Kevin Jenkins

'Can I See Your Social Licence Please?'

Abstract

The concept of a 'social licence to operate' has become ubiquitous in recent years, but there is no agreed definition, and its meaning continues to mutate as it spreads to ever more domains. The concept was first floated by a mining company executive after a disaster at a mine in the Philippines in 1995, and it spread exponentially. A small but growing body of academic research and commentary is bringing some rigour, but is not keeping pace with its rate of mutation. The narrative around the term is now more valuable than the term itself, which should be retired.

Keywords social licence, acceptance, trust, governance, democracy, business

Everyone has a story about a practical driving test, but my mate Bruce's takes the biscuit. Dropped off at the testing station in 1970s Hastings, he was pleased to find that all he had to do was drive around the block – a flat rectangle with little risk of meeting any other traffic, and only left turns. The kicker, though, was that the fellow testing him finished his instructions with 'I'll wait here'. Yep,

that's right, Bruce did his practical driving test alone. Thankfully, the rest of us won't put up with that any more – there's no longer a social licence for dodgy driving licence tests. But wait a minute, what is this 'social licence' thing? And how does one pass *that* test?

It's everywhere

From where I sit, at the intersection of business, research and policy administration, talk of 'social licence' seems to be everywhere nowadays. The term is being applied broadly to new contexts all the time. In June 2018, for example, you could read about Fonterra losing its social licence (New Zealand Herald, 2018), at the same time as government was seeking to develop a social licence for personal data use (Data Futures Partnership, 2018). The term is sucking up a big swathe of the public policy discourse around issues of community support, social acceptance and public opinion in relation to business ventures and government initiatives.

Kevin Jenkins is specialist in strategy, organisational performance and design, and in leading major strategy and change initiatives. He is the managing director of Martin Jenkins.

The current flowering of the 'social licence' concept began in the 1990s in connection with the mining industry

The signs are that 'social licence' is not just one of those fungal phrases that pop up all over the policy discourse and then as quickly die away. A look around the literature shows that the concept has an interesting history, apparently some staying power, and potentially significant relevance to public issues in Aotearoa, including in te Tiriti o Waitangi contexts. But sometimes it's hard to tell what users of the term mean by 'social licence'. They seem to assume a common understanding and reasonably consistent usage, yet it's far from clear that this in fact exists.

In this article I'll explore the origins and development of the 'social licence' concept in the extractive industries, and its relevance and risks for public discussion today. This will include a look at different models that academics have put forward for understanding the concept.

I'll argue that the term has passed its use-by date; that it's not helping discussion around public policy and democratic processes. The problem is that it suggests something sharp-edged and clearly defined, when in fact this terrain is inherently fuzzy and indistinct and various definitions have been put forward. It would be better to focus instead on the more specific, more substantive concepts that have been advanced in efforts to analyse and break down the concept's apparent subject matter. The 'pyramid model', for example, which I'll refer to below, distinguishes between different levels of community acceptance and approval, from simple acquiescence through to active co-governance and participation.

Origins and development of the term

Many talk of the term originating in the 1990s, but you can trace it back further in anthropological use in the sense of 'conferring permission to act', particularly in the context of doing otherwise prohibited things without sanction (University of Auckland and Statistics New Zealand, 2016). For instance, a mid-1970s anthropological study recorded that 'Drunks are accorded great social licence in Oaxacan villages' (Dennis, 1975, cited in Gehman, Lefsrud and Fast, 2017).

You can arguably trace the idea a further 200 years back to Rousseau – to the 'social contract' and the sovereignty of the people to legislate. Gehman, Lefsrud and Fast's 2017 review of the concept of social licence observed that it has 'long been understood to play a vital function in society whereby social norms can precede and supersede legal rules'. In other words, sometimes social norms might lead to new law, and sometimes they might effectively override or nullify existing law.

Emergence in the context of the extractive industries

So it's not novel to note that there is more to a society accepting an activity than legal compliance; that idea has been around for a while. But Gehman, Lefsrud and Fast's review confirms that our current understanding of 'social licence' depends greatly on its emergence in the 1990s in relation to the extractive industries. There was then increasing pressure internationally for social and environmental issues to be considered alongside the economic returns

from mining, oil and gas operations, and increasing conflict between mining operators and community groups (Fraser, 2017).

