Features of the Uniqueness of New Zealand and their Role in Regulation

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> "Paradoxically what made New Zealand distinct is the abnormal degree to which its people have borrowed from other cultures and the particular combination of cultures they have borrowed from. However, we have not understood how this particular area of distinctness might make a good case for New Zealand exceptionalism for, quite naturally, we associate national distinctness with autochthony, not with the factors that have prevented it."[1]
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> "Businesses have been telling us of the need to better tell the 'New Zealand Story' overseas. Smaller exporters particularly emphasise that it is New Zealand's reputation that gives them their initial market entry point as they are too small individually to secure brand recognition for their product or service."[2]
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> "New Zealand's international profile focuses predominantly on our beautiful landscape, but our exporters also need to be recognised offshore for attributes like our high quality of goods and services, our innovation and fresh ideas, and our unique Māori culture."[3]

1.1 Introduction

New Zealand's uniqueness is something that two of the above quotes suggest should be utilised to increase our exports – which we can broaden to the idea that our peculiar features can be used as an advantage to make our lives better. There are undoubtedly several ways in which New Zealand is unique and, aside from the contribution to making its inhabitants different, and maybe even feel good, there are legal and economic implications.

On the economic side there are many ways in which business interests can utilise notions of uniqueness to their advantage. For instance, one driver of trade is the quest to gain by seeking to swap the familiar for the strange.

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[1] Miles Fairburn "Is there a case for New Zealand Exceptionalism" in Tony Ballantyne and Brian Moloughney (eds) *Disputed Histories: Imagining New Zealand's Pasts* (Otago University Press, Dunedin, 2006) at 167.
[2] Economic Development Minister, Steven Joyce, quoted in "Govt to develop broader 'NZ Story' to help exports" <http://www.voxy.co.nz/politics/govt-develop-broader-nz-story-help-exports/5/131822>.
[3] Minister of Trade, Tim Groser, quoted in "Govt to develop broader 'NZ Story' to help exports" <http://www.voxy.co.nz/politics/govt-develop-broader-nz-story-help-exports/5/131822>.

As Fairburn suggested, in the first quote above, part of New Zealand's uniqueness is its global connectedness. This occurs through relationships in the business and personal realms, as well as a more pervasive, but less well understood, general legal and cultural inheritance from other places.

On the face of it, it is unclear just what impact any aspect of uniqueness could, and should have, on the various stages of the regulatory development process, including: regulatory policy, design, content, enactment, implementation and evaluation. This is shown in the normal process of regulatory design. Often in that process there are claims made that something has to be done a particular way, or a particular rule should be created or not adopted from elsewhere, because *New Zealand is different*. Similarly, frequent and related to claims of uniqueness, are claims that *sovereignty is at stake*. Indeed, all sovereign nations can claim to be unique in some way or another (even if only by not being any of the others). While uniqueness normally means different from others and sovereignty is about retaining power, the purpose in many debates of highlighting uniqueness is so that it can be retained; and the ability to retain uniqueness is thought by some to be achievable by, or at least strongly tied to, the question of retaining sovereignty.

So, for example, not allowing so-called 'foreigners' to buy New Zealand land will allegedly (amongst other things) keep New Zealanders in control of New Zealand so we can live the New Zealand way.[4] The relationship between retaining uniqueness and sovereignty is politically charged and undoubtedly complex.

We do not propose to enter into that debate in the abstract. Rather, our starting point is that the impacts of New Zealand uniqueness on the regulatory process should be analysed separately from New Zealand's unique features. This is not because New Zealand's regulation should not be sensitive to New Zealand conditions or indeed exploit New Zealand conditions for the benefit of for example, exporters. On the contrary, what we hope to achieve in this paper is a way to approach those considerations analytically. We recognise that frequently uniqueness or sovereignty-type arguments will be part of the on-going political debate; where we do not underestimate their role. We do not purport here to make any attempt to solve any specific dispute over whether the uniqueness of New Zealand calls for one approach to a particular area of regulation or another.

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[4] For a discussion of foreign direct investment in New Zealand see Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand –Further Analysis" in Susy Frankel (ed) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 63. See also Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 127.

Our goal is to analyse how those engaged in the regulatory process might be able to discuss and indeed respond to uniqueness-of-New-Zealand style arguments in a productive way. We seek to begin a dialogue and to suggest an analytical framework in which these issues can be discussed. We ask can "whatever it is that makes New Zealand unique" or, not so unique, be incorporated appropriately within the processes of: policymaking, drafting, the Parliamentary process (including select committees), implementing, enforcing and evaluating regulation?

1.1.1 Swimming in a wider sea? Drawing on the international setting

Claims relating to New Zealand's unique circumstances can result in a variety of approaches to regulation that do not necessarily enhance global connectedness. A provision in legislation, for example, may be based on an English or Australian statute but have been changed sufficiently that extensive testing via local courts (which may not happen) is required before anyone can be clear about whether specific aspects of practice or case law from those other jurisdictions are relevant in New Zealand.[5] That cost and the associated uncertainty is not necessarily a bad thing, although, if a different (even novel) practice was precisely the point of the change from the overseas law. After all, the advantage of being behind others in time and experience is sometimes precisely to be positioned to see their faults and take a different path. One example might be the unique way in which copyright law in New Zealand protects technological protection mechanisms from being circumvented.[6] The New Zealand approach is unique and was deliberately devised to avoid difficulties that had arisen under United Kingdom and United States law.[7]

However, we sometimes adopt overseas regimes even though they have been strongly criticised in the country or region from which the regulation originated. As discussed further below, New Zealand has started to get itself out of a cycle of over-eagerly taking on overseas regimes that are not useful, or fit for purpose locally[8]. But the answer is not necessarily to

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[5] For instance the use of the internationally well-established breathalyser technology in NZ took many test cases – and resultant modification of Police practice - before the process was effectively bedded into its wider NZ specific setting.

[6] Copyright Act 1994, ss 226-226E, as inserted by the Copyright (New Technologies) Amendment Act 2008.

[7] See Commerce Committee *Copyright (New Technologies and Performers' Rights) Amendment Bill* (27 July 2007).

[8] Part of the reason for this is that the previous policy development process (which might have been seen – perhaps, cynically – as: "Ready. Fire. Aim."), was essentially a 'real-time error-correction model' with swift amendments to regimes based on actual experience being the norm. But the ready ability to use this effective form of "experimentation" (see discussion in Joel Colón-Ríos "Experimentation and Regulation", in this volume) depended on the way our electoral system produced 'elected dictatorships'; once MMP was the rule, no government has had unalloyed control of the Parliament with the ease of legislation that it brings. The upshot has gradually been a shift to rebalance the trade-off between **prior** investment (before implementation) in how a new regime might operate under local conditions, and post-investment in readiness to watch the

always create entirely new domestically-sourced regimes that cannot be maintained and which, because their lack of global connectedness, can create costs and uncertainty.[9]

Another way in which global connectedness can be achieved is through regulatory co-operation and sharing resources. When sharing regulatory resources (as has been experienced when cooperating with Australia[10]) the sovereignty issue is likely to be raised. This often takes the simple form of claims that New Zealand is losing control of its own system and, thus, its destiny and likely overall well-being. In particular, and not at all uniquely, alleged loss of sovereignty is often raised in opposition to many international agreements, particularly trade agreements. However, all international agreements involve a loss of sovereignty, as that is precisely the purpose of the agreement: to join a wider grouping with outside control.

Moreover, given our size, sharing resources with other countries usually means we are the smaller (or smallest) partner. In the case of Australia this usually means that Australia is the main "driver"[11] and politically not all find this tenable. In the last round of the Australian/New Zealand Therapeutics Authority (ANZTPA) negotiations the resulting Bill, from the New Zealand side, was considered by many to be an unacceptable sacrifice of New Zealand autonomy and was even challenged by Māori as contrary to the Treaty of Waitangi.[12]

Whether the alleged incursion into New Zealand sovereignty or autonomy in that case was an accurate assessment or not, that process may demonstrate that even trans-Tasman regulation needs to be approached in a different way from purely local arrangements; or, at least, that a message

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progress of new mechanisms, while standing by to modify and adjust if features are performing in unexpected ways.

[9] Not the least important aspect of which is the 'start from scratch' nature of the interpretation of the key terms in the rules, without any relevant precedents. See discussion in Daniel Kalderimis, Chris Nixon and Tim Smith "Certainty and Discretion in New Zealand Regulation" in this volume.

[10] See Chris Nixon and John Yeabsley "Australia New Zealand Therapeutic Products Authority: Lessons from the Deep End of Trans-Tasman Integration" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 491 and Susy Frankel and Megan Richardson "Trans-Tasman Intellectual Property Coordination" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 527.

[11] In other words the locus of control; or the as if "managing partner."

[12] See Chris Nixon and John Yeabsley "Australia New Zealand Therapeutic Products Authority: Lessons from the Deep End of Trans-Tasman Integration", above n 10; and for the WAI 262 claim see Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

needed to be conveyed to the public to show the overall benefits of the arrangement, particularly from the point of view of consumer safety.[13]

Additionally, while claims to incursions on sovereignty may politically look similar, when the regulation in question is looked at closely the claims to sovereignty are not necessarily the same. As discussed in the trans-Tasman papers in this project, a claim to share a food standards regime may not be the same as a claim to control the refusal of trade marks that are culturally sensitive.[14] The latter has a direct claim to sovereign decision making. Similarly if shared institutions make a certain type of business harder, such as complementary medicines regulation, that raises different issues from making regulation smoother: hence why some wanted the complementary medicine regime removed from the proposed ANZTPA.[15]

1.1.2 Our existing ecological niche – local institutions and their impact

Another impact of the uniqueness of a nation, or at least differences between nations, is on the wider administrative and legal setting – the institutions that provide the framework for our decisions, actions and regulation. These structures – the "rules of the game" – both need to reflect aspects of the uniqueness of their operating environment (to be as effective as possible), and also help create facets of that uniqueness. One subset of the New Zealand institutional framework is how regulation might express the national determination of what the state desires its citizens to do.

