Refusal of assent – a hidden element of constitutional history in New Zealand

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Introduction

For nearly a century from 1854, when New Zealand gained representative government, all legislation passed by the New Zealand Parliament – both reserved and assented to by the Governor/Governor-General – was sent to Britain for scrutiny. It was not until 1947, when the country adopted the Statute of Westminster, that this practice halted.

In most cases Britain agreed to the legislation without comment or qualification, but over the period nearly a hundred bills were reserved and a number of measures received serious attention. Britain refused assent to some legislation. The process of gaining royal assent was not smooth nor one free of controversy. It reveals in an interesting fashion the shifting constitutional relationship between the colony and Britain and provides significant benchmarks in the process of New Zealand gaining full autonomy in its lawmaking.

Under the Constitution Act the Governor had the discretion, subject to the Constitution Act and his instructions, to assent to, refuse assent to, or reserve legislation for Britain's assent. The Governor could also amend legislation. (From this point on, reference will largely be made to ‘the Governor’ as the discussion is largely confined to the pre-1917 period.) Britain issued instructions to the Governor to guide him in the exercise of the powers of assent and reservation. The Governor was to send copies of all legislation, including bills he had assented to, to Britain. Britain had two years to consider whether to disallow legislation already assented to by the Governor. Britain also had two years to decide whether to assent to legislation reserved by the Governor. Reserved legislation did not have the force of law until Britain had assented to it.

The Constitution Act also gave the colonial legislature competence to make laws for the peace, order, and good government of New Zealand, provided that such laws were not ‘repugnant’ to the law of England, i.e. not in conflict with imperial law. New Zealand’s lawmaking was limited to domestic concerns. Legislation which went beyond or was ‘excessive’ to New Zealand’s legislative powers would be ultra vires. Native policy was effectively retained by the Crown, delegated to the Governor. Britain also had a continued imperial responsibility for New Zealand’s affairs.
Britain could block legislation, either by disallowance of the enacted and assented legislation or by not giving assent to reserved bills. Almost always laws to which the Governor had already assented would be ‘left to their operation’. It was a draconian step to disallow legislation that had already been implemented. Disallowance rendered the entire Act null and void.

Refusing assent was less severe than disallowance, in that the legislation had already been reserved by the Governor, but it was a heavy-handed intervention that Britain would rather avoid. Withholding assent was a more effective, flexible and negotiable way of dealing with problematic legislation. Britain could note difficulties with the legislation and New Zealand’s legislators (if they wished) could redraft it, make amendments or allow it to lapse. In such circumstances New Zealand frequently passed new legislation that would be assented to. In other cases Britain would give assent but express the hope that New Zealand would amend the legislation in the future.

In the period during which Britain had such powers (1854-1947) it blocked important legislation on a number of occasions. The power of royal assent was used to prevent thirteen pieces of legislation from 1856 to 1910.

In two instances Britain disallowed Acts already assented to by the Governor and on the statute book (the Waste Lands Act 1856 and the Indemnity Act 1866).

On five occasions Britain specifically notified New Zealand that it would refuse assent to bills (the Native Territorial Rights Bill 1858, Picton Railway Bill 1861, Governor’s Salary Bill 1867, Extradition Bill 1873, and the Administration Bill 1878).

On another six occasions Britain held its decision in abeyance (withheld assent) for two years and the bills became void (the Native Council Bill 1860, Provincial Compulsory Land Taking Bill 1863, Colonial Reciprocity Bill 1870, Confederation and Annexation Bill 1883, Asiatic Restriction Bill 1896 and the Shipping and Seamen Amendment Bill 1910).

From the perspective of today, with New Zealand having full lawmaking powers, it is easy to neglect these arrangements of the past that gave Britain an active role.

In 1986, when New Zealand put its constitutional legal framework in order, the historical anomaly of royal assent to legislation was largely removed from the Constitution Act. The majority view in the Officials Committee on Constitutional Reform considering such issues was that explicit reference to the possibility of withholding or refusing assent should be dropped. The Constitution Act simply said that legislation ‘shall become law when the Sovereign or the Governor-General assents to it’.

But the Governor-General’s powers of assent do remain in place even if silently. Philip Joseph argues that the power to grant assent suggests also that assent can be withheld. Scrutiny of this process reveals in an interesting fashion the shifting relationship between the colony and Britain and provides significant benchmarks in the process of New Zealand gaining full autonomy in its lawmaking.

