up preconditions, and procedural requirements that are onerous. The essential elements of s 33 are that a local authority (i.e. a regional council or a territorial authority) with ‘functions, powers, or duties’ under the RMA 1991, may transfer them to another ‘public authority’ which includes an ‘iwi authority,’ government department, or statutory authority, as well as other local authorities. The transferor local authority and the transferee public authority must agree that the transfer is desirable because it is:

• Efficient, and;

• The public authority has technical or special capability or expertise, and;

• The public authority ‘represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty.’

The requirement that an appropriate community of interest must be represented and that the transfer is ‘efficient’ suggests that transfer to an iwi authority would probably need to be in relation to a limited physical space rather than some general authority over a part of a district or region. If the iwi owned a place or resource the requirements for a transfer would be more easily satisfied. There is no requirement to provide resources with the transfer but that could be a matter of agreement between the authorities however.

54 Policy 2.1.3.
In terms of the procedure, the local authority must notify the Minister for the Environment of the proposal to transfer. The local authority must use the 'special consultative procedure specified in s 716A Local Government Act 1974. The special consultative procedure requires that the proposal to transfer powers must be publicly notified, and public hearings held at which submitters may be heard. Copies of all submissions received must be madeavailable to the public.\textsuperscript{55} The local authority must give proper consideration to the submissions, but is not bound to follow them.\textsuperscript{56} There is no formal appeal process in the RMA if a local authority refuses a request for a transfer.

Even after functions and powers are transferred, the local authority remains responsible for their exercise.\textsuperscript{57} This suggests that the local authority have to keep a close eye on the activities of the transferee. It will want to avoid actions being taken against it, and costs being incurred from poor decisions. A transfer of powers may be changed and withdrawn at any time by the local authority, or relinquished by the public authority. The above points indicate most of the reasons why transfers of powers to iwi authorities have not been advanced.

One can foresee other problems. Where an iwi or hapu group has taken a view over a particular proposal then it will not be possible to propose a s 33 transfer of powers to the group in relation to that proposal, since they are already a party with a particular view on the proposal.\textsuperscript{58} If an iwi authority has in the past taken a particular view on how that resource should be used, would that make it more difficult to transfer powers over that resource to that authority?

Finally, under the present regime, would iwi even want such a transfer? If an iwi authority has a s 33 transfer of power in relation to a resource, it will have to act judicially — that is, fairly and impartially and in accordance with the RMA and relevant plans — when it considers any applications relating to that resource. For example, it will have to weigh Māori concerns in balance with other matters of national importance. It will also be bound by decisions of the Environment Court and other courts on the way in which Māori interests are to be considered under the RMA,

\textsuperscript{55} Local Government Act 1974, s 716A.
\textsuperscript{56} \textit{Urlich v Wellington City Council}, unreported, High Court, Wellington, 29 July 1996 (CP174/96). McGechan J.
\textsuperscript{57} Resource Management Act 1991, s 33(3).
\textsuperscript{58} \textit{Otaraua Hapu of Te Atiawa v Taranaki Regional Council}, unreported, Environment Court (WI29/96). Sheppard J, PA Catchpole & F Easdale.
even if it disagrees with the approach and result of those decisions.\textsuperscript{59} And its decisions may be appealed to the Environment Court. Given the criticism by the Waitangi Tribunal in the Whanganui River Report and other reports that the RMA 1991 generally does not give Māori interests sufficient priority, an iwi authority given powers under the RMA over a resource which it does not own may find its task a difficult one.

**CHANGING THE JUDGES**

There is also the controversial suggestion from the Privy Council that the pool of decision-makers at the Environment Court level ought to include people able to deal appropriately with Māori values:\textsuperscript{60}

Counsel for the appellants made the point that at present there are no Māori Land Court Judges on the Environment Court and only one Māori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Māori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Māori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Māori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Māori membership will prove practicable if the case does reach the Environment Court.

That case concerned a designation across Māori freehold land. There is no indication that the government has determined to act specifically on this issue however.

Against this we may contrast the Court of Appeal approach in *Watercare Services Ltd v Minhinnick*,\textsuperscript{61} where that court was asked to support the notion that, when considering whether the piping of sewage over wāhi tapu was ‘...offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the

\textsuperscript{59} For example, *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113, considered below.

\textsuperscript{60} *McGuire v Hastings District Council* [2001] NZRMA 557 para 28 per Lord Cooke.

\textsuperscript{61} [1998] NZRMA 113.
environment.’ The appropriate test was what the ordinary Māori person would find objectionable. The Court of Appeal rejected that view, finding that the relevant test was that of the ‘ordinary person, representative of the community at large’ — presumably no matter how ignorant that community might be of Māori values, or, more importantly, its own hidden assumptions and prejudices.

TESTING THE EVIDENCE — TE MATAPUNENGANGA PROJECT

Resorting to dictionaries and documentary sources to prove or disprove the existence, extent and scope of tikanga Māori in a particular area tends towards the academic and away from the determinative spiritual and cultural context of Māori. As Metge notes:

To come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation — the direct reference — is substantially the same, the connotations are significantly different.62

Hence those qualified to articulate the values and practices inherent in tikanga Māori are Māori, especially kaumatua. But as illustrated above in this paper, what happens when kaumatua slightly or even diametrically disagree about what constitutes ‘authentic’ tikanga or the details and scope of a group’s tikanga and values?

The work of Te Mātāhauariki Institute at the University of Waikato may be of some assistance here.63 One of the key projects of Te Mātāhauariki Institute is the assembling of a collection of references to the concepts and institutions of Māori customary law to explore ways in which the legal system of Aotearoa/New Zealand could better reflect the best of the values and principles of both major component cultures. The Director of the Institute, Judge Michael Brown, in consultation with the Institute’s Advisory Panel,

63 See the Te Mātāhauariki Institute website at http://www.lianz.waikato.ac.nz

28 Yearbook of New Zealand Jurisprudence Volume 6 Issue 1 2002-2003
accordingly initiated *Te Matapunenga* which is an attempt to traverse
the existing historical materials with a view to bringing together such
references to customary concepts and institutions as appeared to
come from an influential or authoritative source and/or to exhibit
explanatory insight.

The Te Mātāhauariki researchers have started with a list of tikanga
terms, concepts, and institutions found to be in use in historical and
contemporary Māori discourse selected with the assistance of
kaumatua. The researchers have searched a wide range of records for
entries, which have been listed in chronological order under each title.
Each entry consists of a sourced statement or explanation relevant to
a particular title together with an explanatory preface intended to
supply a context for the statement or explanation. The purpose of the
context is to enable the reader to understand the circumstances in
which the statement or explanation arose, and to judge its credibility
and authority. As noted by Lord Cooke in *McGuire* (in reviewing
House of Lords authorities on interpreting legislation): 'In law, he
[Lord Steyn] has said elsewhere, context is everything.'

The researchers have not set out to determine what is or is not 'true
custom', or authentic tikanga Māori but rather to record what has at
various times and in various circumstances been claimed to be
custom. Accordingly, part of a Te Matapunenga entry looks like this:

Māoritanga: Literally, 'Māoriness, circumstances or qualities of
being Māori' *Etymology:* māori (stative) [from Proto-Polynesian
ma(a)qoli 'true, real, genuine'] ‘normal, usual, ordinary; native,
belonging to New Zealand, Māori (the use of this word to denote
Māori people dates from the early part of the 19th Century) + -tanga
(nominalising suffix). Note that an older use of the term māoritanga
denotes 'meaning, explanation.'

a) A search of 19th Century Māori Newspapers reveals the use of
the term Māoritanga as early as 1844 in the Governor’s
newspaper, Te Karere o Niu Tireni. Complimenting the
alleged many Māori who want their children educated in the
ways of the Pakeha, the paper notes:

‘*Ka maiengi ratou i roto i to pukohu o te Māoritanga.*’ ['They will rise
out of the shrouds of Māoriness’] (Vol 3, July 1, 1844, No. 7, at 33).

---

64 *McGuire v Hastings District Council* (supra. n 60) 561.

*Possible Ways Forward*
b) There are numerous references to Māoritanga in the newspapers during the later half of the 19th Century. A discernible theme of the period is that Māoritanga as the cultural traits and practices of the ancestors, are antithetical to progress and civilisation. In a report on a Government council in Auckland in 1864 where a major subject of deliberation was ‘rebellious’ activity amongst the Māori population, it was asserted:

‘Te mahi a ena tangata he whakararuraru i nga iwi, he tuku pouritanga ki runga ki te whenua. E kore e noho pai i tona kainga ka whai pea ki nga ritenga totika. Tana i pai ai he whawhai, he tutu, he hoki ki nga ritenga o te Māoritanga.’ [What those people do is cause trouble for the people and misery over the land. He will not reside peacefully on his homestead and pursue law-abiding endeavours. What he prefers is conflict, mischief and to return to the customs of Māorihood.] (Te waka Māori o Ahuriri, Issue 2, No. 40, 24 December 1864, at 1).

c) By the turn of the century, there was ambivalence amongst many Māori towards the desirability of the total assimilation of the Māori people and the loss of Māori identity. At a hui at Te Kuiti in 1911, leading Māori rangatira from around the country gathered to discuss what was meant by the term ‘Māoritanga.’ The gathering moved the following motion:

‘E kotahi ana te whakaaro a tenei hui, kua tae tenei ki te wa e tika ana kia whakapaua te whakaaro o nga iwi Māori katoa o nga motu nei, ki te whakakotahi i a ratou ki runga ki tetahi tikanga tapu, i runga i te kaupapa o te Māoritanga motuhake, kaore nei ona tikanga e taupatupatu, ki te Ture ki nga hai ranei me nga tikanga motuhake o ia iwi o ia iwi.’ [‘This gathering is of one mind, the time is now right for all Māori tribes of the land to give real thought to uniting themselves around a sacred term, around the idea of a special Māorihood, its cultural traits not conflicting with the Law, religions and the individual cultural practices of each tribe.’] (H.H Wahanui, Māori Development Hui, Alexander Turnbull Library, Reference No, MSY-5005).

d) There was a growing assertion that Māori must retain their Māoriness. One of the leading advocates was Sir Apirana Ngata’s father, Paratene Ngata, who in a letter to the Māori
newspaper, Te Toa Takitini in 1920, lamented the state of the Māori language as part of a wider neglect by Māori of their Māoriness:

‘He Māori tonu te tangata ko ona whenua i heke mai i roto i tona taha Māori, ka haere ki te tono ki te Kooti kia kiia ia he tangata pakeha ko ona whenua kia whaka-pakehatia. He tohu enei hei kitenga iho ma tatou ko te Māori ano kei te takahi i tona Māoritanga me ona take Māori.’ ['A Māori person whose lands he inherited from his Māori side goes and requests the court to declare him or her a European and to Europeanise his/her lands. These are signs that show us Māori that Māori themselves are transgressing their Māoriness and Māori concerns. '] (Te Toa Takitini Number 3, 1920 at 4).

e) Sir Apirana Ngata writes that a hui in 1920 at Te Kuiti, Sir James Carroll urged his audience to:

‘Kia a mau ki tou Māoritanga.’ ['Hold on to your Māoriness. ’] ('Tribal Organisation’, in Sutherland, I.L.G (ed.), The Māori People Today: A General Survey (Wellington: Whitcombe & Tombs, 1940, at 177.). This statement by Carroll has generally been credited with being the coinage of the term Māoritanga and is located within the climate of the first Māori renaissance. (See Toon van Meijl, ‘Historicising Māoritanga: colonial ethnography and the reification of Māori traditions’ in Journal of the Polynesian Society Vol. 105, no. 3, at 311.).

f) In a chapter on the tribal makeup of Māori society, Ngata commented on Carroll’s catch cry, ‘kia a mau ki tou koutou Māoritanga’ and offered his own definition:

‘It means an emphasis on the continuing individuality of the Māori people the maintenance of such Māori characteristics and such features of Māori culture as present day circumstances will permit, the inculcation of pride in Māori history and traditions, the retention as far as possible of old-time ceremonial, the continuous attempt to interpret the Māori point of view to the pakeha in power.’ (‘Tribal organisation’ in Sutherland, I.L.G (ed) The Māori People Today: A General Survey Whitcombe & Tombs, Wellington, 1940 at 177-178.).
The Te Matapunenga project therefore may prove useful to
the judiciary and wider public because of its authoritative and
well audited research that will assist with contributing to tikanga
Māori debates but even more important for reflecting on the best
customary concepts and values of both of New Zealand’s major
component cultures.

CONCLUSION

While Māori values and tikanga have now re-entered the legal
system, there is evidence that the system may not yet have the tools,
or have developed a sufficiently informed approach, to dealing
appropriately with those values. This article has highlighted some of
the complexities that the Environment Court is facing when
attempting to incorporate Māori values and to define tikanga Māori
in legislation. That is without even mentioning epistemological,
translational, pedagogical and ontological complexities. We have,
however, highlighted briefly a number of possible options to move
towards a better understanding and treatment of these issues in New
Zealand, including:

- More effective consultation with Māori communities;
- Iwi Management Plans;
- The use of Māori Hearing Commissioners;
- The effective use of s 33, RMA Transfer of Powers provision
to Iwi authorities;
- Changing the Judges; and
- The more extensive use of authoritative and well-audited
tikanga Māori reference works such as Te Mātāhauariki Te
Matapunenga Work.

There still appears to be a potential for the values of the dominant
society to be ‘regularly applied in the assessment of proposals
without a thought as to their origin.’ However, perhaps sufficient
tools now exist which can be applied to address that situation and the
inclusion of Māori values and tikanga.

65 Manukau Report (supra n 15) 8.
APPENDIX I – MĀORI TRILOGY

The Māori trilogy provisions in Part II of the RMA are sections 6(e), 7(a) and 8, which provide:

6. Matters of national importance –
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relations to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7. Other matters –
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
(a) Kaitiakitanga

8. Treaty of Waitangi –
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

An important factor in understanding the operation of the Māori provisions is the hierarchy of Part II, underpinned by:

• The descending weighting of the various decision-making injunctions as one moves down the Part II chain: ‘shall recognise and provide’ (s. 6); ‘shall have particular regard’ (s. 7); and ‘shall take into account’ (s.8)\(^6\); and

---

Possible Ways Forward
• Sections 6-8 being expressed as requirements to be fulfilled ‘in achieving the purpose of this Act’, i.e. the promotion of ‘sustainable management of natural and physical resources’ has primacy under the RMA.  

67 As defined in s 5(2) Resource Management Act 1991.
The Basic Principles of American Law As It Applies to American Indian Tribes

ROBERT LAURENCE*

INTRODUCTION

The law of the United States as it relates to American Indian tribes may fairly be described as unique, both within the domestic law of the United States and when one compares it to the law of other nations. In this article, I will set forth the basic principles of that domestic law, leaving aside for now both the emerging international regimen regarding indigenous peoples, and any direct or indirect comparison to the internal law of any other nation regarding the native peoples who live therein. Much, much more could – and has been – written on the topic, of course, but here I wish to set forth a primer, if you will, for newcomers to the field. What follows is meant to provide merely an overview of a complex field, upon which a reader could either proceed to a more careful study of the subject, or make initial comparisons with the body of New Zealand law as it relates to the Māori.

* Robert A. Leflar Distinguished Professor of Law, University of Arkansas. This article is amalgamation of the material from three presentations that I made during the Southern Hemisphere winter of 2002 at the University of Waikato, Victoria University of Wellington and University of Canterbury, and I thank my hosts at those institutions for providing me with the opportunities to discuss a fascinating, if esoteric, subject. Generous support both for the preparation of this article and for travel to, from and within New Zealand was provided by a Northern Hemisphere summer research and writing grant from the University of Arkansas.

I should emphasize here at the outset that it must remain the readers' task to draw comparisons, if they will, between the principles set forth here and New Zealand domestic law as it applies to the Māori people. That body of law is rich in nuance and it would be more presumptive than the present American could muster to think that he could draw those comparisons or offer significant insight into the principles of Māori law. The law set out here is American domestic law relating to the tribes of the United States. Its Aotearoan application, if any, awaits further discussion.

There is no better place to begin a discussion of American Indian Law than with the following quotation from the Supreme Court of the United States in the case of McClanahan v. Arizona State Tax Commission:

It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.

This statement should be seen as no mere platitude; it is the essential truth of North American life. That is not to say that it, in fact, always is remembered; it is easy enough to point to cases in which our courts seem clearly to have not heeded the Supreme Court's injunction. And there are surely millions of European-Americans, African-Americans and Asian-Americans who, on a day-to-day basis, forget that the tribes were here first. Nor, it must be conceded, is it the case that merely remembering the antiquity of the tribes means that the Indians should, or will, prevail in all controversies.

3 Id. at 172.
4 As Justice Reed famously wrote in Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288 (1955): "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." Years later, Professor Philip Frickey responded: "Every learned schoolchild would be appalled by this point, for it cannot be defended as accurate, if incomplete. Instead, it is just plain wrong, a mixture of myth and ethnocentrism masquerading as past legal practice." Philip P. Frickey, "Domesticating Federal Indian Law", 81 Minn. L. Rev. 31, 32 (1996). As Professor Frickey noted, the quotation is especially misguided in a case, like Tee-Hit-Ton, dealing with Alaska Natives, for little force was used to remove these peoples from their homelands. For an interesting discussion of the historical context of Justice Reed's remark, see Eric Kades, The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands, 148 U. Penn. L. Rev. 1065, 1129-30 (2000).
It is enough that the starting point when one approaches the field of Indian law is with the antiquity of the tribes and the youthfulness of the United States. The dominant society is young, large, vibrant, headstrong, diverse, self-indulgent and very much these days full of itself as "The World's Only Remaining Super-Power." Tribes, on the other hand, tend to be old, small, homogeneous, vibrant in their own ways, introspective, and aware of their own fragility. When approaching a conflict between the two, the Supreme Court was surely correct in admonishing that it will serve the younger government well to keep in mind that the elder government is indeed that, especially when the courts of the younger government are attempting to determine the extent of that more ancient sovereign power.

It is this sovereignty, as we shall now see, that lies at the heart of American Indian law.

