The relationship between the social licence and law in the context of the Scottish fracking debate: a textual, thematic and comparative analysis of environmental and planning law governing onshore oil and gas authorisations in Scotland.

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THE RELATIONSHIP BETWEEN THE SOCIAL LICENCE AND LAW IN THE CONTEXT OF THE SCOTTISH FRACKING DEBATE: A TEXTUAL, THEMATIC, AND COMPARATIVE ANALYSIS OF ENVIRONMENTAL AND PLANNING LAW GOVERNING ONSHORE OIL AND GAS AUTHORISATIONS IN SCOTLAND.

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The relationship between the social licence and law in the context of the Scottish fracking debate: a textual, thematic, and comparative analysis of environmental and planning law governing onshore oil and gas authorisations in Scotland.

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Declaration

I, Andrew Jones, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

Abstract

The Governments of the constituent parts of the UK have in recent years considered promoting the exploitation of UK shale formations via fracking in order to recover oil and gas. In all jurisdictions, this has been met with opposition groups citing environmental risks. Various groups have called for either an outright ban on this process or for regulatory reform to address specific concerns. In Scotland, this led to an impasse, with the Scottish Government eventually announcing an 'effective ban' on fracking in October 2017 following an extensive period of moratorium and public consultation.

In announcing its ban on fracking, the Scottish Government cited a lack of 'social licence' for the activity despite expert evidence that the activity could be safely regulated. As the social licence is commonly conceived of as non-legal, the Scottish Government's reliance upon the concept as part of its rationale for banning fracking merits legal analysis. Accordingly, the research considers the relationship between the social licence concept and law in the context of the Scottish fracking debate. Informed by the researcher's use of literal and thematic coding of academic literature as a basis for defining the social licence as an objective concept, this relationship is considered via a textual, comparative content analysis of the environmental and planning law governing onshore oil and gas authorisations in Scotland. The results of this analysis are utilised by the researcher in order to establish and evidence a new model for conceptualising the social licence as capable of acting as a tool of measuring law.

List of Abbreviations

CAR	The Water Environment (Controlled Activities) (Scotland) Regulations 2011
CCSA	Climate Change (Scotland) Act 2009
CE	Community Empowerment (Scotland) Act 2015
CNHR	The Conservation (Natural Habitats &c.) Regulations 1994
COMAH	The Control of Major Accident Hazards Regulations 2015
DO	Development Order
DP	Development Plan
EA95	Environment Act 1995
EASA	Environmental Assessment (Scotland) Act 2005
EASR	The Environmental Authorisations (Scotland) Regulations 2018
EIA	Environmental Impact Assessment
MEWS	The Management of Extractive Waste (Scotland) Regulations 2010
NPF	National Performance Framework
PAC	Pre-application Consultation
PP	Planning Permission
PPC	The Pollution Prevention and Control (Scotland) Regulations 2012

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Contents

Chapter 1 – Introduction

Large-scale reserves of shale oil and gas (hereinafter referred to interchangeably as 'petroleum') exist underground in parts of the UK[1]. Shale petroleum is extracted using hydraulic fracturing, a technique more commonly known as 'fracking'. Citing environmental hazards and social issues[2], numerous medical professionals, scientists, political interest groups, and non-governmental organisations worldwide have called for either a moratorium on fracking to allow for comprehensive study or an outright ban[3].

In Scotland, these concerns led to the Scottish Government announcing in October 2017 that their preferred policy position was not to support the development of fracking, following a public consultation on the topic and moratorium on fracking activities[4]. In announcing this to the Scottish Parliament in 2017, Energy Minister Paul Wheelhouse MSP stated '*there is no social licence for unconventional oil and gas to be taken forward at this time*'[5]. This statement reiterated earlier findings of the Scottish Government that it was '*clear that there is no social licence for fracking...*'[6].