Examining the relationship between the unique features of New Zealand and our regulation-making is a difficult topic; after all, the politics that pervade such a topic are not necessarily rational and cannot easily be controlled by logical reasoning. It risks much anecdote and, indeed, we will use anecdote here. The overall contribution this paper makes is to outline key questions about how to deal with the issues associated with claims to uniqueness in the regulatory process.

The status of uniqueness can be debated, in a variety of ways, and has variable impacts in differing regulatory regimes. These include: the way the process is structured; the way it unfolds; and the final product, as well as the manner of implementation, and thus overall result. However, what is less analysed than specific examples, and indeed than the politics of such examples, is what role those features of uniqueness should have in connection with the regulatory process more broadly considered.

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[13] See Chris Nixon and John Yeabsley "Australia New Zealand Therapeutic Products Authority: Lessons from the Deep End of Trans-Tasman Integration", above n 10.

[14] Susy Frankel , Chris Nixon, Megan Richardson and John Yeabsley "The Challenges of Trans-Tasman Intellectual Property Coordination" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 101.

[15] See historical information at http://www.anztpa.org.

The goal sought, we suggest, is that New Zealand's unique features are used to achieve desirable regulatory outcomes, rather than as hurdles to those outcomes. In essence this requires a balance between the tension of unfettered adoption of the results of global connectedness and the costs and risks of using New Zealand's own tailored practice. That tension is the heart of the issues we address in this chapter. We are looking to provide a framework that can be used to address those issues, rather than to solve them. We do not claim this framework to be authoritative, but we do not think such a structure has been attempted before in this way, if at all.

As a starting point we set out our take on the key features of that framework in the following table.

Table 1: Logical implications of effectively addressing uniqueness

Regulatory phase:	**How to address uniqueness issues**	**What difference should taking account of uniqueness typically make?**
Policy	Use selective mechanisms, (particularly public participation) to allow uniqueness concerns to be specifically heard. (Including hui, fono and other special gatherings seeking a wide range of views).Understand how important this regulation is to change NZ based behaviour. (This can only be answered if the problem that the regulation is addressing is known and situated in a local context.)	The proposed regulation should directly address those local concerns through a variety of means including through explanatory notes.
Design	Assess overseas sources and models for local fit. Is there sufficient justification for degree of usage of drafting resources?	The process has credibility even if not all politically agree. Pragmatism has been optimally used.
Content	Understand local politics (sometimes trans-Tasman politics and beyond)	The *interest of NZ* value is understood and articulated.
Enactment	What regulatory tool is best? (Do you need regulation? What kind?)	The appropriate regulatory model is used rather than reflecting bias toward legislation.
Implementation	Explicitly acknowledge a degree of experimentation – even if only due to bringing a working model to a new environment - while including methods of measurement of success or otherwise. Relate observations to apt responses.	Regulation is consistent with the rest of the NZ regulatory system and takes account/advantage of : • Global connectedness • Scale effects and still allows for innovation.
Evaluation	Meets the goal of the regulation, so in fact leads to benefits that enhance unique aspects of NZ. These benefits need to be monitored and measured alongside more general measures (such as the economic outcomes).	NZ uniqueness is integrated into the system. The extent of the outcome in terms of global/ local balance can be measured. The perceived/ real NZ loss of sovereignty is assessed as worthwhile. The specific uniqueness aspect of learning is fed back into the system, as well as general findings.

In sum, this paper discusses whether "whatever it is that makes New Zealand unique" or not so unique, can be incorporated appropriately within the various phases of making regulations so as to be able to enhance regulatory practice.

We have reached this framework by drawing on examples from the New Zealand Law Foundation Regulatory Reform Project, of which this paper is part. In that project there are different streams of research which have focussed on different and diverse areas of regulation or critical themes about regulation. Each of those has revealed different issues of uniqueness claims which we draw together and discuss further in this paper.

Before turning to these examples we establish a degree of background by discussing some of the unique features of New Zealand.

1.2 Unique features of New Zealand

1.2.1 What is "unique?"

We use "uniqueness" here to indicate what makes New Zealand New Zealand, rather than suggesting that some of what makes New Zealand unique is that it has features not found elsewhere; or that New Zealand is not unique because its features are also found elsewhere found elsewhere and, for example, make Norway what it is. Although, some features we note, such as European and Māori bi-culturalism, are more literally "unique."

There are a variety of geographic, demographic, cultural and political features that make New Zealand what it is. Each is worthy of considerable discussion in its own right.[16] Here we begin with an overview of New Zealand's most obvious unique features including those related to geographical location (which includes both isolation and connectedness), size, population, trade and finance, constitutional arrangements and institutions, and consequences of scale. We then turn to the incorporation of such features of uniqueness in a framework of the regulatory process.

1.2.2 Geography, Isolation and Connections

New Zealand's unique geography includes relative isolation and having a large size relative to population (a large small country). The land mass is significant as it is the 74th largest state but (ranking 123rd) with a relatively small population. New Zealand's extensive exclusive economic zone (EEZ) and continental shelf, compared to 223 other countries, is the fourth largest. GDP per capita is the 27th highest.

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[16] A scan of these as reflected in the writings of a selection of commentators on this country revealed the list attached at Appendix.

There is no doubt that New Zealand is geographically isolated and that this isolation has contributed to the perceived need to have a New Zealand unique approach to regulation.

The effects of global isolation are frequently overcome, but the New Zealand specific circumstances are often acknowledged as being of primary importance. Paul Conway notes that in discussing the "negative impact of economic geography" that:[17]

> An ongoing push for greater regulatory harmonisation, mutual recognition and integrated institutions, where appropriate, would continue to reduce spatial transaction costs between New Zealand and Australia and mitigate the negative impact of economic geography. As such, the recent Memorandum of Understanding between the New Zealand and Australian governments, which encourages more cooperation between regulators and policymakers and sets out a range of co-ordination initiatives to deepen business integration, is most welcome. The principles underlying these arrangements need to be broadened and extended to other potential trading partners, particularly in Asia, to reduce the additional compliance costs for firms doing business in offshore markets. However, as with all significant regulatory changes, it is important that harmonisation initiatives be consistent with New Zealand's own objectives and circumstances.

Physical separation, for instance has allowed us to approach geographically related issues without worrying overly about the possible complications of near neighbours. Much of our rules about radio spectrum use, for example, were able to be our own choices because the (technical) spill-overs were minor.[18] But even in such a domain the rest of the world is influential. Take the frequencies allocated to cell phones. Unless we were going to have our own particular models with the associated diseconomies of small scale, it made sense to align our frequency allocations with the rest of the world.

This is an example of one of the many different ways New Zealand is internationally connected – directly and indirectly. The ways in which New Zealand is connected internationally some may say is, in fact, what makes New Zealand unique.

Miles Fairburn, as mentioned, in his essay "Is there a Case for New Zealand Exceptionalism?" argues that New Zealand culture is a pastiche (overly) dominated by imported elements. This is part of an analysis which builds to his conclusion that New Zealand peculiarity is demonstrated by "domination by Australia, British and American cultures" and it is for this reason "it had very little chance of developing major and distinct features of other kind".[19] While he is clearly stretching his assessment to make a

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[17] Paul Conway *How to Move Product Market Regulation in New Zealand Back Towards the Frontier* (OECD Economics Department Working Papers No 880, 2011).

[18] However, when it came to adopting provisions that related to copyright issues with spill-over from satellites these provisions were adopted into our Copyright Act 1994 even though in fact there was no relevant spill-over. It seems they were a direct transplant from the United Kingdom Act, which responded to a real problem due to their position in Europe.

[19] Miles Fairburn "Is there a case for New Zealand Exceptionalism", above n 1.

point, there is a degree of truth in his conceit: small countries employing internationally common languages will inevitably be exposed to a wide range of international cultural interests, as their marginal cost of supply is low, and local competition is likely to be sparse, or often lower quality. The important part of this global feature of New Zealand's social setting is what does it do to the factors impinging on efficient regulation?

The complexity of the modern regulatory task has generated an interest in regulation as learning and experimentation.[20] The complexity of the subject matter and the paucity of information mean that for harder regulatory problems it is difficult to define the problem with precision, let alone produce the solution. This context naturally lends itself to viewing regulation as a learning process; particularly when the wider setting consciously seeks to borrow from others.