5 One must be very careful when indulging in stereotypes such as these. There are some five hundred federally recognized tribes within the United States — about one hundred and fifty of which are in Alaska — and many more self-proclaimed tribes that are seeking federal recognition. There is extraordinary variety within this group among the tribes, greater variety, it is commonly said, than among the various nations of Europe. Generalities are dangerous and can be unfair. Fragility, especially, is a problematic characterization to apply to Indian tribes, or to any government a thousand years old. It is true enough that tribes live these days on the edge of extinction, and their members represent less than 1% of the population of the United States. On the other hand, it seems rather near-sighted to predict the demise of governments that have survived so much.
THE SEVEN BASIC PRINCIPLES OF AMERICAN INDIAN LAW

1. Indian tribes are recognized as governments under American federal law.

It was early on, in the case of *Cherokee Nation v. Georgia*, that Chief Justice John Marshall recognized the sovereignty of the Indian tribes, declaring them to be "domestic dependent nations." This sovereign status is unique in American law to American Indians. No other ethnic group — nor, for that matter any other religious, racial, gender nor political group — is recognized as being a government. Members of all of these other groups must participate in American society as individuals, or as members of private, voluntary interest groups. In many cases following *Cherokee Nation*, the Court has made it clear that tribes are not mere voluntary organizations.

---

7 Id. at 17. It is perhaps historically noteworthy that in *Cherokee Nation v. Georgia*, Chief Justice Marshall was writing only for himself and one other Justice, announcing the decision of the Court, which was that the Cherokee Nation was not a "foreign nation" under the United States Constitution. Two Justices concurred in this result, expressing the opinion that the Cherokees were in nowise a nation at all. Two other Justices dissented, arguing that the Cherokees were, indeed, a "foreign nation" within the Constitution's meaning. One other Justice did not participate in the case. Thus John Marshall's conclusion that, while not a "foreign nation," the Cherokees retained sovereignty as a "domestic dependent nation" was far from the holding of the Court. Nevertheless, it is his opinion that is best remembered and most often cited, and it is true that four of the seven Justices accepted the foundation principle that tribes are governments. See generally, Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 Stan. L. Rev. 500 (1969).

8 Of course, the United States is a federal republic made up of fifty states that have their own retained sovereignty, only some of which is surrendered to the central government by becoming a state. Hence, when one adds tribal sovereignty to the mix, one sees the United States as being a tri-partite federal system with the resulting competition among the federal government, the state governments and the tribal governments for authority. Much of this competition plays out in battles between a state and a tribe or one of its members, see, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

On a practical level, this recognition of tribal sovereignty means that, day-to-day, tribes do the kinds of things that governments do: they tax, they regulate, they adjudicate both civil and criminal disputes, they incarcerate, and they enforce judgments. On a more theoretical level, to say that tribes are governments and not mere private organizations engages this interesting question: what, exactly, distinguishes the two types of entities? At first blush, the answer seems easy: governments exercise power over people, not all of whom consent to each individual exercise of that power. Sure enough, there is often thought to be a connection between some generalized consent of the citizens and a government's exercise of power over them, a connection expressed, perhaps, most eloquently by Thomas Jefferson, in the American Declaration of Independence: "Governments are instituted among Men, deriving their just powers from the consent of the governed." But all understand that such consent is only generalized, and that persons who have generally consented to the exercise of power may not withhold that consent when the particular exercise does not suit them. Thus, one stopped for driving too quickly through a school zone may not reply to the arresting officer that his consent to the exercise of governmental power is withheld. Well, one may reply that way, but one ought not expect it to do any good.

Members of private organizations, on the other hand, may opt out at any time, leaving the organization with no authority over their lives. However, it appears that the only way that one is ever sure that an entity is able to exercise power over non-consenting persons is if some other government will react to such exercise by recognizing and acquiescing in it, or, instead, by enjoining the

13 See, e.g., United States v. Ant, 882 F.2d 1389 (8th Cir. 1989).
14 Id.
exercise as beyond the original entity’s power. Such analysis, then, ends up defining a government according to the reaction of another government to the exercise of the first government’s power, if the first is a “government” at all. In the end there is only this unhelpful circular definition: an entity is sovereign if, and to the extent that, another sovereign entity recognizes it as being sovereign.

Both of these practical and theoretical questions then collapse together into this reality: the United States, undeniably a sovereign entity in everyone’s estimation, recognizes the sovereignty of the tribes within its borders, and has since the beginning of its own sovereign existence. Thus tribes may, and do, exercise the powers of governments, often against non-consenting individuals. This recognition by the federal courts is not absolute, and certain exercises of power – especially with respect to non-Indians – are not recognized by the United States as legitimate, so the governmental status of the tribes under the domestic law of the United States is not as extensive as is, say, its recognition of the sovereign status of New Zealand. Nevertheless, the first basic principle remains uniquely true: tribes are governments, and they act like it every day, with the approval of the dominant society.

2. Tribal sovereignty is inherent in the tribes and does not derive from the United States.

Historically, this proposition is unassailable: the tribes are more ancient than the United States itself, much more ancient. As mentioned above, the Supreme Court in *McClanahan v. Arizona State Tax Commission* admonished,

> It must always be remembered that the various Indian Tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government.\(^\text{18}\)

How could, in fact, the older governments derive their sovereignty from the younger one?

---

17 See infra at notes 47-50.
The inherency of tribal sovereignty was definitively established by the Supreme Court in *United States v. Wheeler.* In that case, Wheeler had been prosecuted, convicted and incarcerated by the Navajo Tribal Court on charges of contributing to the delinquency of a minor. He then was re-prosecuted by the federal government, this time for statutory rape, based on the very same acts of consensual intercourse with a minor. Under the Double Jeopardy clause of the Fifth Amendment to the United States Constitution, such a dual prosecution would be prohibited if the tribal prosecution were tantamount to a federal prosecution. But under the judicially established "dual sovereign doctrine," two prosecutions by different sovereign powers does not offend the Constitution. The Court held that the Navajo power to prosecute Mr. Wheeler did not derive from the United States, so the second prosecution was valid. The Navajo Tribe was declared to be a sovereign independent of the United States and Mr. Wheeler went to jail for the second time, in a decision that all, save him, consider a great victory for the concept of tribal sovereignty.

The linkage between inherent sovereignty and double jeopardy is, perhaps, unfortunate, for the Dual Sovereign Doctrine is one about which opinions vary widely, and an important concept like the inherency of tribal sovereignty should not rest on such a slender reed. For example, consider the question of tribal criminal jurisdiction over Indians who are not members of the prosecuting tribe. Interpreting the federal common law, the Supreme Court held in *Duro v. Reina* that such jurisdiction did not lie in the tribe. Congress disagreed, and shortly thereafter declared that

---

20 U.S. Const., amend. V, cl.2. This clause is the Double Jeopardy Clause of the Fifth Amendment to the Constitution, one of the first ten amendments, which are known to Americans as the Bill of Rights. The Fifth Amendment states: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
21 Double Jeopardy and the *Wheeler* case are discussed in more detail in Robert Laurence, “Dominant-Society Law and Tribal Court Adjudication”, 25 N.M.L.R. 1 (1995). In particular, it is noted there that the analysis changes if the first prosecution is in federal court and the second prosecution in tribal court, due to the application of Principle 3, below.
22 *Wheeler,* 435 U.S. at 323.
tribes did have such jurisdiction. Now the question arises whether, when a tribe is prosecuting a non-member Indian, is it exercising power delegated to it by Congress, or its own ancient and inherent jurisdiction? One would think that, notwithstanding the disagreement between two branches of the two-century-old American government, such jurisdiction is consistent with what American Indian tribes have been doing for ten thousand years, more or less, and certainly since long before contact with any European. However, when the issue arises in the context of Double Jeopardy, a court will be confronted with the specter of an Indian spending time in two different jails for one criminal act, with the only judicial solution being to declare the Dual Sovereign Doctrine not to apply, due to the congressional act of ratifying tribal criminal jurisdiction.

It must be noted that the Dual Sovereign exception to Double Jeopardy analysis, and its application in the narrow case where the federal government is prosecuting under the congressionally enacted “Duro fix,” does not cut back on the fundamental truth of the basic principle established by Wheeler. It may be that in the narrow case where tribes are prosecuting non-member Indians they are acting under congressional authority, and not their ancient sovereignty, though that result would be unwise. Even so, in most other governmental acts, the tribes are acting for themselves and no other government. Tribal sovereignty is inherent.

3. The United States Constitution does not apply to the tribes.

This principle is not to say that the protections of the Constitution do not apply to Indians; by and large they do. However, the Constitution, generally speaking, accomplishes these ends: (1) it

26 See, e.g., United States v. Lara, 294 F.3d 1004 (8th Cir. 2002); United States v. Enas, 255 F.3d 662 (9th Cir. 2001); United States v. Weaselhead, 156 F.3d 818, (8th Cir. 1998), vacated by an equally divided court, 165 F.3d 1209 (8th Cir. 1999) (en banc).
27 A good deal of history, law and policy are subsumed under the words “by and large.” A careful discussion of the situations in which constitutional protections do not apply to Indians, and why, is beyond the scope of the present essay. Here I am focused on the law as it relates to tribes, not individual Indians, but it is worth noting that the two are related, and individual Indians may find themselves at either an advantage or a disadvantage vis a vis the federal government due to their membership in an Indian tribe. Compare United States v. Dion, 476 U.S. 734 (1986)(applying a tribe’s treaty rights to an individual Indian as a possible defense to a federal crime) with United States v. Antelope, 430 U.S. 641 (1977)(upholding a murder prosecution of an Indian where a non-Indian would have been prosecuted for a lesser offense, because the defendant was a member of an Indian tribe).
creates, and grants powers to, the federal government,\textsuperscript{28} (2) it limits the power of the states;\textsuperscript{29} (3) it protects the states from federal overreaching;\textsuperscript{30} and (4) it protects individuals from the improper exercise of both state and federal power.\textsuperscript{31} It is not the case that the Constitution is silent regarding Indian tribes,\textsuperscript{32} however the Supreme Court held in the case of \textit{Talton v. Mayes},\textsuperscript{33} that the specific provisions of the Constitution do not bind the activities of Indian tribal governments as they do the federal and state governments.\textsuperscript{34}

It can be seen that this principle flows most directly from the last. Why \textit{would}, in fact, the organic document creating the United States in 1789 apply to governments a thousand years older than the one being created? The tribes did not join in the drafting of the Constitution, nor did they ratify it; they are referred to in it as entities with whom the United States has external relations. Their members are excluded from the enumeration that apportions Congress. The Constitution only provides its protections to people who are facing action by the federal or the state governments. \textit{Talton v. Mayes} makes eminent sense and has stood the test of time; it is still good law.

\begin{itemize}
\item \textsuperscript{28} See, e.g., U.S. Const., art. I, §8, cl.1 (“Congress shall have Power To lay and collect Taxes.
\textellipsis”).
\item \textsuperscript{29} See, e.g., U.S. Const., art. I, §10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation.
\textellipsis”).
\item \textsuperscript{30} See, e.g., U.S. Const., amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
\item \textsuperscript{31} See, e.g., U.S. Const., amend. I, cl. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); amend. XIV, §1, cl. 3 (“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).
\item \textsuperscript{32} Indians are expressly mentioned three times in the Constitution: Article I, §8, cl.3 contains the Indian Commerce Clause, empowering Congress “to regulate commerce . . . with the Indian Tribes.” Article I, §3, cl.1 of the original Constitution, as amended by Amendment XIV, §2, cl.1, apportions the House of Representatives by population, “excluding Indians not taxed.” These latter two provisions have no modern importance, for Indians are now taxed like everyone else, at least under federal law.
\item \textsuperscript{33} 163 U.S. 376 (1896).
\item \textsuperscript{34} Id. The specific provision of the Constitution at issue in \textit{Talton v. Mayes} dealt with the Fifth Amendment’s requirement of indictment by Grand Jury, quoted above in footnote 20. Bob Talton had been convicted of murder by the Cherokee tribe without the full protection of the Fifth Amendment. He sought habeas corpus in the federal courts, which refused to order him released. The Supreme Court affirmed and Bob Talton was hanged by the Cherokees.
\end{itemize}
For this reason, on a very dramatic level from an American perspective, the Establishment of Religion Clause of the Constitution does not apply to Indian tribes. They can, and some do, have official religions. Many tribes, most obviously the several Pueblos of New Mexico, are in fact ancient theocracies, which are not, under *Talton v. Mayes*, threatened by the First Amendment of the United States Constitution. On a more mundane level, criminal defendants have no constitutional right to a free lawyer before tribal court, nor are they entitled to the usual warnings upon their arrest by tribal police.

We might return to the question of double jeopardy to demonstrate what can be the complicated effects of *Talton v. Mayes*. Suppose a tribal member commits an act that is criminal under both tribal and federal law. Suppose the tribe prosecutes first. In the subsequent federal prosecution, the Double Jeopardy Clause of the Fifth Amendment of the Constitution clearly applies, but, as we have seen it is constitutional doctrine that the second prosecution by a sovereign independent of the first prosecutor does not offend the clause. But, as we have also seen, if the defendant is not a member of the tribe, then *Duro v. Reina* causes difficulties that may prevent the second prosecution.

Now suppose instead that the federal government prosecutes first. In the subsequent tribal prosecution, under *Talton v. Mayes*, the constitutional protection against double jeopardy does not apply at all. The local law of the tribe may, or may not, have double jeopardy protection. And, as we shall see, there is federal statutory, as opposed to constitutional, protection available for the defendant. But the Constitution does not work to bind the

---

35 The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." For an application of this principle to Indian law, see, e.g., *Toledo v. Pueblo of Jemez*, 119 F. Supp. 429 (D.N.M. 1954), in which members of the tribe challenged the existence of a tribal cemetery that they alleged was only for the use of Catholics. The plaintiffs were Protestants. The court dismissed the action.

36 See, e.g., *United States v. Ant*, 882 F.2d 1389 (8th Cir. 1989). I speak here in the text of the constitutional right to warnings upon arrest, which *Talton v. Mayes* says do not apply to tribal officers. As we shall see shortly, the Indian Civil Rights Act, 25 U.S.C. §1302, imposes statutory requirements on the activities of tribal police.

37 For reasons having to do with the sixth principle below, state law ordinarily will have no application to on-reservations criminal acts committed by Indians.

activity of Indian tribes, and it will be the tribal judge who will
determine the reach of any possible "dual sovereign" exception
double jeopardy protection.

After the first three principles, the American law seems entirely in
favor of the tribes and there is little to distinguish what I've said
above from the law as it would apply to any sovereign nation
independent of the United States. The nation of New Zealand is a
sovereign government; that sovereignty does not flow from the
United States; the U.S. Constitution has no application to New
Zealand, and the rights granted under it may not be raised by one,
even an American, who happens to be standing before a New
Zealand judge. As we shall now see, however, the sovereignty of
the tribes is not equivalent to the sovereignty of a nation like New
Zealand, at least not under U.S. federal law. 39

4. The United States Congress, and possibly the federal
courts, have plenary power over the Indian tribes.

Begin with this most basic proposition: no Act of Congress has
ever been held by the United States Supreme Court to be
invalid as beyond the constitutional power of Congress to act.
For example, Congress was permitted by the Court to enact a
criminal code for Indian country in United States v. Kagama, 40
and, in fact, had been practically invited to do so by the Court
in Ex Parte Crow Dog. 41 Likewise, the Court has accepted
without dispute the validity of the Indian Civil Rights Act, 42

39 This is probably as good a place as any to remind the reader that I am talking here only
about the domestic law of the United States as it applies to tribes. There is an emerging
body of international law dealing with indigenous populations, but a discussion of that law
is beyond the scope of this article.


41 109 U.S. 556 (1883). In Crow Dog, the Court ordered the defendant released from federal
custody because the murder of one Indian by another in Indian country was not a federal
crime. The Court said "To justify such a departure [from prior precedent], in such a case,
requires a clear expression of the intention of Congress, and that we have not been able to
find." Id. at 572. Congress responded by enacting the Major Crimes Act, whose
constitutionality was upheld in Kagama, previously cited.

42 25 U.S.C. §§1301-03. Section 1301 of the Indian Civil Rights Act (ICRA) contains
relevant definitions. Section 1302 is the substantive provision of the statute and imposes
on the tribes some, but not all, of the protections of individuals contained in the Bill of
Rights and the Fourteenth Amendment of the Constitution. Section 1303 contains a habeas
corpus provision allowing one to attack one's incarceration by a tribal court.
which imposes a Bill-of-Rights regime on tribal governments.  
For a period of time in the last century, it was thought that Congress had something like this plenary power over the affairs of the entire nation. However, in the last ten years or so, the Supreme Court has become increasingly aggressive in striking down statutes in which, it thinks, Congress has reached beyond its constitutional limits and thrust itself into affairs reserved for the states. Still, the plenary power of the Congress over Indian affairs remains. The Court has stricken key provisions of the federal Violence Against Women Act and the Gun-Free School Zones Act, but few Indian-law scholars doubt the validity of a hypothetical Violence Against Indian Women Act, or Gun-Free Indian School Zones Act.

For the first time, then, in this primer on American Indian law, we begin to see the complexity of the field. This congressional plenary power, as it is called, this power without subject-matter limitation, places a sizeable qualification next to the accepted idea of Indian nationhood, and the sovereignty of the tribes becomes quasi-sovereignty at best. Indeed, for some, the recognition under federal law of the plenary power of Congress spoils the federal recognition of sovereignty that is found in the first three basic principles.

See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In the Martinez case, a mother and daughter brought suit in federal court challenging the Pueblo’s membership rule that excluded the daughter from membership because her father was a member of another tribe. The federal district court found that it had jurisdiction, but dismissed the case, holding that the ICRA did not prohibit under its Equal Protection clause, long-standing customs and traditions, even if they resulted in gender-based discrimination. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975). The Court of Appeals for the Tenth Circuit agreed with the court below that jurisdiction was proper, but reversed it on the grounds that the ordinance under which the Pueblo was discriminating did not reflect a long-standing custom or tradition of gender-based membership rules. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). The Supreme Court held that jurisdiction was improper in the trial court, reversed and ordered the case dismissed, without reaching the merits. The Court held that the ICRA did not create a civil cause of action that could be sued on in federal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). I have called the Martinez case the most interesting set of opinions ever written in English: see Robert Laurence, “A Quincentennial Essay on Martinez v. Santa Clara Pueblo”, 28 Idaho L. Rev. 307 (1992). For a case discussing the relationship between gender and immigration into the United States, see Nguyen v. Immigration and Naturalization Service, 553 U.S. 53 (2001).

