Energy law and energy planning in New Zealand

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The legal system has long been concerned with sources of fuel such as timber, peat and coal: they are aspects of land law. More recently has the law been forced to provide for sources of energy such as oil and gas that are less easy to accommodate within Common Law. The perspectives adopted by the law have been extended to enable a wide-ranging approach to decision-making in energy matters and something in the nature of an energy planning system has begun to emerge. This paper describes these developments in the New Zealand context and relates them to the institutional decision-making structures created by the Ministry of Energy Act 1977.

I. ENERGY LAW

One American commentator has suggested that "just as environmental law is a child of the early 1970s, energy law is a child of the latter part of the decade".[1] This is certainly true in the sense that environmental law and energy law have only recently matured as recognisably integrated and comprehensive branches of the legal system. The law relating to the environment and to sources of energy, of course, has as long a history as the legal system itself: both are, in some respects, extensions of land law. The last twenty or so years have witnessed not so much a change of substance as a revolution in perspective. Timber, coal, oil, gas and electricity are no longer conceived merely as individual sources of energy. They are related to each other from the overall perspective of energy development and conservation. This affects the legal system in several ways. Existing doctrines, for example ownership, are adapted to changing circumstances; new institutional structures are created; decision-making processes evolve to meet contemporary objectives; specially contrived mechanisms of regulation are fashioned.

In New Zealand as in other jurisdictions, energy law was a fragmented and functionally unrelated series of rules governing the ownership and use of individual

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1 J. P. Tomain *Energy Law* (West Publishing Co., St. Paul, 1981) xix.

sources of fuel and power. It was no more than the expression of traditional legal doctrines to particular land-related substances such as water, vegetable matter, minerals and surface materials. The position of the Crown as the owner at Common Law of all unalienated land was particularly influential both before and after legislation was enacted to regulate such matters as state forests, water conservation, coal and other mining, petroleum, sources of atomic energy, ironsands, geothermal energy, electricity production and gas distribution. The Crown could be seen as a mechanism for achieving consistency and cohesion in decision-making in the public interest until such a unitary system was fragmented by the alienation of land and land-related interests and the introduction of topical legislation. The enactment of topical legislation, in effect, created a single-purpose decision-making process concerned only with coal, petroleum, forestry or whatever. The tendency over the last decade has been, to some extent at least, to reverse that statutory trend by creating alongside that topical decision-making process a system of energy planning.

II. ENERGY PLANNING

Planning is little more than a way of achieving certain objectives: in other words, a process. It may sometimes influence the objectives so to be achieved. Even if planning and policy are conceptually separate, they are in practice marginally related. The 1981 plan prepared by the Ministry of Energy stated:[2]

> Policy formulation at the strategic level involves the expression of national aspirations and their interpretation by the Government in practicable terms. In contrast, planning is concerned with formulating means of policy implementation. If planning is to be effective it must flow from a sound policy base. This is particularly so where formal machinery for planning exists as it does in the energy area.

Planning then is the link between the creation of policy at the one extreme and the detailed implementation of policy in the individual case at the other extreme. It influences both: it does not mandate either. In practice there are two aspects of any planning system: the acquisition and analysis of information and a rational consideration of how that information may be used to achieve the objectives of the final decision-maker.

The need for energy planning was recognised in New Zealand rather earlier than in some other jurisdictions. It became "obvious" in the 1970s, because, as the Ministry of Energy pointed out, between 1972 and 1974 the price of oil moved from $2 to over $10 a barrel and in 1979 from $16 to $30 a barrel.[3] The first energy plan however was not published by the Ministry until 1980 and there has been a plan every year since then. The formal machinery for formulating an energy plan had been created in 1972.[4] Indeed the purpose of the earlier

2 *1981 Energy Plan* New Zealand. Parliament. House of Representatives. Appendix to the Journals, vol. 2, 1981, D. 6A: 5.

3 Ministry of Energy *Energy Planning '83* (Government Printing Office, Wellington, 1983) 4.

4 Ministry of Energy Resources Act 1972.

Fuel and Power Bill of 1962 had been to introduce an energy planning system[5] but it was deferred for further consultation[6] and never apparently reconsidered.

The functions of the Ministry of Energy Resources set up by the Act of 1972 were described by the Minister of Fuel and Power in these words:[7]

> The Ministry will provide for [energy] policies to be established and will enable a totally objective approach to the development of the energy resources which are best suited to meet New Zealand's needs. . . . It will promote and co-ordinate but it will not be armed with mandatory powers or powers of direction nor will it be a producer or marketing body.