A misleading impression of this issue results from statements, when apparently related to New Zealand, that no British monarch has refused assent to legislation since 1707 in the reign of Queen Anne. This should not be taken to suggest that New Zealand legislation has never been blocked by Britain.
Refusal of assent – John E. Martin

Legislative boundaries

The first decade or so of legislative activity by the New Zealand Parliament was accompanied by searching scrutiny of its lawmaking by Britain, not only on the vexed matters of legislation affecting Maori and land but also concerning ‘excessive’ powers of Parliament that transgressed the Constitution Act or affected Imperial interests. With the transfer of responsibility for Maori affairs to the government by the mid 1860s one cause for problematic legislation was removed.

No sooner had New Zealand begun legislating than it ran up against Britain’s scrutiny. The reserved Provincial Waste Lands Bill 1854 was closely looked at. Britain pointed out that the General Assembly could not ignore the restrictions of the Constitution Act 1852 on delegating powers to provinces and altering provincial constitutions. Britain also made it clear that certain constitutional changes were not possible – such as making the Legislative Council elective and authorising provincial Superintendents rather than the Governor to dissolve provincial councils. These and other measures could not be assented to if they appeared in legislation, Britain warned.

In the session of 1856 Parliament got down to the serious business of legislating, now that a stable government had been established. Recently arrived Governor Gore Browne reserved the Provincial Councils Powers Bill but assented to the Waste Lands Bill. While Britain assented to the Provincial Councils Powers Bill the Waste Lands Act ran into problems. It empowered provinces to make land laws for the sale of Crown waste lands and to sell land. Britain disallowed the legislation because it exceeded the powers of the legislature under the Constitution Act 1852. The following session (two years later) Parliament passed the new Waste Lands Bill 1858. This gave administrative powers over land, but not legislative powers, to provinces. The legislation, which was reserved, was eventually assented to after the New Zealand government argued that it was appropriate.

The New Zealand Parliament also had a warning shot fired across its bows concerning legislation affecting Maori. The Native Reserves Bill 1856 originally gave administrative responsibility to the Governor, but the government controversially brought in a new clause 18 stipulating that the Governor should act only on the advice and with the consent of the Executive Council. Gore Browne eventually assented to the bill with reservations. Britain did not disallow the Act even though there was some consternation over the apparent surrender control over Maori affairs.

It became evident that the House of Representatives considered control over Maori affairs to go hand in hand with responsible government (confirmed in 1856). The government subordinated Gore Browne through the ‘Governor in Council’ phrase – a legislative wedge levering the Governor out of responsibility for Maori affairs. Gore Browne found that he was not able to implement any Maori policies, especially as the government controlled the money.

In 1858 Parliament enacted a torrent of laws (a total of 80 bills). The government also attempted to develop its own concerted Maori policy through the Native Territorial Rights, Native District Regulations and Native Circuit Courts Bills. Faced with this burst of legislating raising constitutional issues, Gore Browne felt the need to assert his powers. He reserved ten bills for further consideration. He also assented to a number of other pieces of legislation which subsequently faced serious scrutiny by Britain.

Britain was inclined to recommend disallowance of the Absent Debtors and Absent Defendants Acts for their excessive powers but agreed to defer the move for the maximum two year period to allow their amendment. New Zealand agreed to repeal these two Acts and in 1860 (the following session – there was none in 1859) this was done.
The Militia, New Zealand Post Office and Foreign Seamen’s Acts required lengthy consideration. Britain required that the first be amended; this was done by legislation in 1860. It was in the end decided to leave the second ‘to its operation’. Shipping legislation was to prove the most enduring area of difficulty (see below). Britain insisted that the Foreign Seamen’s Act be amended on threat of disallowance. The Act was repealed by an 1860 Act which included the provision Britain wanted.

Britain decided to leave the New Provinces Act to its operation on condition that it was amended. This was done in 1860. Britain also deferred consideration of the Bankers’ Returns Act for it to be amended. This duly occurred in 1860. Furthermore, the Interpretation Act (concerning technicalities in Parliament passing Acts) contained a problem relating to the definition of New Zealand’s territory. After correspondence Britain conceded that it would leave the Act to its operation. The Native Districts Regulations Act included a section objectionable to Britain. While reluctant to disallow the entire Act, Britain insisted that the Governor agree to all regulations issued under the problematic section.

While Britain assented to eight of the ten reserved bills of 1858 without difficulty, the Waste Lands Bill and the Native Territorial Rights Bill were not as straightforward. Britain eventually assented to the Waste Lands Bill (see above) but it considered the Native Territorial Rights Bill extremely objectionable. Allowing colonists to purchase land directly from Maori on an individualised basis was inadvisable. New Zealand would also need to rely on the British military to enforce the legislation but such a power was not given to Britain. In conclusion Britain would not surrender control of Maori affairs and the military in such a manner. The Native Territorial Rights Bill was refused assent, causing anger in the colony.