See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In the Martinez case, a mother and daughter brought suit in federal court challenging the Pueblo’s membership rule that excluded the daughter from membership because her father was a member of another tribe. The federal district court found that it had jurisdiction, but dismissed the case, holding that the ICRA did not prohibit under its Equal Protection clause, long-standing customs and traditions, even if they resulted in gender-based discrimination. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975). The Court of Appeals for the Tenth Circuit agreed with the court below that jurisdiction was proper, but reversed it on the grounds that the ordinance under which the Pueblo was discriminating did not reflect a long-standing custom or tradition of gender-based membership rules. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). The Supreme Court held that jurisdiction was improper in the trial court, reversed and ordered the case dismissed, without reaching the merits. The Court held that the ICRA did not create a civil cause of action that could be sued on in federal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). I have called the Martinez case the most interesting set of opinions ever written in English: see Robert Laurence, “A Quincentennial Essay on Martinez v. Santa Clara Pueblo”, 28 Idaho L. Rev. 307 (1992). For a case discussing the relationship between gender and immigration into the United States, see Nguyen v. Immigration and Naturalization Service, 553 U.S. 53 (2001).

From a logical perspective, the plenary power is inconsistent, if not frankly contradictory, with the notions of tribal sovereignty. But from a public policy perspective, the two are perhaps at odds, but no more so than many other policies that are at odds in a diverse, vibrant society. Much like a well-tuned piano, which has to be strung with strong, conflicting forces in order to make music, the conflict between the plenary power, on the one hand, and the concept of tribal sovereignty on the other, can be seen as the force that holds American Indian law together, and does not pull it apart.

However, in the past twenty-five years, the Supreme Court has added another force which threatens to upset the dynamics of the balance just described, as it has created, under the federal common law, a plenary power running to itself, which it, and the courts below it, may use to divest tribes of sovereign power. This process began in 1978 with the case of Oliphant v. Suquamish Indian Tribe, where the court held, in a poorly reasoned case, that an Indian tribe has no power to prosecute a non-Indian for on-reservation activity. Duro v. Reina, discussed above, extended the Oliphant holding to prevent the prosecution of Indians who are not members of the prosecuting tribe. Montana v. United States took Oliphant to the civil side, restricting under the self-same common law, a tribe’s ability to regulate the on-reservation activities of non-Indians. A-1 Contractors v. Strate divested the tribes of civil adjudicatory authority over tort actions between two non-Indians, and recently in Nevada v. Hicks tribes were denied the power to adjudicate a civil controversy between a tribal member and off-reservation game wardens.

It is difficult to overstate the destructive nature of this trend of judicial diminishment of tribal sovereignty via a common law judicial plenary power. Layer by layer, tribal power has been stripped away by the Supreme Court on its own, all in the face of Congress’s ability to accomplish the same result democratically if it so wishes, which it apparently doesn’t. American Indians represent less than one percent of American society, so their representation in the national political process is always

problematic. Yet through effective lobbying and through the perception by many that Indians hold a high moral ground due to the historical circumstances of their loss of the continent, they have, of late, received a largely friendly reception before Congress. The common law judicial diminishment of tribal power via the Oliphant - Hicks line of cases is not subject to these democratic processes, nor does the present Supreme Court seem to find particularly relevant this high moral position. Neither the concept of tribal sovereignty nor the structure of American government is served well by the judicial activism represented by this aggressive common law.

5. Indian treaties are enforceable and part of what the Constitution calls “the Supreme Law of the Land.”

Treaties between the Indians and the Europeans were a feature of the North American legal landscape from before the United States existed, and the new nation carried on the tradition early on. The first treaty, with the Delaware Tribe, was ratified on September 17, 1778. By the time treaty-making ended in 1871, more than 350 treaties had been ratified. Thereafter, formal treaties became unknown, but more than seventy agreements between tribes and the United States were entered into and were approved of by Congress, usually by way of legislation. All of these treaties and agreements are with tribes outside of Alaska, and the nation never treated directly with the natives of Hawai‘i, so treaty law has direct application only in the contiguous 48 states.

Treaties generally — that is without specific mention of Indian treaties — are made the “supreme law of the land” by the Constitution, as well they should be as they are ratified by the

52 See generally Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994).
53 7 Stat. 13 (1778).
54 Treaty-making was formally ended by the Appropriations Act of March 3, 1871, ch. 120, 16 Stat. 544, 566, codified at 25 U.S.C. §71.
55 See Prucha, supra note 52, at Appendix B. The constitutional ratification process implicates two branches of our government. The Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .” U.S. Const., art. II, §2, cl.2.
56 See Prucha, supra note 52 at Appendix C.
57 U.S. Const., art. VI, c1.2 states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land…”
Senate and proclaimed by the President. Many, many cases could be cited for the proposition that Indian treaties are an enforceable part of the federal law of the United States; *Worcester v. Georgia* comes immediately to mind as an early case applying a treaty between the United States and the Cherokee tribe.\(^{58}\) Not only are Indian treaties enforceable, they are also subject to a generous set of canons of judicial construction that may generally be summarized by saying that Indian treaties are to be construed to the advantage of the weaker parties, who were negotiating in a language other than their own, generally using interpreters provided by the other side. Terms and conditions are to be read as the Indians are presumed to have understood them, and ambiguities are to be resolved in favor of the tribes.\(^{59}\)

The law with respect to treaties is not, however, entirely favorable to the Indians. While the canons of construction just mentioned remain formally in place, and while the Supreme Court continually gives lip service to them, one can point to cases where it is difficult to discern any particular resolution of ambiguities in favor of the Indians.\(^{60}\) Even more markedly, the Supreme Court has held that treaties may be abrogated by one side acting alone, the reality of North American life being that it is always the United States that is the abrogating party. It was in the case of *Lone Wolf v. Hitchcock* that the Court refused to enjoin the implementation of an abrogating statute,\(^{61}\) and since the time of that case, there have been many instances of the abrogation of Indian treaties, often via the diminishment of treaty-made reservations.\(^{62}\)

With the Lone Wolf case, the Supreme Court decided in 1903 that Indian treaties were abrogable by the United States, but it was not until 1980 that the Court held that such abrogations may be compensable before the United States Claims Court. In *United States v. Sioux Nation of Indians*,\(^{63}\) the Court established a “good faith test,” under which a treaty abrogation leads to a claim for

---

61 187 U.S. 552 (1903).
money damages if the federal government made no good faith attempt to compensate the Indians for the abrogation at the time the treaty was breached. If a good faith attempt to compensate the tribe existed at the time of the abrogation, then the Court was willing to entertain the presumption that the government was acting as a fiduciary, under the seventh principle below, and was managing the tribe’s property as it thought best. But, as Justice Benjamin Cardozo had earlier written with his usual brief eloquence, “Spoliation is not management,”64 and it is those abrogations that are compensable. In *Sioux Nation* itself, the court, over Chief Justice Rehnquist’s strong dissent, held that the government had abrogated the treaty without good faith, and affirmed the entry of the largest money judgment ever entered against the United States.65

6. State law has only limited applicability on-reservation.

Given the realities of American federalism, where so much of the corpus of the law flows from the states, and not the federal government, it is not surprising that the competition between the states and the tribes for the control of reservation activity is intense and long-standing. Indeed, both of the famous *Cherokee* cases, *Cherokee Nation v. Georgia*66 and *Worcester v. Georgia*,67 previously discussed, involved exactly that competition between the tribe and the State of Georgia. The tribe was the nominal loser of the earlier case, as a majority of the Court held that the Cherokee Nation was not a “foreign nation” for constitutional purposes. However, as we have seen, the tribe won the moral and practical victory as four of the six Justices voting held with the principle of tribal sovereignty, a principle that is with us still. And in the second case, in which there was no tribe or individual Indian party, the tribe nevertheless won, as the Court declared the attempts by Georgia to regulate Rev. Worcester’s activities on the reservation to be contrary to federal law and void. Here, though, the practical victory may have gone to the State, first when

65 In a related case, the Court of Appeals for the Eighth Circuit held that an award of money damages was the sole remedy for abrogation of a treaty and dismissed a quiet title suit against the current land owners of property taken via the abrogation of the treaty at issue in United States v. Sioux Nation. See Oglala Sioux Tribe of the Pine Ridge Reservation v. United States, 650 F2d. 140 (8th Cir. 1981).
President Andrew Jackson said "John Marshall has made his law; now let him enforce it," and later when most of the Cherokees were removed from Georgia and re-settled in Oklahoma, a 19th Century ethnic cleansing that the Cherokees call "The Trail of Tears."

Happily, the second half of the 20th Century brought less dramatic battles between the states and the tribes, often fought out over the mundane issues of taxation. In the process of deciding the cases, the modern Court has established a two-tiered analytical scheme. When a state attempts to apply its laws on-reservation, a court is first to look to see if the state law runs afoul of conflicting federal law, including, of course, Indian treaties. If it does, the state law falls, under the Constitution’s Supremacy Clause. If there is no direct or indirect conflict between the state law and federal law, there remains a federal common law inquiry into whether the state action "infringes on the reservation Indians’ right to make their own laws and be ruled by them." Supremacy Clause analysis is much preferred by the Court to Infringement analysis, but both remain as viable defenses to the application of state law on-reservation.

One area in which state law is especially restricted on-reservation under Supremacy analysis is criminal law. Far and away most criminal law in the United States is state law, but the Major

68 Some doubt that President Jackson ever made the statement. See Anton-Hermann Chroust, "Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?", 4 Am. J. Legal Hist. 76 (1960). Even if the words were not his, however, the sentiment was, and Worcester v. Georgia threatened a grave constitutional crisis, as the states and central government battled for power in the early days of the Republic. See generally, Burke, The Cherokee Cases, supra note 7. John Quincy Adams’ appraisal of the situation was that “the nation is about to founder.” See Albert J. Beveridge, The Life of John Marshall 544 (1919). The crisis was averted, however, as the main political actors stepped back from the brink, and the Governor of Georgia was persuaded to pardon Rev. Worcester and release him, thereby mooting out the case. Id. The brink remained there to be approached again, however, until in 1861, South Carolina fired on Fort Sumter, and both sides fell into the chasm that we call our Civil War.

69 Much has been written about the removal of the Cherokees, Choctaws, Chickasaws, Seminoles and Creeks from the Southeastern United States to Oklahoma. Interested readers might start with Trail of Tears National Historic Trail, Comprehensive Management and Use Plan, US Dept of Interior. National Park Service, excerpts of which can be found at http://www.powersource.com/cocine/history/trail.htm


Crimes Act and the General Crimes Act, as well as other, less sweeping federal statutes, make on-reservation crimes, committed by either Indians or non-Indians, federal crimes, thereby preempting the application of state law. This pre-emption, however, applies only if the crime was committed on-reservation, which implicates the question of where, exactly the reservation boundary lies. That question, in turn, often implicates an Indian treaty, for it is there that most reservations are defined. And it further implicates the question of Indian treaty abrogation, for many of those reservations suffered what is called “diminishment” during the so-called Allotment Period of the late 19th and early 20th Centuries. During the Allotment Period, ninety million acres of the American West and Mid-West changed from Indian to white hands, usually via the unilateral abrogation of a pre-existing treaty and the opening of the reservation up to white settlement. In some, but not all, of those cases, the reservation boundary was completely destroyed, leaving as a reservation only a disjointed series of non-contiguous blocks of land, a so-called “checkerboard” reservation. In these reservations, it is only crimes committed on the Indian “squares” that are subject to federal statutes; on the non-Indian “squares,” state law applies. Ergo, the efficient administration of criminal justice becomes difficult, if not impossible, requiring as it does a virtual land survey before one can know which jurisdiction’s law applies.

75 Many, many treaties, of course, accomplished as one primary objective the conveyance of the ancient homeland of the Indians to the United States government. (Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), held that the tribes were able to convey their land only to the government in Washington, thereby (1) ensuring the orderly progress of European civilization to the Pacific, and (2) removing from the tribes the ability to set potential buyers bidding against each other in order to maximize the price.) Often – usually – the treaty also reserved to the tribe a certain portion of the homeland for all time, hence the term “reservation.”
79 The solution to this problem, as with so many Indian law practical problems, is state-tribal cooperation, including the cross-deputization of police officers, so that a single officer is a tribal officer, a state trooper and a federal marshal. Then, when criminal activity is spotted an arrest can be made, with the jurisdictional issues sorted out later.
Nevada v. Hicks," previously mentioned, represents a recent inroad into a larger role for state law on-reservation. As the previous discussion showed, the issue in that case was whether the tribal court had jurisdiction over a civil action brought by a tribal member against state game wardens, the Court holding that it did not. However, Justice Scalia went far afield and commented on the legitimacy of the on-reservation service of state-issued search warrants. In Hicks itself, one could hardly argue that there had been an infringement of tribal self-rule, for the tribal court had signed off on the state-issued search warrants, an admirable example of state-tribal cooperation. Thus Justice Scalia’s opinion in dicta that such service was appropriate is not squarely wrong. But without the tribal court approval, the on-reservation service of off-reservation warrants poses a serious question both under Supremacy and Infringement analysis.

7. The United States acts as a fiduciary toward the Indian tribes.

“Humanity,” Chief Justice John Marshall wrote in Johnson v. M’Intosh,12 “... acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed.” Here one finds the origin of the trusteeship between the United States and the conquered tribes. The Chief Justice was more explicit in Cherokee Nation v. Georgia,4 where he described the Indians’ condition as being in “a state of pupillage,” noting that “[t]heir relation to the United States resembles that of a ward to his guardian.”

Nearly everyone is of two distinct minds regarding this guardian-and-wardship. Chief Justice Marshall’s “state of pupilage” was, and is, demeaning, even if consistent with the kind of divine arrogance and effortless certainty in the superiority of European civilization that was common in America then, and today. On the other hand, there is something that rings true in the notion that the

81 See supra, notes 47 - 51.
82 21 U.S. (8 Wheat.) 543 (1823).
83 Id. at 589.
84 30 U.S. (5 Pet.) 1 (1831).
85 Id. at 17.
86 Id.
United States owes a higher responsibility toward the Indians than mere good faith, arms'-length dealing. Having so commonly breached the solemn obligations of a treaty, usually in order to grab yet more tribal land to relieve the westward pressure applied by immigrants from Europe,\(^87\) and having so commonly used ruthless negotiation tactics in order to gain the Indians' consent to the treaty in the first place,\(^88\) a higher standard for the latter-day dealing with the tribes seems appropriate. Judge, later Justice, Benjamin Cardozo defined that standard as "Not honesty alone, but the punctilio of an honor the most sensitive . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."\(^89\) And nowhere does this high standard seem more deserved than when the United States deals today with the tribes.

---

\(^{87}\) See notes 75 - 76, supra.

\(^{88}\) See, e.g., South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998). In that case Justice Sandra Day O'Connor for the unanimous Court quoted a communication from John J. Cole, an emissary from the federal government to the Yankton representatives, during a lengthy negotiation regarding the sale to the United States of lands guaranteed to the Yankton Sioux tribe by the Treaty of 1858, 11 Stat. 743:

I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.


The issue before the Court in Yankton Sioux was whether the statute that followed those negotiations was intended by Congress to result in the diminishment of the Yankton reservation down to merely the lands that remained with the tribe itself after the sale, or whether, on the other hand, the sale of the lands to the United States, ratified by Congress via statute, left the reservation boundary intact. The purpose of Justice O'Connor's quotation seems to be that, with the hard negotiating position taken by the United States, as exemplified by this communication, it was appropriate for the modern Court to interpret the resulting sale and legislation as having been on the government's most extreme terms. "Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders." Yankton Sioux, 522 U.S. at 347.

Perhaps so, but it is more than a little difficult today to read Mr. Cole's words to the effect that if the Indians don't sign then three fourths of them will starve the following winter and that will be all right with the government. Such a statement can give one a different perspective from which to view the Statue of Liberty’s lamp of welcome to the homeless downtrodden of Europe.

The parameters of this guardianship have never been fully defined. In some senses, at least, it is like a private trust relationship, and the Supreme Court has, on occasion, used private trust cases as precedent in Indian trust cases.\textsuperscript{90} On the other hand, for the federal government to be a fiduciary for the tribes raises unique and difficult questions of sovereign immunity, when the ward seeks to hold the guardian liable for breach of trust.\textsuperscript{91} Likewise, because \textit{Johnson v. M'Intosh} held that only the federal government could deal with the Indians over land, the government ends up in a conflict of interest that we would not tolerate if undertaken by a private trustee, buying land out of the trust corpus for re-sale to the trustee's own "family."\textsuperscript{92}

Perhaps the two most practical ramifications of the trusteeship are, first, the generous canons of treaty interpretation mentioned above.\textsuperscript{93} Some scholars read those canons to be justified by the existence of the trust responsibility, and this seems to be a reasonable reading.\textsuperscript{94} And second, it is in some sense the trust responsibility that gave rise to the creation of the ubiquitous Bureau of Indian Affairs in the federal Department of the Interior, whose influence reaches directly into the lives of most American Indians.\textsuperscript{95}

**CONCLUSION**

On these few pages, one can hardly do justice to an area of the law as complex as American Indian law. A foreign audience, especially, might feel itself lost in a forest of unfamiliar legal principles, sketched out here in a map that gives less than is necessary to find one's way. Even more especially when the audience resides in a country with its own body of law regarding indigenous peoples, one worries that such a short description will lead others to false

\textsuperscript{90} See, e.g. Cheyenne-Arapaho Tribes v. United States, 512 F.2d. 1390 (Ct.Cl.1975)(applying the Restatement 2nd of Trusts.).
\textsuperscript{92} Conflict of interest in the area of American Indian law can give rise to very convoluted analysis. See generally Robert N. Clinton, et al., \textit{American Indian Law} (3d ed. 1991) at 255-75.
\textsuperscript{93} See text at note 59, supra.
\textsuperscript{95} See Robert N. Clinton, et al., \textit{American Indian Law} (3d ed. 1991) at 200-09.
metaphors or unfair comparisons. I have tried to avoid these pitfalls in this primer and hope that I have instead managed to engage the reader's interest in an esoteric topic, leading perhaps to future comparative exchanges regarding the two quite different, but still similar situations on an essential level.
Power to the Provinces?  
England’s Regional Reforms

W JOHN HOPKINS*

INTRODUCTION

The reform of local government has recently become a focus of attention for the government of New Zealand. This has sparked a degree of interest in parallel reforms processes happening elsewhere in the world, particularly in the United Kingdom. The similarity of local government legislation in the two countries makes such comparisons natural. However, one area of reform has yet to receive much attention in New Zealand. This is the proposal to create a regional tier of governance in England with powers to develop and implement distinctive regional policy over a number of central government functions. This paper explores these potentially revolutionary proposals and asks whether such a radical approach to sub-national government has any place in New Zealand’s sub-national governance structure.