When the Ministry of Energy was established in 1977, it took over not only the planning functions of the Ministry of Energy Resources but also the operational responsibilities of the Department of Electricity, the operational and regulatory duties of the Department of Mines and the regulatory functions of the Department of Works and Development relating to geothermal energy. The Minister described the planning function of the Ministry of Energy positively:[8] "We are determined that long-term planning for all forms of energy will be fully developed and properly co-ordinated." And in these words:[9]

> The formulation of balanced policies between different forms of energy is no longer left to co-ordination and co-operation among several different departments of State. This is to be the responsibility of the Ministry of Energy and, as such, is a clear expression of the Goverment's own policies.

The commitment to energy planning is clear. The framework was created by the Ministry of Energy Act 1977. It must be remembered, however, that the energy planning system established by that Act exists alongside the topical legislation dealing with petroleum, coal, mining, geothermal energy, atomic energy, electricity, gas and other energy matters. The relationship between the planning system and the other functions created by the legislation gives rise to some legal problems.

III. THE MINISTRY OF ENERGY ACT

The relationship between mandatory energy law and the energy planning system in New Zealand depends partly upon the terms of the Ministry of Energy Act 1977 as amended by the Ministry of Energy Amendment Act 1981. There is nothing unusual about the constitution of the Ministry. A Department of State called the Ministry of Energy is established by section 3 and a Secretary of Energy appointed under section 5. The Minister of Energy is recognised for the purposes of the Act.[10] He is invested not only with control of the Ministry[11] but

5 N.Z. Parliamentary debates Vol. 332, 1962; 2558.
6 Ibid. Vol. 333, 1962; 3046.
7 Ibid. Vol. 378, 1972; 17.
8 Ibid. Vol. 413, 1977; 2512.
9 Ibid. Vol. 413, 1977; 2513.
10 Ministry of Energy Act 1977, s. 2 "Minister".
11 Ibid. s. 4(1).

also with power to give directions to the Secretary.[12] Provision is made by section 8 for the appointment of advisory and similarly non-executive committees and an Energy Advisory Committee has been appointed. Particularly important is the definition of energy. It means:[13]

> Work or heat that is or may be produced or derived from coal, electricity, gas, geothermal activity, petroleum, petroleum products, uranium, water, or any other fuel or any other source whatsoever.

To consider first the functions of the Ministry under the Act: they are described in sections 11, 13 and 14. The Ministry is required by section 11 (1) to advise the Minister on the formulation, implementation, co-ordination and continuing review of effective and efficient energy policies for New Zealand. The functions necessary to do so derive from section 11 (2). Subsection (4) of the same section imposes a range of specific duties upon the Ministry in relation to energy in New Zealand. These responsibilities are not strictly operational: they comprise the acquisition, analysis and publication of information, the promotion and encouragement of exploration and development and, more generally, the planning and co-ordination of energy-related activities.[14] Direct operational involvement by the Ministry is permissible only if the Minister so directs.[15]

The perspective of subsection (3) is rather different. It indicates the matters to be taken into account by the Ministry in the discharge of these statutory functions. They set out in effect the scope of the planning function contemplated by the legislation. Included, for example, is the cycle of exploitation from exploration and discovery, through production and processing, to distribution and consumption: specifically mentioned is the rather different but not inconsistent purpose of conservation.[16] Industrial, commercial, domestic, regional and sub-regional needs and interests[17] are as important as environmental and social considerations.[18] The final factor is perhaps one of the most important in the present context: future needs, patterns, changes and problems and the need to plan for and influence such matters.[19]

Section 11 discloses a complicated structure. The Ministry is required to undertake tasks that could lead in several possibly conflicting directions simultaneously. But, it must be recalled, the powers of the Ministry are not mandatory. The Ministry exists, in a sense, to service the Minister economically, technologically, administratively and legally: the relevant information, an appropriate analysis, the options and the implications of the options are made available by the Ministry. Decisions are for the Minister.

12 Ibid. s. 4(2).
13 Ibid. s. 2 "energy".
14 This is a paraphrased synopsis of s. 11(4). The precise terms of the provision must be consulted.
15 Ministry of Energy Act 1977, s. 11(4)(b) and (d).
16 Ibid. s. 11(3)(b).
17 Ibid. s. 11(3)(c) and (d).
18 Ibid. s. 11(3)(f).
19 Ibid. s. 11(3)(h).

