

Section Three of the Town and Country Planning Act 1977:

Adjudicating the Non-Justiciable

by

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Introduction

This article emerges from the convergence of two developments which have concerned this writer; first,

The possibility that a multi-specialty body modelled on the Australian Administrative Tribunal might assume the role of several existing Tribunals including the Planning Tribunal; and secondly,

The increase in the number of statutes which contain broad policy directives towards which the regimes regulated by those statutes must aspire. The problems associated with adjudication of such policy directives are clearly illustrated where the Planning Tribunal has to consider and balance the seven subsections of section three of the Town and Country Planning Act, 1977.

The writer's intention is to briefly outline the characteristics of the Tribunal and to identify theoretical problems and their emergence in the adjudication of section three.

The Planning Tribunal: Procedure and Jurisdiction

The Planning Tribunal has evolved from a purely administrative licensing body under the Town and Country Planning Act 1926 to a purely adjudicative body under the present Town and Country Planning Act of 1977 (TCPA). The 1953 Act, the forerunner to today's statute, transferred planning control from central to local government and the need was seen to change the function of the Board (as it was then called) to a body which would adjudicate on challenges to the local bodies and their District Schemes. This, with some minor modifications and additions by other legislation, has remained the Tribunal's purpose under the 1977 Act.

The Tribunal is composed of fifteen members: not more than five

Planning Judges and ten other members. It sits in four divisions: one in the South Island, one in the lower/central part of the North Island and two based in Auckland covering the upper North island. At present, the Tribunal is headed by Principal Planning Judge Turner.

The Tribunal variously hears appeals (which form the bulk of its work); holds inquiries (in the past these have occurred where large development interests have clashed with multiple objectors under the Public Works Act 1981 or the National Development Act 1979); and in some cases the Tribunal may be called upon to make a recommendation or declaration (for example under section 163 of the TCPA where a dispute has arisen between any of the bodies listed therein).

The Tribunal has the power to govern its own procedure (section 149). Specific procedural points are dealt with in practice notes issued occasionally by the Tribunal! However the day to day operation of each particular division of the Tribunal is to a large extent determined by the presiding Judge. It is hard to determine the input of the non-judicial members in this regard. Obviously they defer to the Judges in all legal/judicial matters and certainly in many of the areas where the Judges have gained expertise through experience, members may just serve to reinforce the Judges' conclusions, however their input 'behind the scenes' in areas of their own particular expertise is no doubt considerable. The recent appointment of one member previously involved in retail advice and building management would seem to indicate both the recognition of increased retail and office development in Auckland and the need for specialised input in this area. The approach of Principal Planning Judge Turner however, is indicated by the following statement:²

The Planning Tribunal does not plan

which suggests a heavy emphasis on the adjudicative role as opposed to the planning role of the Tribunal.

The Tribunal is a Court of Record (section 128) and has all the usual powers of Tribunals as to public interest immunity (section 140), contempt (section 142), protection of witnesses and counsel (section 143), awards of costs (section 147) and other powers incidental to a judicial type hearing. It is now established that the Tribunal holds a total de nova rehearing on the merits,³ and in support of this, the Tribunal by section 150 is given all the powers, duties, functions and discretions of the body appealed from. In practice this means that the whole case must be argued afresh before the Tribunal and that the transcript of the first instance hearing is not automatically available; first instance findings have no greater effect than any other evidence produced to the Tribunal.⁴

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¹ The latest practice note issued by the Tribunal may be found at (1985) 10 NZTPA 467. (1982) 67 Planning Quarterly 5, 5.

³ *Wellington Club Inc. v Carson, Wellington City and Others* [1972] NZLR 698; *Ross v Number Two Town and Country Planning Appeal and Others* [1976] 2 NZLR 206 [CA].

⁴ *Hudson and Others v Timaru City Council* (1981) 8 NZTPA 410.

Rights of reference to the Tribunal arise under eight different Acts of Parliament. Of these the TCPA is by far the most comprehensive containing twenty-eight separate provisions allowing appeals, inquiries and other references to the Tribunal. In addition the Tribunal must often consider the effect of statutes such as the Reserves Act 1977, the Forests Act 1969 and the Health Act 1972 which impinge upon planning issues. As may be expected from such a menagerie of legislation, discerning a coherent body of relevant considerations to be taken into account by the Tribunal is difficult. Many of the statutes give no guidance whatsoever in deciding a particular issue. The Water and Soil Conservation Act 1967, for example, has had its long title gymnastically exploited in attempts to import relevant considerations.⁵ The common approach seems to be that advanced by Casey J in 'the Clutha Dam case' where he stated that the Tribunal's only justification for not taking a factor into account "... must be that the factor is made irrelevant by the nature and extent of those matters the authority is required to take into account in the granting of a right"⁶. The Court of Appeal has accepted this approach by implication in the leading case of *Keam v Ministry of Works and Development*.⁷

It is submitted that confronted with this confused situation, the Tribunal has looked to section three of the TCPA, either explicitly or implicitly, to supply a core of relevant considerations. In much the same way as the principles expressed in section five of the Official Information Act 1982 and section twenty-six of the Accident Compensation Act 1982 have moulded those areas of the law so has section three of the Town and Country Planning Act 1977 flavoured the decisions of the Planning Tribunal. The purpose of this article is to suggest theoretical difficulties raised by the consideration of section three provisions by the Tribunal and to suggest the direction in which changes might be made to better accommodate these difficulties.