The success of the Labour Party in the elections of 1997 led to a significant change in the way that the United Kingdom is governed. The avalanche of constitutional change that cascaded from Westminster in the late 1990s was phenomenal, starting with devolution of power to the ‘Celtic fringe’ of Scotland, Wales and Northern Ireland¹ and continuing with the Human Rights Act², a Freedom of Information Act³ and the reform of the Supreme Courts.⁴ These reforms have been well documented and have been discussed elsewhere but the reforming zeal of the Labour administration, ironically led by a constitutional conservative in the person of Tony Blair, extended far beyond these headline grabbing changes.⁵

* Dr W John Hopkins, Senior Lecturer in Law, University of Waikato, New Zealand.
¹ The Northern Irish example of devolution is somewhat of a separate case. The institutions have been suspended since October 2002 as a result of Unionist withdrawal following the Republican spy scandal.
⁵ See for example, Oliver, D Constitutional Reform in the United Kingdom (Oxford: Oxford University Press, 2003).
As with the 1999 election of the Labour government in New Zealand, the United Kingdom’s Labour administration promised to change the operation of local government and to encourage local democracy. To some extent these promises reflected similar problems in both systems caused by their common constitutional framework. The constitutional situation of local government in both New Zealand and the United Kingdom is precarious. Both are creatures of statute limited by the constraints of ultra vires and largely at the whim of central government policy. The product of central government policy in New Zealand and the United Kingdom has, however, created two very different systems of local governance. In the United Kingdom local government, although still responsible for high levels of government expenditure, is largely an agent of the centre. In New Zealand, by contrast, the local government tier still operates autonomously (the major exception to this being in the area of roading), although its role is often limited and peripheral. Despite the structural differences the reform programmes of both governments have a number of similarities, most notably the creation of limited powers of ‘general competence’ for local government in both states. Outside the local (or territorial) authority examples, all similarities tend to disappear, as the approach taken by the United Kingdom government to regional governance has no equivalent in New Zealand. It is this divergence of approaches that forms the basis of this paper.

The United Kingdom has, to varying degrees, embraced the concept of regional policy autonomy in a way that is not yet evident in New Zealand. The devolution of power to Scotland, Wales and Northern Ireland is part of this process, but reflects particular ‘micro-national’ pressures that do not exist, at least not in such territorially definable units, in New Zealand. However, the regional reform process has now moved to England where the government is proposing up to eight directly elected Regional Governments to co-ordinate and administer policy over a wide range of policy areas.

7 For a detailed examination of the place of local government in New Zealand governance see, G. Bush, Local Government and Politics in New Zealand (Auckland: Auckland University Press, 1995).
8 Some claims for Māori autonomy would fall into the ‘micro-nationalist’ category, but unlike the mainstream micro-nationalist movements in Scotland and Wales, these claims are not based upon territory but on ethnicity.
The term England is used advisedly as sub-national government in the United Kingdom has never been a single subject. Separate structures of local government and regional administration have been the de facto norm for Northern Ireland, Wales and Scotland throughout the history of the United Kingdom. This was one of the features of the ‘Union’ state, which accepted the need for individual systems of local administration and central state service provision (although not democratically accountable institutions to oversee it) in the non-English parts of the United Kingdom. England’s system of local government has therefore always been distinct from its Celtic partners and England was the only part of this ostensibly United Kingdom that had no regional administrative level. As with much of the United Kingdom’s constitutional history, the ‘Union state’ was from the ‘make do and mend’ school of constitutionalism. Since 1999, the traditional structure has been put under immense strain through the advent of devolution which has led to the emergence of an ‘English question’ whereby the governance of the largest constituent part of the United Kingdom has started to receive significant attention.

Devolution has made it clear to the populace of the United Kingdom, and particularly England, that the governance of England is an issue separate from discussion of such matters on a United Kingdom basis. It was ever thus, but until now, few but the small band of academics who cared about such things took much notice. The post-devolution United Kingdom has raised the profile of this issue in a way not previously seen. The moves towards regional government in England reflect the first steps in answering this English question and an acceptance that regional policy is required for England as well as the other constituent parts of the United Kingdom.

THE ENGLISH QUESTION

There can be little doubt that the impetus for English regional government is not to be found in England itself. Developments in continental Europe, where regional governments have emerged to undertake a policy making role between the central state and the local government sector, have played some role in encouraging English policy makers and academics to consider alternatives to the current local-central government model, but this European influence has only come into play in the context of a crucial domestic driver. The advent of devolution in Scotland and Wales has had an impact upon the
political elites of the English regions that was perhaps not envisaged by the Labour leadership. Although references are often made to developments across the channel, particularly in the northern periphery the real impetus is coming from beyond Hadrian's Wall.

Despite the physical dominance of England within the United Kingdom the question of how to govern England in a post-devolution United Kingdom was very much a minority interest in the discussions, both academic and political, that surrounded the development of the devolution policy in the late 1980s. The Labour Party had discussed the prospect of democratic regional government in England intermittently in the early 1990s, but the 'policy' of English regional government, was developed as a reaction to criticisms that devolution to Scotland and Wales would create an unstable United Kingdom.

The development of this 'policy', if such a term could really be used to describe the Labour Party's vague statements on English regional government up to this point, was left to Jack Straw who was appointed to oversee a consultation process on the issue. The appointment of Straw, a known sceptic of decentralisation and regionalism, was seen by many as an attempt to slowly abandon the policy. Although a few of the Labour hierarchy, notably John Prescott, were known to favour some form of regional empowerment, the key players, including Blair and Brown were either apathetic or actively hostile. Those hostile to the policy clearly felt that it had no real support outside a few Labour activists in the provinces and expected the consultation to confirm this.

The consultation document proposed a weak tier of 'regional chambers' be created with the possibility of regional assemblies to follow, if there was evidence of support for such a move. The expectation that the second part of the policy proposals would shrivel on the vine was confounded by the results of the consultation process. Straw himself was visibly surprised by the strength of regional feeling he encountered, particularly in the North East, with its strong regional identity and fear of Scottish devolution. Despite his own personal

9 The Liberal Democrats favour English regional government as part of a semi-federal United Kingdom. Although they co-operated with the Labour Party on constitutional reform issues, as a minority party their influence is limited.


11 The author witnessed Jack Straw's obvious surprise at the strength of regional feeling after a speech to Labour MPs and councillors on the subject given in Gateshead in 1995.
scepticism the ‘Choice for England’ process produced a vague blueprint for regional policy in England. This largely confirmed what the consultation document had proposed, namely the immediate creation of indirectly appointed Regional Chambers to co-ordinate local government activities in the regions with the possibility of administrative devolution to directly elected Regional Assemblies to follow (subject to referenda). The government’s insistence that additional taxation or expenditure powers would not be devolved to the regional tier unless Regional Assemblies were created, encouraged those who harboured designs of decentralisation without democracy to move towards the Assembly model. The policy laid down in the policy paper became a manifesto pledge in 1997 largely as a response to the continued pressure from northern activists and MPs.

Despite its surprising presence within the Labour Party’s manifesto, English regional government did not enjoy the wholehearted support of the Labour Cabinet that assumed office after their electoral success of 1997. Nevertheless, the hesitance shown by Tony Blair and the opposition of a number of senior party figures towards English regional democracy did not stop a series of regional administrative reforms being introduced, which laid the foundations for the current regional governance proposals. Amongst the most important were the creation of Regional Development Agencies (RDAs) and development of the Regional Chambers (as outlined in the Straw policy document). Advocates of regional devolution in England clearly regarded these reforms as a preliminary step towards English Regional Assemblies and John Prescott, the key cabinet supporter of such reforms made his position clear in announcing the establishment of the RDAs:

> The government is committed to move to directly-elected regional government in England, where there is a demand for it, alongside devolution in Scotland and Wales and the creation of the Greater London Authority.

The policy remained as part of the Labour Party’s manifesto as it went into the 2001 election and a number of factors began to conspire

---


13 Regional Chambers are voluntarily constituted bodies that comprise representatives from local councils, industry, the trade unions and other regional interest groups, according to the procedures of the individual chamber.

in its favour. Most notably, the influential government think tank, the Policy Information Unit produced a damning assessment of policy co-ordination amongst the various arms of central government in the provinces.\textsuperscript{15} Although the PIU report did not explicitly favour regional democracy (indeed it could be argued that it favoured greater centralisation) the evidence of regional policy failure was used by supporters of regional democracy to secure the assent of key players in the Labour hierarchy, most importantly the Chancellor, Gordon Brown.\textsuperscript{16}

The result of these political manoeuvrings was the publication in March 2002 of the White Paper, ‘Your Region: Your Choice’. The White Paper proposes a number of changes to regional governances in England, but the key proposal is the creation of elected Regional Assemblies subject to referenda in the regions concerned. The democratic regional tier will be given the role of co-ordinating and developing policy over a wide range of administrative areas in an attempt to ‘join up’ government at the sub-national level. The aim is to provide a level of government capable of developing coherent regional policies and encouraging co-ordination between local governments, regional bodies and central agencies.

**ENGLISH REGIONAL GOVERNANCE TODAY**

The growth of regional administrative units is a development that has occurred across Europe as Nation States have struggled to come to terms with their post-war role. The result in most EU member states has been the deconcentration and/or decentralisation of government power to regional tiers beneath the national level. The United Kingdom was no exception to this trend with increased development of field agencies becoming a feature of governance from the 1970s onwards. In Wales, Scotland and Northern Ireland, the existence of the 'Offices' provided a natural conduit for the deconcentration of such powers. In England the need for the deconcentration of policy delivery was also recognised but the process was extremely ad hoc with individual departments creating their own field offices in the absence of an existing regional structure.\textsuperscript{17}

\textsuperscript{15} Policy Information Unit *Reaching Out. The role of central government and the regional and local levels* (London: The Stationary Office, 2000).


These did not have coterminous or contiguous boundaries and their responsibilities varied considerably. The result was an extremely confused structure and even experts were hard pushed to understand the extent of sub-national decision-making by regional officials and QUANGOS\textsuperscript{18}. The actions of the Conservative government in the early-1990s rationalised regional policy delivery in England through the creation of a series of regional offices, one for each of the eight economic planning regions (although some boundary changes took place at this point). Under the moniker of the 'Government Office'\textsuperscript{19} field offices from several departments were brought together under the one roof.\textsuperscript{20} The Director of each office is responsible both to the Office of the Deputy Prime Minister and individual departments for the delivery of regional services.

The coalescing of regional powers around the Whitehall administrative boundaries has had the surprising effect of turning these largely unknown administrative borders into immutable regional boundaries in the eyes of the government. These will form the borders of the new democratic regions despite the fact that they are not based upon any historical or rational division of England and largely date from the economic planning boards of the 1960s (which in themselves were based upon Treasury attempts to create a single regional structure on the basis of the wartime planning regions). The White Paper has made it clear that no challenges to these boundaries will be entertained in the regional governance process. The government clearly views the price that it will pay in the unpopularity of these borders in certain regions is worth the avoidance of squabbles over where exactly Yorkshire ends and the Midlands begin. The problem for the pro-regional lobby is that people do care about these borders, often more so than the issue of regional democracy itself. In recent public debates on the subject many members of the public showed almost total ignorance over what the reforms meant but were adamant that the boundaries of the regions were wrong. The government’s attempt to avoid an argument of

\begin{footnotesize}
\item[18] Quasi-autonomous non-governmental organisations. In New Zealand the concept of the Crown Entity has been used to give a degree of structure to the Quango state, see Palmer, 
\item[19] Examples include G.O.N.E. (Government Office North East), based in Newcastle and GOYH (Government Office for Yorkshire and the Humber) based in Leeds.
\item[20] Originally, Government Offices incorporated field agencies from the departments of trade and industry, transport, employment and the environment. In 1999 this was expanded to include Education, Culture and the Home Office.
\end{footnotesize}
boundaries may yet backfire and cause opposition to the reforms themselves. Nevertheless, although the use of the current boundaries perhaps represents a missed opportunity it does not mean that such a system will not work. Identities have developed in Germany, the US and even New Zealand\(^{21}\), among others, on the basis of 'artificial' regional boundaries. Whether a similar phenomenon will be experienced in England remains to be seen.

**REGIONAL GOVERNMENT AND REGIONAL STRATEGIES**

The White Paper (Your Region: Your Choice)\(^{22}\) outlines how each of England's eight regions will be able to move towards a directly elected regional government.\(^{23}\) The reforms will require a majority of electors to support them in a referendum and demand a reform of local government as part of the package.\(^{24}\) The Assemblies themselves will have between 25-35 members elected through the Additional Member System with up to six members forming the regional executive. The government has also indicated the inclusion of some form of stakeholder involvement although the format has yet to be finalized.\(^{25}\)

Although the issue of regional boundaries seems destined to exercise the minds of some participants in the referenda, it is a matter of relatively little importance compared with the question of what exactly the erstwhile regional tier will be empowered to do? On the face of it, the responsibilities of the regional tier are significant and

\(^{21}\) One need only spend one afternoon watching a New Zealand Provincial Rugby game to confirm this.


\(^{23}\) London is not included in these reforms as a limited form of Regional Government for the Capital was established under the Greater London Authority Act 1999. For a discussion of this reform see Tomaney J, ‘The Governance of London’ in Hazell, R (ed) *The State and the Nations: The First Year of Devolution in the United Kingdom* (London: Academic Imprint, 2000), 241-268.

\(^{24}\) The government has stated that Regional Assemblies will only be created in areas that have a single tier of local government. At present all the regions have some areas of two-tier local government (Counties and Districts) and should the regional reform be accepted by the region as a whole, a form of unitary council will be introduced in these areas.

the White Paper outlines ten areas in which the Region Assemblies will operate, namely:

- Sustainable Development
- Economic Development
- Skills and Employment
- Spatial Planning
- Transport
- Waste
- Housing
- Health Improvement
- Culture (including Tourism)
- Biodiversity

Those familiar with the devolution of power to Scotland and Wales and the mechanisms utilised for the allocation of such power will be forgiven for thinking that this represents a significant list of responsibilities. In Scotland the negative method of policy definition has meant that significant, and relatively broad, areas of policy can be legislated on by the Scottish Parliament and its Executive. In Wales, although the method of definition has been positive, there are still broad areas of delegated powers that have been transferred en bloc. Neither of these methods will be used in the English model. Instead, the English regions will be given specific authority to undertake particular executive tasks and responsibilities. There are no plans, at present, to grant them a power of general competence, even of the limited variety recently granted to local government in both England and New Zealand. Instead the English regions will be given responsibility for drawing up a number of strategies, in the fields

26 Powers are defined negatively when the body in question is given a 'general competence' with certain powers (which can be quite an extensive list) being reserved to the central level. The limits on the autonomy of the Scottish Parliament (and executive) are found in Section 29 and Schedule Five of the Scotland Act 1998.
27 See for example, The National Assembly for Wales (Transfer of Functions) Order 1999.
outlined in the White Paper. They will also have specific 'implementation' powers to undertake tasks within these strategy areas. It is less than clear, however, that the implementation powers envisaged will be sufficient to ensure delivery of the regional strategies.

The strategies will be drawn up by each regional assembly in partnership with the various regional stakeholders in negotiation with the centre. They will be accompanied by a small number of 'high level targets' (the example of economic development indicators is given in the White Paper), which will be negotiated between the Assembly and central government.\(^{29}\) The extent to which these will be true negotiations must be questioned, given the power imbalance between the two tiers. These will be assessed by reference to an 'annual report' that will give details as to the regions' progress in achieving its targets and the wider strategic objectives.

This system of nationally agreed strategies and targets is reminiscent of the 'government by contract' systems that have become popular in the central government's relationships with executive agencies and public service departments. That such a structure is envisaged for a democratically elected body does not suggest the development of an autonomous regional tier, but rather an arm of central government. The contract model suggests a relationship of regional governments delivering national policy priorities (particularly as successful achievement of targets will lead to financial rewards). This leaves little scope for the regional level to deliver the policy priorities that the regionally elected representatives believe should be followed. The relationship between the centre and the region in relation to the development of strategies could develop into one of principal and client rather than partnership of equals.

**STRATEGY IMPLEMENTATION**

Although there are significant question marks over how exactly the regional 'strategies' will operate, the main problem that will face the regional tier is whether the implementation powers granted to the regions will allow them to make any meaningful impact upon them. Although the White Paper has much to say upon the role of the regional tier in developing regional strategies it is much more

\(^{29}\) Op cit n 22, paragraph 4.7.
circumspect when discussing the implementation powers to be given to the regional tier. The details that do exist point to an eclectic collection of powers and paucity of responsibility in key areas which has significant implications for the government’s proclaimed aim to encourage ‘joined-up’ government. It is also questionable whether the English regions as constructed in the White Paper will be able to develop meaningful regional policies.

The Government has made much of the potential benefits of a regional tier for economic development and it is in this policy area that the main powers of the region will lie. Key to the delivery of regional economic strategies will be the Regional Development Agency for which the Regional Assembly will now be responsible. These institutions, which were established in 1999 to deliver improved regional economic development, have already become an established part of the English regional landscape. The linking of the RDAs to the Regional Assemblies will clearly improve the legitimacy of these organisations but the exact relationship is yet to be laid out in any detail.