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[1]House of Commons Environmental Audit Committee, *Environmental Risks of Fracking: Eighth Report of Session 2014–15* (Hansard, 2015) p.5 <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/856/856.pdf> accessed 22 April 2019

[2]I. de Melo-Martin, 'The role of ethics in shale gas policies' (2014) 470-471 Science of The Total Environment 1114–1119, pp.1114-1115 <http://www.sciencedirect.com/science/article/pii/S0048969713012321> accessed 22 April 2019

[3]Concerned Health Professionals of NY, *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking*, (2nd edition, 10 July 2014) pp.66-70 <www.concernedhealthny.org/wp-content/uploads/2014/07/CHPNY-Fracking-Compendium.pdf> accessed 22 April 2019

[4]L. Brooks, 'Scotland announces moratorium on fracking for shale gas' (*The Guardian*, 28 January 2015) <http://www.theguardian.com/environment/2015/jan/28/scotland-announces-moratorium-on-fracking-for-shale-gas> accessed 22 April 2019

[5]P. Wheelhouse MSP, 'Unconventional oil and gas: minister's statement', (*Gov.scot*, 3 October 2017) <https://www.gov.scot/publications/unconventional-oil-and-gas-statement-2017/> accessed 22 April 2019

[6]D Griesbach *et al*, *Talking "Fracking": A Consultation on Unconventional Oil and Gas – Analysis of Responses* (Scottish Government, October 2017) p.71 <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2017/10/talking-fracking-consultation-unconventional-oil-gas-analysis-responses/documents/00525464-pdf/00525464-pdf/govscot%3Adocument> accessed 22 April 2019

In October 2019, a further statement on Scotland's unconventional oil and gas policy was made by Mr Wheelhouse MSP to the Scottish Parliament wherein he confirmed the Scottish Government's final policy position was not to support the development of fracking and, instead, effectively ban it:-

> *As a result of our decision fracking can only happen if licences are issued and we do not intend to issue any licences which would permit fracking…To put this position into immediate effect, the Chief Planner has today written to planning authorities across Scotland, stating our finalised policy and confirming that a new planning Direction is being issued in respect of this policy*[7].

In the same statement it was re-iterated that this position was '*based on the evidence on impacts and the clear lack of social acceptability*' demonstrated by the '*overwhelming response*' to Scottish Government consultation that '*there is no social licence for the development of unconventional oil and gas in Scotland*'[8].

The Scottish Government's references to the social licence concept raise a number of questions, such as:-

- What is a social licence?
- How does an activity, operator, or industry gain a social licence?
- Would fracking be allowed if it gained a social licence?
- Does reliance upon the social licence concept imply a critique of the existing

[7] ibid
[8] P. Wheelhouse MSP, 'Unconventional oil and gas: minister's statement', (*Gov.scot*, 3 October 2019) <https://www.gov.scot/publications/unconventional-oil-gas/> accessed 22 November 2021

legal framework in terms of its ability to allow for public participation in decision making?

- What is the relationship between the social licence concept and law?

The current research addresses the above questions, focussing primarily on the question of the relationship between the social licence and law. However, in order that further detail can be provided, the following preliminary questions must be answered:-

1. What is fracking?
2. What are the environmental risks of fracking?
3. How did the Scottish Government reach its decision to effectively ban fracking?
4. What is a social licence?

These preliminary questions are answered below in order that the research project may then be set out in detail.

1.1. What is fracking?

Shale is a fine-grained sedimentary rock within which natural gas commonly occurs[9]. The extraction and production of natural gas from shale differs markedly from conventional forms of oil and gas extraction[10]. Whilst the oil or gas sought in conventional extraction has migrated from its source rock into defined reservoirs or

[9]A. Kibble *et al*, *Review of the Potential Public Health Impacts of Exposures to Chemical and Radioactive Pollutants as a Result of the Shale Gas Extraction Process* (Crown/Public Health England, 2014) p.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332837/PHE-CRCE-009_3-7-14.pdf> accessed 17 September 2015

[10]ibid

traps, shale gas must be harvested from the source rock directly[11]. This requires a different, or unconventional, method of extraction and production, resulting in shale gas being classified an 'unconventional' fossil fuel.

Shale gas is typically methane but may also contain a small amount of other gases, such as hydrogen sulphide, carbon dioxide, nitrogen, and other hydrocarbons[12]. Its composition varies depending upon the geological formation being tapped as well as the temperature and pressure forces that the shale has been subjected to over time[13], and it is extracted via the drilling of a number of wells from a single well pad[14]. A vertical borehole must first be drilled to a prescribed depth, identical to the initial step in conventional drilling[15]. However, once the prescribed depth has been reached, horizontal directional drilling then occurs[16]. Horizontal drilling may occur in various directions from the pad and can extend for thousands of metres from the original vertical borehole[17].

