



Reading Room: [Public Ownership & Accountability](#)

Public Ownership and the Community

A paper presented by Peter McKinlay, Executive Director of MDL, at the Public Administration and Development Jubilee Conference, Oxford University, England, April 1999.

The purpose of the paper was to present to an international audience the work reported in the book "Public Ownership and the Community".

Abstract

\$NZ5 billion (\$NZ1,400 for each New Zealand resident) is held on behalf of consumers and communities as a result of restructuring New Zealand's trustees savings banks and electricity distributors.

For Government, ownership was a purely secondary but necessary consideration in the process of corporatising non-government public assets. The result? A series of trusts the study of whose governance and management sheds new light on issues of public versus private ownership, mandate, legitimacy, and the meaning of community. Addressing these issues may reshape both the role of local government and its relationship both with central government and with the communities to which it is responsible.

Introduction

The Labour government elected to office in 1984 embarked on a wave of reforms which, for a period, saw New Zealand regarded as a world leader in the process of change. It deregulated financial markets, freed the central bank from government control, embarked on a radical restructuring of the public service, began the process of corporatising/privatising government owned trading activities and took a number of other measures intended to free up the economy.

Context: Public Sector Reform

In part, the reform process was a matter of political expediency; the incoming Labour government had inherited an economy which was in

very serious difficulty in large part because of the highly interventionist policies of its predecessor.¹ It was also, though, driven by a strong intellectual framework. Senior officials, particularly in the Treasury, had been actively following international debates on the role of government and on public sector management. They drew heavily on the work of leading writers on management theory and practice with their theme of "let the managers manage". They were also very strongly influenced by the so called "new institutional economics" particularly public choice theory, agent/principal theory and transactions costs theory. (Schick 1996)

It was this combination which gave New Zealand public sector reform its unique characteristics. The advice given to and accepted by Government was that the overriding purpose of reform was to improve economic efficiency, even if those improvements came at an apparent cost in government wealth.² A good illustration is the contrast between the approaches taken in New Zealand and in the United Kingdom to the privatisation of their state owned airlines. In the United Kingdom, the government had a deliberate strategy of maximising the value of British Airways by ensuring that, as far as possible, it would retain its monopoly privileges post-privatisation. In contrast, New Zealand's Labour government deliberately deregulated the airline industry before privatising Air New Zealand taking the view that the main effect of monopoly privileges was to enrich owners at the expense of users (thus maintaining a higher than necessary cost structure within the economy) and that privatising without removing the monopoly privileges carried with it the risk that future owners could assert that a government obligation to maintain those privileges was implicit in the terms of privatisation.

Internationally the New Zealand reforms have attracted most for features such as the creation of an independent central bank, the introduction of full accrual accounting into the public sector, the shift to a purchase relationship between ministers and chief executives and the extensive use of the government owned company model in areas such as health (where they replaced the previously part appointed, part elected, area health boards) and research (where they replaced government research ministries).

The Purpose of This Paper

This paper looks at a much less well known outcome of the New Zealand reform process, the creation of a series of trusts which now hold significant public wealth, and the implications of this for our understanding of the nature of the ownership and the role of governance.

These trusts can be seen as a series of "one-offs"; a product of two factors, the existence of a series of entities in the public sector, broadly defined, which had no readily identifiable owners, and the New Zealand government's emphasis in its reform of trading activities on economic efficiency rather than on government wealth as its primary objective. In this paper I argue that the implications are somewhat wider. The trust experience provides new questions/insights into the nature of public ownership. It may also set precedents elsewhere whenever corporatisation does not automatically imply a claim of ownership by government as such as opposed, for example, to a claim by government as trustee for or representative of the public (in New

Zealand a possible outcome, for example, in the restructuring which is currently in prospect for our tertiary sector).

Of necessity, a major part of this paper is devoted to outlining the processes which led to the creation of a number of trusts as an understanding of this background is essential to a consideration of the ownership and governance issues they now raise.

Once this has been done, the balance of the paper considers the implications they raise for ownership and governance. It does so in context of the changing role of local government in New Zealand and goes on to proffer solutions which, although focused on the particular situation which now exists in New Zealand, may well have application elsewhere.

Restructuring Ownerless Entities: Trustee Savings Banks and Other Trust Based Outcomes

High amongst the Labour government's priority areas for restructuring of trading activities were the financial sector and the electricity industry. The financial sector because of the government's very high exposure through a number of state owned institutions several of which collapsed or came close to failure in the aftermath of the 1987 share market downturn.³ The electricity industry because the lack of proper commercial incentives was seen as a major contributor to poor investment decisions and poor management with a significant flow-on impact into costs throughout the economy.

Trustbanks

Government's involvement in the financial sector included a statutory guarantee of deposits with a network of regionally based trustee savings banks (hereafter "trust banks"). These were ownerless entities, governed by politically appointed boards, and distributing any surplus available for that purpose to "good works" within the area they served. Typically they were small, uncompetitive in New Zealand's newly deregulated financial market, and with one or two exceptions of minimal net worth.