The White Paper states that the Regional Assembly will decide the RDA Board and Chair, although 50% of these appointments must be from the business community. In addition, the RDA’s Regional Economic Strategy, which defines the RDA’s policy, will require approval by the Assembly although the drafting process will remain in the hands of the RDA. The Government also intends to hold a veto power to ensure that Regional Plans are not 'inconsistent with national policies' or have a detrimental effect beyond the borders of the region.30 The extent to which governments utilise this veto power and its exact definition in the legislation may prove significant to regional control of the RDA. Of equal significance will be the funding mechanisms. The RDAs will no longer be funded by central government, but instead through a block grant provided by the region. The exact nature of the funding mechanism and further accountability mechanisms are left to the regional assembly, although the government, in what appears to be a veiled threat, has indicated that it 'believed' in a wide degree of flexibility for the RDA.31

30 Op cit n 22, paragraph 4.23.
In addition to each Regional Government having responsibility for its RDA, a number of peripheral powers in the field of economic development are devolved to aid the delivery of regional strategies in the fields of sustainable economic development and skills development. These include the right to be consulted by Small Business Service Offices, on bids to the Higher Education innovation fund while Local Skills Councils will be required to 'have regard to' assembly strategies in the development of their own policies. Local Skills Councils will also have a number of regionally appointed members on their boards. Even the briefest examination of these 'implementation powers' makes it clear that they are not significant policy levers. The right to be consulted by a number of government QUANGOs (Crown Entities) and even to appoint some of their board members do not amount to the ability to deliver policy.

On the basis of these powers and responsibilities, the ability of the Regional Assembly to deliver a regional economic strategy appears something of a Sisyphean Task, but such conclusions are not confined to the economic development portfolio. The pattern of limited and eclectic involvement in substantive policy fields is repeated throughout the White Paper. A few examples will suffice to emphasise the point.

The development of regional transport strategies is seen as a positive step towards improving the United Kingdom’s transport situation, but the powers of 'implementation' given to the regions in this area are minimal in the extreme. The Regions will be able to advise the centre on the funding of local transport projects, including whether they fit within the regional strategy; to proposed road and rail schemes to the Highways Agency and the Strategic Rail Authority respectively; allocate Rail Passenger Partnership Grants (around £1 Million for the NE Region) and have a right to be consulted by national transport bodies. To ask the regions to deliver a meaningful transport strategy on the basis of these largely consultative powers is bordering on the ridiculous. The ability of the Regional Assembly to deliver its transport strategy will continue to be reliant upon decisions of central government and national Agencies.

Overall, the Regional Assemblies will have responsibility for appointing a number of regional QUANGO representatives, a right to consultation over central policies which affect the regions and the power to allocate resources for several centrally sponsored initiatives
(e.g. in relation to funding of public housing). These do not amount to significant policy levers capable of delivering regional policies and strategies without the co-operation of central (and possibly local) government.

The one exception to these comments lies in the field of planning where the regions will have a significant role as outlined in the Green Paper ‘Planning: Delivering a Fundamental Change’. These reforms will see a greater use of regional planning strategies to deliver clear planning guidance and remove much of the confusion and delay that currently dogs the United Kingdom's planning regime. This will happen whether or not the Regional Assemblies are created. Directly elected Assemblies, however, will take responsibility for drawing up and issuing regional spatial plans without reference to the Secretary of State. The Region will also have the right to request that planning applications be ‘called in’ by the Secretary of State if they believe they are incompatible with the regional plan, although the final decision will remain with the United Kingdom Minister. Under these reforms, the democratic regional tier, independent of the centre, will now exercise significant powers in an area formally dominated by the central executive.

Notwithstanding this significant exception, this short tour through the powers of the regional Assemblies brings us to the inescapable conclusion that England’s regional reforms as currently proposed fall far short of the aims expressed in the White Paper. They are certainly not an English equivalent of devolution to Scotland or even Wales and will not deliver real regional policy-making and ‘joined up’ governance. The wide range of regional strategies that each region will develop, are of limited relevance without coercive force or incentive to back them up. It is difficult to see how the disparate and limited range of ‘implementation powers’ that will be allocated to the regions will be able to deliver these strategies. How will regions satisfy the expectations that such strategies will create?

32 ‘Called in’ refers to the process by which the Secretary of State can review any planning decision at his or her own discretion. For more information see Craig, PP Administrative Law (4th ed) (London: Sweet and Maxwell, 1999) 202-286.
FINANCING THE REGIONS

The key area in which the regions may find space to exercise a degree of autonomy and thus deliver a truly regional policy framework is through expenditure. In stark contrast to the lack of functional authority that the regional tier will enjoy, the financial autonomy of the regions has the potential to offer significant policy leverage. As is common with all sub-national government in the United Kingdom, the primary source of finance for the regions will be a block grant supplied from the Treasury. At present this is estimated to amount to around £350 million in the case of the North East and £500 million in the case of the North West region. Although this may sound like a significant sum it amounts to less than 5% of public expenditure in these regions, excluding Social Security. The White Paper claims that the regions will have 'influence' (through its consultation rights) over a further £500 million in the North East example and £1.3 billion in the North West. Even if they are able to exert their 'influence' successfully this still amounts to a limited budget, particularly when one realises that significant elements of it are constrained by nationally mandated expenditure.

Nevertheless, the fact that the finances are from a block-funded source to be allocated on the basis of formula has the potential to give the regions some ability to exert influence on the development of their territories. Although the Regions will not be granted a general competence, the broad range of aims that are likely to be part of the regional strategies could give the regions the ability to spend their financial resources relatively freely within these limits. Subject to the judicial limits of 'fiduciary duty', the general nature of the strategy concept may allow the regions to slip the leash of ultra vires at least to a limited extent.

To the surprise of many, the English regions have also been given the right to raise their own taxation through an optional levy on the local government 'Council Tax'. The government expects this power to be used immediately to pay for the start up costs of the Assembly predicting an extra 5p per week on the Band D range of Council Tax Payers for this purpose. Although the regional taxes could provide the region with a degree of flexibility in this area, politically the use of this resource may prove difficult. Council Tax is a notoriously

33 The Council Tax is a form of property-based taxation.
inequitable form of taxation and as it is the only independent source of finance open to the regions any meaningful policy expenditure is likely to require a significant increase.

Of more relevance may be the ability of the English Regions to borrow. Although subject to limits to ensure that the regions do not abuse this power in their formative years the regions will be free to engage in such activities after this period. This significant power, not granted to the Scottish and Welsh devolved institutions, has been used to some effect in European systems. Even if the region does not undertake the borrowing itself, by acting as guarantor, it has the potential to unlock significant funding for capital projects.\(^\text{34}\)

The financial freedom of the English regional tier may yet prove to be crucial to them making an impact upon the governance of England. Lacking significant imperium powers and hampered by the lack of a general competence, the freedom of expenditure that the White Paper proposes is likely to play a key role in ensuring that regional strategies are delivered.

**ENGLAND’S REGIONAL REVOLUTION?**

The White Paper, 'Your Region: Your Choice' marks a significant change in approach to sub-national governance in England. It marks an acceptance by the national level that policy cannot always be developed and delivered by the centre even through regional agencies. There is therefore a need for democratic institutions between the local administrative tier and the centre to co-ordinate and deliver policies within a national framework. This argument has been widely accepted across continental European states and England will be one of the last EU member states to establish a meso or regional level. Such an argument has yet to accepted in New Zealand where the regional tier remains confused and disparate. The operation of centrally operated services and regional QUANGOs remains the norm while accountability and regional policy-making remains un-coordinated. Although many within the local government sector in particular, accept the need for a co-ordinating meso level (at least in private) few regard the current Regional level as the suitable body to undertake this role. Despite the aims of the Local Government Act

2002 to broaden the remit of the New Zealand regional level, as they currently stand New Zealand's regions lack both the remit and ability to undertake the 'joined up' role that the English Regional reforms envisage.

Although the aim of the English Regional Assemblies will be to deliver coherent policy at the sub-national level, the ability of the proposed institutions to live up to their billing must be seriously questioned. The White Paper represents the results of a long series of battles fought out in the Cabinet Committee of Nations and Regions. Chaired by the White Paper's sponsor, the Deputy Prime Minister, John Prescott, this Committee pitted Cabinet centralists against and those who favoured regional decentralisation. It met on numerous occasions as the release of the White Paper was repeatedly delayed while concessions were won and lost from individual departments. The net result of this process was a White Paper that promises much but delivers little. A 'Whitehall knows best' attitude amongst central departments has deprived the proposed regional tier of a number of key powers that are necessary to deliver successful regional strategies and create real regional policy.

It is likely therefore, that the regions as constructed in the White Paper, will not live up the expectations that will be encouraged by their creation. Nevertheless, the fact that the English regional tier will not possess the requisite powers to deliver some of its aims does not mean that the region reforms are doomed to fail. Constitutional change is often a slow and incremental process and the mere creation of a regional policy tier will itself create a dynamic that may lead to more meaningful change. This is certainly the wish of the pro-regionalists within the Labour cabinet and their long term goal is clear from the White Paper's comments that further powers may flow to the regions in future.  

All these questions must be put on hold while we await the first referenda. These will be held in the three northern English regions of Yorkshire (and the Humber), the North West and the North East towards the end of 2004. Should the voters of at least one of these regions accept the reform proposals, which will be outlined in a draft bill prior to the referenda taking place, it is unlikely that the Regional

35 Op cit n 22, paragraph 5.5.
Assemblies as currently proposed will prove the last word on English devolution. The creation of regional government has created a new dynamic in sub-national decision making throughout Western Europe and there appears little reason to suppose that the English version will prove any different. Although the limited nature of the reforms makes it unlikely that there will be much in the way of dancing in the streets should the reforms be introduced, history may yet look back on these developments as the beginning of a fundamental change in the governance of the English state.

While England continues to struggle with its regional question, New Zealand policy makers could be forgiven for thinking that such changes may be interesting to view from afar but have little relevance for a country with one tenth of England’s population. Such assumptions do not necessarily follow. With a landmass the size of Italy, the needs of New Zealanders vary significantly while the state finds itself unable to deliver coherent policy across such vast areas. The development of a plethora of local and regional field agencies testifies to this second point. The English experiment is an attempt to resolve these problems and to answer and deliver responsive and coherent government at the sub-national level in a system of Westminster Parliamentary sovereignty. If it succeeds, New Zealand policy makers would do well to take note. If it fails then attempts to deliver improved sub-national governance may need to look elsewhere for inspiration.
INTRODUCTION

The hearing of individual consumer disputes was a primary reason for the establishment of small claims institutions both in New Zealand and overseas. In this paper I shall examine the principles that should guide the management of these disputes by small claims courts or tribunals.

In presenting these guiding principles, I shall refer to two typical consumer disputes, so as to ground the principles in reality. The first dispute concerns a lounge suite that was ordered in the fabric of the customer’s choice. The customer paid a deposit and the storekeeper gave an approximate delivery date. The obtaining of the fabric took much longer than expected to arrive from overseas and the store did not keep the customer informed of the delays. In frustration the customer eventually told the store that she was cancelling the contract and she went ahead and bought another suite of inferior quality. Shortly thereafter the fabric arrived and the store was in a position to complete the covering of the suite. The customer demanded the return of the deposit, but the storekeeper insisted that the contract go ahead and the customer take delivery and pay the balance.

The other dispute concerns the reconditioning of a motor engine. Shortly after the reconditioning was completed, the engine developed problems. An independent mechanic was called in to investigate and he found severe engine failure, but no evidence of faulty workmanship and no real explanation of the breakdown. The customer demanded a refund, but the mechanic said that he had not been at fault.
Against the backdrop of these two disputes, I shall now present four guiding principles for the management of individual consumer disputes. In relation to each principle I shall present the current operation of courts and tribunals, in New Zealand and overseas, and make suggestions as to how these institutions should ideally operate.

**GUIDING PRINCIPLES**

**Adequate access to justice**

An essential criterion of the effective managing of consumer disputes by small claims courts is that they need to be accessible to a broad cross-section of the community. This is because the central feature of consumer disputes is that they potentially involve all of humanity. To the above two examples may be added many others affecting people in their commercial interactions with others. Yet, there is disquieting evidence, in jurisdictions such as Canada and New Zealand, that a large proportion of consumer disputes are initiated by traders rather than consumers. In addition, the applicants tend to be disproportionately professionals or otherwise employed, better educated and European.

One aspect of accessibility is cost. Cost is determined partly by the level of fees required to lodge claims in the small claims forum. France has the admirable principle that the legal system is a free service provided by the state (although since 1991 a tax has been imposed on legal acts). In Australia, most jurisdictions have court fees considerably below the cost of the small claims process. New Zealand for many years operated on the basis of low filing fees, and since 2001 has operated a sliding scale of fees from $30 to $100, dependent on the amount of the claim. The scale of cost is also determined by the involvement allowed for lawyers. In jurisdictions such as Quebec and New Zealand, lawyers are excluded from representing clients on either side, and in recognition of this there is limited scope in New Zealand for the award of costs in relation to the Tribunal proceedings.

---

3 Howells and James, ibid, 7.
4 Ibid, 46.
5 Disputes Tribunals Rules 1989, Rule 5(1).
6 Disputes Tribunals Act 1988, ss 38(7) and 43.
A second feature of accessibility is the jurisdiction of the forum to hear a sufficiently wide range of matters. Small claims forums impose an upper financial limit: in New Zealand, this is $7500 and up to $12000 where the consent of both parties is obtained. There are also limitations in terms of cause of action: almost invariably small claims forums are limited to civil actions, and in New Zealand there are selected areas of legal complexity excluded. A useful feature of the New Zealand jurisdiction is that claims can be brought in contract and quasi-contract to enforce a contractual obligation or for a declaration that the applicant is not subject to an obligation. Whereas claims for enforcement of consumer contracts are commonly brought by traders looking for payment, consumers find the declaration of non-liability a useful remedy.

A third aspect of accessibility is the nature of the forum for the hearing of consumer disputes. A number of jurisdictions simply provide modified procedures for small claims within the court system. In the United Kingdom, the county court has adopted an arbitration procedure for small claims. Research there indicates that consumers are not best served by institutions that retain many of the characteristics of traditional courts. In France, where consumer disputes are heard in the court system, albeit with simplified procedures, research indicates that these courts are not particularly friendly to individual consumers with small claims. Other jurisdictions provide for small claims courts as distinct parts of the court system. In Quebec, small claims court judges are regular, full-time judges of the Civil Division of the Court who hear cases in the small claims court one day every other week. In New Zealand, the Disputes Tribunals function as a division of the District Court and claims are heard on court premises. Yet other jurisdictions, such as New South Wales, have adopted specialist consumer claims tribunals.

A fourth feature of accessibility is the degree of informality in the procedures adopted. A recurrent feature of forums designed for small claims is that there is a large measure of flexibility in the procedures

7 Disputes Tribunals Act 1988, ss 10(3) and 13(2).
8 Disputes Tribunals Act 1988, ss 10-11.
9 Disputes Tribunals Act 1988, s 10(1)(b).
10 Howells and James, op cit, 4.
11 Ibid, 8.
12 Ibid, 27.
13 Disputes Tribunals Act 1988, s 4(3). See also Spiller, op cit, 10.
14 Howells and James, op cit, 44.
used, to respond to the needs of the parties and their situation. In Quebec, small claims judges are authorised to use the procedure that seems most appropriate. In New Zealand, referees who preside in the Disputes Tribunals may adopt such procedure as is best suited to the ends of justice and may receive any relevant evidence even if not legally admissible in a court of law.

It is suggested that access to small claims forums is a high priority in any effective system for managing consumer disputes. The state needs to recognise and maintain a commitment to keeping fees as low as possible so as to facilitate the pursuance of consumer claims in small claims courts, rather than by resort to more expensive court forums or to out of court and anti-social measures. The involvement of lawyers as representatives should as far as possible be excluded. The small claims court needs to have a jurisdiction which is sufficiently extensive so as not to allow too wide a gap between the outer limit of the small claims court and the level at which it is cost effective to pursue remedies in the traditional court system. The small claims court needs to be afforded a distinct status within the court system, so as to retain the benefit of state sanction and legitimacy without submerging the small claims court’s identity in the traditional court system. The small claims court needs to have processes that are sufficiently flexible, meaningful and informal for lay people to make effective use of the system. All of these matters need to be addressed so as to avoid the real consequence that the small claims court, in situations like the lounge suite purchase or the mechanical services, is ineffective or is rendered ineffective or an instrument for unfairness.

Procedural and substantive justice

It is of central importance that procedures and decisions governing small consumer claims be as closely aligned as possible to fairness and justice. Indeed, in that the weight of the state is thrown behind the outcome of the small claims process, an unjust small claims process is worse than having no process at all. Justice requires a balancing out of interests of both consumer and trader: there cannot be said to be a just process or outcome that is biased or distorted in favour of one

15 Ibid, 227.
16 Disputes Tribunals Act 1988, ss 40(4) and 44.
side or another. A system that is, for example, loaded in favour of either the purchaser of a lounge suite or the storekeeper, is neither defensible nor likely to survive.

In New Zealand, there is an important emphasis on the procedures of natural justice in that there are grounds for appeal where proceedings have been conducted unfairly and this unfairness has prejudicially affected the outcome. Furthermore, there is review to the High Court on the basis of breach of natural justice. While the number of appeals is low and the number of successful appeals lower still, and judicial review is rare, the presence of these safeguards acts as an important incentive to referees to pursue fair procedures.

In terms of decision-making, in Queensland and New South Wales, there is provision that the final order must be "fair and equitable", thus giving the judge leeway to deviate from the strict letter of the law. In New Zealand referees are directed to decide in terms of the substantial merits and justice of each claim, are not bound by strict legal technicalities and forms, and may disregard contractual terms which appear harsh or unconscionable. Thus, there is a strong emphasis on common-sense justice rather than legalistic outcomes. However, referees are required to have regard to the law, and it is a ground of appeal that a referee did not have regard to the provision of an enactment brought to the attention of the referee at the hearing.

It is submitted that, while there should be flexibility in process and the avoidance of legalism in decisions, it is essential that there be safeguards for procedural fairness and adequate regard to the law. Furthermore, it needs to be recognised that, in the context of flexible procedures and common-sense decision-making, much rests with the discretion of the presiding officer. In the examples above, there may be dangers of bias in favour of either the "victimised" consumer or the "exploited" trader. There may also be a danger of bias in terms of gender, background and professional orientation of the presiding officer. Finally, there may be dangers of power imbalance between first-time inarticulate users of the system and those who are adroit and adept multi-users. All of this raises, even more crucially than

17 Disputes Tribunals Act 1988, s 50(1).
18 Spiller, op cit, 137.
19 Ibid, 136-137.
20 Howells and James, op cit, 46.
21 Disputes Tribunals Act 1988, ss 18(6) and 19(1)(e).
22 Disputes Tribunals Act 1988, ss 18(6) and 50(2).
with judicial officers in the traditional court system, the need for appropriate appointment, monitoring and training systems for those who preside in the small claims forums.