Section Three of the Town and Country Planning Act 1977

3. *Matters of national importance*

1. In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:
 - (a) The conservation, protection, and enhancement of the physical, cultural, and social environment;

⁵ *Metekingi pp Atihau-Whanganui Incorporation and Others v Rangitikei-Wanganui Regional Water Board and Another* [1975] 2 NZLR 150.

⁶ *Gilmore and Others v National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZTPA 298, 301.

⁷ [1982] 1 NZLR 319 [CA].

- (b) The wise use and management of New Zealand's resources;
 - (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development;
 - (d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food;
 - (e) The prevention of sporadic subdivision and urban development in rural areas;
 - (f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities;
 - (g) The relationship of the Maori people and their culture and traditions with their ancestral land;
2. The Minister may exercise all such powers as are reasonably necessary for promoting in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district, and maritime planning.

The section was clearly not enacted solely to provide relevant considerations for the Tribunal. Its evolution shows the gradual realisation that "... some method, whether it be brute strength, tradition, or legislation, [is] required to resolve the conflict inherent in resource allocation".⁸ As Judge Turner noted in an early case under the TCPA:⁹

... the underlying philosophy of British law has for centuries been the recognition of the individual freedom and liberty except to the extent necessary to achieve the common good.

The legislature, in section three and its forerunner, provided a set of goals by which local bodies could administratively allocate use of land resources. In this light it is interesting to note Professor Grant Hammond's observation that an agriculture dominated economy led to an emphasis at least initially on preservation of agricultural land.¹⁰

When this administrative discretion is challenged however, the allocative role is forced upon the Tribunal. In such a situation section three is used not as a goal which the Tribunal is encouraged to attain, but rather as a means by which competing claims can be judged. It will be suggested that the purpose behind section three — as a set of standards flexible enough to absorb changes in the community — is ill-suited to the provision of a body of rules applicable to particular facts and able to be argued meaningfully by the participants before the Tribunal.

⁸ R. Grant Hammond *Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence* (1982) 5 *Hastings Int'l and Comp. LR* 324, 364.

⁹ *Centrepont Community Growth Trust v Takapuna City Council* (1978) 6 *NZTPA* 503, 507.

¹⁰ Hammond *supra* note 8 at 364.

The Problems With Section Three

The writer submits that there are three theoretical problems raised by consideration of section three. These are:

1. Polycentricity
2. Multiple criteria
3. Responsiveness

To a large extent these concepts overlap; however, for the sake of simplicity, they will be defined and analysed separately.

1. Polycentricity

The concept of polycentricity was first introduced into legal discussion by Professor Lon Fuller in 1957. He explained the concept with the following illustration:¹¹

We may visualise this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centred" — each crossing of strands is a distinct center for distributing tensions.

More often than not Fuller defined polycentricity by example rather than explanation, a common case being that of a testatrix named Timken who left a valuable collection of paintings to two museums 'in equal shares'. This problem, Fuller explained, is polycentric because the choice of one painting has a direct bearing on all other choices. The choices interact, and the priorities of each museum will change as each choice is made. Applying this to section three, it is submitted that emphasis on any one matter of national importance will directly affect the consideration of the other matters. For example, a decision to allow a development to go ahead on prime productive land, near a coastline, which may interfere with Maori burial sites clearly involves interactive choices.¹²

There are however further aspects associated with section three, matters which indicate polycentricity. Taking subsection (b) as an example, quite clearly a question as to whether a proposed use of land is 'wise' in itself is a polycentric question. It may involve:

— issues of economics: will the proposed development increase employment in the short or longer term; will it cut down on imports of any of the products it produces; will it increase competition in that market or is it necessary and/or viable;¹³

¹¹ Fuller, *The Forms and Limits of Adjudication* (1978) 92 Harv LR 353, 395.

¹² These question had to be considered by the Tribunal in *re an Application by NZ Synthetic Fuels Corporation Limited under the National Development Act* (1981) 8 NZT^rA 138.

¹³ The relevance of viability and necessity was considered in the "Clutha Dam Case" especially where that case came to be considered by Casey J. in the High Court. (*Clutha Dam v National Water and Soil Conservation Authority and Minister of Energy*. Sup^ra at note 6. 298.

- issues of social ordering: will further housing be required; has the area enough support facilities; how will the local population react to an influx of “outsiders”;
- issues of culture or morality: for example, establishment of an alternative lifestyle farm; will it affect local children or cause racial or religious disharmony in the community.

This is certainly not an exhaustive list but serves to show the problems present in section three consideration.