This assessment is supported by the provisions of sections 13 and 14. Section 13 provides in simpler terms for minerals what section 11 does in complex fashion for energy at large. Section 13 (1) requires the Ministry to advise the Minister on the development and regulation of the mineral industry of New Zealand and confers the necessary functions for doing so. Subsection (2) indicates quite clearly, although in general terms, that it is the Ministry's duty to promote the discovery and development of minerals in New Zealand and to foster the development of New Zealand's mineral industry. "Mineral" for this purpose has the same meaning as in section 5 (1) of the Mining Act 1971, namely any mineral, mineral substance or metal notwithstanding that it may be regulated by legislation other than the Mining Act. Section 13 is wide in its application and it states positively what is the policy to be achieved by the Ministry in supporting the Minister.

Section 14, on the other hand, is silent on such matters. It merely directs the Ministry to "administer" the enactments specified in the First Schedule. The Schedule is a list of the topical legislation on energy in New Zealand: it covers coal, electricity, gas, geothermal energy, minerals, nuclear energy and petroleum. The 1977 Act, finally, amends the relevant provisions of the topical energy legislation so that the various Ministerial powers are now exercisable by the Minister of Energy.

What, then, are the powers of the Minister of Energy as distinct from the functions of the Ministry of Energy? The 1977 Act itself vests two powers in the Minister. The responsibilities of the Minister of Trade and Industry under Part IV of the Commerce Act 1975 as they relate to the control of prices of energy and energy related products are exercisable by the Minister of Energy under section 12. Section 15 confers upon the Minister of Energy the right to participate in operations related to energy development and conservation. Otherwise the Minister of Energy finds the statutory authorisation for his executive mandatory powers in the relevant topical legislation. Some are regulatory; others are operational.

Examples may be taken from each of the statutes mentioned in the First Schedule to the 1977 Act. The decision whether to grant a prospecting licence,[20] a mining licence[21] or a pipeline authorisation[22] under the Petroleum Act 1937 lies with the Minister of Energy. The Minister also has the responsibility under that Act for the approval of the work programme[23] and for variation of the rate of petroleum development in accordance with the requirements of the national interest.[24] Prospecting licences,[25] exploration licences[26] and mining licences[27] under

20 Petroleum Act 1937, s. 5(1).
21 Ibid. s. 12(1).
22 Ibid. s. 55.
23 Ibid. s. 14A(2).
24 Ibid. ss. 14B(1) and 14C(1).
25 Mining Act 1971, s. 48(1).
26 Ibid. s. 60(1).
27 Ibid. s. 69(1).

the Mining Act 1971 are granted by the Minister. That is also the position for coal mining rights under the Coal Mines Act.[28] The Minister controls the disposition and use of uranium and other prescribed substances under the Atomic Energy Act[29] and of geothermal heat under the Geothermal Energy Act.[30] The supply of gas[31] and electricity[32] and the construction of electricity transmission lines[33] are subject to control by the Minister of Energy. The Minister, finally, has powers to engage directly in operational activities under these various Acts.[34] Particularly interesting in this regard is the Electricity Act. Section 11 enables the Minister to construct works for the generation and supply of electricity. But the obligation to undertake the generation of electricity is imposed by section 7 (2) upon the Ministry of Energy. The general scheme of the energy legislation, then, both general and specific, is that the Minister is invested with the power to make legally binding decisions while the obligations related to the various statutory decision-making processes are imposed upon the Ministry. This is to some extent an oversimplification but it represents the general position.

IV. THE RELATIONSHIP BETWEEN THE MINISTRY AND THE MINISTER

The division of function between the Ministry and the Minister has certain practical consequences that flow from the nature of the several decision-making processes. The power to authorise energy developments lies with the Minister. The process of Ministerial decision-making is generally not constrained by the legislation. The major exception is found in the procedures for objection and inquiry into mining applications[35] and the subsequent obligations placed upon the Minister[36] by the 1981 amendments to the mining legislation. That apart, the legislation generally leaves to the Minister the privilege to control and regulate specific energy developments as a matter of policy free from statutory interference. The Ministerial power to engage in operational energy development is similarly exercisable as a matter of policy. Apart from coal mining by the State coal mines, however, the Minister does not in general use these powers. Although the government owns the shares of the Petroleum Corporation of New Zealand Ltd, that organisation operates as a commercial enterprise incorporated under the Companies Act 1955 and derives no powers, privileges or status from its shareholder: Petrocorp is subject to the legislation just as any other person engaged in petroleum development.