Consistent with the view common both to ministers and their advisors that the appropriate organisational form for a trading activity was a limited liability company with tradeable equity, and to reduce its exposure through the guarantee, government resolved to restructure the trust banks by legislating for a staged withdrawal of the guarantee and turning the banks themselves into companies. This begged the question of ownership: shares need shareholders.

Government was aware of the UK precedent under which trustee savings banks were corporatised as a single entity and then privatised through a new share issue under which the subscribers received not just the new shares themselves but ownership of the entire group. It was also aware of the public outcry in the UK at the suggestion government should claim ownership (ironic in that litigation against

the government by depositors, and ultimately determined in the of Lords, resulted in a judgement that voluntary filing of rules under the 1817 Act had the effect of nationalising savings banks with depositors' only claim being the contractual rights associated with their deposits).

The Trust Banks themselves argued strongly that they were owned by their depositors (the New Zealand legislation had no equivalent to the UK provisions on the nationalisation point). The logistics of allocating ownership to depositors would have been formidable but a readily acceptable alternative was available. The fact that any surpluses distributed by the banks had gone to local "good works" and that these were "**trustee** savings banks" pointed the way; ownership would be vested in "the community". This would be done by creating a series of trusts which would hold the shares in the corporatised banks, and any income or capital resulting from those, "on trust to be applied for charitable, cultural, philanthropic, recreational and other purposes, being purposes beneficial to the community principally in the area or region of the trust".

The trusts are subject to a set of statutorily imposed rules concerning matters such as appointment, accountability and merger/winding-up. The statute also has the effect of giving them an indefinite life span.⁴ Otherwise they are similar to and subject to the same legal requirements as private inter vivos trusts. Trustees are appointed by the Minister of Finance (reflecting that they result from a bank restructuring) who is also required to approve any changes to trust deeds.

Accountability to the community itself is minimal. It consists of obligations to:

- publish annual accounts;
- publish a list of each year's donations; and
- hold an annual meeting which members of the public may attend to ask questions of trustees but without any right to move resolutions.

Reading the officials reports' and Cabinet papers which led up to the establishment of these trusts suggests that the government was relatively indifferent on ownership. Its objective was to restructure the banks as companies and remove the guarantee. Ownership was a purely secondary consideration. Government's interest was in a solution which would cause it minimal political difficulty. Once it accepted that claiming ownership for the taxpayer was politically infeasible, it was prepared to let the nature of the outcome be determined primarily by officials in discussion with the trust banks.

Undoubtedly, one factor was the perception that most of the banks had very limited commercial value - from government's perspective, why buy a political fight when there was relatively little at stake?

It also seems clear that, at the time, the decision was treated as an isolated instance which was unlikely to set a precedent.

Both judgements were wrong. The restructuring of the banks themselves was followed by significant changes in management and

performance. In successive stages, most of the banks merged into a single group, which several years later listed on the Stock Exchange and then, in 1996, was acquired by a major Australian bank, Westpac.⁵ Today, the trusts which were created to receive the ownership of the shares in trust banks have a combined net worth in excess of \$NZ2 billion and distribute some \$NZ75 million each year within their communities.

The restructuring not only very much underestimated the potential value of the trustee savings banks, it also, quite unwittingly, set what has become a major precedent which has been used both as a solution in other "one off" situations and for major industry restructuring.

The Auckland Regional Services Trust ("ARST")

In 1992 as part of ongoing reform of local government, government forced a restructuring on the Auckland Regional Council. This body was responsible for a series of region wide functions in New Zealand's largest urban area.⁶ The Regional Council owned 80% of the capital of New Zealand's largest port, the bulk water and wastewater infrastructure for the region, significant commercial property investments, the Auckland bus company and a number of other commercial assets, as well as undertaking a number of region wide planning and regulatory functions and managing New Zealand's largest network of regional parks. Government resolved that the Regional Council should be restricted, substantially, to regulatory and planning activity and the continued operation of the parks network. At least two concerns drove this decision:

- A belief that the Council was becoming too large and influential.
- A concern that its debt position - which was substantial - might be non-sustainable.

The commercial assets and liabilities were separated into a new body known as the Auckland Regional Services Trust (which was not in fact a trust but a statutory corporation governed by members elected at large across the Auckland region). At the time, forecasts prepared by financial advisors suggested that it would be years, if ever, before the ARST generated a surplus. Because of this the transfer legislation included a power for the ARST to require the Regional Council to rate to cover any deficit.

Against the off chance that the ARST might generate a surplus, the legislation also provided for that to pass to a community trust established with the same powers and for the same purposes as the Trust Bank trusts. Officials' papers at the time show that this was a deliberate endorsement of the Trust Bank solution.⁷ Perhaps more importantly, the officials' papers also show the beginnings of a misunderstanding of trust structures which was to become vital in their next use.