One of the events that focused attention on 'social licence' and that was specifically linked with the emergence of the term was a 1996 disaster in Marinduque in the Philippines, at the Marcopper mine operated by Canadian company Placer Dome. This saw the evacuation of 20,000 villagers and the destruction of a region's water supply when several million tonnes of tailings waste poured into the Boac River. The disaster (among other forces) prompted a shift in the Philippines government's regulatory response. New legislation intended to enable mining was revised to establish a more demanding regime, with tighter operating conditions and requirements for miners to consult with local authorities and indigenous groups (De La Cruz, 2017).

In the aftermath of the disaster, according to Gehman, Lefsrud and Fast, a Placer Dome executive described the challenge facing the industry as a matter of 'obtaining a social license to operate', and so the specific usage began its spread. They cite a 2000 article by Susan Joyce and Ian Thomson as an early attempt to 'provide the term with substance'. Joyce and Thomson listed 'social risks' facing mining companies in Latin America, noting that, at the project level, those risks threatened 'social acceptability' by posing 'problems of legitimacy'. They also surveyed the use of the term, finding that

'scholars have concluded that the concept of social license to operate initially emerged as little more than a memorable turn of phrase'. They cited Morrison (2014), who called it 'a term largely invented by business, for business'.

But nearly 20 years later, the issue of social risk for business endures, and 'social licence' is now the common parlance for discussing it. A 2017 Canadian PhD thesis in mining engineering (Fraser, 2017) put it this way: 'a failure to earn stakeholder approval has emerged as one of the leading causes of project delays and a key strategic risk'. The author notes that from 2008 until 2016 the multinational firm EY included the failure to earn 'a social license to operate (SLO)' as one of the top ten business risks for the mining sector. 'In other words, for mining companies, whose projects can be built only where the deposit exists, and where the life of mine can extend several decades, generating value for both company and community is becoming a strategic imperative.'

A slippery but well-used concept
Depending on where and who you read, social licence ranges from an emerging concept to a well-established, although possibly inadequate, mechanism within discussion about development.

Justine Lacey wrote that there was 'increasing debate in the academic literature over how to define SLO and what (if any) value the concept brings to our understanding of the social aspects of sustainable development' (Lacey, 2013). Gehman, Lefsrud and Fast emphasise a tension here, namely that use of the term was exploding while at the same time the concept had 'so far … only tenuous scholarly footing'. Looking at North American print media, they found that the phrase appeared in fewer than ten articles a year from 1997 through to 2002, but in more than 1,000 from 2013 to 2015, and over 2,000 in 2016.

The sharp expansion in use has been reported in New Zealand too. A 2016 survey noted local usage ranging across the forestry, farming, wind energy, dairy, pulp and paper, agriculture, unconventional gas and aquaculture industries (Edwards and Trafford, 2016). The survey drew on the work of John Morrison (2014) to burrow

into issues of legal status and general scope, and concluded:

SLO does not mean any diminution of existing legal requirements, but is an additional step. Further, [Morrison] brings in the implied element of risk, describing SLO in part as a negotiation of equitable benefits and impacts of an operation within the community … This is relevant for not only a single operation, but also industry-wide practice. (Edwards and Trafford, 2016, p.166)

'Social licence' in Aotearoa: recently observed extensions
The following is a compressed, high-level traverse across four key areas of operation in this country. It reveals some interesting

common elements in the expanding use of 'social licence' in Aotearoa.

The jump from mining into primary industries and tourism
While the concept of a social licence to operate has been a big part of the 21st-century mining landscape, in New Zealand it has bloomed across a wider range of productive industries (Edwards and Trafford, 2016). In 2018, it is certainly as relevant to farming, forestry, aquaculture and tourism as it is to mining and oil and gas.

Tourism New Zealand board member Raewyn Idoine has noted that dairy farming's 'social license disqualification' is a cautionary tale for tourism: 'Everybody loved farmers until they started polluting streams and rivers and making butter cost too much' (Cropp, 2017). Tourism professor David Simmons from Lincoln University also pointed to the need for the tourism industry to attend to its social licence to operate. He warned that when

New Zealanders 'go to their favourite places and find them trashed or overrun with freedom campers and the like, they may go "this is not what we expect, tourism has not kept its social contract"' (Cropp, 2017).