28 Coal Mines Act 1979, s. 20. See also s. 2(1) "coal mining right".

29 Atomic Energy Act 1945, ss. 5, 5A and 6.

30 Geothermal Energy Act 1953, s. 9.

31 Gas Act 1982, s. 18(1).

32 Electricity Act 1968, s. 20(1).

33 Ibid. s. 21(1).

34 Petroleum Act 1937, s. 36; Mining Act 1971, s. 132; Coal Mines Act 1979, s. 102; Atomic Energy Act 1945, s. 10; Geothermal Energy Act 1953, s. 11; Electricity Act 1968, s. 11; Ministry of Energy Act 1977, s. 15.

35 Mining Act 1971, s. 126 as substituted by s. 32 of the Mining Amendment Act 1981.

36 Ibid. s. 126(15).

The Ministry of Energy, on the other hand, is bound to comply with a wide range of directions and obligations enacted by Parliament. Some are operational: for example, the generation of electricity. Several are related directly to investigation and planning. The Ministry carries the administration of the legislation and has the primary responsibility of advising the Minister. But the Ministry lacks the power to make legally binding decisions in relation to energy development. This is not to say that the Ministry has no capacity to engage in decision-making in exercise of the administrative function. But the level of decision-making entrusted in this way to the Ministry is clearly different from that vested by Parliament in the Minister. The legal system thus distinguishes between the formulation and implementation of policy on the one hand and the provision of services in support of policy formulation and implementation on the other hand. It will often be difficult in practice to apply this distinction: it will involve a close examination of the legislation in relation to specific sets of circumstances. But the distinction exists: it has been created deliberately by the legislature: it must as a matter of law be effective.

Some examples may help to illustrate these difficulties. Section 13 (2) (a) of the Ministry of Energy Act 1977 directs the Ministry to promote and encourage exploration for and discovery of minerals in New Zealand. This would include, for instance, gold, iron ore or uranium. Section 11 (4) (k) of that Act[37] provides for grants, loans or subsidies to be made available out of public funds for the purpose of implementing policies relating to energy. The earlier version of section 11 (4) (k),[38] it should be noted, did not refer to energy policy. If it were the policy of the Minister to encourage the development of domestic sources of energy, there would prima facie be no reason why the Ministry could not subsidise exploration for uranium in New Zealand. It might equally be the policy of the government not to use nuclear power. The duty on the Ministry under section 13 (2) (a) in relation to uranium could be elided by the exercise by the Minister of the power in section 4 (2) to direct the Secretary in relation to the carrying out by the Ministry of their functions. As section 11 (4) (k) is linked to policy, the Minister would simply indicate that grants for uranium exploration were contrary to policy and therefore not available for distribution by the Ministry. On the other hand, not all minerals are sources of energy and hence not all minerals may be linked to energy policy. That probably does not matter because section 4 says nothing about energy. It is a provision which merely links the Minister, the Ministry and the Secretary in institutional terms. The reason is that the legislation does not indicate what policies are expected to be followed by the Minister. If, therefore, there is a conflict of policy and there are no policy constraints upon the Minister in the legislation, then the Minister is free to decide which policy prevails in any set of circumstances.

Is the position any different where the obligation is imposed upon the Ministry

37 As amended by s. 2 of the Ministry of Energy Amendment Act 1981.
38 In the 1977 Act.

by a statute other than the Ministry of Energy Act? Section 6 (a) of the Electricity Act 1968 places upon the Ministry the function of organising and maintaining the production, transmission and supply of electricity. This is supplemented by section 7. The Ministry is required inter alia to undertake the generation of electricity[39] and to arrange or execute the supply of electricity at the lowest practicable cost.[40] Sections 6 and 7 are both prefaced by the words "subject to section 11 of the Ministry of Energy Act 1977." But there is no reference to section 4 of the 1977 Act. Does section 4 enable the Minister to control the activities of the Ministry when the Ministry is discharging an obligation imposed upon it by the Electricity Act? Or, expressed the other way round, does section 4 apply only to the functions in the 1977 Act? Prima facie, it is suggested, because the 1977 Act is a general institutional measure, it applies to all activities involving the Minister and Ministry of Energy. On the other hand, why did the Electricity Act specifically acknowledge the relevance of only section 11 of the 1977 Act? The matter is by no means clear and it is not likely to arise frequently. It may be that the Minister is able to resolve conflicts of policy in energy matters by relying upon section 4 of the 1977 Act but he may not be able to use section 4 to exonerate the Ministry from a specific obligation prescribed by a different Act. The Minister therefore may be competent to indicate how that statutory obligation should be discharged but no more.