Another possible problem with decisions based on section three is their precedent effect. It is extremely hard to gauge how much note the Tribunal takes of its previous decisions. Certainly it is very rare for a previous decision to be directly relied upon and the facts of each particular case will always be paramount. Nevertheless undisclosed precedent effects may also add to the issues which need to be balanced. The direction that regard must be had to “. . . the town and country planning significance beyond the immediate vicinity . . .” contained in sections seventy-four and seventy-six of the TCPA (dealing with specified departures, and dispensations and variations respectively) has been interpreted to mean that the precedent effect of any decision must be taken into account, seemingly in recognition of this problem.¹⁴

As Fuller recognises however there are polycentricity elements, explicit or implicit, in almost every problem submitted to adjudication. Clearly there must be something more which, either in conjunction with or alternatively to polycentricity, makes an issue non-justiciable. Professor Melvin Eisenberg in analysing Fuller’s work suggests that “. . . at a minimum there must be added to the test of polycentricity what might be called the problem of multiple criteria . . .”¹⁵

2. Multiple Criteria

As defined by Eisenberg these situations involve “. . . competing claimants for a given subject-matter, none of whom has a substantive right that can be determined by the application of an authoritative standard”¹⁶ Roscoe Pound defined a rule in much the same way as a “. . . legal precept attaching a definite detailed legal consequence to a definite detailed state of fact”¹⁷ In the New Zealand planning context Noel Ingram states that such issues are non-justiciable because they are not able to be predicted by applying general rules to particular facts without resorting to policy.¹⁸

Fuller’s central thesis although more generalised is very similar¹⁹:

¹⁴ See for example *Highway Motors Limited v Mount Wellington Borough Council* (1972) 4 NZTPA 220.

¹⁵ Eisenberg, *Participation, Responsiveness and the Consultative Process: An Essay for Lon Fuller* (1978) 92 Harv LR 410, 424.

¹⁶ *Idem*.

¹⁷ (1959), Vol. 2 *Jurisprudence* 124.

¹⁸ *Justiciability and the Issues Involved in a Specified Departure* [1971] AULR 45, 46-7. See also Ingram’s Cambridge Ph.D Thesis, *The Control of Administrative Discretion Within a Licensing System* (1979) at pp 14-16.

¹⁹ Fuller *supra* note 11 at 364.

... the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.

It is submitted that section three raises two problems associated with multiple criteria. These are:

1. Weighting
2. Joinder of issues.

Martin Shapiro states in considering administrative discretion:²⁰

At one end lie those statutes which, in announcing a number of purposes, state priorities or weights as clearly and exactly as they can. At the other end lie 'lottery statutes' in which contending forces in the legislature, unable to agree on weights, placed all their contending preferences in the statute as the only available alternative to having no statute at all.

Although this may be true in some circumstances the present writer prefers to think, similarly to Hammond, that such 'constructive ambiguities' represent a desire to maintain flexibility as already mentioned and also a defensible compromise between conflicting principles of significance. It may also be in the section three context that, as conservation and recognition of Maoritanga have become more important, these subsections have been 'tacked on' to the agricultural subsections together with a 'development' subsection without full realisation of the difficulties raised by their conflicts. The Tribunal is faced with a series of conflicting subsections without any guidance as to how they are to be interpreted in relation to each other. Does the Tribunal presume equal weighting? If it does not, then by virtue of the section's polycentricity, emphasis on one or more subsections to the detriment of others would have far reaching effects. The way section three is drafted adds to this problem. Are the specific subsections (1)(c) to (g) merely particular instances of subsections (1)(a) and (b)? Conversely, and perhaps more in consonance with section three's development, does the inclusion of the particular subsections mean that the legislature has moved to remedy particular mischiefs? This might especially be said of section 3 (1)(g). From the cases it would appear that the weighting of each subsection is a fairly arbitrary matter dependant on the facts of the particular case and on an underlying feeling as to what the legislature and the community consider important. For example, in recent years there has been a tendency, especially under the National Development Act, to subordinate preservation of prime agricultural land and other subsections to the provision for wise use of resources,²¹ the latter subsection having been some-

²⁰ *Administrative Discretion: The Next Stage* (1982) 92 Yale LJ 1487, 1505.

²¹ For examples of this tendency see the Synthetic Fuels decision — supra note 12; and also *Smith and Others v Waimate West County Council* (1980) 7 NZTPA 241 (ammonia-urea).

what biased towards development by the Tribunal's restrictive interpretation of the word 'wise'.²²

The weighting problem is well summed up by Eisenberg:²³

Often, however, the criteria cannot be reduced to one or objectively weighted, except by seriously impoverishing the solution. Where that is the case, and where the situation does not lend itself to a negotiated outcome, an optimum solution can normally be arrived at only by vesting a single decisionmaker with "managerial" authority — by which I mean authority not only to apply relevant criteria, but to determine how much weight each criterion is to receive and to change those weights as new objectives and criteria may require.

The second problem with multiple criteria — joinder of issues — is highly relevant to section three. Fuller adverted to this only briefly, stating:²⁴

To preserve some substance for the form of adjudication you have to judge pumpkins against pumpkins, not pumpkins against cucumbers . . .

Is it possible to balance the merits of a development against the loss of valuable farm land or significant detriment to sacred Maori burial sites? The answer is probably yes but not by adjudication. For if we examine the definitions listed at the beginning of the discussion on multiple criteria it seems clear that such a balancing is not a matter which can be determined by application of any fixed rules and cannot therefore be subjected to reasoned proofs and arguments by those participating. This brings us to the third theoretical problem raised by section three.

3. Responsiveness

What distinguishes adjudication from other forms of social ordering is not simply that the parties have the right to present proofs and reasoned argument to which the decision maker must attend, but that the decision ought to proceed from and be congruent with those proofs and arguments.²⁵

It is submitted that the characteristic of strong responsiveness of the decision to the arguments adduced by the parties provides an explanation as to why section three is non-justiciable. The problems already canvassed with regard to polycentricity and multiple criteria are, it is submitted, directly attributable to the lack of responsiveness in adjudication of section three issues. In other words the problem with both polycentric problems and multiple criteria is that the decision does not necessarily correlate strongly with the proofs and arguments of any of the parties. The flexibility of section three can in the light of adjudication be seen to be another factor by which ". . . the parties' participation is reduced when it is impossible to foretell what issues will become

²² For comment, see Timmins, *Jurisdictional Pressures on the Planning Tribunal* (1982) 67 *Planning Quarterly*, 7 and the cases cited therein.