And so where does this bias to accepting outside influences lead? A starting point might be to suggest the following possible effects:

- An openness to wider sources of ideas and methods and a related low resistance to importing ideas and solutions
- A familiarity with the ways of other administrations and jurisdictions, which establishes a culture which is aware that different approaches can be used. (New communication technology and globalisation has just improved our access to information about other regimes, and our access to the officials that administer those regimes. We can now more easily and cheaply – in both time and money - know more about the features of overseas regimes, and how they are administered, than was possible before).
- A consciousness of alternative approaches to problems – thereby allowing ready access to other solutions.
- A readiness therefore to recognise that regulation may involve processes of experimentation and learning.[21]

1.2.3 Population

New Zealand's relatively small population has a number of consequences for regulatory quality, some positive and some negative. New Zealand's smallness, along with a history of openness, has meant that the public has ready access to the heart of the decision-making mechanism (especially parliamentary select committees) and there is a well-established, credible, and often influential submission process. Unlike comparable jurisdictions

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[20] Joel Colón-Ríos "Experimentation and Regulation", in this volume.
[21] See Derek Gill and Susy Frankel "Learning the Way Forward?: The Role of Monitoring Evaluation and Review" and Joel Colón-Ríos "Experimentation and Regulation", in this volume.

we make extensive use of primary legislation[22] (rather than relying on secondary or tertiary regulations) and under Parliamentary Standing Order 280 all legislation (other than Bills under urgency) goes to a select committee.

By contrast, the small population size, extremely high number of ministerial portfolios and large number of small public organisations means that a relatively small total number of policy advisors are spread across a large number of public organisations, and capability to design and implement regulation is thereby splintered and dispersed. This raises concerns about the lack of critical mass of expertise in more advanced and complex areas of regulation.[23]

Moreover the system is strongly vertically aligned – while Cabinet Government is strong in New Zealand there is no strong tradition of horizontal functional leadership at the level of the public service. The recent Better Public Services Report[24] proposed changes to increase 'functional leadership' focused on inputs through achieving more economic costs, such as procurement, ICT, property & finance; but had no proposals for 'functional leadership' of outputs, including policy, regulatory design and enforcement.

1.2.4 Trade and finance

Another demonstration of New Zealand connectedness is our economic dependence on international trade and the ways in which relationships stretch across borders. Our export focus is not in itself unique, but New Zealand's recent trade policy is full of New Zealand being the first and having the most extreme approaches in the world.[25] This is not surprising as the post-James Cook economic history of the country is of a search for a staple export trade which would generate the wealth desired by settlers and locals. The initial approach was via a classical "imperialist" approach with the trading and economic structure dominated by a two way periphery/metropole[26] exchange of manufactures for agricultural products, with both ends gradually becoming enclosed within the end of the

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[22] Indeed if true recognition is to be given to human rights values primary legislation may be important. See Petra Butler "When is an Act of Parliament an Appropriate Form of Regulation?" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 489.

[23] Andrew Ladley and Derek Gill *No State is an Island: Connected Governance in the South Pacific* (IPS, Wellington, 2008).

[24] State Services Commission "Better Public Services" (2012) <http://www.ssc.govt.nz/better-public-services>.

[25] For further discussion see Jane Kelsey *The New Zealand Experiment* (Auckland University Press with Bridget Williams Books, Auckland, 1995), and Chris Nixon and John Yeabsley *New Zealand's Trade Policy Odyssey* (NZIER, Wellington, 2002).

[26] Where "metropole" is a term for London (or the whole United Kingdom), as the centre of the wider trading empire. See Anthony Webster *The Debate on the Rise of the British Empire* (Manchester: Manchester University Press, 2006) at 70.

nineteenth century emergence of the British preferential tariff system. Since the early 1980s and a shift to trading more widely, unilateral tariff reduction and deregulation are perhaps the most obvious examples of our inventiveness and preparedness to be original, or perhaps even unique, at least in the speed and comprehensiveness of our changes.

Our (natural and historical) focus on primary industries means we are heavily reliant on imported technology and manufactured goods. This is not unique, but as a small market economy we are arguably unusual: being both players in the developed world, and having many indicators of being more like a developing country.[27] Focus on agriculture and low productivity industries are two such indicators. This in turn means that relative to other developed countries we have a low income per capita.

One way in which New Zealand is less globally interconnected than some may wish is in the field of investment. New Zealand individuals and business make very little overseas direct investment.[28] And even fewer profitable ones.

1.2.5 Constitution and institutional arrangements in a changing world

As discussed in *The Future State*[29] there are forces that will continue to shape New Zealand. Some of these forces are "local manifestations of globally occurring phenomena" including the internationalisation of policy, climate change, population ageing, the shift in economic and political power from west to east, and globalisation.[30] New Zealand cannot affect these global forces of change in any significant way, although it can choose how to respond to their pressures. Other influences that will contribute to shaping New Zealand are unique to its heritage and geography. These influences include the geographical features discussed above and New Zealand's unique constitutional arrangements.

There are a number of unique constitutional features that either assist or might be viewed as constraining the quality of law making. These include a unitary and extremely centralised state with one House, a three year parliamentary term, limited functions undertaken by local government and the relative paucity of checks and balances. This all leads to an imperative for legislative haste over quality – what Palmer described as "the fastest

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[27] Other small market economies, such as Singapore and Israel, may be in a similar situation. There are of course cultural differences between each of these small market economies and New Zealand.

[28] See below and discussion in Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand –Further Analysis", above n 4.

[29] Derek Gill and others *The Future State* (Institute of Policy Studies. Working Paper 10/08, May 2010).

[30] Gill and others *The Future State*, above n 29.

law in the West."[31] Mai Chen attributes this speed to a range of features of the legislature including the limited scope for filibusters, the use of omnibus bills, the ability to truncate house procedures, and part by part rather than clause by clause review during the committee of the whole house phase.[32] These constitutional factors, arguably together with the (relative) lack of deeply entrenched industry lobby groups, make it easier to enact legislation in New Zealand than in other comparable jurisdictions.

Offsetting this, New Zealand has evolved other systems. Consultation with indigenous Māori people, while sometimes marked in the breach, has become more common.[33] Also, while the system of officials committees is not (today) nearly as strong as other comparable jurisdictions, the Cabinet and Cabinet Committee system is arguably the strongest amongst Westminster countries, as is the Select Committee review process. Commenting on the quality of Select Committee review in New Zealand, the late George Tanner, former Chief Parliamentary Counsel and an experienced observer of legislative process around the world, remarked (in email correspondence), "At its best, it works well and is probably a more effective scrutiny process than many upper Houses around the world."

The introduction of MMP, while it has been successfully nested in the cabinet system, has also resulted in the growth in the use of urgency.[34] MMP requires minority governments to put together a parliamentary majority for each piece of legislation (other than confidence matters) before the bill is introduced into the house.[35] Over time this imperative may undermine the role of the Select Committee, as amending the legislation in committee risks unpicking the delicate balance of support for the bill as drafted.

Regulatory management regimes have largely been "welded" onto existing machinery of government and constitutional arrangements. Many of the special features of the regulatory management regime are common to all developed countries. However, the 'devil is in the detail' of the fine grained rules that determine how these broad regimes apply. For example the US and UK regulatory management regimes superficially look similar to New Zealand's.

In practice, though, the US regime only applies to rule making by independent regulators and does not apply to law making by the US

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[31] Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington and New York, 1979).
[32] Mai Chen *The Public Law Toolbox* (LexisNexis, Wellington, 2012) at 341.
[33] Chen *The Public Law Toolbox*, above n 32 at chpt11.
[34] See generally, Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry* (VUW Press, Wellington, 2011).
[35] See the discussion in Chen *The Public Law Toolbox*, above n 32 at 73-81 and 241-245. For a longer treatment see Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making under MMP* (Institute for Governance and Policy Studies, 2008).

Congress; while the UK regime does not apply to EU regulations. In New Zealand by sharp contrast – reflecting the centralisation of power - the Regulatory Impact Statement (RIS) regime is meant to apply to all legislation developed by the executive so essentially only private members bills would not be subject to the regulatory management regime. In practice, however, even fundamental changes at select committee are not given a RIS.

1.2.6 Specialisation

Looking overseas, to comparator jurisdictions such as the UK and Australia, one can see a range of ambitious institutional innovations being tried made in the effort to ensure adjudication adequate to the complexity and importance of the regulatory environment. However, when one turns to consider their application here, one is immediately confronted with the resourcing constraints of a much smaller jurisdiction. Central among these constraints is the limited pool of expertise available for any such exercise.

New Zealand is a large country compared to its population, which is small in world terms. This means that there is a smaller pool from which to draw expertise. Sheer scale thus makes the incidence of specialists fewer than in large populations. The influences that drive this include:

- Individuals who have narrow skill bases (expertise) are less robust in the labour market (fewer specialised opportunities are open) so in small markets face high risks.
- Specialisation does create intensity of understanding and knowledge that is potentially more valuable – especially as a complement to the run of generalists our smaller economy breeds and trains.

An obvious answer to this limit on resource availability is to move to use the wider offerings of the rest of the world to effectively supply "embodied" expert skills, in a manoeuvre that parallels the way we structured our economy to depend on the exchange of goods with others. The need to use the expertise of the world can reinforce the need for global connectedness.

Although small in numbers New Zealand is diverse in cultures. The multicultural population of New Zealand is a unique mix and Auckland is the largest "Polynesian" city in the world. And we are also uniquely placed in the way we are developing relationships with Asia.[36]

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[36] See Susy Frankel, Meredith Lewis, Chris Nixon and John Yeabsley "The Web of Trade Agreements and Alliances, and Impacts on Regulatory Autonomy" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 17 . An important topic is how this development and likely future trend relates to the discussion that follows in [1.2.7].