At least two of the current government-funded national science challenges focus specifically on investigating social licence. In May 2017 a new project in the Our Land and Water programme was launched, for Scion to explore 'the importance of trust and social licence in the primary sectors to enhance productivity and sustainable growth in New Zealand'. Another research project within the Our Seas programme is developing frameworks for achieving and maintaining social licence for marine industries. The proposal notes that this requires teasing out meaning and

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application in different contexts, including reference to te Tiriti o Waitangi, kaitiakitanga and associated co-governance aspirations of iwi. A land-based concept also has to stretch to fit the marine environment, including offshore operations where communities of interest can be on very different social-geographic scales and are not always well-defined (National Science Challenges, n.d.).
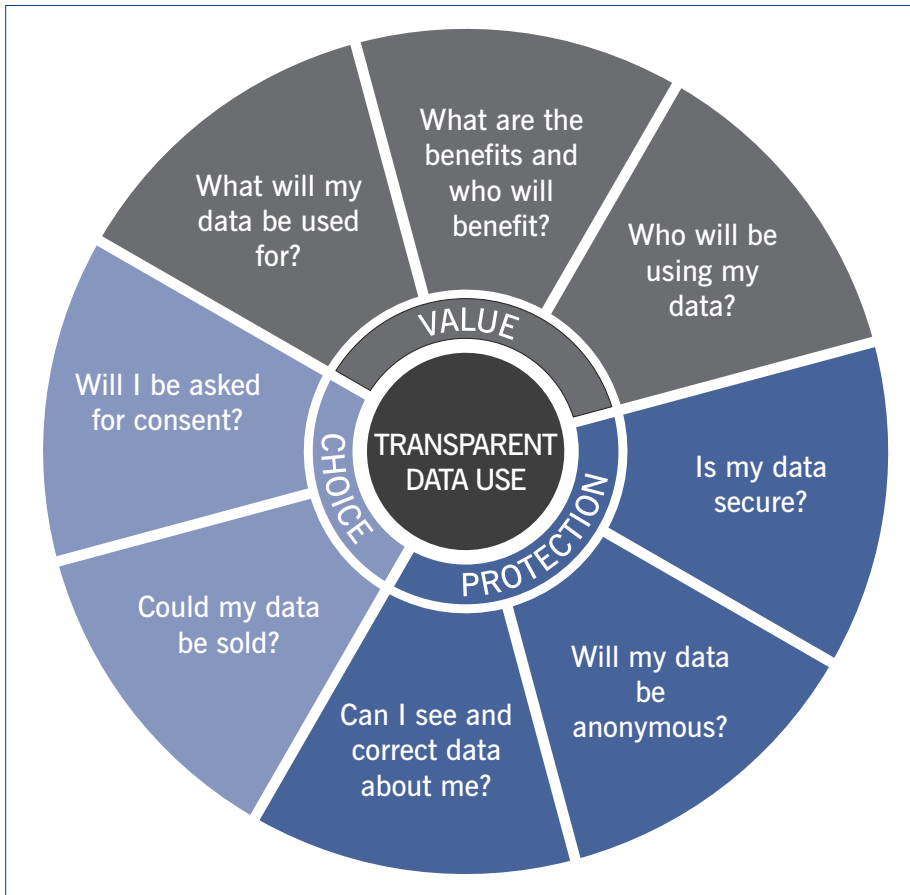
The leap to green initiatives …
Similarly, obtaining social licence has become an issue for pest management programmes and other state and community efforts with environmental and conservation goals. Here's a voice from the blogosphere: Mike McGavin, a keen tramper who blogs at *Windy Hilltops*:

> People need to care about the outcome [of an initiative] before they can give a social licence, and so when people can be steered towards understanding what
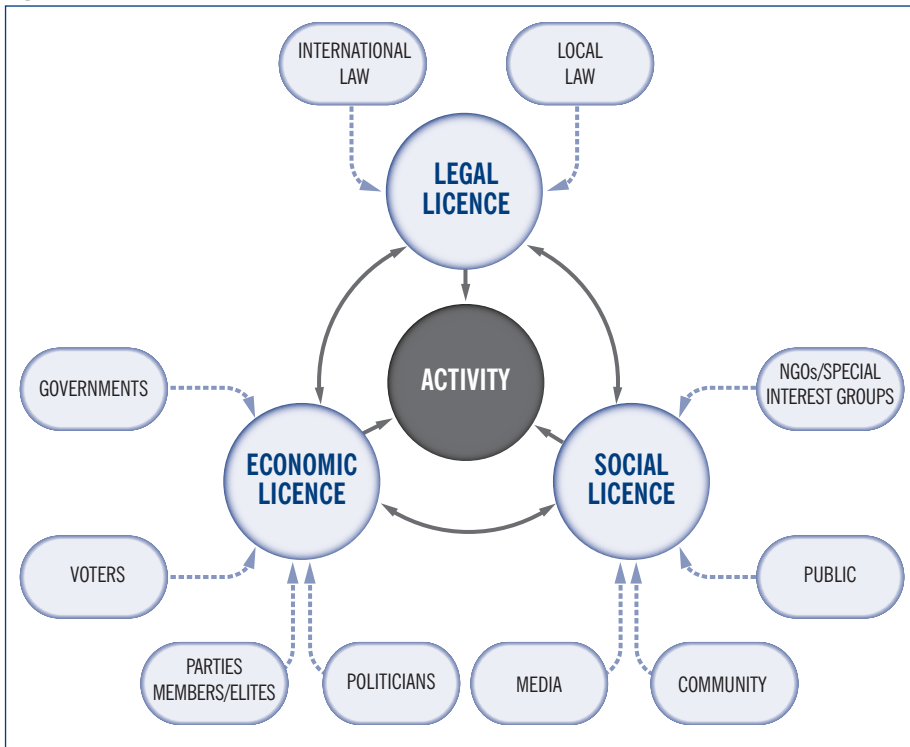
Figure 1: Transparent Data Use Dial

Source: Data Futures Partnership, 2018

Figure 2: The three strand model

Source: Gehman et al, 2017

a range of activities or projects across the public, private and community/NGO sectors. 'Social consensus' is in fact the term favoured by Sir Peter Gluckman, then the chief science advisor to the prime minister (Gluckman, 2017).

… and new technology …
Gluckman's arguments are couched generally, with pest control programmes an extension of his discussion of social licence for new digital, engineering or biological technologies. Echoing John Morrison on the relevance of risk, Gluckman argued that the choices communities make about new technologies are driven by their perception of risk, and that this isn't new. The breadth and pace of innovation is now growing exponentially, however, and 'what is relatively new … is the ability of democratic society to have some say in how technologies evolve, and how they are used and controlled'.

He provided an array of examples of these debates and of different assessments of risk. Assisted reproduction, folic acid supplements and the fluoridation of water have all been debated extensively. We might be hesitant about introducing a new drug if we bear the cost and the risk and a large pharmaceutical company gets much of the benefit. On the other hand, we readily accept smartphones despite the cost and risk to privacy, because the benefits to us as individuals are clear. Gluckman also emphasises how different societies take different views – he points to how gene modification and editing are seen differently in Europe and the US. He writes that this is:

> a complex topic involving different perceptions of risk and benefit, and different views of different stakeholders. It varies for different types of technology and is managed differently for different types of product. Depending on the technology and the societal response, it may involve regulators and formal processes, it engages politicians or it is driven by the market place.

… and right into our private lives
The Data Futures Partnership has developed 'A path to social licence: guidelines for trusted data use'. These

might be at stake, in part through the enthusiasm for and engagement with … local projects, it's a crucial thing for goals like Predator Free 2050. (McGavin, 2017)

This widens the application of the concept – from permission for a profit-making activity to continue, to an idea of social consensus that might be applied to

focus on eight questions, under three headings, that organisations can address in order to explain how they collect and use data, to better build trust with clients and the wider community (see the Transparent Data Use Dial in Figure 1). These need satisfactory answers if people are to feel comfortable about data use.

This is work required by the recent government drive to improve the statistical evidence base for public programmes, particularly in the sensitive social area.

A walk around the models

So what models or analyses of social licence have been put forward by people who have time to think about this at length? I found the Canadian review by Gehman, Lefsrud and Fast (2017) particularly useful for its comparison of three variations, as follows.