²³ Eisenberg *supra* note 15 at 425.

²⁴ Fuller *supra* note 11 at 403.

²⁵ Eisenberg *supra* note 15 at 413.

relevant in the ultimate disposition of the case".²⁶

Clearly responsiveness is linked to participation but the two terms are not co-extensive. Great emphasis has been placed on what Fuller terms "the mode of participation".²⁷ (As we have already seen the mode of participation is restricted where the issues are non-justiciable.) However little notice has been taken of the less theoretical problem of actual physical participation before an adjudicative body. Fuller was content merely to comment in passing that polycentricity ". . . might require in each instance a redefinition of the 'parties affected'".²⁸ This problem has been developed more fully by Barry Boyer, a United States attorney, and his comments are highly relevant to section three matters.²⁹

The problem is compounded by the fact that the broad public interest standards governing many areas of agency activity, as well as the cases requiring agencies to seek 'optimally beneficial' solutions to certain kinds of questions, indicate that the agency decision maker should not rely solely on the views presented to him, but rather must discern and evaluate the concerns of unrepresented, unarticulated interests.

Paul Weiler, a member of the British Columbia Labour Board, writes similarly:³⁰

The agency is instructed to make its decision 'in the public interest', perhaps taking into account a number of specific factors, but without any particular weight or priority being assigned to them. In the absence of real statutory guidance, a subtle trend develops in the regulatory environment. On the one side, the target of regulation is a large enterprise, such as a railroad, which has the financial interest, ability, and resources to make a sustained and pervasive case to the agency over many years. On the other side, the beneficiary of regulation, the 'public interest', is comprised of small, marginal benefits accruing to each member of the very large public. But it is very difficult to organise such a diffuse constituency so that an economically sophisticated position, contrary to that of the regulated firm, can be presented to the agency . . .

The Tribunal in taking section three matters into account is faced with a somewhat paradoxical problem. If it is to try and assemble some coherent argument based upon 'absentee interests', as required for example when considering the effect of a development on the Maori relationship to ancestral land, then the resulting decision, although a true recognition of the polycentricity of section three, is not an adjudicative one in the sense of being strongly responsive to the participating parties' arguments. This leads us to the next phase of this discussion — what happens when section three matters are submitted to adjudication?

The Results of Section Three Adjudication

The writer proposes to deal with this topic in two stages; first, by dealing with the theoretical results and, secondly, by reference to selected

²⁶ Fuller supra note 11 at 389.

²⁷ Ibid at 364-5.

²⁸ Ibid at 395.

²⁹ *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues* (1972) 71 Mich LR 111, 167.

³⁰ *Administrative Tribunals from Inside* (1976) 26 University of Toronto Law Journal 193, 211.

cases, the actual results of using section three as a means for deciding competing claims.

1. *Theoretical results*

As I see it, three things can happen, sometimes all at once. *First*, the adjudicative solution may fail. Unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly. *Second*, the purported arbiter ignores judicial proprieties — he “tries out” various solutions in posthearing conferences, consults parties not represented at the hearings, guesses at facts not proved and not properly matters for anything like judicial notice. *Third*, instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem so as to make it amendable to solution through adjudicative procedures.³¹

Writing in 1957 it is remarkable how pertinent Fuller’s analysis is to the Planning Tribunal.

It is submitted that to some extent all three of these results are at least possible. The first result is self-explanatory and need not be dealt with except by example later. The second result seems at first sight to be highly unlikely in a Tribunal presided over by District Court Judges³², however it is submitted that theoretically at least, and in a limited form judicial proprieties may be ignored. This is not as inflammatory a statement as may first appear since the Tribunal despite choosing for itself a highly legalistic procedure is not a court in the strict sense of the word. The writer is referring here to the little discussed concept of judicial notice.

An analysis of how much note the Tribunal takes of facts within its expertise and experience not actually proved before it is unfortunately outside the scope of this article, but two brief observations can be made. Firstly, it is clear that the reason for a separate planning tribunal and the inclusion of members with planning or local government expertise is the development of a body which can make use of its experience and expertise so as to deal with planning matters efficiently and quickly. Secondly, given that this is so, the question arises as to how far judicial notice can be taken before the requirement of strong responsiveness is lost.

Because section three issues are not susceptible to proof, either because of polycentricity or multiple criteria, the tendency may be for the Tribunal to supplement the subdivisions of the parties with its own expertise. Clearly the more the issue deviates from a truly justiciable either/or question the more the Tribunal will have to rely on its own value judgments and expertise. In doing so it is forced to shed judicial proprieties and as a final result make decisions which are not strongly responsive to the participating parties’ arguments. As we shall see the Tribunal itself has recognised and struggled against this tendency which

³¹ Fuller supra note 11 at 401.

³² It is interesting to note in this context J.A. Farmer’s list of transgressions experienced in other Tribunals contained in *Tribunals and Government* (1974), ‘Law in Context’ series, Weidenfeld & Nicholson, London 167-9.

it sees as a direct result of being forced to provide a judicial cloak for political decisions.