1.2.7 Autochthonousness

The county's bi-cultural status of a Māori and Pakeha population is found nowhere else and is legally and culturally premised differently from other European and indigenous peoples' relationships. The Waitangi Tribunal has characterised this as follows:[37]

> … another Treaty principle: that of partnership. Parliament, the courts, and the Tribunal have all characterised the exchange of rights and obligations encompassed by the Treaty – its provision for both kāwanatanga and tino rangatiratanga – as a partnership. Indeed, partnership can be seen as an over-arching principle beneath which others, such as kāwanatanga and tino rangatiratanga, lie. This emphasis on partnership makes New Zealand unique among the post-colonial nations (such as the United States, Canada, and Australia) with which we are most often compared. Those other countries, by contrast, emphasise the power of the state and the relative powerlessness of their indigenous peoples by placing state fiduciary or trust obligations at the centre of domestic indigenous rights law. New Zealand… emphasises through the partnership principle that our unique New Zealand arrangements are built on an original Treaty consensus between formal equals. We do of course have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests. But it is not the framework. Partnership is.

As noted above, other countries emphasise the great power of the state and the relative powerlessness of their indigenous peoples by placing state fiduciary or trust obligations at the centre of domestic indigenous rights law. Not so in New Zealand. Here we emphasise, through the partnership concept, that our indigenous law is built on an original Treaty consensus between formal equals. We do, of course, have our own protective principles that acknowledge the power asymmetry between Māori and the British Empire in 1840 and between Māori and the post-colonial state today. But, while protecting the interests of a less powerful group is an objective of our Treaty law, it is not the framework. Partnership is New Zealand's framework because of our history since 1840 and the important role Māori play in contemporary national life.

1.2.8 Land and Property Rights

We have a strong attachment to land ownership. Other nations do too, but our land ownership regime has unique features. According to Boast and Quigley there are three factors of land ownership that "make New Zealand stand out":[38]

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[37] Waitangi Tribunal *Ko Aote Aro Atēnei A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua*, above n 12 at 117-18.

[38] Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand", above n 4.

- High levels of state participation in direct ownership in land and resources;
- Importance of the family owned farm (both statistically and ideologically); and
- The existence of a separate category of land (Māori freehold land), which has no exact equivalent anywhere else.

But land ownership rules are only part of the regulatory picture. One of the more contentious issues in New Zealand has been about the economic value of property rights and regulatory takings, which we discuss further below.[39]

1.3 Relationship between uniqueness and issues of scale

Features of New Zealand uniqueness, particularly population size and (relatively) low incomes and resulting available public revenue, make it difficult, if not impossible, to have a complete regulatory state that resources every aspect of regulatory design, implementation, management and evaluation. This is so; yet New Zealand maintains a full service and non-corrupt government with very few institutions shared with other nations. The shared institutions are with Australia and some Pacific Islands.

The latter sharing may be more about donating resources than the former. Sharing institutions with Australia is complex and usually raises issues about New Zealand uniqueness, and the desire to keep it that way, together with related sovereignty issues, as already mentioned. Even though shared institutions are rare, there are - in some fields - increasing signs of their development.[40] Regulatory cooperation may be the first step in the process of sharing. Although regulatory cooperation does not inevitably lead to shared institutions, it may be a goal in itself, which may sometimes create economies of scale.[41]

A small and relatively open market economy means that there are limited local entities of significant size. Most organisations are stretched for resources to deal with the effects of regulation in any detailed or dedicated way.

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[39] See also Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 329.

[40] Susy Frankel, Chris Nixon, Megan Richardson and John Yeabsley "The Challenges of Trans-Tasman Intellectual Property Coordination", above n 14.

[41] See Tracey Epps "Regulatory Cooperation and Free Trade Agreements" in Susy Frankel and Meredith Kolsky Lewis (eds) *Trade Agreements at the Crossroads* (Routledge, 2013) (forthcoming). Also see Chris Nixon and John Yeabsley New Zealand's Trade Policy Odyssey, above n 25, where it is suggested that there are many complications in making this work.

This may lead to cooperative efforts such as those undertaken by Standards New Zealand. Standards New Zealand is globally connected to worldwide and Australian standards bodies and draws on the resources, including intellectual property, of those other bodies. As an organisation, Standards New Zealand may be under increasing pressure to develop or upgrade standards where there is no government agency or body for whom such standards are a direct (resource bringing) priority.[42] The natural alternatives of allocated government funding, or industry or interest group levies, raise concerns about accountability and associated bureaucratic structures. However, given that standards may become embedded in legislation there is a government regulatory issue about ensuring that those standards are up to date.[43]

However, being small does not necessarily require difference. In this project Paul Scott argues that although New Zealand is a small market economy it should have an analogous approach to monopolies to that of large jurisdictions. Monopolies do not enhance competition in New Zealand any more than they do elsewhere.[44]

In contrast, perhaps, John Prebble indicates that the size of New Zealand was influential in regulatory decisions: "perhaps the principal reason [for rejecting anonymous publications] was that NZ is a small country and even if rulings are made anonymous it is hard to hide the identity of the taxpayer in question."[45]

Most obviously, scale begs questions about if and when it is practical to regulate. Probably we (as a nation) cannot afford to fix every problem – or, more specifically, in the long run we cannot afford to fix as many problems as a more wealthy developed nation, and so different and harder choices may have to be made than in the (larger) countries we compare ourselves to. Sometimes, however, the need to regulate comes as a reaction to crisis events. As discussed in other parts of this project regulation may come as a response to a natural disaster, (the Christchurch earthquakes), a nationwide regulatory failure (the leaky homes crisis), or the belief that certain areas need constant regulatory development (telecommunications and electricity).

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[42] While this is not, in isolation, necessarily problematic, what becomes harder, perhaps, is the way in which such a body relies on charging costs for copies of standards law for its funding. The ability to do this relies on copyright law and is increasingly less able to maintain in the online world.

[43] We are grateful to Standards New Zealand for discussion of these points.

[44] Paul Scott "Competition Law and Policy: Can a Generalist Law be an Effective Regulator?" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 139.

[45] John Prebble "General Anti-avoidance Rules as Regulatory Rules of the Fiscal System: Suggestions for Improvements to the New Zealand General Anti-avoidance Rule" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 363.

It may be that New Zealand can be uniquely flexible because of its size, but how often and why it can flex is also a question of scale. We begin our discussion of pragmatism here, but recognise that it is a meta-characteristic that bites in different ways in the diverse aspects of the regulatory process, and discuss it further below.

The lack of readily available sources of relevant local information, which elevates the cost of acquiring evidence or data on which to make policy decisions, may also be an issue.[46] Also, overseas research might be close to irrelevant in some circumstances, because the data from overseas may not be culturally appropriate enough.[47] Moreover, if we are looking to improve the quality of regulation by more analytical preparation and thus less reliance on pure experimental "trial and error",[48] the availability of local data becomes crucial.[49] It enables the experimental aspect of all new initiatives to be better risk managed – in particular by pre-identifying the indicators to be monitored.[50] And an important component of such material is the detailed information that illustrates and emphasises the differences between our populations, behaviours and institutional workings. It is these that will mean whether an imported solution will work that way "it says on the box."

Analytically this can be seen in terms of a direct practical consequence of uniqueness. The more NZ's setting for the regulation differs from that in the home country of an imported solution, the more likely the implementation problems are likely to be Type II errors; in other words, those related to mis-specification; while, the closer the correspondence with the situation in the source country, the more likely problems are going to be Type I, or "expected" wrong results - within the system design's margin of error.

1.4 Where to take these Aspects of Uniqueness

We now turn from the consideration of the aspects of uniqueness that might be relevant to the regulation and look more closely at the interaction with

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[46] As one paper in the Regulatory Reform Project has noted, see Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision Making" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 265.
"NZ is a small country with limited resources and it will sometimes be too costly for us to carry out the relevant research. Without adequate empirical knowledge there is a chance that the paternalistic intervention will be sub-optimal. One cost-saving option is to take advantage of relevant overseas research and to study the success or otherwise of overseas regulatory schemes … Moreover, importing tested overseas legislative models is less expensive than formulating NZ legislation from scratch".
[47] Tokeley, above n 46 at 31.
[48] See Derek Gill and Susy Frankel "Learning the Way Forward?: The Role of Monitoring Evaluation and Review", in this volume.
[49] Chris Nixon and John Yeabsley "Voyage of Discovery: How do we Bring Analytical Techniques to State Driven Behaviour Change?" in this volume.
[50] Joel Colón-Ríos "Experimentation and Regulation", in this volume.

the various stages of the regulatory production system. The framework we are using here is a simple one. It takes the broad steps that any regulation has to go through – including the final outcome, the regulation itself - and discusses the way different facets of local uniqueness might impinge.

The discussion here can be conceptually separated into two distinct parts:

- How the various unique features of New Zealand affect the different stages of regulation production.
- What overall effect is seen in the final regulatory outcomes?

The next section discusses different regulatory stages and commentary on the overall effect is in the following section.

1.5 Policymaking and uniqueness

1.5.1 Public Perception and Participation

New Zealand society might be described as having an expectation of government that it will help address citizen's problems. This contrasts with the view put forward in FJ Turner's arguments[51] that the "frontier" (a wilderness within which new migrants could find themselves anew) had been a catalyst to create a novel American people. But it parallels the Australian discussion about their alternative approach – also very prone to be reliant on the state as problem solver.

If we take a view that history leaves a strong mark, such an attitude might easily be seen as a somewhat hazy memory of the positive mood of the last really tough times (the thirties, which extended the welfare state significantly), that has created a tradition. As a nation we do have a tendency of looking to the state for solutions to issues that in other places or times might have been addressed autonomously by citizens. Yet it is arguable that, ironically, public participation in government process is not what it ought to be. [52]

(a) Sustainability and mandate

Once a regulatory change has been made, its mandate is always temporary. New Zealanders have a practical approach to social institutions dominated by a straight forward question: do they work? This parallels the national

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[51] These were developed over a period of time following the initial delivery as a lecture in 1893, by which time the US frontier was declared to have ended. Turner's evolving ideas were collected by him as Turner, Frederick Jackson *The Frontier in American History*. (New York: Holt, 1921).