When Parliament met again in 1860 it confronted a virtually unprecedented situation. Britain, encouraged by Gore Browne and without consulting the New Zealand government, had introduced legislation into the Westminster Parliament to provide for a Native Council working with Gore Browne. The measure, although passed in the Lords, was withdrawn by the government in the Commons after strenuous lobbying by colonists in London and a petition presented on behalf of the New Zealand government.

In the British Parliament considerable qualms were expressed about the propriety of passing such a law without the consent of a self-governing colony. In the end the British government accepted that it should not press ahead with a measure that concerned ‘important principles of colonial legislation’. It believed that there were sufficient powers for the Crown under the Constitution Act to protect the interests of Maori, and if not, then the government could reconsider legislation.

Alarmed by this move, the New Zealand government rapidly drew up its own Native Council Bill, putting the Council under the government’s thumb. Gore Browne reserved the bill, while acknowledging that the measure was the best that could be obtained from the New Zealand Parliament. (Britain meanwhile waited for Gore Browne to be replaced by Sir George Grey before deciding what to do – see below.)

In 1861, William Fox’s government in a most bizarre step itself recommended that Britain refuse to assent to the private Picton Railway Bill, one of half a dozen reserved bills. This was the result of a deep-felt political division between the new Speaker David Monro, member for Picton and a Stafford supporter, and Fox. The bill had been introduced while Stafford was still in power. Monro was a strong backer of the measure. The bill was controversial, with allegations of inappropriate pecuniary interest and irregularities. Monro participated in a vigorous debate on the bill while it was in Committee of the Whole. Despite Fox defeating Stafford on a motion of no-confidence and forming a new ministry the bill went through Parliament. Fox refused to accept the legislation and recommended that the Governor refuse assent to the bill. Gore Browne reserved the bill and Britain refused its assent.
Warring parties

This squabble over a local railway, although important to the politics of the day, was somewhat of a distraction from more serious events with longer-term constitutional consequences. In 1860, the simmering conflict arising out of Maori resistance to land sales burst out into war in Taranaki. The tension between Gore Browne and the government over Maori and military matters reached breaking point. The contentious matter of the Native Council legislation had not helped at all. Gore Browne’s attempts to take effective charge of Maori affairs had proved fruitless and he had been drawn into war by accepting a crucial block of land at Waitara. After a year an uneasy peace emerged but the larger threat of the Waikato King movement remained.

The conflict between Gore Browne and the government was to prove a turning point in Britain’s relationship with its colony. As Maori and Pakeha fought in New Zealand Britain began to rethink its colonial responsibilities. When the New Zealand Parliament sent a resolution to Gore Browne that the challenge to Her Majesty’s sovereignty posed by the King movement must be confronted, in unprecedented fashion he sent a message directly to the House, bypassing the government. Gore Browne laid down his own challenge – he would not call upon British troops unless New Zealand co-operated fully. Some questioned whether he had the right to demand this. Parliament assured him of its co-operation but within the limits of the country’s resources.

Immediately afterwards news arrived that Gore Browne was to be relieved by Sir George Grey. Britain thought that Grey’s experience was needed. This appointment completely changed the power relationships at work. Britain could now see no better approach than yielding discretionary power to him. Britain said that it would meanwhile withhold assent from New Zealand’s Native Council Bill. Grey proposed district runanga instead of a Council. The Native Council Bill was never assented to and Grey assumed considerable powers over Maori affairs.

The session of 1862 again produced a number of reserved bills, one of which was the momentous Native Lands Bill. In resigned fashion, Britain assented to the bill. Parliament had no intention of allowing the Imperial government or Grey to dictate on this aspect of Maori policy. The colonial government now effectively assumed this responsibility. Britain formally discharged its responsibility for Maori affairs in early 1863.

Britain remained very critical of a range of legislation and was quite prepared to continue to intervene. Two Acts of 1862 were under threat of disallowance – the Native Purposes Appropriation and Colonial Defence Force Acts. Both were amended in 1863 as a result and were assented to.

With further conflict in Taranaki, Grey and the government agreed in July 1863 that the military should move south into the Waikato to deal with the King movement. Parliament met late that year to endorse developments, and passed a range of amending and consolidating provincial land legislation that required reservation, along with crucial legislation to deal with the situation of war. The only problematic bill amongst those reserved was the Provincial Compulsory Land Taking Bill. Britain withheld assent from the bill because it included Maori land. An amended bill attempted to deal with this, but the Attorney-General wanted further amendments and the bill was discharged. With the expiry of the two-year period new legislation was required. This was introduced in 1866, minus the offending clause of 1863. The bill was reserved and assented to.