The third result predicted by Fuller — reformulation of the problem to reduce non-justiciable content — is a common feature of the legal system. In a study of the New Zealand Rent Appeal Boards in 1976 Alex Frame and Paul Harris compared use of a legal code with use of a map. They observed:³³

Of course, in both cases, the summarising power of the plan, initially useful, becomes a weakness the closer the interpreter comes to applying the theoretical ideal. It turns out that those long straight lines on the map have failed to convey the reality of pot-holes, roads under repair and heavy traffic. Similarly, the map of the "law-world", which had presented such a useful guide to the lawyer making his initial prediction, becomes less adequate as he and his client begin to pick their way through the decision making processes of the real world of legal institutions.

Again the Tribunal is faced with an impossible situation. Either it takes account of polycentric/multiple criteria issues with the resulting decrease of responsiveness or it ignores what in a non-adjudicative setting would be relevant considerations, thereby severely emasculating the force of section three.

A problem which may flow from both the reduction of 'relevant' considerations and the converse desire on the part of the Tribunal to use its expertise in deciding non-justiciable issues has been called "the dwarfing of soft variables".³⁴ Under this argument it is suggested that certain factors are likely to have easily quantifiable values, such as the amount of extra power a dam will put into the national grid, whereas other factors such as environmental, cultural or social considerations will not. In a situation where these factors must be balanced the decision maker may be tempted to assign arbitrary values to unquantifiable items or even to ignore these items. As we shall see this tendency has been noted and criticised by the Waitangi Tribunal in regard to section 3 (1)(g) issues.

The proof of the pudding, so it is said, is in the eating and in order to test the theoretical problems outlined above it is now necessary to look briefly at a few major cases which have come before the Tribunal.

2. Section Three in Practice

The writer has respectfully adopted Judge Turner's historical narrative³⁵ as a framework for looking at the development of section three.

In 1974 the Maori owners of land which was to be flooded by the damming of the Mangawherawhera stream in the Wanganui district appealed against the decision of the Town Planning Board. In *Metekingi v Rangitikei — Wanganui Regional Water Board*³⁶ Cooke J held in the

³³ (1977) 7 NZULR 213, 214.

³⁴ Tribe, *Trial by Mathematics* (1971) 84 Harv LR 1329, 1361.

³⁵ Turner, *The Changing Basis of Decision-Making: Is Reason Sufficient?* [1985] NZLJ 195, 197.

³⁶ *Supra* note 5.

Supreme Court that the term "soil conservation" meant that emphasis had to be placed not only on the water right itself but also on the loss of valuable and productive land. The Board on reconsideration held that the right should not issue.³⁷ Judge Turner says of this decision:³⁸

The effect of the High Court ruling was to say that a scientific approach was no longer sufficient.

The next case of importance was *Smith v Waimate West County Council*³⁹. This was a hearing concerning the Kapuni ammonia-urea plant. Although the Tribunal did take into account the loss of prime dairy land, it refused to accept that the end use of the natural gas was a relevant consideration. It was argued that because of the wasteful nature of the process and the uncompetitiveness of the end product in the international market that this was not a "wise use of resources" as required by section 3 (1)(b). The Tribunal stated:⁴⁰

We have concluded that the 'wise use of resources' provisions is aimed at ensuring in a planning sense that an opportunity is afforded to make use thereof. When a person wishes to take advantage of the opportunity so afforded the economics of the end-product of his processing is not a matter for investigation by the Council or the Planning Tribunal.

It is interesting to note that only several months later a farming co-operative was set up to import ammonia-urea at a much cheaper price. Clearly the parties affected by the Tribunal's decision were not only those parties to it but also farmers and to some extent taxpayers who contribute to the support of this ailing project. In the light of Fuller's consequences it may be argued that the Tribunal reduced the polycentric content by refusing to take downstream concerns into consideration and also produced a decision which has in the long run been ignored in the practical sense.

At this stage the National Development Act 1979 (NDA) enters the fray. The first referral to the Tribunal under the Act concerned the Waitara methanol plant. *Re an Application by Petralgas NZ Ltd*⁴¹ the Tribunal stated:⁴²

The Town and Country Planning Act (1977) creates control over the use and development of land only, and does not authorise control over the use of raw materials and resources generally, once they have been won from the land.

The second referral under the Act was the case of *re an Application by NZ Synthetic Fuels Corp Ltd*⁴³ concerning the synthetic petrol plant at Motanui. The inquiry raised complex issues as to the interpretation

³⁷ *Metekingi pp Atihau-Whanganui Incorporation and Others v Rangitikei-Wanganui Regional Water Board* (1975) 5 NZTPA 340.

³⁸ Turner supra note 35 at 196.

³⁹ (1980) 7 NZTPA 241.

⁴⁰ Ibid at 259.

⁴¹ (1981) 8 NZTPA 106.

⁴² Ibid at 109.

⁴³ (1981) 8 NZTPA 138.

of section three. Conflicting and inter-relating considerations as to wise use of resources section 3 (1)(b), preservation of the coastal environment section 3 (1)(c), possible interference with Maori ancestral fishing grounds section 3 (1)(d) and the consequential question of alternate sites all had to be considered. The decision of the Tribunal is notable for its detailed environmental assessment. However, the Tribunal again stressed that it was not its function to decide whether the "use of natural gas for the production of synthetic petrol is indeed the best or wisest use of that natural resource".⁴⁴ In support the Tribunal adopted its reasoning in *Smith*⁴⁵ and *Petralgas*⁴⁶. Dr Palmer argues that the Tribunal's rulings were appropriate since the⁴⁷

Investment decision must be primarily one for the developer . . .