Electricity

Restructuring the electricity industry was a major preoccupation of the Labour government of the second half of the 1980s. It dealt with its own assets (generation and transmission which were owned by the Electricity Division of the Ministry of Energy) by corporatisation and

then turned its attention to local distribution which was then in local authority ownership - 21 municipal electricity departments owned by territorial local authorities and 38 standalone electric power boards (elected special purpose local authorities).

The debate over future ownership was bitter. Officials argued for privatisation through share give-aways. Had this happened it would have been as a give-away to consumers in the case of the electric power boards, and to ratepayers, where the undertakings were owned by territorial local authorities. The rationale was that the "true owners" were best placed to make decisions about ownership long-term. Territorial local authorities attacked this argument on the grounds that it amounted to "theft" (an interesting use of the term given that the receivers were to be their own ratepayers). Power boards attacked the decision on the grounds that it would lead to privatisation.

On 16 March 1990 a major paper on "Electricity Distribution Restructuring: Ultimate Ownership and Company Formation" went to the Cabinet State Agencies Committee. Part of it discussed community ownership including, within this, local authority, consumer co-operative and trust. It drew a distinction between two types of trusts - one where the beneficiaries and parties who appoint or elect the trustees are defined as the government or the public at large, and one where the beneficiaries and parties who appoint or elect the trustees are consumers. It argued that the first option would be very similar in performance and behaviour to the local authority option. It went on to say that the second option, which it described as a consumer owned trust, would perform and behave like a consumer co-operative. This was a fundamental misunderstanding of the difference between a trust and a co-operative. Beneficiaries have very limited rights to regulate or query the behaviour of trustees. Apart from their right to vote (where trustees are elected) their only other right is to seek the intervention of the court alleging a breach of trust. Where the beneficiary group is large in number, it may be perfectly rational for a beneficiary or a group of beneficiaries to take no action on a suspected breach of trust simply because the cost of doing so may far outweigh their pro rata share of any benefits from a successful action. Of perhaps even greater import, action is available only for a breach of trust. No remedy exists for an action on the part of trustees which beneficiaries may regard as wrong but which falls short of being an actual breach.

Unless the trust deed or other constituting instrument makes specific provision, beneficiaries have no rights to convene or attend meetings of trustees, or to propose or vote on resolutions. In contrast, members of a co-operative not only elect directors; they have the power to dismiss them and replace them, to call meetings and vote on resolutions and generally (provided they have the numbers) to exercise very considerable influence.

That officials' paper was a key step in the lead up to legislation, later that year, which provided for:

- The corporatisation of every electric power board and municipal electricity department.
- The vesting in community trusts of the shares in those companies formed from electric power boards (those formed from MEDs were to vest in the parent local authorities).

- The replacement of the elected members of electric power boards (who were to become the trustees of the future community trusts) by persons selected to be the directors of the future power companies.

With the passage of the Act, the elected members were sidelined as "interim trustees" and management of the power boards passed to the "directors in waiting". Before the rest of the legislation could be implemented, Labour lost the 1990 election.

The incoming National government had strong reservations about the idea of trust ownership, especially as the 1990 legislation implied that this would be permanent. It decided to revisit the question of ownership with a clear preference for privatisation.

In practice, it found itself unable to resolve contending arguments for privatisation, trust ownership in some form or continuing public ownership. Instead, it decided to opt out of the debate in favour of putting in place a process intended to resolve, on a case by case what form of ownership should be adopted.

It enacted the Energy Companies Act 1992 which provided for compulsory corporatisation under a process in which:

- The "directors in waiting" (termed the "establishing authority" by the legislation) were to prepare an establishment plan for corporatising the electricity undertaking which was to include a share allocation plan.
- In preparing the share allocation plan the establishing authority had complete discretion to determine who the future owners might be subject to:
 - going to public consultation, a process which required them to publish the plan, provide an opportunity for written submissions, give submitters an opportunity to be heard orally, and then make a decision on the merits;⁸
 - obtain the consent of the interim trustees to the plan as finally adopted following public consultation; and
 - gain the concurrence of the Minister of Energy
- If the interim trustees and the establishing authority could not reach agreement, then ownership was to vest in territorial local authorities within the district of the power board (each board operated within an exclusive franchise area established by statute).

A bewildering array of ownership options resulted. A number of establishing authorities opted for privatisation through share give-aways but all who did so included a minority public ownership component through an allocation to local authorities and/or a trust established for the purpose. Some 19 - primarily smaller undertakings but also the Country's largest, the former Auckland Electric Power Board - opted for 100% trust ownership.⁹ In only one case did ownership default to a local authority.

For the default ownership provision to have acted as a real discipline on the debate between interim trustees and establishing authorities, it was essential that interim trustees saw local authority ownership as an acceptable outcome. What was clear before the process started was that most establishing authorities would not. They were primarily commercial directors drawn from the private sector and with that sector's fashionable contempt for local government. Many, possibly the majority, of interim trustees were either current or former elected members of local authorities (in New Zealand it was quite common for local politicians to build up a portfolio of elected positions). Whether because or despite of this, most interim trustees turned out to be more opposed to local authority ownership than the establishing authorities themselves. They tended to argue that ownership should be kept out of the hands of local authorities because they might spend assets which had been built up by electricity consumers on other areas of their activities such as water and wastewater. It seems not to have occurred to interim trustees that electricity consumers also use water and wastewater services.