The New Zealand Settlements Act 1863 – passed to enable confiscation of Maori land in the wake of the land wars – received extremely close scrutiny from Britain. The legislation had come under serious criticism in Parliament but the New Zealand government argued that this Act, together with its accompanying Suppression of Rebellion Act 1863, were vital pieces of legislation. British involvement would subvert New Zealand’s new responsibility for Maori affairs. Grey had given assent to the measure on the basis of the necessity for its immediate operation.
Britain wanted to disallow the Act but did not want to weaken Grey’s hand. It would create a bad impression to disallow the very first legislation New Zealand had passed since gaining responsibility for Maori affairs. Meanwhile the Colonial Treasurer was in Britain negotiating a new £3 million loan. This gave Britain some purchase. It agreed to guarantee £1 million on condition that New Zealand pay more towards the cost of troops and limit the duration of the New Zealand Settlements Act to two years. But Britain’s expectations of Grey in negotiating a less draconian form of confiscation came to nothing.

The Act was amended in 1864 to meet Britain’s concerns to a limited degree – its operation was to end in December 1865. But it did not establish a commission nor introduce satisfactory compensation provisions. Grey assented to the amending legislation but disallowance remained a distinct possibility. Britain continued to place faith in Grey’s ability to moderate the impact of the Act. Legislation was again introduced in 1865. This would make the confiscation legislation perpetual with a proviso that there would be no confiscation after December 1867.

Britain remained unhappy with the legislation, but with troops being withdrawn, it refrained from disallowance at that time. If circumstances changed it might still do so – and there it was left. Because the Governor had assented to the initial legislation of 1863 nothing further needed to be done. In this case disallowance would have been virtually certain had it not been for the rapidly changing shift of constitutional powers.

The land wars also resulted in Parliament passing the Indemnity Bill 1865 to indemnify those involved in the conflicts; this was assented to by the Governor. Britain was not happy. When even broader indemnity legislation was passed in 1866, also assented to by the Governor, Britain disallowed the 1866 Act. Amended indemnity legislation passed in 1867, which included the required changes, was assented to.

Governor Grey was ignominiously recalled and replaced by Sir George Bowen in 1867. By this time, despite all the previous troubles, Grey had redeemed himself in New Zealand eyes. Parliament leaped to his defence, in an act of spite aimed at the replacement Governor, and through the Governor’s Salary Bill attempted to reduce Bowen’s salary by £1,000. Such legislation had to be reserved under the Constitution Act. Britain saw no justification in the measure and refused assent to the legislation.

Following this Britain expressed concern with two further pieces of legislation in 1869 which attempted to deal with continued disturbances. The Disturbed Districts Act and the Arms Act Amendment Act would not be disallowed but needed amendment. The former, which suspended habeas corpus and introduced other draconian powers to deal with people in areas affected by disturbances, expired after a year and thus was probably left to its operation. The Arms Act Amendment Act was amended in 1871 and assented to.

By the late 1860s Britain was determined to remove all its troops from New Zealand. There developed a crisis of confidence in the British-New Zealand colonial relationship. New Zealand felt that Britain was deserting it at a time when disturbances by Maori continued. In frustration there was rash talk of independence from Britain. A deputation saw the Secretary of State for the Colonies in 1869 in London, but this did not prevent the last troops leaving.

This experience told New Zealand politicians that they would have to take a greater responsibility. Already there had been a significant reduction in the sphere within which Britain felt it necessary to intervene, with New Zealand’s assumption of responsibility for Maori affairs. Other areas of colonial responsibility would eventually emerge as the bonds gradually loosened and as New Zealand’s politicians developed a ‘colonial nationalist’ streak. Julius Vogel was a forerunner; he would be followed by Sir George Grey, John Ballance, Richard John Seddon and Sir Joseph Ward. Meanwhile a range of legislation ran the gauntlet of British scrutiny. New Zealand still to a large degree accepted British intervention in its lawmaking with little complaint.
Matters of repugnancy and excessive powers

The gold rushes and the flood of unregulated immigration to the country highlighted New Zealand’s incapacity to deal with criminals. In 1863 the Criminals Bill, modelled on Victorian State legislation, sought to prevent criminals coming over from Australia. The government explained that the bill was more to indicate to Britain that something needed to be done than to put it on the statute book. (The bill accidentally failed to get through the Legislative Council.) Britain responded that it would not disallow the legislation if passed, but it was inadvisable. Eventually, in 1867 New Zealand passed the Introduction of Convicts Prevention Bill which was assented to.