The last question is the relationship not between policies nor between policy and obligations but between the advisory and planning functions of the Ministry and the executive power of the Minister. It concerns the several elements of section 11 of the 1977 Act. Any decision by government on an energy proposal will have for legal purposes three stages. First, the Ministry will investigate the proposal by acquiring the relevant information, assessing it and formulating a view on the proposal and its implications. In particular the Ministry will consider the matters specified in section 11 (3). The first stage effectively discharges the Ministry's obligations in section 11 (4). The second step will be for the Ministry to tender its advice to the Minister under section 11 (1). If there is an existing relevant policy, the advice will be likely to indicate how policy will be implemented. If there is no policy, the process involves both creating and implementing policy. The Ministry is then functus officio and it is for the Minister at the third and final stage to make a decision pursuant to the powers in the statute that applies to the proposal.

The Ministry tenders advice under section 11 (1). The Minister makes a decision under another statute. There is no formal link between the two stages. For the Minister is not bound by the advice of the Ministry. Is he bound by the information upon which the advice was based? Or can he introduce facts and factors not contemplated either by the Ministry or by section 11 of the 1977 Act? The matter is even more complicated as the decision will be made

39 Electricity Act 1968, s. 7(2)(b)(i).

40 Ibid. s. 7(2)(c)(ii).

by the Minister under the Petroleum Act, the Mining Act or whatever. If the substantial statute does not restrict the decision of the Minister, as it normally does not, how can the 1977 Act have any legal bearing upon the decision under the other Act? Parliament has decided, for example, that the decision whether to grant a prospecting licence under the Petroleum Act is for the discretion of the Minister. The Ministry through the 1977 Act is required to supply the necessary information, assessments and advice. To imply an obligation upon the Minister through the 1977 Act would be to restrict a discretion properly exercisable. The 1977 Act does not impliedly abrogate the 1937 Act because there is no inconsistency between them. The 1937 Act deals with petroleum and the 1977 Act with energy at large: so the general statute does not derogate from the provisions of the earlier statute. There is moreover nothing in the legislation to suggest otherwise. On the strength of these arguments, then, there is no legal impediment in the 1977 Act to prevent the Minister from reaching a decision consistently with the terms of the topical legislation.

The alternative argument may be this. The Ministry is bound to advise the Minister. The Minister is bound to receive but not to act upon that advice. The Ministry was bound to consider the matters in section 11 (3). If the Ministry failed to do so and the Minister acted in reliance not on the advice but on the basis of that advice, then the failure of the Ministry to comply with the 1977 Act carries through to the decision of the Minister and to that extent puts it at risk. On this basis, then, the Minister and the Ministry would be legally in the same position and the decision of the Minister would depend for its legal validity not only upon compliance with the topical legislation but also upon compliance by the Ministry with the 1977 Act. The argument is tortuous. It is not likely that a court would find it attractive. So the simpler position may be preferred. The Minister reaches a decision related in practice but not in law to the discharge by the Ministry of their responsibilities under the 1977 Act. The link between Minister and Ministry may be real in practice but it is of no effect in law.

V. CONCLUSION

Control of the sources of energy in New Zealand began as an incident of the right of ownership by the Crown of all unalienated land. Legislation fragmented this simple approach by providing for the alienation of land and by regulating specific resources and sources of energy. Three further trends have appeared: transfer or restoration of title to the Crown in some cases; continuing statutory regulation; and the introduction of statutory energy planning. The present law is complicated because further statutory regimes have been created on top of or alongside existing systems rather than in substitution for them. This gives rise to legal problems of the relationship between these various systems. The Crown tends to dominate the development of energy in both practical and legal terms. This is highlighted by the distinctive functions within the legal system of the Minister of Energy and of the Ministry of Energy. The legislation provides, it would seem, for the exercise of powers by the

Minister and the discharge of obligations by the Ministry. The reasons are historical. This relatively technical aspect of the legislation influences considerably the ways in which the system of energy law and planning in New Zealand works.