The three strand model

This places social licence in the context of different factors that enable businesses to operate successfully. Gehman, Lefsrud and Fast cite a study of pulp mills (including in New Zealand) that concluded that firms in 'closely watched industries' depend on three strands to operate, as shown in Figure 2.

- *legal licence* relates to statutory obligations and regulatory permits;
- *social licence* relates to the demands of stakeholders;
- *economic licence* relates to the demand for profit by shareholders and others.

The authors cite later research testing this model that hypothesised that social licence has five factors: environmental impact; customer power; customer interest; corporate/brand visibility; and community pressure (pp.297–8). The researchers (Lynch-Wood and Williamson, 2007) concluded that at least two of these factors must be in play for a small or medium enterprise to go beyond compliance.

The triangle model

This model grew from the notion of social acceptance that emerged in the 1970s and 1980s in the context of overseas moves to develop renewable energy policies. It views social licence to operate as resulting from three areas of acceptance necessary 'to generate policy maker support for the financial and regulatory incentives

Figure 3: The triangle model
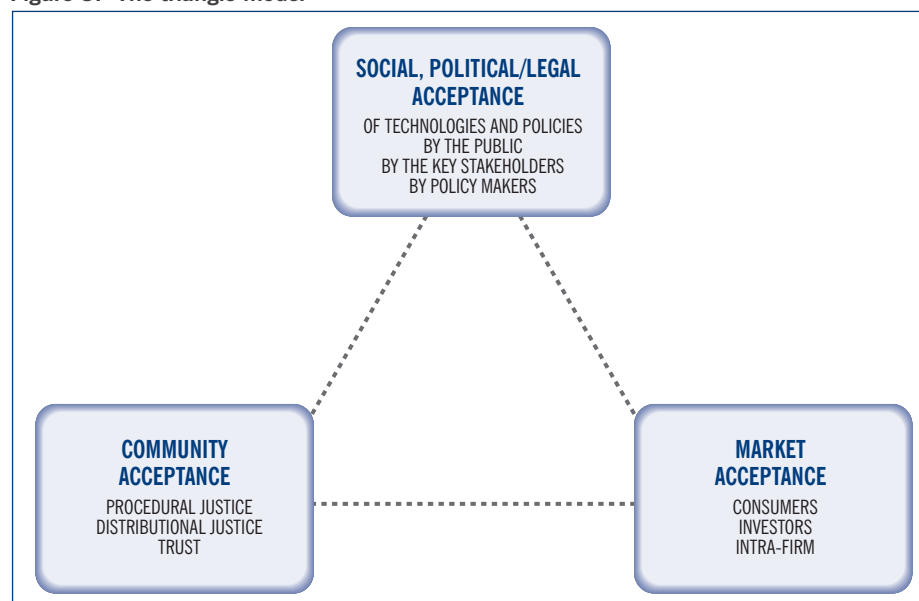
Source: Gehman et al, 2017

Figure 4: The pyramid model
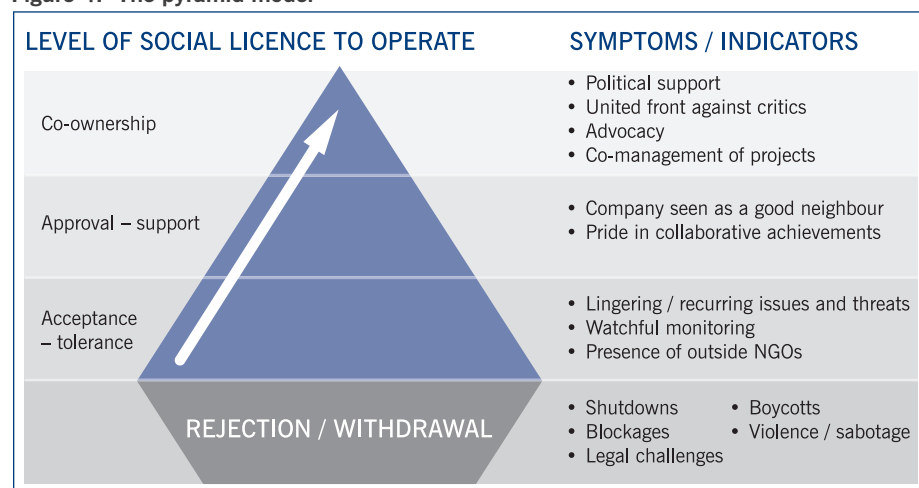
Adapted from Boutiller and Thomson

required to overcome entrenched interests and the path dependency of conventional fossil fuel energy systems' (Gehman, Lefsrud and Fast, 2017, p.299):