[52] See Mark Bennett and Joel Colón-Ríos "Public Participation in New Zealand's Regulatory Process" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis 2013) 181.

trait discerned by Schlick[53] of being averse to gaps between formal and informal structures – i.e. of having most public business transacted in formally correct ways. It translates into being judgemental about regulation based on the criteria of effectiveness. To make such a set of preferences work demands public information.

So if the overall gains of any regulatory change are positive then that should be clear; as should the way the (virtually universal) combination of associated gains and losses are distributed – just who is affected, and what is the result? But the public message is often not clear[54] and this creates uncertainty about the place of an institution in the administrative system. One view of this potential difficulty with assessing regulatory change formally is that it stems from a reluctance of policy makers to provide a comprehensive set of fixed values or "trade-offs" which might allow the analytics of regulatory design to be carried through to firm conclusions. From a law and economics stand point this makes the problem look like an "incomplete contract": one where not all of the possible outcomes are covered in detail in the agreed deal. In that setting, the solution is to invoke a *process* to close out the gap; an individual or group may be nominated to make the call, perhaps according to specified criteria. In this case, the obvious group to be looked to is the politicians who make up the government. So it may be a matter for reference to the Minister, or it may be significant enough to go to the full Cabinet.

The partnership between Māori and the Crown has unique implications for consultation in general and for the Government mandate in particular. In reality that association requires proper discussion before decisions are made rather than discussion after the fact. In relation to international negotiations, consultation with Māori was brought to the Waitangi Tribunal, which recommended:[55]

> We recommend the Māori engagement strategy be amended to require engagement over both binding and non-binding instruments, and that it provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest. As a starting point for that engagement, we would propose that the lead agency responsible for an international instrument consult with Te Puni Kōkiri before coming to a view whether there is a Māori interest, the likely nature and strength of that interest, and the degree of engagement that its priority might justify.
>
> To enable consultation or negotiation to take place, to identify relevant bodies that already exist which could also serve as partnership forums for the discussion of international instruments, and to create them as necessary (instrument by instrument) where they do not

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[53] See A Schick *Why most developing countries should not try New Zealand reforms* (1998) 13(1) World Bank Research Observer at 123-31.

[54] Unsurprisingly, given that the rationale for much state intervention via regulation is the need for a social judgement about the right balance between the different aspects of a problem. Often the underlying issue is different views as to the value of different outcomes.

[55] Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand law and Policy Affecting Māori Culture and Identity*, above n 12.

exist. We also suggest that Māori consider the appointment of electoral colleges so that such forums may be readily constituted on matters of specialised interest. As this suggestion is for Māori alone, we do not make it a formal recommendation.

We also recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.

In order to ensure that quality engagement takes place and is effective, we recommend that the Crown adopt a series of mechanisms to ensure accountability. These include regular reporting to iwi and Māori organisations, as well as to Parliament's Māori Affairs Select Committee. When Parliament considers an international instrument agreement under standing orders, we recommend – as the Law Commission did before us – that the National Interest Analysis include consideration of whether the instrument has any effect on Treaty rights and interests. Statutory enforcement might also be appropriate, and we recommend that the Crown consider situations where this may be required. Finally, we suggest that the Crown consider reporting its engagement with Māori, and the outcomes, to the relevant international body or forum, where it does not already do so.

(b) Structural ideas

One way of looking at the RIS process[56] (which looks at Cabinet level decisions before they are made) is as a way of implementing the shift in policy implementation from post-adjustment to prior investment. Its key features though are a tendency to mechanistic implementation, an unclear notion of where it fits into the raft of other stages of regulation making and who it is aimed at.[57]

1.5.2 Pragmatism

New Zealand is arguably especially able to be pragmatic in aspects of its policy making. Indeed, the isolation of this country from larger economies and its relatively low population with limited local production for most of the last 160 or so years inevitably gave rise to a philosophy of "making do," and the logically related test of whether resources are earning their way. More recently, the positive innovative aspect has been dignified with an association with the farmers' universal fix-it: "Number 8 Wire." It might be seen as being willing to take more risks[58]; or at least a willingness to be more experimental.

The underlying difficulty with experimentation in the policy arena - including regulation - is that the political approach to risk is not well-

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[56] See Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand law and Policy Affecting Māori Culture and Identity*, above n 12; and Derek Gill and Susy Frankel "Learning the Way Forward?: The Role of Monitoring, Evaluation and Review", in this volume.

[57] For further discussion see Chris Nixon and John Yeabsley "Voyage of Discovery: How do we Bring Analytical Techniques to State Driven Behaviour Change?", in this volume.

[58] Such an attitude would make sense as the limited availability of alternatives (including spare parts) would likely imply frequent delays if vital implements broke down. Remedying these by innovative approaches (even if risky) could eliminate downtime and thus have a significant positive return.

developed.[59] Indeed, it has been argued,[60] that the logic of portfolio risk management (through diversifying risk among a string of risky prospects[61]) is not applicable in the political sphere. This would suggest that the agenda of moving in an experimental direction is subject to making significant changes in the surrounding context.

A specific way in which pragmatism has been manifested is the ease of access to decision-makers by those who are "stakeholders" one way or another. (Such access is far harder to achieve in other countries.)

How has this been reflected in our regulation process? Our first assessment – though based on little more than casual empiricism – is that there is no explicit recognition in any systematic way of what ought to be a positive off-setting feature of the disadvantages that stem from our small scale. The only way we can see this reflected in the regulation process is via the representative consultation part of the regulatory mechanism. In cases where there is little time or resourcing available, sector knowledge of an expert can be tapped to create a collection of sounding boards - effectively a 'focus group' of stakeholders that can be seen as broadly representative of wider views.

Such a group will not have the mandate-creating power of a more formal and open consultative arrangement, but does allow the full range of sector understanding to be tapped and applied to the task of validating the workability and efficiency of the proposal. It will be significantly less time consuming and also inherently cheaper than other more comprehensive techniques. Whether it is more or less than proportionately effective in accomplishing the testing role depends on the quality of the representation selection made.

Nevertheless, this pragmatism is obviously capable of being a double-edged sword and has been described as the fastest legal system in the West[62] and sometimes has the suggestion that the government responds to demands of big business too easily. But a recent commentator[63] notes:

> [In New Zealand] The cabinet makes policy decisions and legislation is drafted to reflect those decisions. There is much less need to draft legislation in order to attract votes than there is in the United States; typically, the votes are there before the drafting begins. A side effect of this process is that legislation can be written clearly because there is no need to have clauses whose meaning is fuzzy or contradictory and that can attract votes by virtue of their multiple interpretations. The speed of the legislative process in New

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[59] See Joel Colón-Ríos "Experimentation and Regulation", in this volume.
[60] "Introduction and overview" in Sundakov and Yeabsley (eds) *Risk and the Institutions of Government*, (Institute of Policy Studies, 1999) at 1-14.
[61] See H M Markowitz "Portfolio Selection" (1952) 7(1) The Journal of Finance at 77.
[62] Geoffrey Palmer *Unbridled Power* (Oxford University Press, Wellington and New York,1987).
[63] CL Jackson "Coase and the New Zealand spectrum reforms" (2011) 54 4(2) *Journal of Law and Economics* at 192.

> Zealand is not always beneficial – both good and bad legislation can be enacted quickly. …

As already discussed pragmatism has different aspects. For the purpose here there are three sides of pragmatism that need to be distinguished:

- Being prepared to take risks (or endure higher costs) to have a mechanism working when it would otherwise be awaiting a proper repairman or makers' part.
- Putting an intervention in place without fully understanding how it is going to work, with the understanding that it will be withdrawn (or modified) if it fails to perform.
- Shortcutting processes when the "right" answer appears to be obvious.[64]

1.5.3 Cultural Attachment to Land and Investment Issues

The nature of our attachment to land can give rise to particular policies which reflect that passion rather than a broader view on what the regulatory framework should achieve. Some might say our policies regarding land are not pragmatic enough. Although, much land regulation is hard to change because of our cultural attachment to land Richard Boast and Susy Frankel have noted that:[65]

> The entire foreshore and seabed saga does illustrate the propensity of our legislators to play fast and loose with property rights and indeed with core concepts of property which is difficult to imagine happening in more conservative and more complicated jurisdictions like Australia and the United States.

And Daniel Kalderimis, in a study for this project about foreign direct investment (FDI) , for example, suggests:[66]

> whether indigenous Māori or Pakeha settler – has deep historical and cultural connections with NZ land. This is why NZ's FDI regime is unusually land-focused, but does not have any national security assessment or apply the NBT to other forms of strategic assets.

In essence the investment regime protects land interests, but may not have a coherent policy about investment itself. Kalderimis discusses how, as New Zealand progressively builds trading relationships in the Asia region investment, into Asia and from Asia into New Zealand, these can form a way to integrate better and lastingly into that region. The belief that New

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[64] Perhaps the most famous case was the order given by Prime Minister Muldoon in 1975 that was the subject of the *FitzGerald v Muldoon*, which saw the original Bill of Rights be cited as part of a NZ judgment.

[65] See Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" above n 39.

[66] Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand –Further Analysis", above n 4.