The requirement for ministerial assent gave the opportunity for some discipline on the nature of the ownership options which were put in place. In practice, this discipline was extremely limited. So long as the establishing authority had been through the steps set out in the Act, stated that it had dealt with all of the issues raised through public consultation, and had the agreement of interim trustees, the Minister was prepared to endorse whatever was put before him. The only significant exception to this applied to trust ownership. Because of his (and the Government's) preference for privatisation, he was not prepared to accept trust ownership unless the deed included a provision for a review, at intervals not greater than five years, of trust ownership and options for dealing with the trust's shareholding in its related energy company. This review itself was required to go to public consultation to allow consumers to express their preferences for future ownership.

The Minister, in an extension of the misunderstanding of the rights and incentives of beneficiaries already referred to, seems to have believed that the review process would result in consumers demanding privatisation through a give-away so that trust ownership would have a very limited life. This inference is supported by the following quotation from an account of the restructuring process written by an advisor who was very closely involved with the ministerial approval process. The reference is to the consultation required during the periodic review process.

This consultation, unlike that undertaken for the establishment plans, is not governed by a legislative procedure and will require the trustees to meet their normal obligations under their trust deed, ie, they will have to consider only the financial interests of their beneficiaries and ignore any political or emotive aspects. If they fail to do this, then any aggrieved beneficiary could challenge their decision. If the Court upheld such a challenge, then the trustees could face a substantial personal liability.

The consequence of this process is likely to be a further substantial degree of privatisation in the next five years.

(Farley 1994, p70)

This expectation was quite mistaken. Trustees had strong incentives to undertake reviews in a way which would ensure their continuance. Many of the initial round of reviews were quite cursory. The thought that they might be subject to legal challenge seems not to have occurred to trustees (or, alternatively to have been dismissed as not a serious risk). Public support for continuing "public ownership" was quite strong, in part because most of the material coming before consumers was arguing for a continuance of trust ownership (the review process made no provision for any well resourced counter-argument) and partly because the New Zealand public as a whole has never been enthusiastic about privatisation.¹⁰

Electricity restructuring has resulted in the creation of nearly 30 trusts which, as a matter of law, are no different than conventional private inter vivos trusts. The only practical differences are the numbers of beneficiaries - typically income is to be distributed to consumers the district of the former power board as the equivalent of a rebate on their electricity charges. Consumers (or possibly the community however defined) are also capital beneficiaries.¹¹

Because the trusts are private bodies, their meetings take place in private and all of their records are also private except for an obligation to publish their annual accounts - and these are in very truncated form providing no material which would allow an assessment of performance.

Collectively, the energy trusts hold assets with a value in the order of \$NZ3 billion. They have the potential to have quite significant impacts both on economic activity within their local communities and on the welfare of consumers.¹² For all practical purposes, the trusts are unaccountable. Their trustees are elected triennially but in the absence of any significant public information on performance, either of the trust itself or of individual trustees, it is very difficult for electors to make informed judgements, even if they wish to do so. The potential for electoral discipline is also reduced by the well known fact that electors typically take little interest in the activities of special purpose bodies.

The Government's willingness to allow the creation of a series of unaccountable bodies holding significant public wealth is all the harder to understand given what it was doing elsewhere at the time of the electricity restructuring to increase requirements for accountability.¹³ It was completing work on the Fiscal Responsibility Act 1993 which subjects government itself to quite strict accountability requirements. The Act requires it to abide by a set of principles for prudent fiscal management and it may only depart from those on a temporary basis and subject to explaining when and how it intends returning to compliance. The Act also obliges government to publish periodic forecasts of the fiscal position including one which is to be released immediately in advance of any election. For the business sector the Companies Act 1993 and the associated Financial Reporting Act 1993 very much tightened the accountability regime for companies large and small. Treasury and the State Services Commission, at the behest of ministers, were continuing their work on refining the accountability regime for ministries, departments and Crown entities. Work was underway which was to lead to the passage, in 1996, of

extraordinarily comprehensive accountability requirements for local government. Each local authority is now required to publish:

- An annual plan setting out, by significant activity, in detail for the coming year and in outline for the subsequent two years, the activities that will be engaged in, the associated costs and revenues and the performance measures against which the activities should be assessed.
- An annual report which includes reporting outcomes in terms of the performance measures in the annual plan for that year.
- A funding policy which sets out for each function the costs involved and the means by which the local authority intends covering those costs including an allocation of those costs to ratepayers at large, groups, or individuals based on the benefits which will result from the performance of those functions.
- A long term financial strategy which must set out, for a minimum of ten years, the intended activities of the local authority, the rationale for being engaged in each of those activities, the associated cashflows and a proforma balance sheet.