It is submitted however that section three requires a much wider approach as a matter of statutory interpretation. The language of section three indicates that rather than taking an instant snap-shot the Tribunal should consider carefully not only the environmental consequences but also the social, cultural and economic consequences of its decision both at the time of the decision and in the future. Indeed Judge Turner has stated recently when considering section 3 (1)(d):⁴⁸

Such land may not be required for the production of food today. The object of the sub-section is to protect against the day that it will be required for that purpose, be it 20, 50, or 100 years in the future.

Tying these cases back to the theory it is submitted that the Tribunal, in adhering to strict judicial interpretations, has reduced the polycentric content. In so doing it has severely limited the impact of the conservation/environmental sections and by refusing to limit section 3 (1)(b) has increased that subsection's weight.

The synthetic fuels decision also leads into another troublesome area, that of consideration of section 3 (1)(g). This subject would provide enough material for another article by itself, however, it highlights the problem with non-justiciable questions so it will be canvassed briefly.

The approach of the Tribunal has been fairly consistent as regards section 3 (1)(g). In decisions such as *Brighthouse v Dannevirke County Council*,⁴⁹ *Quilter v Mangonui County Council*,⁵⁰ *Emery v Waipa County Council*⁵¹ and *Minhinnick v Auckland Regional Water Board*,⁵² the Tribunal has refused, sometimes in somewhat disparaging terms,

⁴⁴ Ibid at 144.

⁴⁵ Supra note 39.

⁴⁶ Supra note 41.

⁴⁷ *The National Development Act 1979 — A Lawyer's Assessment* (1982) 68 Planning Quarterly 27.

⁴⁸ *B.J. Coppard v Thames-Coromandel DC* — unreported Planning Tribunal decision No. A23/83.

⁴⁹ Decision No. A86/81 (September 1981).

⁵⁰ Decision Nos. 296/77; 38/78 (21 July 1978).

⁵¹ Decision No. 549/78 (22 August 1979).

⁵² Decision No. A116/81 see [1982] Recent Law 190.

to consider Maori claims where they are not based on ownership of the land in question or are concerned with metaphysical questions. In 1985 Principal Planning Judge Turner made his views quite plain:⁵³

... to attribute spiritual personality to natural features and to give those spirits power over human activity would now be rejected by most people as sheer superstition, as merely irrational belief founded on fear or ignorance. As beliefs which restrict mankind unreasonably. We have been promised that we shall know the truth and that the truth will set us free. But perhaps some have difficulty in recognising the truth when they see it.

Quite apart from observing that Judge Turner goes on to justify his own suggestions by reference to the Bible, the writer submits that this is exactly the type of relationship envisaged by the Act.

First, on a purely literal translation of section three (1)(g), if the Maori relationship encompasses "spiritual" matters then surely they are to be recognised and provided for. Secondly, the flavour of the Tribunal's comments suggests that "scientific" evidence is to be preferred. The Waitangi Tribunal in commenting on the Motonui decision⁵⁴ stated:⁵⁵

In our view it is not entirely relevant to consider whether the Te Atiawa contention is corroborated by scientific evidence. Indeed we question the extent to which scientific evidence should be preferred. The Maori lore on the conservation and preservation of natural resources, as inherited by word of mouth, represents the collective wisdom of generations of people whose existence depend upon their perception and observation of nature. We do not consider that the weight given to scientific evidence should be such as to denigrate the worth of customary lore, or to inhibit Maori people from relying on it. In the final analysis it is the test of experience (and the generations of the future) that will determine the worth of scientific postulates.

This problem has been recognised also in the United Kingdom where a common complaint heard from witnesses has been that quantitative evidence seemed to be preferred to qualitative.⁵⁶

Thirdly, it is submitted that simply by reason of its existence, section 3 (1)(g) indicates that the legislature has recognised that the Maori relationship differs from or goes beyond the normal criteria relevant to assessing planning questions. The Waitangi Tribunal, in the recent *Liquigas* decision concerning development in and around the Manukau Harbour, went to great lengths in detailing the social and cultural consequences of decisions affecting the Maori relationship to the land.⁵⁷ Surely the language of section three indicates that these considerations should be taken into account.

A recent case in this area indicates that a less restrictive interpreta-

⁵³ Turner, *supra* note 35 at 199.

⁵⁴ Motonui decision *supra* note 12.

⁵⁵ *Report of Waitangi Tribunal on Application by Aila Taylor on behalf of Te Atiawa Tribe* (1983) 6 WAI 34. See also, John Tamihere's article *Te Take Maori: A Maori Perspective of Legislation and Its Interpretation With An Emphasis On Planning Laws*.

⁵⁶ A joint winner of the Auckland University Law Review prize in 1985 AULR at 137. Armstrong, *How Inquiries Could Win Back Our Trust* (1985) *Town and Country Planning* (UK) 251, 252.