At the same time, Parliament passed the Foreign Offenders’ Apprehension Bill 1863. This built upon existing British extradition legislation and dealt with offenders crossing the Tasman. The legislation was assented to in spite of legal opinions that it was likely ultra vires and repugnant to English law.

New Zealand remained concerned about such issues. Following doubts about the imperial Extradition Act 1870, New Zealand drew up an Extradition Bill in 1873. Britain refused to assent to it, arguing that New Zealand enact new legislation more closely along the lines of the imperial legislation. The new legislation of 1874 was assented to. In 1879 two cases heard in the New Zealand Supreme Court suggested that the Foreign Offenders’ Apprehension Act 1863 was problematic and indeed ultra vires. The government wanted Britain to deal with the matter; this was achieved by the Fugitive Offenders Act 1881.

New Zealand also needed Britain’s co-operation to deal with its vexed provincial system. The County of Westland Act 1867 transgressed the Constitution Act and was ultra vires, as the New Zealand government candidly admitted. Britain legislated in 1868 to give the New Zealand Parliament greater powers and to validate the Act. This introduced the legal means for the eventual abolition of all the provinces in the mid 1870s.

New Zealand laws continued to fall foul of repugnancy. Britain wanted the Privileges Act 1866 amended. This legislation, rushed through with no debate, exempted MPs from attendance in court during parliamentary sessions. Speaker Monro had been summoned to appear in court. Britain felt that the exemption was too broad and that the Act was not consistent with other colonies and countries. No amendment was forthcoming and Britain did not seem to press the matter. (It is possible the matter was overlooked as a result of the turmoil associated with Governor Grey’s recall.)

Britain also saw problems in the British-Australasian Mail Service Act 1867. The scheme required Britain to contribute half of the cost of the service and it refused to do so. While Britain did not disallow the Act clearly it would not come into operation. It was formally repealed in 1878.

Laws relating to marriage and inheritance were regarded as repugnant. In 1878 Britain refused assent to the Administration Bill because it might affect the estates of those residing outside New Zealand. New legislation of 1879 was assented to. In 1880, the Governor reserved the Deceased Wife’s Sister Marriage Bill. Such legislation had been blocked by Britain on several occasions in Australian States. Britain assented to it despite its conflict with English law.

Britain continued to intervene when it thought that repugnancy was an issue. In 1900, Britain withheld consideration of the New Zealand Ensign Bill until new legislation was submitted to it because of conflict with its ensigns. New Zealand passed new legislation in 1901. This was assented to.
In 1912 Britain again withheld consideration of New Zealand legislation until it had been altered. The Divorce and Matrimonial Causes Amendment Bill had not been reserved by the Governor but Britain regarded it as repugnant. New Zealand had to pass amending legislation in 1913.

The Governor’s reserve powers under scrutiny

There remained important legislative areas related to excessive powers that would come to the fore as New Zealand’s legislation increasingly extended into the wider world, dominated as it was by the British Empire. While fewer bills were reserved and fewer were seen as problematic by Britain it still took a long time for New Zealand to gain full lawmaking powers. In the 1890s the energetic reformist Liberal government and in particular the powerful populist Premier Richard John Seddon espoused an emerging colonial nationalism that questioned the extent of the Governor’s reserve powers.

In the late 1870s the country witnessed a bizarre incident. In 1877 Grey’s new government inherited a Land Bill from the previous government which included contentious provisions that Grey was dead set against. Following his failure to have these clauses taken out, Grey advised Governor Normanby to refuse assent to the bill. Normanby declined to comply. When Grey failed to sign his name to the form advising assent to the Land Bill the Governor in turn withheld his signature from the Appropriation Bill, threatening the future supply of money. Grey was forced to sign the form and the Land Bill was assented to. When Grey took the matter to Britain the Governor’s actions were supported.

In 1883 the New Zealand government came up against the limits of its legislative powers with the Confederation and Annexation Bill that sanctioned such arrangements between New Zealand and Pacific Islands. The legislation was reserved. Britain refused to accept such an imperialistic move and withheld assent from the legislation.

With the Liberal government assuming power in 1891 a confrontation developed between it and the Governor over appointments to the Legislative Council. The Legislative Council, stacked by the outgoing Atkinson government, was blocking key Liberal reformist legislation. Britain endorsed Atkinson’s appointments, but when Liberal Premier Ballance sought to make his own appointments the recently arrived Governor, the Earl of Glasgow, refused to accept them.