Once the well has been drilled, steel casing pipes are cemented in place along the length of the wellbore to isolate the well from the surrounding geology and groundwater zones found above[18]. A perforating gun is then lowered into the well and used to perforate the steel casing, cement, and surrounding shale formation[19]. This perforation creates small cracks, or fractures, in the rock that allow natural gas to enter

[11]ibid
[12]ibid, p.2
[13]ibid
[14]ibid
[15]ibid
[16]ibid
[17]ibid
[18]United Kingdom Onshore Oil and Gas, 'Drilling and the Hydraulic Fracturing (Fracking) Process' (*UKOOG*, 2013) <http://www.ukoog.org.uk/onshore-extraction/drilling-process> accessed 17 September 2015
[19]ibid

the wellbore[20].

'Fracking fluid', a mixture of water and chemicals, is injected into the wellbore under high pressure to create further small fractures that stimulate the release of more shale gas[21]. This fluid is usually made up on-site from local water supplies or abstracted from a local water course or aquifer[22]. The various chemicals added to the fluid, such as gelling agents, clay stabilisers, friction reducers and acids, improve the efficiency of the process[23]. Small particles, or 'proppants', are also added to the fluid to keep the newly created fractures open; typically sand[24]. Massive quantities of fracking fluid are required, with estimates ranging from 9–29 million litres per well[25].

Whilst a significant proportion of the fracking fluid pumped into the borehole is lost below ground, some fluid, known as 'flowback' fluid, will return to the surface as a high pressure mixture of natural gases, water, brine, minerals and hydrocarbons[26]. Flowback may also contain low levels of naturally occurring radioactive materials[27]. The fraction of flowback recovered varies according to geologic formation, shale properties, well design and the type of fracking fluid used[28].

[20]ibid
[21]ibid
[22]A. Kibble *et al*, *Review of the Potential Public Health Impacts of Exposures to Chemical and Radioactive Pollutants as a Result of the Shale Gas Extraction Process,* p.2
[23]ibid
[24]ibid
[25]ibid
[26]ibid
[27]ibid
[28]ibid

1.2. What are the environmental risks of fracking?

In January 2015, the House of Commons Environmental Audit Committee reported[29] on the associated environmental risks of fracking[30], concluding that extensive use would be inconsistent with UK climate change obligations[31]. Also, specific environmental risks were identified relating to groundwater quality, waste, water supplies, air emissions, habitats and biodiversity, geological integrity, noise and disruption[32].

Certain risks are not singularly caused by fracking. Many other UK industries pose potential hazards to habitats, biodiversity and public health, requiring regulation. For example, whilst fracking presents additional potential for local air pollution from haulage associated with site operations, with projections that a single well might require between 500 and 1250 HGV movements over a 4-week period per well (based on each HGV carrying 30m3 of liquid)[33], increased haulage would be encountered as a result of most industrial processes that exploit natural resources on a comparable scale[34]. Similarly, it may be counterproductive to exploit new fossil fuel sources when commitments have been made to reduce dependency[35].

Derived from the specific nature of fracking as an industrial process, the most pressing examples of environmental risk include:-

[29]House of Commons Environmental Audit Committee, *Environmental Risks of Fracking: Eighth Report of Session 2014–15* (Hansard, 2015) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/856/856.pdf> accessed 17 September 2015
[30]ibid, p.8
[31]ibid, p.3
[32]ibid, p.16
[33]ibid, p.23
[34]Freight Transport Association, *The Logistics Report 2014*, pp.12-13 (PWC, 2014) <https://www.pwc.co.uk/transport-logistics/assets/lr14-report-web-060514.pdf> accessed 17 September 2015
[35]House of Commons Environmental Audit Committee, *Environmental Risks of Fracking: Eighth Report of Session 2014–15*, pp.13-14

- the combination of vast water quantities with toxic, carcinogenic or mutagenic substances[36] which may return to the surface, threatening groundwater[37];
- well leakage and subsurface contamination of surrounding aquifers or private water wells, with spatial intensity of the process heightening both the potential for leaks and their risk factor[38],
- areas with substantial fracking build-out demonstrating high ozone levels and air quality decline[39];
- fugitive methane emissions at levels posing high explosion risks[40]; and
- increased seismic activity[41].