Zealand land should be in New Zealand hands "overlooks that most of this country's farmland is privately held."[67]

Kalderimis argues that New Zealand's history shows that government has funded most large infrastructure projects, most probably because of the small size of New Zealand's capital markets, and, therefore, it is in New Zealand's interest to be more globally connected through investment than "to spend the next decade locked in a political conflict which, because its roots are historic and cultural, is not soluble by reason or economics". This, he suggests, would make it "unwise to preclude the government's ability to make ad hoc agreements with foreign investors".[68] This is an argument in favour of an ad hoc approach to ensure flexibility.

The shape of a counterargument here includes what most economists would say about FDI which is that we should be "generally open for business," in the sense of having a sound open and transparent system so that we are a relatively low risk place to invest. That allows the foreign investors to see NZ as a reasonable place to consider as part of their portfolio; and to do it quickly and cheaply. To offer to "treat" with all potential investors is to increase potential transaction costs[69] for the applicant and the government and also create the potential for an inconsistent and uncertain policy stand to be on display internationally.

A vital part of the investment scene is the way our institutions are viewed. If they are seen as independent, certain and transparent then we are unlikely to have "games" played against us by international FDI controllers. If they are discretionary and easy to keep hidden, then we are open to gaming. This tends to lead to one-off deals. Assessment of these is always an issue as acceptability of "deals" is problematic in New Zealand public life.[70] In addition, there are more system related issues to be drawn into the assessment:

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[67] Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand –Further Analysis" above n 4 at 15.
[68] Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand –Further Analysis" above n 4 at 21.
[69] This would include the need to collect the array of information that would underpin any serious negotiation.
[70] A Schick *Why most developing countries should not try New Zealand reforms*, above n 53.

- The national "value" of the potential investments is typically poorly assessed and any ad hoc approach is likely to both contribute to uncertainty and possibly undermine the ordinary citizen's attachment to the system of law[71].
- There are always other options of achieving the same impact if we are prepared as a country to develop a specific solution. But in assessing the value of such interventions we lack data and ready capability to bring these to consideration in detail. There is also the small matter of the interaction of these "deals" with the wider political system – who is to be given carriage of the issue?
- The public accountability of such deals is poor, not the least because of weaknesses in the OIA – especially the loop-holes for commercial deals.

"Protection of property rights is not an absolute and eternal value. It is contextual and works within political, cultural and legal traditions."[72] The role of land in New Zealand society is not only influential in relation to policy that directly affects land, but also in relation regulatory regimes that are not exclusively about land. When it comes to regulatory takings the model of what legally amounts to a taking is predominantly based on land ownership concerns such as confiscation. In the project's discussion of regulatory takings and what the ambit of that doctrine should be the following is said:[73]

> Property rights are well defined in NZ and that any comparative approach is potentially flawed because different jurisdictions take different approaches towards property rights depending on their distinctive histories, politics, and economies....NZ has settled into a distinctive pattern when it comes to property rights in land.
>
> [The current regime] fails to provide an intellectually satisfactory framework within which contemporary recognition and enforcement of various rights recognizable under the Treaty of Waitangi, can be integrated into our approach to the protection of property. The political power of Māori in contemporary NZ society may allow them to achieve some compensation when (for example) customary rights are taken, but this is a highly unsatisfactory basis on which to run a legal system or a country.
>
> NZ has no choice but to grapple with the legal and economic questions raised by the existence of the Treaty of Waitangi. The challenge, therefore, is to create a legal framework – whether constitutional or otherwise – which is capable of addressing rights of compensation for loss of the value of rights in property arising from regulation or other state actions as this is relevant to contemporary NZ.

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[71] This argument is parallel to the debate that is at the heart of Prebble, above n 45, that the trade-off between citizen's ability to know and understand the law to the greatest degree and the state's perhaps overwhelming need to achieve some objective by whatever means it takes .

[72] Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings", above n 39 at 21.

[73] Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" above n 39.

The challenge is not just about Māori interests but arguably all economic interests and regulatory takings. Compensation for regulatory takings is not a specifically New Zealand concern but there are some aspects of the debate in New Zealand which are influenced by our unique property law.

As discussed in this project, regulatory certainty conveys notions of predictable and stable regulation.[74] Property rights advocates call for regulation to only trench on private property rights when the regulatory objective is serious and, in the view of most property rights advocates, only when just compensation is paid to the rights holder. Although under New Zealand law there is no such provision for just compensation for so-called regulatory takings. This led to a proposal to introduce what may have been the most expansive approach to regulatory takings found in any jurisdiction; compensation for impairment.[75] That approach has now lost favour – for, among other reasons the sheer practical difficulties of making an effective working system out of a seemingly simple principle. But the issue will likely not disappear in part because, as discussed above, an approach to regulation as an ongoing learning and experimentation process does not sit well with either predictability or certainty, without shrewd implementation.

This tension is important, because the notions of regulatory certainty and property rights protections are important in our type of market economy. They speak to the conditions required for investors to put their personal wealth at risk and make capital investments. This risk taking and investment making is at the heart of capitalism's 'innovation machine' as proposed by Baumol[76] and, in that respect, we should be slow to erode these conditions that stimulate economic activity and help mediate the relationship between the individual and the State.

One potential outcome of this tension is a more nuanced articulation of regulatory certainty. Or more particularly, the degree of regulatory certainty required to maintain appropriate investment incentives. The requirement is probably not absolute. Investors and business people deal with a range of uncertainties - future consumer demand, future costs, exchange rate fluctuations, the innovations of competitors, and so on. The lack of absolute certainty in other important areas of business operation does not deter investment making. The lack of absolute regulatory certainty is unlikely to either (and we can observe, has not had that effect in practice).

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[74] See Daniel Kalderimis, Chris Nixon and Tim Smith "Certainty and Discretion in New Zealand Regulation" in this volume.
[75] Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" above n 39.
[76] William Baumol *The Free-Market Innovation Machine, Analyzing the Growth Miracle of Capitalism* (Princeton University Press, 2002).

The Court of Appeal explored certainty and related investment issue in *Commerce Commission v Vector*[77], a case concerning the interpretation of price control regulation. Vector had been successful in the High Court arguing that the legislative scheme should be interpreted in a way that maximized regulatory certainty. The Court of Appeal observed (at paragraph 34(b)):

> ... s52A(1) describes the purpose of Part 4 as being "to promote the long-term benefit of consumers in markets [where there is little or no present or likely competition] by promoting outcomes that are consistent with outcomes produced in competitive markets...". The reference to "promoting outcomes produced in competitive markets" assist in placing the concept of certainty in its proper context. Participants in competitive markets generally face conditions of considerable uncertainty: that is the nature of competition. In the present context, while Parliament undoubtedly saw certainty as being important, particularly in terms of encouraging investment, it was not identified as the predominant consideration."

Of course, if the judgment is that investor confidence requires regulatory certainty but not absolute certainty, the challenge is to identify the appropriate degree of predictability and stability. For present purposes we can observe that when the objective is defined in this way there is a greater potential to articulate a standard of regulatory certainty that is consistent with the concept of regulation as experimentation and learning. After all, while we may describe the modern regulatory process as a learning exercise and iterative, and in some cases might recommend more conscious forms of experimentation, in the real world policy, political and bureaucratic process only moves so quickly when it comes to updating the stock of regulation (with notable exceptions, of course). Is a similar 'question of degree' compromise identifiable in relation to property rights protection? In the abstract, the answer is no. To have the confidence to invest, an investor needs to know that there is a high probability that she will retain her property, or be compensated, in the event of a regulatory taking. Equally, for property to perform its role in protecting individual autonomy, it must be respected.

The tension here comes to the surface in the debate over regulatory takings, in situations where regulation impairs the use of property and its value, but does not remove all utility or value. From some economic viewpoint this intrusion requires compensation.[78] However in most, if not all, legal systems where a regulatory taking is treated as triggering a compensation right (including the United States), the regulatory taking must be the practical equivalent of physical expropriation.[79] A lesser impairment will

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[77] *Commerce Commission v Vector* [2012] NZCA 220. Paul Scott, above n 44.
[78] Richard Epstein "Takings, Givings and Bargains: Multiple Challenges to Limited Government" (New Zealand Business Roundtable, Wellington, 2004).
[79] Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2012) 145.

not trigger compensation. No legal system compensates the property holder for every regulatory intrusion, even where the impact on value is demonstrable. The degree of property rights protection in a legal system will reflect the culture and history of the jurisdiction.[80] However it is striking that no jurisdiction has characterized 'ordinary' regulatory intrusion as being so inconsistent with property rights as to require compensation.

It is possible that an appreciation of the modern regulatory context is informing expectations as to the definition of property rights and their protection. Stakeholders, including property owners, understand the complexity of the modern regulatory state. Government would become unworkable if every regulatory intrusion required the detailed assessment and payment of compensation, and every evolution of regulation (including every revision that takes place as a result of learning) effectively required the government to buy existing stakeholders out of the status quo. This is not what investors and property owning individuals expect in a modern state, and no modern state privileges property to this degree. From this starting point then, the exercise does become recast in terms that hint at a constructive dialogue. Can we identify a degree of property rights protection that meets expectations in a modern regulatory state, such that investors have the confidence they need and individuals the liberty to flourish in today's world?