Britain instructed Glasgow to accept the appointments and generally to follow the advice of the government unless imperial interests were affected. It was only in extreme and exceptional circumstances that the Governor should act contrary to the government’s advice. The revised instructions concerning the Governor’s relationship with the government contained a subtle but significant shift in emphasis. The previous instructions had said that the Governor could act in opposition to the advice of the government. This was replaced by a statement that the Governor should be guided by the advice of the government, but if he had ‘sufficient cause to dissent’ he could act in opposition to the views of the government. In practice the shift in the Governor’s role was substantial. With regard to legislation, unless imperial interests were obviously affected through repugnancy, the Governor should reserve bills only on the advice of the government.

Despite this shift Seddon, who took over the Premiership from Ballance when he died in 1893, came up against an immoveable obstacle. Britain would not countenance overtly ‘racist’ immigration legislation. Such legislation emanating from the Australasian colonies had proved controversial with Britain in the past as a result of its treaty obligations.

In 1881 New Zealand passed the Chinese Immigrants Bill to limit the numbers of Chinese coming into the country. Britain assented to this reserved legislation. In 1888 the legislation was
amended to restrict entry further. The Governor gave his assent and Britain left the Act to its operation.

In 1896 Seddon brought in the Asiatic Restriction Bill to increase restrictions again. He met with stiff resistance in the Legislative Council which sent a protest to Britain. The Governor reserved the measure and Britain withheld assent from the bill. It suggested new legislation along the lines of the recent South African Natal Act so that the same object was met without being based on colour or race.

Although Seddon temporised and introduced another bill in 1897, he eventually had to accept Britain’s view. In 1899 he brought in the Immigration Restriction Bill, modelled on the Natal Act. The bill was assented to and became the basis of early twentieth-century immigration legislation.

**Trade-offs**

Trade within the Empire became a prime means of challenging Britain’s intervention in legislation on the grounds of imperial interests. Trade became an issue following the recession of the late 1860s at a time when colonies such as the Australian States and New Zealand wanted to expand markets. One way of fostering trade was to agree to reciprocal reductions in customs duties. This became a prime focus of the Australasian colonies. Britain had already lost the battle to prevent Canada passing legislation for reciprocal trade treaties with the USA but wanted to prevent similar developments in the antipodes to preserve its fundamental longstanding policy of free trade and prohibition of differential tariffs.

In 1870 New Zealand passed a Colonial Reciprocity Bill that allowed for favourable reciprocal duties with Australian States. The Governor reserved the bill and Britain withheld assent from it. The extent of the continued British prerogative in this area came under serious scrutiny. Britain argued that the move was protectionist and would greatly weaken the ties between the mother country and its colonies. New Zealand and Australia strongly disputed British opposition. Eventually Britain agreed to preferential agreements within Australasia. This was enabled by the (Imperial) Australian Colonies Duties Act 1873.

Such trade issues reappeared at the first Colonial Conference of 1887 over New Zealand’s proposal to sell frozen meat in France. Similar matters arose at the second Colonial Conference in 1894 at which it was resolved that British legislation should be enacted to enable colonies to agree to reciprocal arrangements and enter into differential tariffs with one another and with Britain.

The issue became tied up with the matter of imperial federation at the 1897 Colonial Conference. Imperial federation was seen as a means of strengthening the Empire. At the 1902 Colonial Conference, Seddon proposed that Britain and New Zealand establish a system of preferential tariffs and the conference endorsed the principle of preferential trade within the Empire. Britain had to stand aside because of its continued commitment to free trade.

New Zealand began to open up the issue of preference within the Empire. When New Zealand introduced the Preferential and Reciprocal Trade Bill in 1903, the Governor refrained from reserving the bill only because the government argued that it was an urgent tariff measure. Britain left the Act to its operation. As a result New Zealand subsequently gave Britain preference in its tariff and made preferential treaties with Canada and South Africa. The Governor was in the same position over the New Zealand and South African Customs Duties Reciprocity Bill in 1906. Britain again decided to leave the Act to its operation.
There was much discussion of preferential trade at the Colonial Conference in 1907 at which colonial governments were for the first time treated equally with the British government. Ward also wanted uniformity of practice in the reservation of bills and the Governor’s instructions to be liberalised. He argued that New Zealand should have the right to make preferential tariff agreements unfettered by treaties or conventions. By now a number of preferential agreements were being negotiated, including by New Zealand.