**Constructive outcomes**

It is a justifiable hope that the small claims processes that manage consumer disputes produce outcomes that are not only procedurally and substantively just, but are also of maximum benefit to the parties. The matters at hand in consumer disputes have real and ongoing significance to the parties. The purchaser of a lounge suite has the need for the suite and the owner of a car has the need for a workable machine, while the store owner and the mechanic need to preserve a good business reputation and have the satisfaction of providing worthwhile products.

Thus, small claims systems commonly provide for a variety of outcomes, including both agreed settlements and decisions. In France, pre-trial conciliation allows one party to bring the other before the court for an attempt at conciliation where a settlement is believed to be possible. In British Columbia, the small claims court programme of 1991 introduced mandatory settlement conferences for disputed claims. In New Zealand, referees are required to assess whether the matter is appropriate for a settlement and, if so, to facilitate that process, but failing that give a decision in the same forum.

It is recognised that most parties who attend a small claims process expect and prefer the decision-maker simply to hand down a decision, and that this reality needs to be respected by the presiding officer. It is also recognised that there are practical constraints on the extent to which there can be true mediation in the small claims forum, bearing in mind time constraints, the fact that the respondent/defendant attends involuntarily, and the role of the presiding officer as an authority figure. Nevertheless, it is suggested that it is important for small claims process to allow the flexibility to allow disputes to be

---

23 Howells and James, op cit, 8.
24 Ibid, 28.
25 Disputes Tribunals Act 1988, s 18(1)-(4).
27 Spiller, ibid, 90-91.
settled where this is appropriate. The parties' underlying needs may best be met through settlements, which they have fashioned and are committed to implementing. In the example of the lounge suite, a decision to award the consumer a refund could be adverse to the interests of both consumer and trader. The consumer would then be left with the inferior suite that she does not really want. The trader would be left with less money and with the suite that the consumer really wants and is tailored to her wishes. However, a settlement in terms of which the consumer receives the suite that she ordered, at a lesser price, and with the inferior suite sold by the trader, could meet both parties' needs much more effectively. There is also the hope that the experience of the consumer and the trader in resolving their dispute will have a remedial and educative effect, not least in heightening the sensitivity of the trader to the consumer's needs.

**Binding and effective remedies**

It is essential that the outcome of the small claims process be binding and effective. There is little point in either consumer or trader initiating and pursuing a process which has inevitable financial and emotional cost and which ends with an outcome that makes no difference in reality. Thus, the purchaser of a lounge suite and the owner of a defective car require usable articles and not simply a court order on paper. However, the reality is that many judgment debtors do not voluntarily comply with court orders, and that law enforcement officers are unable to exact fulfilment of orders (because of parties' lack of means, disappearance or bankruptcy). The experience of many litigants in obtaining remedies which are not complied with, and which sometimes can never be enforced, has caused some observers to question the value of the small claims system.28

Small claims systems commonly provide for enforcement of outcomes of the process, either because the small claims system is part of the court process or because there is provision for registration of the outcome for purposes of enforcement. In New Zealand, orders for the payment of money or the delivery of property automatically become orders of the District Court and are enforceable through the court process.29 In Victoria, there is a “funds in trust” model, whereby

---

28 Howells and James, op cit, 47 and 56.
29 Disputes Tribunals Act 1988, s 45(1).
if a consumer disputes payment of an account the money must be paid by the consumer into a trust account until the order is decided.  

It is recognised that the enforceability of court orders is an issue not only for the small claims process: throughout the court process, there is the experience of successful litigants being unable to translate their orders into tangible benefit. Nevertheless, it is submitted that it is essential that the orders of small claims forums be given the maximum support possible by the state. It is also submitted that the difficulty of enforcement of orders underlines the need for accessible, just and flexible small claims processes. The purchaser of a lounge suite, the storekeeper, the owner of a defective car who has paid for mechanical services and the mechanic himself are less likely to require enforcement proceedings where they have engaged in a meaningful, fair process, particularly one which has culminated in an agreed settlement geared to their needs.  

CONCLUSION  

The managing of individual consumer disputes by small claims tribunals requires that key criteria be met. These are that the community has adequate access to this form of justice, that there are safeguards for procedural and substantive justice, that provision is made for a variety of constructive outcomes, and that these outcomes be backed by binding and effective remedies. The extent to which small claims institutions satisfy these criteria will determine the extent to which the high consumer expectations of these institutions will be met.
A Green Sales Law?

THOMAS WILHELMSSON*

INTRODUCTION - CONSUMER SALES LAW AS A TOOL FOR ENVIRONMENTALS?

The relationship between consumer law and environmentalism is much debated. Depending on the perspective it can be looked at in opposite ways.

One way is the adoption of the “market failure” perspective. If one looks at the protection of consumers and the protection of the environment in the overall structure of the regulation of the market, a picture of similarity emerges. Typical for both types of protection is a certain degree of intervention in what would otherwise be the result of the operation of the market. In this sense consumer protection at least partially can be labelled “interventionist” in the same sense as environmental protection. In this perspective there seems to be a relatively close similarity between the areas, as some of the methods for intervening in the market are similar. It might therefore at least in certain situations seem practical even to combine both types of protection in the same instruments.

However, if one chooses a “substantive goals” perspective, the picture changes. “Consumerism” may be understood as having its main goal in the securing of a problem-free consumption. This may produce rules which, if one draws a caricature, may be said to have the aim of promoting as much consumption of undefective goods and services as possible. Consumer law may obtain the function of supporting consumption. For example, the regulation of marketing increases the trust of the people in marketing as a whole and thereby makes the consumers more defenceless against the creation of needs through such activity. An improvement of consumer rights may also

* Professor of Civil and Commercial Law, University of Helsinki.
lower the hurdle for making decisions concerning new consumption. In this sense consumer law is apparently in fundamental conflict with environmental interests for which the growth of consumption as such is a negative tendency.

However, despite this very basic contradiction between consumerism and environmental protection, those who emphasise the common paths for the protectors of consumers and of the environment do not focus only on the regulatory proximity of consumer and environmental law in a market failure perspective. They claim that there exist at least some common substantive goals for consumer protection and environmental protection as well. The consumers are said to have an interest in the environment. Because of this it is possible that consumer law under certain circumstances can be used as a tool for promoting environmental interests. As the "consumer interest" does not appear as a homogeneous whole, one may claim that environmental issues in certain situations might be taken into account within consumer law, in spite of its (environmentally unsound) basic commitments to consumerist ideals.

The purpose of my paper is to illustrate this possibility by discussing whether consumer sales law can be used for environmentalist purposes. To limit the contribution sufficiently I here focus only on one central issue, that is whether and under what conditions rules on non-conformity of the goods in consumer sales law may be applied against the seller of environmentally harmful goods.

Even though I think much of my reasoning is general enough to be in some way relevant in most modern systems of (consumer) sales law, for the sake of clarity I have found it important to choose one legal text as a point of departure. I have earlier discussed the same issue

---

2 One small example may suffice to illustrate this effect: since the introduction of the right of cancellation concerning post order sales in Finland, the businesses in this field have actively used these rules as a central argument in their advertising practices. Obviously some people who would not have dared to make purchases in this way beforehand do it now — and the right of cancellation poses few risks for the businesses, as the cancellation rate, despite the frequently occurring low quality, is very low.


4 As Meier notes, in German case law concerning environmentally relevant conflicts cases concerning non-conformity are most frequent: Meier K, "Ekologische Aspekte des Schuldvertragrechts" (Berlin, 1995) 17.
from the point of view of Nordic sales law. In the present paper I will use the new EC Consumer Sales Directive as a normative basis. This basis of reasoning should be relatively familiar to most private lawyers, even outside the European Union, as the wording of the definition of non-conformity in the Consumer Sales Directive is to a large degree inspired by the UN Convention on Contracts for the International Sale of Goods.

CONDITIONS FOR REACTION: SELF-INTEREST OR GENERAL ENVIRONMENTAL INTEREST

Before going into detail regarding sales-law regulation I would define the issue by raising a general problem of private law that can set both actual and normative limits to our possibilities of developing an effective green law of contract. Such limitation may result from a fundamental notion of traditional private law, that is, the notion that private law rules are intended to be used by market actors promoting their self-interest in individually determined relationships with other actors.

This point of departure implies that traditional private law is self-implementing in character. Application of the rules is not watched over by any prosecuting or supervising authority; rather, initiative for the process of applying the rules is left to the parties themselves, or rather to the party whose interest has been encroached upon. The party wronged by a breach of contract or by a tort can themselves decide whether to make any claims against the other party or the tortfeasor on this score and whether they wish to employ legal mechanisms in the attempt to have these claims met.

The use of private law rules as means of controlling the behaviour of a party to a contract therefore presupposes that the other party sees it as being in his or her interest to make use of the rules. It has been said that control through private law is obviously unsuitable in cases

5 Wilhelmsson, T "Bidrag till en grön köprätt" in Blume & Petersen (eds), Retlig polycentri (Köpenhamn, 1993) 19-36. Parts of the present paper are based on that article, translated from Swedish by Tim Crosfield.
where there is no conflict of interest between the parties. If both parties have congruent interests the rules of private law are not brought into play. This suggests that environmentally-related contract law arguments would in practice be considered primarily where one party has suffered from the other’s environmentally harmful actions.

In German critical writing, analysing private law against the background of modern theories of risk society, the relevance in contract law of different kinds of risk has been discussed. Even here the focus of attention has been primarily, albeit not exclusively, on risks to the individual contractual party (the buyer). The buyer may then naturally have a self-interest, e.g. by referring to the cancellation rules of sales law, to eliminate the risks to him or herself. Self-interest need not apply only to damage that has already materialised.

So, on the basis of considerations of efficiency alone, at a first glance there appears to be little point in asking what possible sales law options buyers have where the goods entail no particular risk to themselves, only to the environment in general. The question of whether the buyer can react if, for example, the buyer discovers that the washing powder purchased is more environmentally harmful than envisaged would lack practical significance, since no direct conflict of interest between seller and buyer arises here.

In the great majority of cases this view is certainly correct. New knowledge of environmental problems associated with a product would scarcely cause many buyers/consumers to react. The most enlightened would perhaps not buy the product but it would occur to

---

8 Rodhe K, Obligationsrätt (Lund, 1956) 9.
10 See e.g. Hart (ibid) 376 et seq.
11 In Hart’s terminology, “vertragsexterne Risiken”: see Hart (ibid) 365.
few to do anything about purchases already made. Traditional retrospective sales law would not be faced with a new challenge.

However, it cannot be excluded that there may be buyers who would be prepared to take individual sales law action in relevant situations if only this were possible. Under favourable conditions such reactions can even have wider effects, particularly if the procedural conditions for this are developed. In a future perspective it may therefore be relevant to analyse the question whether a buyer should be able to link the sanctions of sales law to the general environmentally harmful nature of the product purchased. Do the sales law rules that enable the buyer to implement sanctions against the seller presuppose that the buyer has a self-interest, or can he (or she) also rely on the fact that the product is environmentally harmful in general? Precisely this question is the subject of my paper.

In what follows the rules concerning non-conformity of the goods in sales law will be analysed with regard to their possible application in the case of the goods being generally harmful to the environment. I will not dwell further on cases where the product involves the buyer in direct risks, as obviously the buyer in many such cases has a remedy under sales law. In the light of the problem of self-interest the question of the possibility of recourse to sales law can assume a fairly different character depending on whether the buyer is acting commercially or as a consumer. A business which has purchased a product for resale or use in its own production often has a self-interest in being able to apply sanctions for defects in connection with any threat to the environment that may be discovered. This is because it can expect that the environmental hazard, if generally known, will hamper the sales of the product or of products manufactured with its use. These cases, in which application of sales liability is easy to justify simply for the reason given, will not be further considered here. They fall outside the scope of a paper focusing on cases in which there is no self-interest of the buyer. As I am analysing consumer law and

---

13 The question of what is to be considered environmentally hazardous must in this context, in the limited space available, be left open.
14 Cf. e.g. Hart (supra n 9) 374 who, concerning BGB § 243.1, states: "Da sie aber wie das gesamte Vertragsrecht auf die Interessen der Vertragsparteien zugeschnitten ist, scheint sie für die Bewältigung vertragsexterner Risiken untauglich".
15 Also such cases may of course be hard cases because of problems regarding the definition of relevant risks and the determination of acceptable levels of risk.
environmentalism my focus will be on the individual consumer's right to claim environmental harmfulness vis-à-vis the seller. I am interested in a grassroots perspective: what legal options are there for green-thinking citizens?

Unfortunately there is not much legal debate to be found concerning this issue. The issue of non-conformity is almost exclusively analysed with reference to the quality and usefulness of the goods for the self-interested consumer. This might be connected with a perceived lack of practical importance of the issue. The answers to the question may also be felt so self-evident that they do not merit further discussion. But is general environmental harmfulness, which is not connected with the self-interest of the consumer, self-evidently outside or inside the scope of the sales law liability?

In the concluding section of this essay I will return to the question why liability for defects in sales law for environmental harmfulness can have some practical significance after all, even in cases where there is no self-interest of the consumer. I am referring to the possibilities of using private law action as a part of a green legal strategy.

**THE CONTRACT AS STARTING POINT**

It is a rather self-evident starting point that judgment concerning non-conformity in sales law is always based on the actual sales contract. The assessment is primarily concrete: there is non-conformity if the product supplied does not fulfil the requirements the parties have set out in the contract. If performance deviates from what the seller has undertaken, then the rules regarding non-conformity become applicable. This is expressed also in the EC Consumer Sales Directive, Art. 2(1): The seller must deliver goods to the consumer which are in conformity with the contract of sale.

It is made very clear that this starting point is independent of the presumptions of conformity mentioned in Art. 2(2) of the Directive.

---

16 As to the Consumer Sales Directive I can only refer to Brüggemeier G, "Zur Reform des deutschen Kaufrechts - Herausforderungen durch die EG-Verbrauchergüterkaufrichtlinie" Juristenzeitung (2000) 530 et seq., who very shortly notes that "auch die komplexen Umweltrisiken eines Produkts unter die kaufoertragliche Fehlerhaftung subsumiert werden müssen". He does not expressly mention, however, whether he wants to include also general environmental harmfulness in the liability.
— to which I will return later — in the sense that breaches of explicit contractual specifications are relevant even though they would not fulfil any of the tests described in the latter paragraph. According to the preamble of the Directive “the goods must, above all, conform with the contractual specifications”.

Here it is important to note that the rules on non-conformity can also be referred to when the departure from the contract lacks economic significance and the buyer thus has other grounds for insisting strictly on the terms of the contract. The examples concerning this given in Nordic literature on sales law tend to be very similar: while some note that a person who has bought a red car does not need to be content with a blue one of the same make even if this should be more valuable, others speak more modestly of a red shirt and a blue one.

It is therefore obvious that the parties can also agree on terms regarding the environmental properties of the product so that they gain relevance for the judgment. If it has been expressly provided in the sales contract that the product shall e.g. be free from some environmentally harmful feature or that it shall meet certain environmental requirements, the consumer can use remedies for non-conformity if the goods do not correspond to what has been contracted for. More general statements regarding the environmentally friendly character of the product may also be relevant, even though their effect will naturally depend on interpretation and will therefore be harder to predict.

In this context I would like to note the relevance of the development of the doctrines of interpretation of contracts also for a green sales law. Traditionally in many legal systems the importance of the parties’ intentions has been stressed as a central element of interpretation. Interpretation is said to be based on the parties’ joint purpose in concluding the contract or, if this cannot be established, on what the parties should be considered to have intended. However, for example some more modern Nordic writers — not only “alternative” scholars, but also commercially oriented ones — have stressed that the goal of contractual interpretation can no longer be to approach as

closely as possible the individual intention of the one or the other\textsuperscript{20} and that reasons of legal policy must be given a more prominent position. Social interests may urge other interpretations than what follows from the parties’ intentions.\textsuperscript{21} Similar trends in the doctrines of interpretation may be noted elsewhere as well. A more socially oriented method of interpretation can obviously give greater scope for interpreting even relatively general and unclear descriptions of the qualities of a product to mean that an environmental threat later brought to light is assessed as a case of non-conformity. If one at all accepts legal policy reasoning in the interpretation of contracts, the importance of the protection of the environment makes environmental arguments very relevant also in the interpretation of contract terms relevant in determining a seller’s liability for non-conformity. Here one could mention that for example German courts in some cases because of environmental reasons seem to have interpreted the liability of the seller more widely than otherwise accepted by German law.\textsuperscript{22}

The fairly obvious premise that sales law liability for environmentally harmful products arises when the contract explicitly or by interpretation provides that the product must not be environmentally harmful is, however, of scant help to the environmentally aware consumer in many cases. In the great majority of cases, when the sale is concluded it is seldom accompanied by any written or even oral agreements on the product’s environmental characteristics. There is therefore reason to go further and ask how far a consumer can establish liability in sales law on the basis of environmental harmfulness where the contract does not give any explicit indications to this effect.

What has been said in this section is of importance in the further reasoning, as it shows that there are no theoretical obstacles to seller’s liability in connection with environmental harmfulness. The private law requirement of self-interest is superseded by the contract. One may say that it is up to the parties to define their interests in the

\textsuperscript{20} Grönfors K, \textit{Tolkning av fraktavtal} (Göteborg, 1989) 18 et seq. However, also in Swedish doctrine the intention of the parties is still today strongly stressed by some, see e.g. Lehrberg B, \textit{Förutsättningsläran} (Uppsala, 1989) 122.

\textsuperscript{21} Grönfors (ibid) 37.

contract and interests so defined should not without grounds be questioned by the law. A general interest may with the help of contractual terms be turned into an individual interest as well.