- *socio-political acceptance* is broad acceptance by the public, employees and policy makers;
- *community acceptance* is by the local community;
- *market acceptance* is the widespread adoption of an innovation.

The pyramid model

The triangle model considers three areas of acceptance, but the 'pyramid model' grapples with the idea of acceptance itself (Thomson and Joyce, 2008). This model was developed iteratively by mining industry consultants over more than a decade from 2000 (Gehman, Lefsrud and

Fast, 2017). Starting at the bottom and moving up through the three layers of the pyramid, we get this:

- *legitimacy*, at the base, is about conforming to established legal, social and cultural norms: this distinguishes between projects that do not have acceptance and those that have gained acceptance through 'playing by the rules';
- *credibility* is about being believed: this second layer distinguishes between projects that have merely been accepted and those that have been approved through negotiation;
- *trust*, at the top of the pyramid, is defined as 'the willingness to be vulnerable to risk or loss through the actions of another': this distinguishes between projects that have merely been

approved and those where stakeholders also have a sense of co-ownership.

There's also a fourth, underground layer, where you find projects that fail to achieve even base-level legitimacy, so that their social licence is withheld or withdrawn altogether.

The pyramid model is arguably a kind of learner–restricted–full structure, where the level of trustworthiness demonstrated by the licence applicant determines the level of trust the licence issuer accords to them, and potentially the scope of the permitted activities at each level. The pyramid model has been adopted by the

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Australian Centre for Corporate Social Responsibility, and adapted by Ngāti Porou Fisheries in developing its Land Based Aquaculture Assessment Framework (Land Based Aquaculture Assessment Framework, n.d.).

Influences and challenges in Aotearoa
Te Tiriti o Waitangi
The interests and voices of a country's indigenous peoples of course need to be a central element in considerations of 'social licence' issues. In Aotearoa we already have a distinctive and relatively well developed framework for these discussions, te Tiriti o Waitangi, the Treaty of Waitangi, the partnership between the Crown and Māori that imposes a number of obligations on both sides. Challenges to the 'social licence' concept from Māori perspectives have invoked te Tiriti and questioned some basic assumptions about exactly to what or whom the 'social' in 'social licence' is supposed to refer, and questioned the adequacy of the term in contexts involving the interests of iwi and Māori.

Ruckstuhl, Thompson-Fawcett and Rae (2014) argue that in fact te Tiriti has a longer track record as a way for Māori to permit or withhold consent than the recently arrived 'social licence'. Referring to the decision of Brazilian oil company Petrobras to give up exploration licences in the face of opposition from local iwi and other obstacles, the authors write:

> What the Petrobras case makes clear is that for iwi like Te Whānau-ā-Apanui, a social licence has to be considered in the context of the Treaty of Waitangi, signed in 1840 and often described as

Aotearoa New Zealand's founding document. Social licence will be granted only when it goes beyond regarding iwi as 'stakeholders', which limits the indigenous Māori voice to an aggregated 'social' voice and masks the specific history and experience of Māori. Instead, we suggest that the Treaty-based partnership approach, developed over the past 40 years as a result of changed legislation in the 1970s, has much to offer as a process for engaging in meaningful dialogue with Māori communities to assess the impacts of mining within a context of shifting social expectations and concerns about resource exploitation.

An element of the wider Tiriti framework is that concepts of partnership and consultation are embedded in some New Zealand legislation. The Resource Management Act 1991 regulates how councils, stakeholders, communities, industry and tangata whenua engage to manage and sustain natural and physical resources and

mitigate effects (Parliamentary Commissioner for the Environment, 2002). The Crown Minerals Act 1991 requires the permitting body, New Zealand Petroleum and Minerals, to consult with iwi and hapū whose rohe (traditional area of occupation) may be directly affected by new mineral permits (New Zealand Petroleum and Minerals, 2018). In this mining context, much effort and thought has been invested into ways of interacting effectively, such as the best practice guideline for engagement with Māori around mineral permits developed by the Ngāti Ruanui iwi of Taranaki (Te Rūnanga o Ngāti Ruanui Trust, 2014).