With the granting of ‘Dominion’ status for New Zealand following the conference, the need to reserve a wide range of legislation was removed. The Governor no longer had to consider various specific grounds for repugnancy. Powers of reservation were only mentioned in passing. However, the Governor still had discretionary powers in a constitutional situation which was increasingly anachronistic.

New Zealand from this point was free to develop its own tariff policy. The Preferential and Reciprocal Trade Act 1903 was repealed by the Tariff Act 1907, through which New Zealand thoroughly revised its tariff schedules to the end of imperial preference. The extent of British preference was greatly enlarged over time.

In our discussion we have now reached that benchmark of Dominion status in 1907. We now turn to the enduring problem of shipping legislation. This was an important ingredient in the Colonial Conference of 1907 that yielded Dominion status.

**Shipping out the problem**

The denouement to the saga of Britain’s role in legislation came with shipping laws. The difficulty involved in regulating merchant shipping in the British Empire, that became a central issue in the mid 1890s, played an important part in New Zealand gaining Dominion status in 1907 and in New Zealand’s eventual complete legislative autonomy with its adoption of the Statute of Westminster in 1947.

Shipping legislation had long been problematic but through much of the nineteenth century New Zealand acquiesced in amending its legislation as required by Britain. The imperial Merchant Shipping Act 1854 allowed colonies to repeal provisions of the Act for ships registered within the colony but also required any such legislation to be reserved. Britain could threaten disallowance of offending legislation, as in the case of the Foreign Seamen’s Act 1858.

Into the 1860s, as steam power was adopted and as New Zealand began to develop its own shipping fleet, colonial legislation became an issue. The Steam Navigation Bill of 1862, was assented to but some issues were noted for amendment by future legislation. The Marine Board Bill of the same year was more problematic. It required immediate amendment. New Zealand dealt with these concerns with the Marine Board Act 1863. Britain remained concerned, as evident in its responses to the Marine Board Act Amendment Bill of 1865 and the Marine Bills of 1866 and 1867. Britain also required the Steam Navigation Bill 1866 to be amended before assent was given. The amended legislation of 1867 was assented to.

The imperial Merchant Shipping (Colonial) Act 1869 helped clarify matters. It allowed colonies to regulate the coastal trade provided that a reservation clause was in the legislation. But this meant that a long list of New Zealand laws, with the last being enacted in 1946, had to be reserved.

The imperial Merchant Shipping Act was re-enacted in 1894. Following this, New Zealand’s shipping laws embarked on a period of difficulty. The Shipping and Seamen’s Act 1896 (assented to by the Governor) fell foul of the Act. Britain required its amendment to limit
application to coastal shipping. Premier Seddon was outraged that some British interests wanted the Act disallowed outright. He argued that New Zealand was within its ‘constitutional rights’ to pass such legislation.

Britain eventually gave way on the understanding that there would be discussions concerning administration of the Merchant Shipping Act. Meanwhile at an Australasian conference in 1897 the various Premiers, including Seddon (who was undoubtedly smarting over his rebuffed anti-Chinese measure), agreed that they should recommend that Britain enact legislation to give the colonial Parliaments greater powers of legislation without reservation.

Matters came to a head following the Shipping and Seamen Bill of 1903 (which repealed the legislation of 1896). This was grudgingly assented to in 1905, just within the two year maximum period and after a great deal of doubt as to which kinds of colonial provisions were repugnant. These matters were addressed at an Imperial conference on merchant shipping legislation in 1907. This focused on New Zealand’s 1903 Act and attempted to produce greater uniformity in such legislation. New Zealand agreed to amend the Act.

New Zealand did indeed amend the 1903 Act in 1909. Despite this it ran into problems. The bill was assented to only on condition that the legislation was further amended. Sections of the Act had to be amended by the Shipping and Seamen Amendment Act 1911.

New Zealand at this time controversially attempted to exclude coloured labour on its ships by the Shipping and Seamen Amendment Bill of 1910. Britain withheld assent until the Imperial Conference in 1911. New Zealand was keen to make progress on such issues at the conference. Prime Minister Ward was very unhappy at the delays in getting assent and stated that New Zealand was much better able to judge what laws suited it than was Britain. Ward pushed the 1910 legislation strongly but to no avail. Britain continued to withhold assent from the bill and it never got onto the statute book.

Ward wanted Dominions to have wider legislative powers regarding shipping. He and the Australian delegation argued over the extent to which Governors had real reserve powers. The debate was revealing. The issue had largely become a semantic one – whether the country believed the Governor had such powers. Australia chose to believe that he did not. New Zealand argued that it was still constrained, as evident in the 1910 legislation.