⁵⁷ *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority* (1983) 9 NZTPA 167.

tion of section 3 (1)(g) is appropriate. The case in the High Court of *Royal Forest and Bird Protection Society Inc. v W.A. Habgood and Ors* decided in March, 1987, takes a novel approach in asserting that "ancestral land" means land owned by ancestors and warns of the dangers of overlying European interpretations.⁵⁸

What is required to be determined is the relationship of Maori people and their culture with *their* ancestral land.

— not what a European would describe as his or her ancestral land. Clearly this is a direction that the Tribunal must take account of the polycentric nature of section 3 (1)(g) and it will be interesting to see how the Tribunal responds.

To continue with the cases more generally, it is submitted that the first indications that downstream resource use was a relevant factor came in *Keam v Ministry of Works and Development*⁵⁹, where the Court of Appeal overruled the decision of the High Court that the Tribunal had exceeded its jurisdiction by taking into account the likely effect of a grant of a water right.

Many of the issues already discussed came together in the controversial Clutha Dam Inquiry.⁶⁰ The basic issue was whether Dam DG3 just above Clyde should be a high or low dam. The former would flood a much greater area of farm and orchard land than would be the case with a low dam. Alternative siting was clearly important as were many of the concepts outlined in section three. As a matter of fact, it was found that the need for more power at the proposed Aramoana Smelter was the sole reason for the high dam. By a majority of four to two, the Tribunal held that the water right should be granted. It is very interesting to note that the two Judges, Judge Treadwell (Chairman) and Judge Skelton dissented from the majority decision of the four lay members (Messrs Ensor, Hermans, McKenzie and Riley). The majority decision is summarised by John Timmins as being based on a "balancing exercise between public interest and generation of power on the one hand, and land utilization and other factors on the other".⁶¹ Judge Skelton, dissenting, held that this balancing went the other way and concluded that the advantage of a gain of four to five percent into the national grid did not outweigh the loss of land use and other environmental factors.

The decision of Judge Treadwell is important. He clearly recognised his difficulty. On one hand were the increasingly obvious directions of High Court's that downstream consequences were to be taken into account (*Metekingi*⁶², *Keam*⁶³) and the factual finding that the only rea-

⁵⁸ Per Holland J., HC (Admin Div) Wellington M665/86. Case and comment cited (1987) Vol. 10 Capital Letter No. 11 at p8.

⁵⁹ [1982] 1 NZLR 319 (CA).

⁶⁰ *Supra* note 6.

⁶¹ Timmins, *supra* note 22 at 10.

⁶² *Supra* note 5.

⁶³ *Supra* note 59.

son for the high dam was Aramoana, and on the other the realisation that this was a policy decision — not a question which should be decided by a judicial body. It is also not hard to detect the fear of the Tribunal of entering into the Aramoana debate which eventually involved the Court of Appeal in five separate decisions throughout 1981.⁶⁴ Judge Treadwell was highly critical of the lack of direction in the Water and Soil Conservation Act 1967 (WASCA) and decided that this was a matter for the legislature to decide.

The decision of the Tribunal was appealed to the High Court on a question of law as to whether the Tribunal had erred in not taking into account the end use of the power. The statements of Casey J. in *Gilmore v National Water and Soil Conservation Authority and Minister of Energy*⁶⁵ are of great importance in their definition of the role of the Tribunal. Applying both *Keam* and *Metekingi*, Casey J. held that the end use of the power could be highly relevant where the need for the high dam and the consequent flooding of so much valuable land was found to be due solely to the smelter's need for that power. The case then went back to the Tribunal which overturned its previous decision and allowed the appeal thereby revoking the water right.⁶⁶ The interesting point to note about the No. 2 decision is picked up by Timmins and provides a very good insight into the background of this case. The Tribunal in its ruling "allowed the appellants costs which constituted reimbursement in full for all fees, witnesses expenses and other expenses directly attributable to the conduct of the appeal".⁶⁷ A good part of this decision results from the Tribunal's distaste for the no-win situation into which it had been thrown by the Government. By delegating what was clearly a policy decision to the Tribunal, the Government was in effect sidestepping its responsibility for a very controversial project. As Judge Treadwell remarked:⁶⁸

I cannot refrain from making some comment on the inadequacy of the Water and Soil Conservation Act 1967 . . . in the absence of any specific direction I am not however prepared to give a judicial cloak to a policy decision of Government when the Crown has placed a specific provision in the Act which, if it chooses to use, removes the matter from the judicial process.

Crown Counsel declined to give an assurance that the provision section 23 (7) of the Water and Soil Conservation Act 1967 — would not be used or that special legislation would not be invoked to detain the water right. The award of costs recognises the Tribunal's criticism of his reasons for so declining.

⁶⁴ *Environmental Defence Society Inc. v South Pacific Aluminium Ltd* [1981] 1 NZLR 146; (No. 2) [1981] 1 NZLR 153; (No. 3) [1981] 1 NZLR 216; (No. 4) [1981] 1 NZLR 530; *CREEDNZ Inc. v Governor-General* [1981] 1 NZLR 172.

⁶⁵ (1982) 8 NZTPA 298.

⁶⁶ *Annan and Others v National Water and Soil Conservation Authority and Minister of Energy* (No. 2) (1982) 8 NZTPA 369.

⁶⁷ Timmins, *supra* note 22 at 10.

⁶⁸ *Annan and Others v National Water and Soil Conservation Authority and Minister of Energy* (No. 1) 7 NZTPA 417, 438.