So within this overall Tiriti framework, people and organisations in Aotearoa have for some time already been negotiating, in a shared territory, relative economic, social, cultural and environmental costs and benefits.

A social license for data use?
Another challenge invoking te Tiriti o Waitangi has come from Māori participants in the Data Futures Partnership initiative, which aims to build social licence for data use. Te Mana Raraunga is the Māori Data Sovereignty Network, committed to protecting and securing Māori rights and interests in data. Its May 2017 statement introduced the concept of 'cultural licence' and raised fundamental questions about who 'issues' a social licence – individuals or communities:

> Te Mana Raraunga sees the need for a clear distinction to be made between individual and collective acceptance of data use and sharing. In the context of the Partnership's work, we view *Social licence* as the ability of an organisation to use and share data in a legitimate and acceptable way, based on the trust that *individuals* have. We view *Cultural licence* as the ability of an organisation to use and share data in a legitimate and acceptable way, based on the trust that *iwi and Māori Treaty partners* have.

> We are concerned that the Partnership's approach to social licence is conflating individual and community acceptability of data use and sharing. There are many instances where individual-level data can be aggregated

to identify population groups or collectives such as iwi or Māori entities. In this context the individual's barometer of trust in relation to their own personal data is an insufficient indicator of the group's level of comfort with the use of data about them. While an individual's acceptance can inform social licence, group acceptance through mandated structures is a more appropriate barometer of trust for data that can be aggregated to represent a group. This is particularly important for any Māori collective (e.g. whānau, hapū, iwi) that has an interest in aggregated data sets.

Is a legal licence the only valid form of social licence?

Luke Malpass from the New Zealand Initiative, the business-backed research organisation, has argued there is a problem with this 'so-called social licence' (Malpass, 2013). In an article entitled 'Rule of law or social licence to operate?', he summarised the social licence concept as being 'a way of asking: does this project continue to have community support?'. He objects that: 'You cannot apply for it, there are no fees to pay, no compliance conditions and no objective criteria on which you can base your claim.'

Malpass argues that Parliament is the ultimate expression of community will, and that you can't elevate 'community' to a higher level of authority than laws and regulations. He cites examples from Australia, including the withdrawal of a fisheries licence by an environment minister, as showing the risk that 'law-abiding businesses, making investment decisions in good faith, may find the rug pulled out from under them by social licence concerns'. He argues that Aotearoa already has an issuing system for social licences: namely, the 'laws passed by Parliament, consisting of elected representatives and the courts that enforce them'.

Malpass concludes his article: 'For anyone caring about the rule of law, the social licence is a concept that should be viewed with suspicion.' But it seems a stretch to draw a line, as Malpass implicitly does, from a government decision to withdraw a licence because of 'social licence'

concerns to a threat to the rule of law. There's no violation of the rule of law if the minister's decision is made lawfully under the discretion granted by Parliament through statute. In any case, if the decision wasn't made lawfully – if the minister breached administrative law principles by, for example, taking into account irrelevant considerations – then there's a legal remedy in the form of judicial review. All kinds of law-abiding people with all kinds of interests – commercial, environmental, recreational – may find themselves on the disappointing end of a lawful government decision. That's the way things go in a democratic society.

More generally, and more importantly, Malpass's narrow conception of democracy appears to leave no meaningful space for

the kind of broad range of interactions and negotiations that are critical to democratic society. Healthy democracy consists of many different conversations – of different types, through different channels and between different groups of people. I like Amartya Sen's understanding of democracy as 'government by discussion', a concept he notes was developed by John Stuart Mill. Sen wrote: 'Democracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard' (Sen, 2009).

The limits of a metaphor

Luke Malpass, who describes the social licence concept as 'pernicious', is something of an outlier among the commentators I've read in this field. His objections aren't about the usefulness of the term; they're much more fundamental

than that. However, I think his objections highlight the limitations of this immensely popular term for clarifying our thinking on important issues.