Despite these contretemps the reality was that New Zealand was gaining more autonomy in its legislating in the wake of becoming a Dominion. While shipping legislation still had to be confirmed by Britain, the 1903 Act remained the basis of New Zealand’s shipping laws. The amending shipping legislation of 1912, 1913, 1922, 1924, 1925 and 1929 was reserved and assented to by Britain without difficulty.

Following the First World War, New Zealand and other Dominions gained in autonomy. The Imperial Conference of 1926 defined the new relationship between Britain and its Dominions. It was agreed that the Dominions were autonomous and equal in status to Britain and not subordinate. Aside from provisions in constitutions or in statutes providing for reservation of bills, a Dominion had the right to advise Britain ‘in all matters relating to its own affairs’. With regard to the legislative competence of Dominions, and specifically in relation to extra-territoriality, British legislation applying to a Dominion would only be passed with its consent. However, the complex issues associated with powers of assent were left to a committee to consider further.

In the end these issues were resolved at a shipping legislation conference in 1929. This conference removed important impediments and opened the way for Britain to pass the Statute of Westminster in 1931. The conference agreed that disallowance could no longer be exercised over Dominion legislation. Dominions could change their constitutions to abolish disallowance if
they wished. The conference also recommended that the discretionary reservation power of Governors-General be abandoned. Where reservation powers existed by statute, such as in constitutional legislation, the advice of the British government to the Crown should not run counter to the views of a Dominion when the Dominion’s own affairs were involved. Dominions should also be able to amend their constitutions so that reservation was no longer required.

The conference observed that the extra-territorial operation of Dominion legislation was a confused area. Britain should legislate to make it clear that a constitutional limitation no longer existed. This required the repeal of the Colonial Laws Validity Act 1865 as it related to Dominion laws. The conference recommended that it should be understood as a constitutional convention that no British law should extend to a Dominion without its request and consent. These changes would give Dominions full legislative powers.

Britain shortly thereafter passed the Statute of Westminster 1931. This gave Dominions, when they chose to adopt the Statute, full powers of extraterritorial legislation and protected them again repugnancy and the extension of British law to their country without their ‘request and consent’. The Colonial Laws Validity Act 1865 would no longer apply to legislation.

But with New Zealand choosing not to adopt the Statute of Westminster for some time, shipping legislation still had to be reserved. This occurred in 1935, 1936, 1940 and 1946. Finally in 1947, after the extra-territorial difficulties experienced during the Second World War and with the example of Australia before it, New Zealand adopted the Statute of Westminster. The assent provisions of the Constitution Act 1852 remained in place but the long process of New Zealand gaining autonomy from Britain had taken another substantial step. Bills were no longer reserved and Britain no longer intervened in New Zealand’s lawmaking in the way it had done in the past. New Zealand was free of the constraints of repugnancy and the extra-territorial effect of legislation.

**Conclusion**

This review of New Zealand legislation indicates the extent to which New Zealand’s lawmaking was enmeshed with Britain over a long period of its history. Some thirteen laws were sufficiently problematic that Britain either disallowed them, refused assent to them or withheld assent from them. Others had to be amended on Britain’s instructions. Britain had a role in a wide range of legislation which was central to the governing of the colony – from the selling of land to the relationship of the provinces to the central government, laws relating to the land wars of the early 1860s, trade, imperial aspirations, immigration, and the regulation of merchant shipping.

By the end of the nineteenth century, New Zealand was less willing to accept such constraints on its legislative activity, but it still took a long time before New Zealand gained full legislative powers. The Governor’s instructions were altered in 1892 and 1907, reducing his powers of reservation of legislation. This was associated with New Zealand attaining Dominion status, which was more than simply a symbolic statement. As a Dominion, New Zealand subsequently had protracted discussions over shipping legislation, associated with the passing of the Statute of Westminster in 1931 and its eventual adoption by New Zealand in 1947.

Britain would use its powers to assent to New Zealand legislation in a variety of circumstances, on occasion bizarre as a result of New Zealand’s politics. Governments could encourage the Governor to refuse assent, as occurred in 1861 and in 1877. Laws could be used as levers to extract legislation out of Britain and conflicts within Parliament could be expressed in problematic laws. Such episodes are part of the colourful history of lawmaking in New Zealand.
But more than this, the exercise of royal assent was part of an enduring and important relationship between Britain and New Zealand which needs to be recognised. This power was an important ingredient in the development of the colony and a vital element in understanding how New Zealand arrived at its present constitutional state. Without this, the story of the movement from colony to independent nation is incomplete and somewhat inexplicable. The change was a lengthy and a gradual process, and British vetting of New Zealand lawmaking was an integral part of this process.

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