Whilst those presenting to the Environmental Audit Committee were generally in agreement that fracking could proceed safely provided proper environmental safeguards are introduced and adhered to, the Committee concluded that uncertainty remained for two reasons: US regulatory experience, and the fledgling state of the UK industry[42]. The Committee recommended that a more *'coherent'* and *'joined up'* regulatory system be put in place before further fracking activity is contemplated[43].

[36]R. W. Howarth *et al*, 'Natural gas: Should fracking stop?' (2011) 477 Nature 271-275, p.272 <https://www.nature.com/nature/journal/v477/n7364/full/477271a.html> accessed 17 September 2015
[37]C. Mooney, 'The Truth about Fracking', (*Scientific American*, November 2011) p.272 <www.nature.com/scientificamerican/journal/v305/n5/full/scientificamerican1111-80.html> accessed 17 September 2015
[38]E. Cantarow, 'Meet Anthony Ingraffea—From Industry Insider to Implacable Fracking Opponent' (*Ecowatch*, 2 January 2013) <http://ecowatch.com/2013/01/02/industry-insider-to-fracking-opponent/> accessed 17 September 2015
[39]Concerned Health Professionals of NY, *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking*, pp.8-15
[40]S. Osborn *et al,* 'Methane contamination of drinking water accompanying gas-well drilling and hydraulic fracturing' (2008) 108(20) PNAS 8172-8176, p.8173 <http://www.pnas.org/content/108/20/8172.full.pdf> accessed 17 September 2015
[41]B. Walsh, 'The Seismic Link Between Fracking and Earthquakes', *TIME* (New York City, 1 May 2014) <www.time.com/84225/fracking-and-earthquake-link/> accessed 17 September 2015
[42]House of Commons Environmental Audit Committee, *Environmental Risks of Fracking: Eighth Report of Session 2014–15*, p.16
[43]ibid, pp.31-32

1.3. How did the Scottish Government reach its decision to effectively ban fracking?

As already outlined above, the Scottish Government effectively banned fracking in Scotland in 2019 by (1) adopting the position of refusing to issue any licences which would permit fracking, and (2) directing that planning permission for such activities not be given. To understand how this position was reached, we must consider the consultation process undertaken by the Scottish Government from January 2015 to February 2020.

Broadly concurrent with the publication in 2015 of the House of Commons Environmental Audit Committee report on the associated environmental risks of fracking, a moratorium was placed on fracking in Scotland on 28 January 2015. Thereafter, the Scottish Government engaged in a process of evidence gathering involving various Scottish public bodies, and a panel of scientific, economic, health and technical experts[44]. Reports were produced on the following topics:-

- understanding and mitigating community level impacts from transportation;
- decommissioning, site restoration and aftercare – obligations and treatment of financial liabilities;
- understanding and monitoring induced seismic activity;
- compatibility with Scottish greenhouse gas emissions targets; and
- economic impact assessment and scenario development.

[44]The Scottish Government, 'Policy: Oil and Gas – Unconventional Oil and Gas' (*Gov.scot*, undated) <https://www.gov.scot/policies/oil-and-gas/unconventional-oil-and-gas/#:~:text=On%2028%20January%202015%2C%20we,far%2Dreaching%20investigation%20into%20UOG.> accessed 21 September 2020

Across 2016, Scottish Government officials held a series of meetings with stakeholders to give them an opportunity to discuss their participation and engagement regarding unconventional oil and gas, resulting in the publication of a participation commitment report[45]. Health Protection Scotland ('HPS') were engaged to carry out a health impact assessment looking into the potential health risks and wider implications associated with exploration and exploitation of shale oil and gas[46]. Working with others, including NHS Health Scotland and the Scottish Environment Protection Agency ('SEPA'), HPS published their report on 8 December 2016[47].

In January 2017, 'Talking Fracking' invited public views on the evidence of the potential impacts of fracking in Scotland, and on the future of the industry[48]. The consultation received more than 60,000 responses, an analysis of which was published on 3 October 2017[49] alongside the aforementioned ministerial statement setting out the Scottish Government's preferred policy position.