This is being worked out in the debates over the degree of impairment needed to trigger compensation and at the international level[81], the evolution of investor protection arrangements that preserve the ability for state governments to regulate for public welfare in a non-discriminatory way, for example the New Zealand/China Free Trade Agreement.[82] In New Zealand this search for a legal balance that meets modern expectations has to weigh our tradition of nationalisation and pragmatic ad hoc solutions against our constitutional heritage of property rights protection and our acceptance that our constitutional order can accommodate the courts applying broadly worded human rights in politically charged contexts.[83] Most immediately, the question is whether the absence of protection against a regulatory taking that is in substance appropriation, strikes that balance.

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[80] See also Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" above n 39, who highlight New Zealand's particular predilections for nationalisation and subsequent licensing of natural resources.

[81] The logic of a separate and distinct assurance mechanism for "foreign" investors seems to have been overlooked in the cries for sovereignty. But it relates to the power that local voters have to hold their agents – the government - to account for misjudgements about the way they have chosen to act with respect to the property of voters. Such power is lacking for overseas investors and they seek the alternative of access to the courts.

[82] See also Richard Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" above n 39.

[83] Jack Hodder SC "Public Law, Property Rights and Principles for Legislative Quality" (NZLS Seminar Administrative Law – the Public Law Scene, February 2011).

1.5.4 Balancing Foreign Influences

In other areas of regulation the influence of foreign jurisdictions may be more apposite and necessary. Competition law is, according to Paul Scott, one of these.[84] As New Zealand's Commerce Act 1986 is based on the Australian Trade Practices Act 1974, the connection to Australia is immediately apparent and arguably economically important as they are our largest trading partner. Yet, Scott notes that:[85]

> Another distinctive and related feature of NZ's competition law is how remarkably uninfluenced by overseas law NZ courts are. This poses a problem as NZ still has a small body of indigenous case law. Not relying on overseas case law leaves market participants very little to draw upon when dealing with possible competition law liability. One can contrast this with intellectual property law where NZ courts regularly cite English and European authority.....As for United States law, NZ courts appear to almost deliberately eschew it. Often to the detriment of NZ's competition law. ...This reluctance to refer to overseas case law and literature does harm to NZ's competition law. It leaves us, in Heydon J's words, as a lonely island in a foggy sea.

So while commonalties can be found on the face of the Australian and New Zealand statutes the differences arise in the local judicial interpretation of those statutes. While independence of judicial interpretation is important, it should primarily occur where the courts find that there is a substantive reason to part company with approaches from Australia, such as if it makes sense on the facts of the case. Such flexibility should be preserved as it is a way of harmonising but making sure that where necessary New Zealand can take a different approach for its local circumstances. This is a mechanism to ensure the working of what might be called the New Zealand interest "safety valve", but it should be in such circumstances where the valve is necessary.

It is a feature that reflects the practical mitigation of the political force of the discussion of sovereignty above; and also the further insight[86] that the idea of sovereignty in a global world relates to the way a country chooses to structure its engagement with the world. In other words, what forces does it allow to play domestically?

A way this can be seen to play out is to consider the two sides of a regulation that govern its application in practice: the rule as it is worded; and the manner of interpretation/ implementation. Clearly there is room for divergence in effect via either of these aspects. The same rule can be interpreted differently – by the courts perhaps? And differently worded rules can, nevertheless be applied, in practice, in very similar ways. We can

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[84] Paul Scott "Competition Law and Policy: Can a Generalist Law be an Effective Regulator?", above n 44.
[85] Paul Scott "Competition Law and Policy: Can a Generalist Law be an Effective Regulator?", above n 44 at 12-15.
[86] See Murray Petrie M "Jurisdictional Integration: How Economic Globalisation is Changing State Sovereignty" (PhD thesis, Victoria University of Wellington, 2009).

see the way these choices work into the practice of local institutions as the exercise of sovereignty and it is a matter for our authorities to decide upon; but there are some (informal) bounds to the exercise of this choice.

So, the systemic application of a different local interpretation, to produce a markedly separate policy from Australia in the areas where efforts have been made to bring regulatory practice together does not make sense in the context of the (wider) CER relationship. An instance of the phenomenon is arguably visible in areas of intellectual property law that purport to be similar across the Tasman.[87] We do not suggest that all intellectual property law should necessarily be the same on either sides of the Tasman, but where it is the same, different interpretation should be avoided if possible.

In the area of consumer law the current New Zealand government has not adopted the Australian approach. In a discussion about consumer law and paternalism Kate Tokeley notes:[88]

> NZ society has historically been relatively open to legal paternalism … Although NZ is generally more likely than the US to support some forms of paternalism, the current National govt is reluctant to follow recent paternalistic developments in Australian consumer law.
>
> In NZ, the Māori population are over-represented in these socio-economic and health statistics … Investigating the deep-rooted social and cultural factors that underpin "poor" decision-making should be a part of finding appropriate policy and legislative solutions.

In the area of tax law John Prebble advocates that New Zealand should follow other jurisdictions needs and because:[89]

> ... some countries have legislated to provide that double tax treaties are subject to the general anti-avoidance rules... NZ should do the same.
>
> These examples arguably show that the influence of foreign jurisdictions needs to be considered on a regulatory area by area basis. They also show that foreign influences are important and need to be carefully considered at both of the levels that can affect the actual impacts of the regulatory measures.

1.6 Legislative Drafting and Uniqueness

One feature of New Zealand is to look to other countries for regulatory approaches, including the actual legislative text, in order to model our own legislation. Is there anything unique about the Parliamentary Counsel Office (PCO)? Aside from some features relating to its history, and scale of funding, there seem to be few significant differences to other drafting units

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[87] Susy Frankel Chris Nixon, Megan Richardson and John Yeabsley "The Challenges of Trans-Tasman Intellectual Property Coordination", above n 14.
[88] Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision Making", above n 46.
[89] John Prebble "General Anti-avoidance Rules as Regulatory Rules of the Fiscal System: Suggestions for Improvements to the New Zealand General Anti-avoidance Rule", above n 45 at 11.

in Australia and the rest of the commonwealth. But, of course, aspects of uniqueness that appear and influence other components of the policy and content stages will (indirectly) impact on the way the PCO carries out its task.

While looking to other jurisdictions for models is, as mentioned above, part of global connectedness and also can be a resource saving measure, it is not without problems. One difficulty is that we may have developed sufficient uniqueness to not fit the global norm in a specific area; the consequence over time is that further adaptations made for New Zealand's pre-existing setting may disconnect us even more from global norms. The creation and continuance of the ACC is a case in point. Two examples are offered here. One is the need to keep developing and amending the relevant legislation governing the way the scheme operates. And the other is its collateral effects. While it might be thought that its effects would be confined largely to the sector of tort law that was removed as a concomitant, it will have had practical implications for the evolution of associated jurisprudence too, as the cost of related torts may have become too significant to be pursued alone.

It is possible to both exaggerate and underestimate these phenomena.

Underestimation of the potential problems of adopting another regime may arise where New Zealand has traditionally regarded itself a follower rather than a leader. Patent law for example, has almost exclusively been driven by overseas models, in particular, that of the United Kingdom. Currently, the model is likely to be dictated by United States policy through the Trans –Pacific partnership trade negotiations.[90] The Patent Bill 2008, which languishes before the House awaiting its reading after returning from Select committee, is the first time that New Zealand interest policy provisions are expressly included in patent law. In particular, based on New Zealand interests, articulated in the policy and select committee stages the Bill includes exclusions from patentability for computer programs,[91] codifying the common law exclusion for methods of medical treatment[92] and to address concerns raised by Māori about patenting.[93] These are also perhaps part of the reason that the Bill is languishing before the House as the trade negotiations potentially threaten all these exclusions.

Exaggeration of the potential for difficulty, on the other hand, can set in when a controversial issue is addressed by a policy adopted in whole or in part from abroad.

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[90] See Susy Frankel and others "The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy", above n 36.
[91] Patents Bill 2008, cl 15.
[92] Patents Bill 2008, cl 15
[93] Patents Bill 2008, cl 15.

1.7 The Parliamentary Process

Aspects of the New Zealand legislative process are unusual. Jeremy Waldron suggested several years ago[94] that aspects of the structure of legislative restraint in New Zealand are not unique. We are not alone in having no upper house; nor in lacking a written constitution; nor in the head of state having to obey instructions from the Prime Minister. What is unique is the specific combination that, in aggregate, dispenses with almost all the typical checks and balances and places tremendous weight on doing the right thing; or what might be seen as the "raised eyebrow restraint," backed only by direct forms of action. But for the legislative process these elements matter.

One aspect is the lack of a written constitution. This does not make New Zealand without constitutional law, but the details of that law can appear remarkably fluid or even flexible when compared with written constitutions.

We have a unique mixed member proportional representation system. This means that all governments since its institution have relied on other parties to pass supply. This has created a 'market' for trading votes. Some takes place in advance of the parliament – supply agreements which typically trade support for the appropriation Bill for assurances of differing degree of firmness for action in other policy areas. This has changed the process by which some regulatory initiatives have been developed and implemented. An example is the Regulatory Standards Bill.[95]

We also have what some regard as a highly effective Select Committee process. The Select Committee process is seen as one of the main ways in which participation in the regulatory process, of stakeholders and third party interests takes place. Although, Bennett and Colon Rios note this is a narrow mode of participation.[96] It is also dispensed with in cases of so-called urgency[97] and is always subject, as a process, to being shaped by pressures on resources, particularly the committee's time.

As noted by Jeremy Waldron one of the reasons that we have a fast legislative process is the absence of any upper house in Parliament. The absence of the 'reflective' house used to be compensated by the ability of the dominant party (government) under the previous First Past the Post

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[94] J Waldron *Parliamentary recklessness: Why we need to legislate more carefully* (Sir John Graham Lecture, Maxim Institute, 2008).