Ownership and Accountability

Both the trust bank trusts and the energy trusts began as the owners of specific business assets - trust bank shares and energy company shares respectively. At this stage in their evolution there was at least a modicum of accountability through the regulatory regimes applying to the underlying assets; both banks and energy companies had their own sector specific regulation.

Sale of the underlying assets changes this. With two exceptions, all of the trust bank trusts have quit their trust bank shareholdings. They now hold "pure wealth" which is subject only to the general law regarding the investment of trust funds. The same trend may now be underway with energy trusts.

This is bringing renewed attention to bear on the question of ownership. Whilst these trusts retained their original interests in banking or energy, there was at least an argument that trust ownership represented no more than a somewhat different (and because of the company structure of the business, hopefully more efficient) form of public ownership of a specific activity. With the sale of the underlying assets, that rationale goes.

Nor is it simply a question of dealing with two separate sets of trust structures which can be seen as something of an aberration, if a somewhat large one. In 1998, Government faced the question of what to do with the Auckland Regional Services Trust. Contrary to expectation, the ARST had been an outstanding success. Its net worth was in the region of \$NZ750 million without taking into account its ownership of Watercare Services Limited, a company which had taken over the bulk water and waste water assets of the Auckland Regional Council.¹⁴

Under its legislation, as we have seen, any surplus of the ARST was to

be paid to a community trust. There was no support for that option. Instead contending parties argued variously for dividing the assets amongst local authorities, distributing the net worth to ratepayers or residents or applying them to fund specific cultural and other assets within the Auckland.

In a compromise decision, assets other than Watercare Services Limited were transferred to a new statutory body with the stated purpose of applying those towards the public good component of future roading, public transport and stormwater investment (where the region's needs, collectively, are massive). Shares in Watercare Services Limited were distributed to local authorities within the region in accordance with a complicated formula based on the extent to which they were customers of the company for its bulk water and wastewater services.

The significance, for our purpose, of the last example, is that it points the way for what may happen to a number of New Zealand's territorial local authorities. Their principal assets are mainly infrastructural (roading, water and waste water) which are increasingly seen as private good activities.¹⁵ Taken to its logical conclusion, treating these activities as private goods implies treating them as profit making businesses. The implications are fascinating. It would turn the major assets of many of New Zealand's local authorities from being activities dependent on rate funding into businesses generating a surplus and with a market value in much the same way as (say) the UK's water and electricity companies or New Zealand's energy companies. The argument that the income (and capital) from what would now be businesses could be used as a substitute for rates funding for other activities faces a substantial difficulty. Doing this, local authorities would be using business income to fund regulatory or other public good activities. There are strong arguments, from accountability, that these activities should continue to be rates funded so that ratepayers continue to be aware of the scope and cost of local authority activity and have some incentive to monitor their performance.

If business income is not diverted to fund regulatory activity, then what should happen to it¹⁶? What should happen to the capital if the local authority decided to sell part or all of its new business asset?

These questions are on all fours with those now being asked in respect of the trust bank trusts and the energy trusts. What is the rationale for these bodies holding public wealth - on whose behalf do they hold it and how do they derive their mandate?

There is a strong body of opinion within New Zealand which argues that the assets of these various trusts, and by extension all those assets of local authorities not required for core public good activity, should be distributed to the "true owners" and that the result of doing so will be a significant improvement in economic efficiency. This is the standard argument that private owners, facing the benefits/disbenefits of their investment decisions, will on average make better decisions than public owners, especially where those public owners may be driven by non-economic incentives (such as the ego-related benefits from doing good deeds with other people's money).

In parallel with the ownership question is the separate issue of

governance. With the growing emphasis on commercialising their core infrastructure activities, New Zealand's local authorities are increasingly seeing their principal role as one of community governance - acting as intervenor or advocate to improve outcomes for citizens across a wide range of areas including community and economic development, housing, health and welfare. All of the trust bank trusts and some of the energy trusts are adopting a similar approach, looking to use their income (and occasionally their capital) to work for positive change in the communities they serve.

In practice what this is coming to mean, is that several different categories of entity, with quite different provisions for consultation, accountability and mandate, are intervening within the same community for broadly the same purposes.

The ownership¹⁷ question is a difficult one to resolve. The case for public ownership has no easy rationale akin to that of those who argue for privatisation. They can draw on the easy analogy of the corporate sector, treating ratepayers, residents, or electors as broadly the equivalent of shareholders and arguing that efficiency and equity are both served by returning surplus capital.

The search for an equivalent rationale for public ownership leads to a consideration of issues such as the rights of the individual as a member of society versus the responsibility he or she owes to that society (Sandel 1997); the role of trust "as an additional condition of economic relations [which] can increase economic efficiency by reducing what economists call transaction costs (Fukuyama 1995, P151) and insights from recent work on social capital and civil society (Coleman 1990; Putnam 1992 and 1995; Foley and Edwards 1997, 1998; Brookings Institution 1997) with its tantalising suggestions of the importance, for the legitimacy of governments, that they should not act in ways which offend deeply held norms and perceptions within civil society, perhaps best expressed by Fukuyama's observation that "the accumulation of social capital, however, is a complicated and in many ways mysterious cultural process. While governments can enact policies that have the effect of depleting social capital, they have great difficulties understanding how to build it up again." (op cit p11)

This leads to the inference that the argument in support of continuing public ownership of public wealth depends not so much on some simple economic rationale (as for the case of private ownership) as on a recognition of the threat to legitimacy of governance of abolishing public ownership if to do so may run counter to deeply held beliefs about how that wealth should be held.