The word 'licence' can, of course, be applied meaningfully in many contexts, but it seems to me the work this word is doing in the phrase 'social licence' is essentially metaphorical. We're invited to think of the plastic cards in our purses and wallets that entitle us to drive, or of the exploration permits granted by New Zealand Petroleum and Minerals – in other words, official permission with sharp, distinct edges.

As with any metaphor, 'social licence' takes us on a leap from the concrete, the well-defined and the familiar to an unexpected new field, giving us that seat-

> As with any metaphor, 'social licence' takes us on a leap from the concrete, the well-defined and the familiar to an unexpected new field, giving us that seat-of-the-pants recognition and the shock of the new at the same time.

of-the-pants recognition and the shock of the new at the same time. That's what can make many metaphors so appealing and useful. But some metaphors are more appealing than they are useful.

The term 'social licence' now appears to be monopolising how we think about and name the key issues. It's in the air, and people seem to be taking it up to describe their thoughts. The problem is that the metaphor suggests something clear edged and well defined. But the real-world things that 'social licence' seems to refer to – community support, public pressure and so on – are inherently fuzzy edged. At the same time, the definitions put forward for the term itself have varied significantly. Because of this, the metaphor obscures rather than clarifies. Luke Malpass's questions about, for example, how and where you apply for your social licence are perfectly reasonable ones, and these

questions are prompted by the term 'licence' itself.

We need to take more linguistic and analytical care in this area, and work with more specific and more substantive concepts, like those examined by the pyramid model. Rather than speaking of the granting and withdrawal of a 'licence', it would be more clarifying to ask exactly what a given initiative project might aspire to, and what a healthy democratic society might expect it to aspire to: for example, merely passive acquiescence from the community, or more active and participatory forms of approval and endorsement?

A new landscape of political exchange
One of the more substantive concepts that could help us here, and that focuses on specific kinds of relationships and interactions, is 'networked governance'. Here's Gehman, Lefsrud and Fast (2017) once more:

> The emergence of social license mirrors a broader trend towards 'networked governance,' or a shift from traditional hierarchal and centralized governance to a more horizontal mode … democratic accountability derives as much from judgments of the target population of policy initiatives, as much as from officials acting as the final decision-makers.

As Gehman, Lefsrud and Fast allude to, the explosion in 'social licence' discourse is not, of course, simply random fashion. It reflects a changing social, political and technological environment, including the emergence of more 'networked governance', the exponential pace of new technology, and massive and instant communications. It reflects in part the ability of interest groups to rally high-profile support very quickly, so that government, business and NGOs must now reckon with the fact that popular support for their projects can be won or lost in hours and days rather than over months and years. If people in New York want to track what's going on at a mine in the Philippines, social media and instant global communication make this infinitely easier than it was in the mid-1990s.

So, as Ruckstuhl, Thompson-Fawcett and Rae (2014) commented, new factors in political exchange have transformed the landscape. These include not just 'the prevalence of global communication technologies', but also expectations (captured in the 2007 United Nations Declaration on the Rights of Indigenous Peoples) that the 'free, prior and informed consent' of an indigenous people will be gained before any initiative or action is taken that affects them.

Those developments have all shaped and boosted the 'social licence' discussion. The challenge now is to transcend the limitations of that term for working in and around public policy issues in that new landscape.

Back on the road
We can scoff at laughable practices in New Zealand in the olden days, and often with justification: in 1973 road fatalities peaked per head of population (and per vehicle, and numerically at 843),[1] due to primitive cars with poor brakes, narrow tyres and no seat belts, along with a drink-drive culture, narrow, badly cambered roads, and of course poor driving instruction and testing.

I'm sure we're all glad we don't just send newbies round the block nowadays. The quality of the licences that we issue matters. If there's a workable and useful analogy here, it's perhaps that the health of the mechanisms for expressing or withholding social approval also matter a great deal in a democratic society. To quote Amartya Sen again, democracy needs to be seen in terms of 'the capacity to enrich reasoned engagement through enhancing informational availability and feasibility of interactive discussions'.

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1 https://www.transport.govt.nz/resources/road-safety-resources/road-deaths/annual-number-of-road-deaths-historical-information/.

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