One should note, however, that even when there is a contractual term which provides that the goods should not be environmentally harmful (in some respect), this does not necessarily remove the problem of lack of self-interest altogether. The self-interest may still be relevant in connection with specific remedies, especially damages. If the consumer decides to keep the goods it may be hard to show such damage that would give them a claim for compensation. Here, as well as in the following sections, non-conformity becomes more relevant as a prerequisite for avoidance (rescission) of the contract, and damages connected with avoidance, as well as for repair. Both remedies are mentioned in the Consumer Sales Directive (Art. 3).

However, according to Art. 3(6) of the Directive the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. This might in some cases be used as a defense against a claim for rescission based on environmental harmfulness. The seller could claim that as the poor environmental quality of the goods does not affect the self-interest of the consumer it is of minor importance. However, I do not think the exception concerning minor non-conformity should be interpreted in this way. It rather refers to the relationship of values between the defect and the goods. As soon as a certain type of environmental harmfulness is considered to be a relevant form of non-conformity, the special character of the actual non-conformity should not be brought into play again in the assessment of the extent of the non-conformity.23 When asking whether the non-conformity was minor, the right questions concern issues such as how much it would cost to remove it and not the nature of the non-conformity as such.

**MARKETING LIABILITY**

Not only express contractual clauses but also other materials in connection with the contract may be relevant when assessing the

---

23 One could also here refer to the fact that it may be that “what appears to the outsider as a minor defect in fact has a major impact on the consumer, undermining his or her confidence in the goods”: Howells G & Weatherill S. Consumer Protection Law (Aldershot, 1995) 144.
issue of non-conformity. As marketing information concerning the environmental qualities of products has become very common, the sales law relevance of such materials is especially interesting.

It is slowly becoming more and more accepted today even in commercial sales that the seller may be liable on the basis of sales law, if the goods do not conform with information given in marketing. Even though some national laws still have not developed this far, for example the European Principles on Contract Law contain a general provision of this sort. Also Nordic sales law today includes rules on the seller’s marketing liability. The product is deemed to be defective if it does not correspond with particulars given during its marketing or otherwise before purchase and that may be assumed to have influenced the purchase.

In the EC Consumer Sales Directive the same idea is hidden in the normal quality rule in Art. 2(2)(d). According to this rule consumer goods are presumed to be in conformity with the contract if they “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.” The last part of the rule indicates rather clearly that also according to the Directive remedies for non-conformity may at least as a main rule be applied, if the goods do not correspond to the information given in marketing. The question now arises as to whether this rule also applies to marketing information related to the product’s environmental properties.

The immediate answer clearly is affirmative. Environmentally relevant information related to the product certainly in most cases in some way refers to its characteristics. It is not a question of such “fringe information” — for example, that the product is used by some

---

24 This is a point where the Consumer Sales Directive will require changes for example in English law, see Howells, G, “Implementation of the EC Consumer Sales Directive in the United Kingdom” in Grundmann, Medicus & Rolland. Europäisches Kaufgehilfeleistungsrecht (Kön, 2000) 161-179 at 177.


celebrity or other — which does not affect liability since it does not refer to the product’s characteristics. 27

However, in many sales laws there is also a general exception to the liability for marketing information which might be referred to in this context. Remedies for non-conformity can usually be applied only if the marketing information has influenced the purchase or such an influence at least can be assumed. As mentioned above, the latter rule prevails in Nordic law. Also according to the EC Consumer Sales Directive Art. 2(4) the seller is not bound by public statements, if he or she shows that the decision to buy the consumer goods could not have been influenced by the statement. This may be used as an argument against granting relevance to claims based on environmental harmfulness of the product. One could fall back on the type of argument described in section 2 above and assert that the information, because of the consumer’s lack of self-interest, can be presumed not to have affected the purchase.

Against such a line of argument both empirical and normative reasons can be offered. Even without closer examination it can be taken for granted that some consumers, at least, when purchasing a product, consider 28 the possible harm it may cause to the environment. There are even good reasons for assuming that this group is now not all that insignificant. 29 Already on these grounds the presumption ought to be the reverse: incorrect particulars of environmentally relevant characteristics may be assumed to have affected the purchase unless otherwise is shown in the individual case.

This conclusion is reinforced by the normative argument that in other parts of the legal order considerable importance has been accorded to marketing information on products’ environmental properties. For example, the Nordic Consumer Ombudsmen in their supervision of marketing have devoted much attention to environmental marketing and the Finnish and Swedish Market Courts have forbidden

28 In Nordic law this is enough. See e.g. Krüger K, Norsk kjøpsrett (4th ed) (Bergen, 1999) 150: in general, it is sufficient that the buyer can be assumed to have taken the information into account when contemplating whether to make the contract.
29 See on the research available e.g. Wilhelmsson (supra n 2) 53. Today the interest for such information seems to be growing again for example in Germany, see Imkamp H, “The Interest of Consumers in Ecological Product Information is Growing — Evidence from two German Surveys” Journal of Consumer Policy (2000) 193-202.
marketing that gives the recipient an incorrect picture of a product’s environmental characteristics. The weight of environmental arguments as a part of marketing has also been recognised through the development of various forms of officially sanctioned environmental labelling systems, such as the Community Eco-label award scheme. One may also mention, although the issue here is slightly different, that according to the EC Television Directive Art. 12(e) television advertising may not “encourage behaviour prejudicial to the protection of the environment”. Since the influence of environmental information on consumers’ purchasing behaviour, as well as other behaviour, has been stressed in these ways within marketing law, it would be exceedingly inconsistent if sales law were to deny the existence of such influence. If a consumer who has bought a rubbish mill because of a claim in the advertisement that it is non-polluting, or a cold degreasing agent when urged by environmental advertising to do so, realises that the mill is polluting, and the degreasing agent is poisoning fish, it is reasonable that he or she should be able to return the product (cancel the purchase) with the support of the sales law rules.

Thus incorrect or misleading marketing information related to the environmental properties of a product may lead to liability for the seller. This is moreover logical considering that the liability for marketing information is based on a notion that the information forms part of the contract in the same way as explicit particulars of that contract do. I noted already above that such particulars might without doubt imply sales law liability for environmental harmfulness.

30 See e.g. in Finland Market Court 1992:4 (exaggerated details on the positive environmental effects of heating insulation); 1992:5 (“environmentally-friendly” Ecothene plasticbag); 1992:26 (“for a cleaner environment” in advertisements for Opel cars); and 1994:12 (“environmentally-friendly” ovens) as well as in Sweden Market Court 1973:8 (the court prohibited as overly categorical and unbalanced the assertion that a mill for grinding waste products did not contribute to the pollution of lakes and watercourses); 1974:12 (prohibition on using, in the marketing of a cold degreasing product, a description that included the word ‘environment’, since on its release into a watercourse the product had a certain toxic effect on fish); 1990:20 (prohibition of the word ‘environment’ in Hydro Miljö Plus and of the claim that a detergent was beneficial to the environment); and 1991:11 (prohibition of an undefined claim that a car was environmentally friendly).

31 Council Regulation No 880/92 on a Community eco-label award scheme.

32 Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

33 This is not to say that the definition of relevant particulars should be exactly the same in contract law and in marketing law. The differing remedies may naturally justify different judgments of this issue.

ABSTRACT JUDGEMENT OF DEFECT

However, the liability for marketing information does not bring us very much further in establishing a sales law liability for environmental harmfulness. The most important and at the same time the most difficult problems emerge when a decision is required regarding whether such liability can be applied where neither the contract terms nor the marketing give any grounds for it. The issue is whether liability for environmental harmfulness can be grounded only in the concrete contract-related decision as to defectiveness, as was done above, or whether the legislative background rules on non-conformity (the application of which is sometimes termed abstract assessment of non-conformity) can lead to this kind of liability as well.

In national laws the tests to be applied in the abstract assessment vary. The EC Consumer Sales Directive, in line with general tendencies in the consumer law material produced within the EC,\(^\text{35}\) employs an expectation test. As stated already in the previous section of this paper the Directive, in Art. 2(2)(d), prescribes that the goods should “show the quality and performance” which are normal in goods of the same type and which the consumer can reasonably expect”.

This provision sets the theme of the argument when the issue of a seller’s liability for environmental harmfulness is being assessed. The question becomes: does a consumer have any reason to expect anything regarding the environmental quality and performance of a product? If the consumer has, then the acceptance in principle of a seller’s liability for environmental harmfulness, where this follows from the contract or marketing information, for reasons of consistency implies that such harmfulness is also accorded relevance in the abstract judgment on non-conformity. It should not be necessary to make explicit references in the contract to expectations concerning the goods being environmentally sound or not being produced by child labour, as long as reasonable buyers in the same

---

\(^{35}\) The legitimate expectation test is about to develop into a general principle of the consumer law in the EC, see, for example, Micklitz H, Legitime Erwartungen als Gerechtigkeitsprinzip des europäischen Privatrechts, in Krämer, Micklitz & Tonner (eds) *Law and Diffuse Interests in the European Legal Order* (Baden-Baden, 1997) 245-277, and Howells G & Wilhelmsson T, *EC Consumer Law* (Aldershot, 1997) 320 et seq.

\(^{36}\) It should be noted that the text of the Directive speaks about both “quality” and “performance”. For a formalist who reads the law word by word this could mean that there is more scope for taking into account various elements — such as environmental performance — connected with the goods, when assessing non-conformity, than according to the English Sale and Supply of Goods Act 1994, which uses only the word “quality”. 
situation would have shared those expectations. The consumers have a basic expectation of some level of honesty and morally acceptable behaviour in the marketplace, which should be respected.

What this pattern of argument should involve in detail must depend upon many factors. When one refers to what can be “reasonably” expected the requirements can obviously become more stringent in step with rising environmental awareness. Much at this stage must be dependent upon pure speculation, and I shall therefore confine myself to a few brief remarks concerning certain questions connected with the area.

Where public-law norms lay down environmentally relevant minimum requirements for a product, it appears natural also in the assessment of sales law non-conformity to require, at least as a main rule, that the product meet these, even where they do not directly affect the consumer’s possibilities of using the product. The consumer can reasonably expect the requirements to be observed. The requirements may also, if one so wishes, be seen as an implied part of the sales contract. Norms of this kind may refer to prohibitions of certain types of substance, maximum permissible content, etc., but they can also concern questions relating to the use of the product and e.g. the way of disposing of it. Norbert Reich even goes as far as claiming that if there are public law provisions on recycling requiring returnable bottles, non-compliance with these provisions by the seller could be considered as a case of non-conformity in sales law.

---

37 See, concerning Swedish consumer sales law, Kihlman, J Fel (Stockholm, 1999) 109.
38 Sec 17(3) of the Norwegian Sales Act contains an express provision to the effect that a consumer product when purchased shall as a rule be considered defective if it does not meet the requirements of public law: “In consumer sales the goods shall equally correspond to public law requirements of the legislation or of public decisions based on the legislation in force when the sales contract was concluded, if the circumstances do not show that the buyer in this respect did rely on the expertise and assessment of the seller or did not have sufficient grounds for doing so.”
39 If a lack of correspondence between the stated norms and the purchased product leads to obstacles to the buyer’s possibilities of using the product as he or she had envisaged, the buyer may naturally claim what could be termed a defect of disposition: on this see e.g. Hellner J & Ramberg J (supra n 18) 169 et seq. This situation is not further analysed here since it concerns a case where the buyer has a clear self-interest in being able to claim the defect.
What I just said does not imply that one in the sales law context cannot go further than to the level prescribed by public law norms. In product liability cases such norms have been traditionally viewed merely as giving a minimum level, with nothing to prevent one, in the private law decision, from setting more stringent demands upon the product. There is no reason in the present situation to approach the problem in any other way. Cases may be imagined where the consumer, because of the obsolete nature of the regulations or for other reasons, can reasonably expect that the product fulfils more stringent environmental requirements.

The requirements thus placed upon the product can be translated into an obligation to inform. To avoid liability for relevant environmental harmfulness the seller before concluding the contract should provide information about the harmfulness. The consumer can in many cases reasonably expect information regarding the harm a product may do to the environment. If insufficient information has been supplied, the product may be considered defective. By thus formulating the liability as an obligation to inform, one brings out the market-compliant character of sales law measures against environmentally harmful goods.

What has just been said implies another limitation of the seller’s liability: the consumer cannot claim as a defect a feature he or she was informed about prior to completion of the contract. But the importance of this limitation for excluding liability in the present case depends largely upon what requirements are made concerning the consumer’s knowledge. In many cases the consumer has received at least some particulars of the product’s composition etc., perhaps including a statement of e.g. the toxic nature of some components. As opposed to this he or she may lack a sufficiently clear picture of what aggregate environmental effects elements of the product have.

---

41 See in German law e.g. Hart (supra n 9) 376: “Das Zivilrecht ist nicht gehindert, gegenüber dem öffentlichen Recht ein höheres Sicherheitsniveau vertrags- oder deliktssrechtlich zu fordern. Insofern ist es autonom.” See also Damm R, “Risikosteuerung im Zivilrecht - Privatrecht und öffentliches Recht im Risikodiskurs” in Hoffmann-Riem & Schmidt-Assmann (eds) Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen (Baden-Baden, 1996) 85-142 at 136. For a similar view on Norwegian law, see Krüger (supra n 28) 210.

42 This applies to the EC Product Liability Directive; see e.g. Wilhelmsson, T & Rudanko M, Tuotevastuu (Product liability) (Helsinki, 1991) 111.

43 Hart (supra n 9) 372 states that one can, according to a model based on contract law information obligations, “von... einer wettbewerbskonformen Konzeption von Dritt - oder Allgemeinschutz sprechen”.

---

A Green Sales Law?
consumer realises perhaps that a product that cannot be recycled becomes refuse but has no conception of the aggregate refuse problems this type of product causes. If one considers in these two examples that there has been sufficient knowledge to exclude liability, it is evident that the area for the seller's liability becomes narrowly limited. A more environmentally friendly alternative is to exclude liability only where the consumer also has knowledge on the aggregate effects. The notion of a green sales law would presuppose the latter interpretation.

THE NEED FOR A 'GREEN' SALES LAW LIABILITY

These rather brief and sketchy considerations are sufficient to show that the liability in consumer sales law may also embrace possible environmental harmfulness of a product. There may doubtless be differing views as to e.g. the requirements that can be placed upon the product in this respect or how the consumer's possible knowledge is to be assessed. The starting point, however, that rules on non-conformity can be applicable, appears in the last instance to be rather self-evident.

Having reached this conclusion, it is time to return to the question of practical relevance. Why bother with the issue of a green sales law at all? In this context I will restrict myself to a few remarks on the kind of situations in which I find the legal possibility of a sales law liability for environmental harmfulness interesting.

It is obvious that the possibility of adducing liability in the situations considered here has hardly at all been used in practice. With regard to what I noted in section 2 of the paper one cannot expect very much to happen in the future either. As a rule the absence of self-interest no doubt raises the threshold for recourse to sales law measures too high even for people who are inclined to make use of them. Where then is the beef?

---

44 Reich (supra n 40) 286 advocates this alternative in a general overview of the possibilities for an ecological law of contract, without particular reference to German law.

45 In a recently published book I have in greater depth analysed the use of private law as a tool for micropolitics: Wilhelmsson, T Sannmodern ansvarsträtt: privaträtt som redskap för mikropolitik (Helsinki, 2001).
One, rather theoretical answer — within a long time frame — lies in the changing relationship between the concepts of “consumer” and “citizen”. As I noted in the beginning, there seems to be a basic contradiction between consumer law as an expression of the consumer society and the need for protecting the environment against the consequences of the consumer society. However, the contradiction between the consumer interest (the self-interest of the consumer in a limited sense) and the environmental interest relates to the short-term interest of the consumer, i.e. the immediate interest attached to an individual act of consumption. If one changes the time frame to a long-term perspective, the conflict between the interests may become less serious or even disappear. This is the case if sufficient segments of the consumer community realise that their long-term interests require a preservation of the environment, even at the cost of their individual consumption habits. In this utopian future the consumer would rather function as a “citizen” who is interested not only in his own consumption but in all aspects of social life. The more conscious the consumers become of the environmental effects of their behavior — the more citizen-like they become — the more self-evident it will become to use also consumer (sales) law as means for promoting environmental goals. The growth of green consumerism opens up new possibilities in this sense.

The reference to green consumerism hints at another answer to my question. This answer, which is basically in the same line as the first one, but given from a more sociological and present perspective, would connect the relevance of a green sales law to its use as an instrument in green “micropolitics”.

As is well known, many have recorded a change in the ways social influence is exerted in the late modern (postmodern) society. Various kinds of small groups, minorities and social movements are taking new places on the social scene. Our time has even been characterised

---


47 The “citizen” sought for here is not the liberal citizen focusing on his rights, but rather the classical citizen, who is interested not only in his own affairs but also in the affairs of the state and the civil society, see Oliver D, “What is happening to relationships between the individual and the state?” in Jowell & Oliver (eds) The changing constitution (3rd ed) (Oxford, 1994) 442-443.

48 See Gabriel Y & Lang T The Unmanageable Consumer (London, 1995) 164 et seq.

A Green Sales Law?
as an era of "micropolitics" or "sub-politics". The development of the information society seems to have strengthened this tendency. It is not surprising that the leading "guru" of the information society, Manuel Castells, both emphasises new forms of grassroots activism as one of the important features of the new society and connects his hope for change to this kind of activism. In this context he especially emphasises the importance of the various forms of the environmental movement, which in the last quarter of this century "has earned a distinctive place in the landscape of human adventure". Later, the events in Seattle and Prague have confirmed the theses concerning the new role of micropolitics even on the global scene.

In the consumer area micropolitics has often taken the form of consumer boycotts and similar campaigns. However, in the current media society, litigation can also be used as a tool for bringing environmental concerns onto the public agenda. Litigation can form one aspect of the strategies by which environmental groups and green consumers practice their micropolitics. In such cases the outcome is often of less importance than the possibility of presenting the arguments seriously and in public.

Among others, sales law may be used as a gate for making various small group environmental claims generally known. Such use of a sales law liability for environmental harmfulness would, in other words, hardly follow from its function as a dispute-solving rule since such disputes seldom come up "of their own accord". The issue is one of an instrumental usefulness. Seller’s liability may offer a basis for introducing a legal component even into private grass-roots actions directed against product-related environmental issues. Environmental organisations can for example develop publicity strategies by sponsoring selected pilot cases. Through such cases it is also possible to compel a decision from the legal order regarding new problems in which the public authorities have not wished to intervene.