[95] Rayner Thwaites and Dean R Knight "Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis 2013) 529.

[96] Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation", above n 52 at 53.

[97] See generally, Claudia Geiringer, Polly Higbee and Elizabeth McLeay, *What's the Hurry*, above n 34.

system to amend faulty legislation promptly. MMP has altered this balance and no formal or informal compensatory mechanism has emerged.

1.8 Implementation and Enforcement

When regulatory changes are made there is a tendency to follow those changes, or some might say to play to the rules. Therefore the notion that regulation has the goal of changing behaviour might mean that New Zealand is uniquely responsive to behavioural cues delivered through regulation. This in part might be attributable to isolation. "In some cases, NZ's geographical isolation might provide the opportunity for effective paternalistic regulation that might not work as successfully in a less isolated country"[98]

New Zealand has its own legal system and institutions, but in terms of substance relies not only on overseas models to create regulatory policy, but overseas cases to test issues. Our small population and low incomes mean that overall there are few court cases to test regulation. Specialised tribunals are often cheaper and more effective than full-blown court procedures and so have tended to spring up in a number of fields. New Zealand has recently rationalised its tribunal system.

But their drawback is that they often have limited ability to create the wider 'shadow of precedent' that is a vital externality of a thoughtful decision. An interesting counter-example is with the merger threshold in the Commerce Act and the Commerce Commission. In 2001 we changed the threshold in section 47 to match the Australian threshold – the substantial lessening of competition (SLC) test. One of the reasons cited by officials and the Minister was the advantage of leveraging off Australian jurisprudence as to the meaning and implementation of that test. In fact, the institutional arrangements in Australia are such that written decisions are very rare! In fact, it is the NZ CC that produces and publishes a treasure trove of reasoned competition law decisions on mergers – something the Australians recognise is a strength of our arrangements. Their capacity can be restricted through the way they are set up whereby their decisions are declared not to be binding,[99] and/or through the desire to trim costs by not having elaborate records of decisions and their rationale. Such innovations therefore have to be seen as part of the costs associated with pursuing uniqueness while recognising that our scale means we cannot justify a full-blown court system.

Similar analysis applies to the longstanding question of the division of labour among courts. The absence of thorough-going specialised judiciary and the pros and cons of specialisation is not something we cover here as it

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[98] Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision Making ", above n 46 at 31.

[99] Rayner Thwaites and Dean R Knight "Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework", above n 95.

is well-traversed. But we do make some general observations about how the lack of expertise traverses all levels of the system.

In principle, this could be overcome, at least to a degree, by relying heavily on the proceedings in other jurisdictions. But the ability to recognise which of these are relevant, and, perhaps more importantly, the limits to their relevance, is obviously a skill that is more likely to be in evidence when individuals are able to focus their attention on a subset of the total legal landscape.

The impact on transparency and legal certainty can be extreme if specialisation is not readily to hand[100] and lack of test cases can simply exacerbate that.

1.9 Evaluation

Clearly, at a high level any New Zealand character that places an emphasis on pragmatism should see evaluation as a crucial driver of the regulatory system.[101] It also ties into a system that explicitly is focused on experimentation as part of implementation. This has two sides.

The first is that in the formal experimental case, feedback, whether positive or negative, has to be driven off a formal assessment process. It thus entails the methods of evaluation including detailed information collection, and typically demandingly, a clear picture of the status quo to serve as a standard of comparison.

Second, even changes that are not seen as formal experiments, are valuable events. This springs from the observation that, the New Zealand regulatory system, as such, is likely to have limited chances to observe "how things work." So all instances of regulatory implementation should be closely monitored and recorded for later reference. This is because these instances – which are clearly taking place inside a NZ setting – are scarce resources to be analysed for their potential to contribute to the experience base of the local set of regulatory designers.

1.10 Overview

How should the New Zealand factors be best dealt with in the regulatory framework?

Different factors have different impacts on stages of the process, (as discussed above) and on the regulatory outcomes. These aspects can be

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[100] See Daniel Kalderimis, Chris Nixon and Tim Smith "Certainty and Discretion in New Zealand Regulation" in this volume.

[101] See Derek Gill and Susy Frankel "Learning the Way Forward?: The Role of Monitoring, Evaluation and Review" and Joel Colón-Ríos "Experimentation and Regulation", in this volume for a full discussion of the is topic.

taken as a simple framework within which to develop an approach to the effects of uniqueness on regulation.

History and tradition build institutions and attitudes; changing times and situations force these to flex or break as their responsibilities or their outcomes date, or just seem inappropriate. Like all countries NZ has a past and an inherited set of infrastructural mechanisms that surround the process of producing regulations. Our national quirks and individual features of the law, and its implementation here, interact with our current values and desires to make the task of designing and running a set of regulations difficult.

Standing back and pulling together the commentary in earlier sections we can produce a table that sets out the broad findings of the investigation so far.

Table 2: Overview of the logic of uniqueness in regulation – in brief

Regulatory phase:	Process: How NZ uniqueness makes a difference	Outcome: what does it do to the regulatory outcomes?
Policy	Perception and participation, including: • Mandate and sustainability • Māori influences • Processes (RIS) Pragmatism Attachment to the land Wider foreign influences	Durability? Scale works on Regulation by calamity
Design	Process, including: • PCO • Select committees • Existing institutions	Scarce drafting resources
Content	• Topics • Approaches	New ideas like infringement and civil penalties
Enactment	Constitutional issues including: • MMP • Unicameral house • Process rules	Limited chances for legislation
Implementation	Scale effects Global connections Formal / informal dichotomy Room for innovation?	Limited number of agencies Each with own culture
Evaluation	Should be important Seems to be characterised by under supply Rules should support	Typically only as reaction to problems No agreed framework
More general	Overwhelming interest in is it working? Is it cost effective?	Should make evaluation a strong suit. But cost containment seems to dominate

1.10.1 Looking ahead

What might we take away from this survey of the aspects of NZ that are more or less unique and the effect that these influences might have on the regulatory process and outcomes?

The analytical and empirical discussion has suggested that the way uniqueness affects regulation is complex. The various unique features of our environment impinge in a variety of fashions. These include: the way the process is structured; the way it unfolds; and the final product; as well as the manner of implementation, and thus the overall result.

Our review suggests that the key factors that relate to uniqueness and their potential effect on the regulatory process are:

- We are pragmatic in the sense of wanting to assess what is going to be the outcome more than the production process. So investment in preparatory work matters; so does evaluation and readiness to revise the regulation – quickly if necessary. It also suggests a very eclectic approach – *horses for courses* will give the best portfolio of working regulatory outcomes. But this may mean a cost of less transparency, and thus higher costs for outsiders in understanding each instance of regulation.
- We recognise the cost of development processes, which bite on a small revenue base. While these might be addressed by seeking more commodified overseas input, they also demand a locally fitting solution. This balance needs to be better understood and teased out so the areas where it is more sensible to look locally, and those where an offshore approach has merit can be classified and known in advance.
- We are aware of the costs of trying new things, but are still attracted to *leading edge* and *experiment* as concepts. We have looked into these and there are ways this dichotomy can be tackled – for instance by trials and pilots.
- Our size is not going to change; also we are already well connected to other jurisdictions. So we should be able to work more closely with those other countries in developing and refining regulation without losing our unique factors. Examples abound but we seem to be slow at investing in learning for the whole system. This is important particularly in the trans-Tasman relationship and the trade negotiations of the day, including the trans-Pacific Partnership.
- Aspects of the policy development system are still in a stage of change. We seem to be driving toward bigger production units rather than more specialised knowledge and application. This suggests more systematic approaches, and more general mechanisms with particular tweaks to improve "fit".
- Regulation needs to be customised to so-called New Zealand specific needs. This situation is not new, so what behaviour has evolved to deal with these challenges?

Appendix: Unique features of NZ as seen by a group of commentators

To test our ideas about the New Zealand is unique we took a small selection of writings about this country, with a degree of historical perspective, and looked for the characteristics that were said to be important for a New Zealand attitude and style. The results are in the table according to the frequency of their occurrence.

Table A1: What makes New Zealand unique? Summary of literature as listed below.

No of references	Characteristic	Themes
8	The land	Use but not exploit; protect natural environment Attitude to land ownership Quakes, natural disasters, geothermal phenomena
6	Trade dependent	Historical connections to England Reliance on imported ideas/materials/funds Exports select commodities to select group of countries Emphasis on value added Importance of trade agreements
6	Agricultural economy	Main income generator Importance of farming Key commodities include livestock, wool, dairy
5	Social equality and community	Strong sense of community and loyalty Less social fences than England Social welfare important The suffragette movement and rights for women
5	The population/Māori	Emigration flows important: young New Zealanders head overseas Large indigenous population – proud alternative culture Treaty of Waitangi
4	Innovation	History of progress Ingenuity needed to be self-sufficient Innovative policy: inflation targeting monetary policy
3	Geographic isolation	No natural market Isolation - independence and freedom act differently Geography determines economic organization
3	Development	Lack of development of roads, manufacturing, infrastructure
3	Politics	Reputation for experimental legislation Nuclear-free stance Access to political process: unicameral Pace of reform more rapid than elsewhere Emphasis on discipline rather than supervision
2	Business operation	Small, personal business rather than corporate enterprise Borrowing for development
2	Labour	Capacities of people vital Flat educational structure Rise of organized labour
2	Sport & recreation	Importance of rugby to self-esteem; active people