A note of caution is needed here. New Zealand experience of share give-aways - basically to consumers by those energy companies which preferred privatisation - is that individuals have been quite happy to receive shares and often quite happy to turn them into cash immediately despite expectations that they should retain them so that their collective voting power can provide a form of consumer influence over the company. Superficially, this suggests a supportive attitude to privatisation of key local assets. However alongside that response there is evidence that those same individuals resisted forced privatisation and would prefer continuing public ownership. In virtually every case of privatisation or part privatisation of an energy company through a share give-away, many if not the majority of recipients

where quick to sell their shares. At the same time, virtually every survey of ownership preferences has shown strong support for continuing public ownership.

Acceptance of continuing public ownership stresses a different set of questions. If these trusts (or perhaps other bodies created to manage the wealth which could result from further restructuring of local government activity) are to have a long term existence, what should be done about issues such as mandate, accountability and their impact on the governance of the community within which they operate.

It is hardly acceptable that the trustees of community trusts should continue to be appointed by the Minister of Finance. This is not just a question of avoiding political intervention; it is a question of how trustees derive their mandate. The same difficulty arises with elected energy trusts given the weak nature of their electoral mandate.

There is only one local democratic mandate of any substance; that of New Zealand's territorial local authorities. It is, admittedly, far from perfect (an average turnout in postal elections of approximately 55% for example) and the role of local government itself is controversial; believers in the principles of new institutional economics argue that it should be restricted to the delivery of local public goods. Others, watching the impact of influences such as globalisation, information technology and the growing diversity of New Zealand society, argue that local government is becoming, increasingly, the government of the locality (McKinlay 1998¹⁸).

Recent changes in the accountability arrangements for local government can be seen as accelerating the shift to a governing role. The purpose behind the very intensive requirements of the annual plan/annual report/funding policy/long term financial strategy framework was quite clearly to put something of a straight jacket on local government, restricting it substantially to public good or user pays activity. The result has been somewhat different partly because of the legislation's recognition that "judgements may reflect the complexity and inherent subjectivity of any benefit allocation for specified outputs and the complexity of the economic, social, and political assessments required in the exercise of political judgement concerning rating".¹⁹ A more important function is of the cumulative impact of requirements to plan long term. Inevitably, this process is seen as requiring not just planning for the future activities of the local authority but planning for the future development of the district itself. For example, infrastructure is provided not for its own sake but to support activities which are dependent upon it. Without an understanding of what those might be, how can a local authority plan for what it will do?

This is not mere speculation. A number of New Zealand's local authorities, both large and small, are in the process of preparing strategic plans which are quite specifically plans for the district rather than plans for the local authority itself. The following quotations from "Outstanding Auckland" the 1996 review of the Auckland City Council strategic plan illustrate this:

"The goals of Outstanding Auckland cannot be achieved by the Auckland City Council alone. We will seek to work in partnership with many businesses, Tangata Whenua²⁰ and

community organisations."

"Increasingly, the role of local government will be centred on democracy, advocacy, leadership and working with others to supply services and activities."

But if the local authority's own planning processes are to become the plan for the district as a whole, then increasingly it needs to find a means of integrating plans/intentions of other key actors within the district. It is a short but profound step from this to seeing a shift in the relationship of the local authority to its planning processes as one of complying with a set of statutory requirements on its own to one of "owning" a process which it runs on behalf of its district as a whole.

Arguably, the need for this shift is most acute to accommodate the activities of the trust bank and energy trusts. New Zealand's local authorities are increasingly concerned not just with matters of infrastructure but with the well-being of their communities. Within the limits of what are typically quite tight expenditure constraints, they are increasing their investment in community and economic development. Commonly, though, they find that they have less discretionary resource available for this purpose than the local trust bank trusts. What they do have, which the trusts do not, is the support of a democratic mandate and a comprehensive planning, consultative and reporting process reinforcing their accountability to the community.

Similar issues can be expected to arise with the major energy trusts. At the moment, it is still common for them to distribute their income to consumers as a form of rebate and the question of distribution of capital has not yet arisen. The further restructuring of the electricity industry which took place during 1998 seems set to change much of this. A number are exploring different options for using their income and capital, recognising the growing gaps between publicly articulated needs and available resources in many of New Zealand's communities (however defined). The same logic applies to them as to the trust bank trusts; the welfare of the communities on whose behalf they hold substantial wealth seems certain to be advanced if their plans for the management of that wealth are presented to the community through a process which is already well established and capable of providing a strong co-ordinating mechanism and thus able to help remedy their own lack of mandate and accountability.