49 Jameson F, Postmodernism, or the Cultural Logic of Late Capitalism (London, 1991) 318 et seq.
51 Castells, M The Power of Identity, The Information Age: Economy, Society and Culture (Volume II) (Massachussetts, Oxford, 1997) for example at 354 et seq.
52 Castells (ibid) 110.
53 A good overview of various forms of consumer boycotts is given by Friedman M Consumer Boycotts: Effecting Change Through the Marketplace and the Media (London, 1999).
Sales law liability can be used as a part of multi-measured collective campaigns. Consumer boycotts of environmentally hazardous products could, for example, be supplemented with campaigns to get consumers who had already bought the product to lodge claims and demand cancellation of the purchase.

Finally, looking to the future there is also reason to consider that the emergence of various new types of collective procedure for promoting mass interests of this nature can bring with it substantial new possibilities for private law strategies. The introduction in the Nordic countries as well as in the EU of class action in the consumer area is being seriously discussed. Such a procedure could conceivably be a useful tool in cases of the type treated here. One could also, e.g. consider extending the scope of such procedures for recall as exist in the area of product safety to the cases discussed in this paper. Other methods of achieving the required procedural collectivisation of disputes are also conceivable.

One condition for being able to use such new mechanisms against environmentally harmful products is that substantive law affords possibilities of doing so. In a perspective such as this the question of a “green sales law” perhaps does not seem entirely impractical after all.

54 For the Nordic countries, see NEK-rapport 1990:7 Grupptalan i konsumentmål, Rapport från ett nordiskt seminarium (Köpenhamn, 1990) as well as the proposals SOU 1994:151 (in Sweden) and LJ 1/1995 (in Finland). A good overview of the “world situation” is given by Lindblom, PH, Progressiv process (Uppsala, 2000) 427 et seq.

55 In the EC, see Council Directive 92/59/EEC on general product safety, Art. 6(1)(h).
Industry-Specific Regulation: The Case of Electricity

BARRY BARTON*

INTRODUCTION

Energy is a fundamental input for economic activity and for human existence generally. Lack of or disruption of supply is a major component of poverty for individuals and a major constraint on commercial activity. On the other hand, supply of energy causes many of our most fundamental environmental problems. The retail supply of energy to businesses and to individuals in the form of electricity raises questions of consumer law and also of the public good. While a number of consumer law issues about consumer choice, price and quality can be left to market forces, it is generally accepted that many consumer issues cannot be satisfactorily resolved by the market, and require legislative intervention, regulation, or a government presence of some kind. I do not intend to engage in the familiar kind of debate about the adequacy of market forces to govern all consumer issues, but assume that regulation of some kind is necessary, and ask, in the context of the electricity industry, whether it ought to be industry-specific regulation or to be general regulation only.²

* Barry Barton is Professor of Law at the University of Waikato. He specializes in natural resources, environmental and energy law, and is member of the Academic Advisory Group of the Section on Energy and Natural Resources Law of the International Bar Association.

1 The following review of the structural and regulatory reforms of the past nearly 20 years grew out of an April 2001 symposium hosted by the Centre of New Zealand Jurisprudence at the University of Waikato School of Law, which explored the development of consumer law in conjunction with changing conceptions of consumers, citizens, and the State itself.

GENERAL CONSUMER REGULATION

By general consumer regulation we understand the common law and general law of contract and sale; general statutes such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993; and the competition rules embodied in the Commerce Act 1986. These are laws that affect most kinds of economic activity. They are couched in general terms rather than in detailed rules for each kind of transaction, and they emphasize the role of the courts rather than the role of administrative agencies, although the Commerce Commission is something of an exception. Even though the Commerce Act may not spring to mind as consumer legislation, it has an important role. It is effective in many ways in ensuring that competition is not reduced through mergers or through collusion. It is less effective in responding to monopoly; it does not target the existence of monopolies, and indeed monopolies are more likely in New Zealand because of the small size of our markets, the paucity of participants, and the difficulty of obtaining economies of scale. The Act can be used to prevent a company with a dominant position in a market from using that position to restrict the entry of another company into the market, using it to prevent another company from engaging in competitive conduct, or using it to eliminate another company from the market; but Telecom Corp NZ Ltd v Clear Communications Ltd [1995] 1 NZLR 385 (PC) showed that there were serious limits on its ability to prevent use of market dominance for anticompetitive purposes. Amendments to the Act to address these limits have been much discussed.³

INDUSTRY-SPECIFIC REGULATION

In contrast to such general laws, industry-specific regulation applies to a particular industry, and generally results in a higher degree of regulation. Industry-specific regulation usually entails the control of privately owned industries by an agency that has power to license entry into the sector, to prescribe the services to be provided, and to set rates of return and of tariffs, all in the public interest. In the United States and Canada, electricity and gas companies have long been so regulated by public utilities boards. Although in New Zealand we saw that pattern for industries such as road transport, the electricity

industry was in public ownership and governed by legislation like the Electricity Act 1968, which controlled the industry under its own set of rules. The neoliberal economic approach to governance and to the role of the state that prevailed from 1984 criticised industry-specific regulation for stifling market forces, for trying to pick winners, and for overall vagueness in objectives. In many areas, industry-specific regulation and its associated agencies were swept aside. Government ownership was similarly cut down. Consumers were to be protected by the free play of market forces, which would improve the quality of goods and services and drive prices down. These market forces would be supplemented and governed by general consumer law.

CONCERNS OF ELECTRICITY CONSUMERS

Electricity is rather different from other consumer purchases, so it is worth considering for a moment the matters that will be of concern to purchasers. Price is obviously important. Other commercial aspects are satisfactory tariffs for small users, incentives or disincentives to conserve electricity (a large fixed price element in the tariff acts as a disincentive for conservation), meter inspection and accuracy, billing arrangements, disputes procedures, disconnection for non-payment, and the ease of communication with the company. Quality of supply is important; blackouts, brownouts and voltage spikes can wreak havoc in a home or a business. Security of supply can be a matter of short-term disruption caused by storms and the like, and raises questions first about the robustness of the construction of the supply network to prevent damage and second about the speed of repair if damage does occur. Security of supply also has a long-term aspect, in regard to the adequacy of generation to meet demand, and in regard to the adequacy of transmission lines to bring the power to where it is needed. These issues raise questions about the adequacy of investment in generation and in infrastructure and about the adequacy of demand management.

These concerns may involve one or more of the four main components of the electricity industry; generation, transmission, distribution, and retailing. The ordinary pattern now is for a customer to buy electricity from a retailer that is also involved in generation, such as Contact Energy, Genesis Power, Meridian Energy, Mighty River Power, or Trust Power. That retailer-generator makes arrangements with Transpower for the transmission of power across the national grid from its power stations to city or regional
substations. The retailer-generator makes further arrangements with the distribution companies, such as WEL Networks or Orion, that own the local distribution networks that bring the power from the substation to individual homes, farms and businesses. Distribution companies are also called lines companies. Small consumers are ordinarily in contractual relations with the retail company and not the local distribution company.

Electricity consumers have had a lot to complain about in recent years. For much of the time, they have had no choice in which retailer brought them their electricity, and there has seemed to be no restraint on the prices and the terms on which electricity would be made available. Companies enjoyed a monopoly position, and dragged their feet in moving into a competitive regime, obstructing customers and competitors who wished to alter the status quo. Many of the local energy trusts were dogged with secrecy and ineptitude as they struggled with their role as shareholders in energy companies. There was a power shortage in 1992 as lake levels dropped over winter. Power company contracts with domestic consumers left a good deal to be desired.\(^4\) In 1998 Mercury Energy's supply of electricity to Auckland's central business district failed for a period of weeks. Its customer contracts capped its liability for failure to restore power within three hours to $50 for residential and $100 for businesses, and so reduced the company's incentive to maintain the security of supply.\(^5\) There was widespread chaos in 1999 as companies swapped customer lists to comply with the legislative direction to separate distribution and retail functions. Some customers were double-billed, and others were forgotten for months as companies struggled with unfamiliar new territories and incompatible computer systems. This scenario arose from a backdrop of rapid commercialisation and deregulation of a tradition of governmental generation and supply of power to citizens as a public good.

**DEVELOPMENT OF THE INDUSTRY'S LEGAL FORM**

For the mid-decades of the twentieth century, generation and transmission were in the hands of the NZ Electricity Department or

---


Electricity Division, while distribution and retailing were in the hands of local electricity boards or municipal electricity departments. In 1987 the NZED was corporatized under the State-owned Enterprises Act 1986, with a principal objective of being a successful business. It lost its legal monopoly over generation and transmission. Local distribution was reformed by the Energy Companies Act 1992, which required local communities to corporatize their electricity boards or departments. The Act’s emphasis was on corporate form and allowed shares in the new companies to be distributed as the representatives of the local communities saw fit. The distributions varied widely from place to place, but many local energy trusts were established to hold shares. Also in 1992 a new Electricity Act removed franchises, licensing, price control and obligations to supply. In 1994, Electricorp, or ECNZ, was restructured by putting the national grid in the hands of Transpower, and then restructured again in 1995 by splitting off about 25 per cent of the generation capacity in Contact Energy; both of which remained as state-owned enterprises. The phase of public development was therefore followed by a phase of restructuring.

It was hoped that a ‘market’ and competition would be the result of the restructuring; that new companies would build generation and distribution, and that retailers would compete for customers. Market competition would then determine the true value of electricity delivered at different places at different times, and price signals would indicate whether companies should make capital investments in new generation and distribution assets. If consumers could switch to another supplier offering better terms, then suppliers would be obliged to offer competitive prices, security of supply and terms of service. The industry set up the New Zealand Electricity Market in 1996 with a spot market to facilitate wholesale trading beyond the individual trades that could be negotiated under MARIA, the Metering and Reconciliation Information Agreement. The only formal regulation in place (apart from the Commerce Act) was the obligation of distribution companies and Transpower to disclose certain information about their monopoly operations under the Electricity (Information Disclosure) Regulations 1994, revised in 1999. It was therefore a restructuring with the resulting industry activity to be governed by light-handed general regulation and not by focused industry-specific regulation.

The hoped-for competition did not emerge in any significant way in spite of these structural reforms and in spite of the removal of barriers
to market entry and to the discipline of market forces, so further change became inevitable. The industry was cajoled into making better arrangements for retail competition so that homeowners and small businesses would have the benefit of different retailers competing for their accounts. Competition was also promoted by further structural reform. In generation, ECNZ's market dominance was dealt with by dividing it, in 1999, into Mighty River Power, Genesis Power and Meridian Energy, all continuing to be state-owned enterprises. Contact Energy was privatized at the same time. The distribution and retail sectors were restructured under the Electricity Industry Reform Act 1998; the local energy companies were compelled to separate their distribution and retail functions, and sell one or the other. The rationale was that this would prevent them from cross-subsidizing their competitive retail operations (i.e., especially large customers) from their distribution or lines businesses where customers had no choice but to use their networks. Most of the local energy trusts retained their lines businesses and sold their retailing businesses to one or another of the generator companies.

In 2000 there was a Ministerial Inquiry into the Electricity Industry. The government adopted most of the Ministerial Inquiry's recommendations and embodied many of them in the Electricity Industry Bill presented to Parliament later in 2000. The Bill proposed that price control be reintroduced, but on distribution companies only. It proposed that such controls be targeted at particular companies, and limited as to term. The Commerce Commission was to determine the criteria, the thresholds and the procedures under which controls might be imposed on individual distribution companies. First the Commission would examine the asset valuation procedures being used by all distribution companies in complying with the information disclosure regulations, because asset valuation is the key to determining the size of a company and therefore its profitability. The prevalent optimized deprival valuation (ODV) method would be re-examined. This re-introduction of price control would not be an easy exercise; there is no recent precedent in New Zealand for price control of any good or service, and even the lightest form of price control draws the regulator into a difficult involvement with the industry.

The Ministerial Inquiry also proposed an amendment to the Consumer Guarantees Act 1993 to provide that electricity be covered by the Act as a good, and that lines services be covered as a service. This would reverse the state of law determined by *Electricity Supply Association of NZ Ltd v Commerce Commission* (1998) 6 NZBLC 102,555 (HC). In consequence, retailers would be required to supply electricity that is of acceptable quality, and lines companies would be obliged to provide their services using reasonable care and skill in the sense of the Act. Reasonably foreseeable consequential losses, such as damage to sensitive equipment, would have to be made good. Retailers would have to negotiate the consequent liability that they expect the lines companies to carry.

Industry members were implementing other recommendations from the Ministerial Inquiry of 2000, in the knowledge that the government was obtaining statutory powers to impose the required changes if they did not move promptly. Key changes concerned the industry’s organs of self-regulation, the NZEM, MARIA and the MACQS. (The latter deals with use of the national grid.) The three organs were being combined into one single Electricity Governance Board, membership of which would be compulsory for generators, retailers, traders, and also for Transpower and for distribution companies. The EGB would be less dominated by the generator-retailers, and would include consumer representation. It would have wider responsibilities in the industry.

The Inquiry also recommended that the industry establish an ‘ombudsman’ or complaints commissioner scheme to resolve consumer complaints, following the example of Victoria and New South Wales, and (in New Zealand) the Banking Ombudsman and the Insurance and Savings Ombudsman. The availability of a complaints commissioner or some such officer would provide a useful and cheap way for consumers to resolve disputes with their power companies. (Use of the term ‘ombudsman’ requires consent of the parliamentary Ombudsman.) One question about the scheme was whether the commissioner would have any say over the content of the contract between the company and its customer. Without that input, the commissioner’s power to ensure fair outcomes would be limited, even if he or she had the power to depart from the express terms of the contract. Unreasonable terms could lead to bad results even though the commissioner’s process was a fair one. The EGB proposed to work on model contracts. If it did, its proposals would be best discussed with the complaints commissioner. Other EGB
functions would affect the work of the commissioner, for instance decisions on standards for security of supply, rules about customer switching and pricing methodologies.

CONCLUSIONS

It took policymakers a long time to perceive that general consumer legislation in tandem with structural reform would not be effective. The Ministerial Inquiry of 2000 can be regarded as a departure from the previous reliance on restructuring as a policy instrument, and a return to formal industry-specific regulation. It is nonetheless still light regulation in several respects. It does not require any licence or franchise to enter electricity retailing or indeed to enter any other part of the industry. While this reduces barriers to entry and reduces the regulatory burden, there is no opportunity in licence renewals to require standard contracts, to review performance measures, or to implement any other measures to protect consumers. Nor has any Electricity Commission or such separate agency been established.\(^7\) (The Ministerial Inquiry into the telecommunications industry that paralleled the inquiry into the electricity industry recommended a separate Telecommunications Commissioner with an independent office, but that was watered down to a Commissioner housed in the Commerce Commission.) Formal industry-specific regulation will therefore play a moderate but growing role.

Other aspects of the legal regime have played an important part for some time, and will continue to do so. The use of general consumer law will be enhanced with the application of the Consumer Guarantees Act. In addition, the numerous restructurings and use of governmental powers over state-owned enterprises have in fact acted as a less formal kind of industry-specific regulation. Further, industry self-regulation, to avoid government reregulation, plays an important role. The self-regulation is very detailed and at times quite legalistic. Some of it directly affects consumers, such as in the scheme for a complaints commissioner and in plans for a model contract, while aspects such as the operation of the Electricity Market affect consumers only indirectly. Under the legislation that was proposed the government would again have more explicit legal tools with which to ensure that the market institutions met government policy objectives.

\(^7\) But see the Postscript, over page.
Many of these elements of the legal regime, including general and industry-specific regulation, have been directed at encouraging market competition. Competition has been slow to emerge, but it has begun to show benefits to consumers. Retailers face competitive pressure in most parts of the country, even in the low-return domestic sector. Customers can move to another supplier if they are not satisfied, and indeed they have done so in large numbers. Consumer contracts have improved. Retailer-generators who invest recklessly in new generation facilities can no longer compel their customers to pay for them. However the amount of effort required to encourage market competition, and to keep it going, is striking. It has required more than a simple removal of the legal barriers to competition, and more than the restructuring of monopolies as competitive commercial entities. It has required more than general consumer and competition regulation. Paradoxically, bringing market competition into existence has needed a great deal of regulation. Keeping it going has not been easy either; the configuration of the industry as dominated by four or five large retailer-generators may marginalize the wholesale market and reduce effective competition, to the detriment of consumers.

POSTSCRIPT

The Electricity Industry Bill was passed in the form of the Electricity Amendment Act 2001, Electricity Industry Reform Amendment Act 2001, Commerce Amendment Act (No 2) 2001, and the Ministry of Energy (Abolition) Amendment Act 2001. The Commerce Amendment Act 2001 strengthened the Commerce Act ability to guard against misuse of monopoly power. The Commerce Commission has work under way on distribution price controls, to establish performance thresholds against which companies will be assessed as a screening mechanism. It is also working on information disclosure requirements. An Electricity Complaints Commissioner has been appointed. She can investigate complaints and issue decisions binding on the company, involving amounts up to $10,000. An Electricity Consumer Code of Practice is part of the scheme. Nearly all power companies participate in the scheme. The proposed amendment to the Consumer Guarantees Act 1993 was made in 2003.

A shortage of water in hydro lakes over the winter of 2001 raised serious concerns about security of supply, concerns that will arise inevitably in a hydro-dominated generation system with only moderate amounts of storage. High wholesale prices forced NGC out
of retailing because it had no generation assets and no hedge contracts in place; its proposal to raise prices to its customers was not viable. A second dry winter in 2003 caused wholesale prices to rise fivefold. At the same time, industry efforts to agree on the rules for the single Electricity Governance Board were not successful. On 20 May 2003 the government announced that its solution to both problems was to form a new Electricity Commission, which will take over the three industry self-regulatory agreements, and will take steps to ensure that sufficient reserve power capacity is available to meet dry year needs. The Electricity and Gas Industries Bill was then introduced to implement this decision. It also proposes that industry consumer dispute resolution systems be regulated. If the Ministerial Inquiry of 2000 represented a departure from restructuring and light-handed regulation, and a return to industry-specific regulation, then the movement towards re-regulation has accelerated greatly, as problems in reliability of supply and generation reframe electricity away from a simple market commodity and back towards an essential public good.