In the final event the Government did just that, invoking special legislation to obtain the water right. This was lamented by many as the end of the rule of law yet it can be looked at from another perspective. The decision was one which in its polycentricity could not properly be adjudicated in any case — the problem lay not in a breakdown of the rule of law but rather in the motives of the Government in leaving the decision to the Tribunal. In fact, as argued by Reich, because of the polycentric nature of such questions, the rule of law is just as likely to suffer where the problem is submitted to adjudication:⁶⁹

When it is used in areas of policy making, [judicialised] procedures serves primarily to preserve the mythology about how government operates. It prevents us from seeing resource allocation as a process by which some are punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy. It preserves the appearance of the rule of law, making it seem that the immensely important allocation and planning process is being carried out at all times subject to fair and equitable guiding principles.

From this very selective group of cases it can be seen that the theoretical problems predicted for section three are to some extent evident. The response of the Tribunal has been to limit its interpretation of the subsections (section three (1)(b) and (g) particularly) thereby reducing the problem of polycentricity and multiple criteria. This reduction has also been accomplished by the heavier weighting of quantifiable as opposed to qualitative evidence. The final issue to be addressed follows on from the Clutha Dam decision and the recognition in that case of the political nature of the planning process. What follows are merely brief observations.

The Politics of Planning

If we survey the whole field of adjudication and ask ourselves where the solution of polcentric problems by adjudication has most often been attempted, the answer is in the field of administrative law. The instinct for giving the affected citizen his "day in court" pulls powerfully toward casting exercises of governmental power in the mould of adjudication, however inappropriate that mould may turn out to be.⁷⁰

Rod Macdonald comments similarly:⁷¹

. . . in most democratic states, the choice as to the appropriate paradigm process is made in advance. But the paradigm selected may be inappropriate . . .

The adjudicative paradigm supposedly imports equality, impartiality and the acid test of the legal contest. There are three arguments the writer would present against this contention as it applies to adjudication of section three issues. Firstly, as we have seen, decisions based on section three may not be strongly responsive to the parties participation.

The writer's second argument against the traditional view of adjudication is based loosely on the work of Patrick McAuslan. McAuslan

⁶⁹ *The Law of the Planned Society* (1966) 75 Yale LJ 1227, 1237-8.

⁷⁰ Fuller, *supra* note 11 at 400.

⁷¹ *A Theory of Procedural Fairness* (1981) 1 Windsor Yearbook of Access to Justice 28.

argues that there are three separate ideologies present in the planning process. These are private property, public interest and public participation. By virtue of the planning system, public participation based on abstract concepts (such as section three matters) is seen as a threat to the status quo and unconsciously resisted by courts and public officials. Although the writer would not go quite as far as alleging a kind of veiled prejudice, this theory does provide a link between the politics and theoretical problems of planning. Not only does a decision based on section three lack responsiveness because it is non-justiciable, but also because it must overcome the preferences of conflicting ideologies.

McAuslan continues:⁷²

This is not to say these other [orthodox] points of view do not get a hearing, or do not have some attention paid to them, or indeed cannot sometimes win victories by using or challenging the governmental system, but the whole structure and operation of the system created, supported and sanctioned by law and lawyers is such that the alternative view always does have to mount a challenge to the orthodox view in 'fora' and via procedures with which adherents of the orthodox view are very much at home, and have the merits of that challenge always judged by adherents of the orthodox view.

It is submitted that by forcing the Tribunal to decide essentially non-justiciable questions the legislature has left the Tribunal open to allegations of providing a judicial cloak to legitimate political decisions.

Conclusion

Macdonald states:⁷³

Adjudication, politics and management may be seen as lying along a spectrum. Management, at one extreme has been characterized as a process which does not guarantee any form of participation in the decision making process to affected parties. Therefore, even should some participation be afforded, it would allow only a weak correlation between participation and reasons which may be given for decision.

This conclusion clarifies the problem facing the Tribunal in deciding cases based on section three. To take proper account of *all* relevant considerations it must sacrifice its adjudicative prejudices to some extent and take on what Boyer terms ". . . mixed procedural forms that encompass both consensual and nonconsensual devices".⁷⁴ In such a situation responsiveness is not as important since the parties participate not merely by advancing proofs and arguments, but by helping to shape the decision themselves. Consequently, any unconscious preferences for quantitative evidence or private property arguments as opposed to 'softer' variables will be limited by the parties.

However, a note of caution is necessary. It is possible to argue that both limitation of section three to judicially relevant considerations, and its expansion by virtue of procedural innovation, create disrespect for the law. The main thrust of this article has been directed towards the

⁷² *The Ideologies of Planning Law* (1980) Pergamon Press, Oxford 237.

⁷³ Macdonald supra note 69 at 16.

⁷⁴ Boyer, supra note 29 at 169.

first argument; the latter has been recognised by another 'developer' of Fuller's theories — James Henderson.⁷⁵

Legal rules couched in essentially aspirational terms . . . must be placed in a proper perspective. Relying too heavily upon such rules generates substantial costs, including a general decline in respect for law.

The Planning Tribunal stands presently at one pole. Tentative steps have been taken (and retraced) along the fine line which separates adjudication from other forms of social ordering. It is submitted, however, that the Tribunal must venture further before it can truly say that it has 'recognised and provided for' the seven goals set out in section three.

⁷⁵ *Implementing Federal Environmental Policies: The Limits of Aspirational Commands* (1978) 78 *Columbia LR* 1429, 1430.