What is required for this to become possible is a recognition that local authorities are not just yet another entity playing a partial role in respect of some of the activities of the people who live in its district but, increasingly, their collective mechanism for determining questions of governance. It will require local authorities to stand apart from their conventional activities, when managing the planning/governance role, and be able to see those conventional activities as deserving of no greater standing than the activities of any other entity whose intentions are being expressed through a common planning process. The increasing trend towards corporatisation of the major activities of local government should help provide the emphasis for this.

So will other impacts on the nature of government. In New Zealand, as in many other societies, the impact of globalisation is limiting the

powers of central government in ways not previously contemplated - as one example, tax is now seen as just another cost of business with the implication that, if the cost is not competitive the business will shift or not come in the first place.

This trend is reinforcing the emphasis on local governance and on maximising the benefits to be obtained from locally owned resources thus putting an added premium on the importance of the "public wealth" held by trust bank and energy trusts (and by local authorities as the restructuring of their activities proceeds).²¹ Ultimately, it is possible that the question of mandate may also be resolved through the use of local authority structures. Many local authorities now have in-depth experience of appointing governing bodies of related entities, typically arms length trusts or local authority owned companies. There is a well established protocol for the selection of suitably qualified individuals designed to minimise political interference by ensuring that selection is made from a shortlist of appropriately qualified persons selected through a process independent of the local authority itself. A similar process could be employed for appointing trustees both of trust bank trusts and of energy trusts, thus bringing the mandate back to the locality.²²

Informal testing of this approach with a number of local authorities suggests that it would have their strong support. Interestingly, the reason is not so much a perceived opportunity to expand their influence as a recognition that effective governance of the community requires closer co-ordination of the activities of key participants and a well grounded mandate. Recognition that the role of the local authority in achieving this is a facultative one, with the trusts themselves remaining as independent entities, should strengthen the case for what seems a necessary next step.

The implications of such an approach may go well beyond the trust bank and energy trusts themselves. Historically, New Zealand's central government agencies with responsibility for the delivery of services at a local level (social welfare, health, education, employment) have tended to operate in isolation from local authorities. One reason for this has been a long-standing view that New Zealand is, relatively speaking, an homogenous society so that it should be possible, centrally, to form a sufficient understanding of local needs and appropriate means of intervention.

More recently, a different view of the nature of New Zealand society has been emerging. The growing ethnic diversity of New Zealand society, and an increasing awareness of regional differences in economic performance, are amongst factors which have resulted in a greater awareness that New Zealand is a heterogeneous society and that effective delivery of social services requires local understandings and local knowledge. This has been reinforced by a new approach to the management and delivery of social services. Examples include the devolution of responsibility for the management of primary and secondary schools to locally elected boards of trustees, an emphasis within the health system on purchase of services based on local needs assessment and major initiatives from within the Department of Social Welfare on developing local strategies for working with families. Typically, the Department seeks to involve local authorities in a leadership/co-ordination role as a means of engaging the local community.

The activities of these various agencies are at least as significant in their impact on the governance of local communities as are those of trusts or local authorities. The case for co-ordinating their activities through a local planning process is at least as strong. On the assumption that the planning processes of local authorities shift from being primarily an accountability mechanism for the local authorities themselves to a means of developing a community plan, this may be hard to resist.

Conclusion

The emergence of a series of local trusts, holding significant public wealth on behalf of their communities, has raised new questions about the nature of ownership and of governance within local communities. The conclusion which follows from the argument in this paper is that it may never be possible to define, finally, who "the community" or "the public" is in any way which parallels the characteristics of traditional private ownership. Instead, the paper suggests that:

- The case for public ownership may depend not so much on arguments for economic efficiency as on arguments about the legitimacy of government - that governments act against deeply held norms and perceptions at the real risk of undermining respect for and public acceptance of their own role.
- That the nature of public ownership, at least at the sub-national level, may play itself out not so much through identifying clear linkages to specific groups or individuals, as through establishing legitimate processes through which decisions about the management and distribution of that wealth can be handled. In New Zealand, the best available process is the very detailed planning and accountability regime for local government.

The coming together of a need for such a process in dealing with substantial public wealth, with the existence of such a process within local government, will mark a further and major step in the evolution of local government towards a truly governing role.

Once (if) the planning processes for local authorities move from being primarily a means of accountability for the local authority itself to a means of planning (co-ordinating) major interventions within the community, it may be hard to resist the argument that this process should also incorporate the plans of major central government agencies whose interventions also play a significant role in governance at a community level. The two processes which began, respectively, with a series of ad hoc decisions about ownership of community wealth and with a very intensive accountability regime for local government may well be coming together in one of the more notable examples of the law of unintended consequences.

New Zealand's public sector reform process has developed its own set of structures and accountability mechanisms. It would be presumptuous to argue that these would translate readily into other jurisdictions. However, the New Zealand experience clearly shows one possible way of dealing with the quite difficult question of how to manage wealth which should properly remain in the public domain but

is not the property of government.

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FOOTNOTES

1. Even before the new ministers were sworn in, the Labour government had to deal with a foreign exchange crisis which, for a period, raised the spectre of New Zealand defaulting on sovereign debt.

2. Treasury advice has commonly drawn a distinction between government wealth and taxpayer wealth and been prepared to argue that a reduction in government wealth may be

quite acceptable as part of a policy of increasing economic efficiency as that will typically increase taxpayer wealth.

3. Notably the government owned development bank, the Development Finance Corporation, which went into liquidation and the Bank of New Zealand which survived only as the result of a major government bailout. Indeed the Treasury went as far as to argue (Treasury 1987 p115) in support of share give-aways noting that although this might require an increase in taxation to offset the loss of dividend income to the Crown, the positive wealth effect for recipients should significantly outweigh the present value of the increased taxation burden.

4. In New Zealand, inter vivos trusts, unless they are solely for charitable purposes, have a maximum life of 80 years.

5. The largest of the various savings banks, the Auckland Savings Bank, declined to join the grouping. Instead, its trust owners sold a three quarter share to the Commonwealth Bank of Australia Limited in 1989. One other bank, that based in Taranaki - one of New Zealand's leading dairying provinces - operates as an independent regional bank 100% owned by its local trust.

6. A little over 1 million of New Zealand's population of 3.8 million live in the Auckland region which covers the districts of five territorial local authorities.

7. The process was actually more complex than has been described, and went through a series of iterations which are discussed in more detail in the book from which this paper is drawn.

8. In very few cases did this result in any substantial change. New Zealand law on consultation makes it clear that the obligation is not to accept the weight of public opinion but instead, acting in good faith, to make a decision on the merits as seen by the decision makers.

9. In the case of Auckland under a convoluted arrangement which gave the trust 100% beneficial ownership, left the control of the board with the establishing authority on the basis that they were representing future private owners - through a public float which is yet to take place - and made the local authorities capital beneficiaries.

10. Until recently the New Zealand government has relied primarily on trade sales as its preferred means of privatisation rather than the alternative of public floatation, with concessions to individual shareholders, which has characterised, for example, UK privatisations with their emphasis on building a "property owning democracy". As a result, it has been all too easy to see New Zealand privatisation as a form of give-away to foreign owners.

11. There are several exceptions to this but the detail does not matter for the purpose of this paper.

12. Following a further restructuring of electricity distribution in 1998, under which energy companies were required to dispose of either their lines or their retail/generation activities, most trusts now own a substantial or controlling interest in companies which own the local network together with the proceeds of sale of retail and any generation assets which they held prior to the split.

13. Unless government genuinely believed that trusts would go out of existence following the first of their periodic reviews.

14. The New Zealand Government is currently undertaking a review of water and waste water services which is expected to result in a "level playing field" regime for public and private providers. It will be difficult to achieve this without requiring water and waste water operators, whether public or private, to earn a normal rate of return on capital. The statutory framework under which this company operates permits it to earn a surplus only for the purpose of reinvestment and prohibits it from distributing any funds to shareholders. If these statutory restrictions were removed, and Watercare Services Limited were able to earn a normal commercial profit, its value would be in the order of \$NZ1 billion.

15. Water and waste water is already treated as a commercial business in many overseas jurisdictions; as electronic road pricing becomes a reality, it will be possible to treat roading the same way.

16. In practice, it is quite likely that a number of local authorities, even if they did use business income to off set their regulatory income, would still be generating a surplus.

17. Amongst the many difficulties in considering the ownership question is what is meant by the expression "the community" or "the public". Is it geographic (the usual meaning when speaking of the community of a local authority), ethnic, gender or interest based? The term has been roundly criticised. Thus: "community" is "a subjective concept which generates considerable confusion between what *is* (empirical description) and what the practitioner *feels it should be* (normative description). Sociologically, it is a meaningless term attributed to widely diverse groups ranging from Kibbutzim, religious associations and ethnic groupings, to neighbourhoods, cities, national and even international "communities" ". (Shirley 1979 p27.) Despite criticism, the term appears to have a certain utility; although there seems real difficulty in finding any agreed definition, common use of the term clearly supports much activity which might not otherwise take place.

18. See also McKinlay P. *Local Government Into The Future: An Overview*. Unpublished paper delivered to the Local Government Finance Conference, Auckland, New Zealand, 25, 26 November 1998.

19. Section 122I (4) (b) Local Government Act 1974 as inserted by the Local Government Amendment (No 3) Act 1996.

20. Maori indigenous to the City.

21. It is probably not being unduly fanciful to see an increasing interest in that wealth being managed, not as conventional trustee investment, but as capital available to support local initiatives where a case can be made for doing so - the growing interest in micro credit organisations internationally suggests one possibility.

22. This process, and the other suggestions in this paper, would need to recognise that the area of coverage of these trusts is significantly different from that of individual local authorities. This might see several local authorities each appointing one or more trustees; it might see appointments being made by local authorities acting collectively; it might use an electoral college process.

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