A consultation on a Strategic Environmental Assessment (SEA) and a partial Business and Regulatory Impact Assessment (BRIA) of fracking development in Scotland then ran from October to December 2018, and an addendum to the 2018 consultation documents, after considering the responses, was consulted on over an eight-week period to 25 June 2019[50]. The analysis of the 2018 and 2019 consultations, and the

[45]ibid
[46]ibid
[47]Health Protection Scotland, 'Unconventional Oil and Gas' (*HPS.scot*, 8 December 2016) <https://www.hps.scot.nhs.uk/a-to-z-of-topics/unconventional-oil-and-gas/> accessed 4 September 2021
[48]The Scottish Government, *Talking "Fracking" A Consultation on Unconventional Oil and Gas* (The Scottish Government, January 2017) <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2017/01/talking-fracking-consultation-unconventional-oil-gas/documents/00513575-pdf/00513575-pdf/govscot%3Adocument/00513575.pdf> accessed 4 September 2021
[49]The Scottish Government, 'Policy: Oil and Gas – Unconventional Oil and Gas'
[50]Ibid

consultation responses, were published on 3 October 2019[51]. As already outlined above, a statement on Scotland's unconventional oil and gas policy was also made at this time by Mr Wheelhouse MSP confirming the Scottish Government's final policy position was not to support the development of fracking, effectively banning it.

As part of the SEA process, the Scottish Government published a Post-Adoption Statement (PAS) on 27 February 2020, outlining the '*ways in which the findings of the initial SEA and addendum, and the views expressed by consultees on both documents, have been taken into account within the final policy*'[52].

1.4. What is a social licence?

The Expert Panel consulted as part of Talking Fracking ultimately concluded that '*the regulatory framework is largely in place to control the potential environmental impacts of the production of unconventional oil and gas in Scotland*'[53]. Further, the Expert Panel also highlighted '*the strength and quality of regulation in Scotland'* and noted *'considerable legislative safeguards to ensure that potential impacts are not realised*'[54]. With that in mind, the Scottish Government's decision to effectively ban fracking may appear odd. However, the previously noted references to the social licence concept by Mr Wheelhouse MSP in his ministerial statements on fracking may provide some clarity.

In broad terms, and as discussed in more detail in chapters 3 and 4 of this thesis, the

[51]Ibid
[52]Ibid
[53]The Scottish Government, *Talking "Fracking" A Consultation on Unconventional Oil and Gas*, p.50
[54]Ibid

social licence concept has a metaphorical underpinning that equates regulatory refusal with community opposition in terms of their shared ability to restrict certain activities. In the current research, the impacted activity is onshore petroleum extraction. The metaphor is as follows:-

- When mandated by law, traditional 'legal' licences are awarded by a public authority and authorise the undertaking of certain regulated activities. Such licences are required for an operator to lawfully undertake onshore petroleum extraction, meaning that said licence not being granted *should* be fatal to successful operations.
- A 'social' licence is based upon the assessment of the same activity by societal stakeholders as opposed to public authorities. Societal stakeholders would include members of the public. Though not required for an operator to lawfully undertake petroleum extraction, the absence of a social licence *could* be fatal to successful operations.

The metaphorical underpinning is provided by the usage of 'licence'. In the example of the Scottish Government's decision on fracking, taken at face value the apparent lack of a social licence has been fatal to successful operations. However, had fracking been supported, other ways in which the lack of a social licence could have been fatal to successful operations would have included direct action by members of the public, such as protests and boycotts.

By referencing the social licence concept in its decision making, it could be inferred that the Scottish Government considered public perception to be of equal importance

to law's ability to safely regulate the industry, if not of more importance. However, as discussed throughout this thesis, there are many alternative approaches to the social licence concept. For example, the simple explanation provided above does not attempt to not consider how a social licence may be obtained or assessed, the usefulness of the concept, whether there is any material meaning beyond the metaphor, or questions of disengagement and 'tacit' consent. Further, the above does not consider how the concept could be modelled and measured. Accordingly, whilst the above description of the social licence is helpful as an introduction to the concept, it would be misleading to suggest that the social licence is either capable of a universally agreed upon objective definition or embraced by all as a meaningful concept.

As per the 2017 and 2019 ministerial statements of Mr Wheelhouse MSP summarised above, the stated basis for concluding that there was no social licence for fracking was the content of the consultation responses the Scottish Government received. However, it is not clear from those statements which theoretical approach to the social licence concept, if any, the Scottish Government had in mind when reaching this conclusion. Further, it is also unclear whether the Scottish Government considered any of the criticisms of the social licence concept that have been raised in recent years[55]. For example, the social licence has been described as a '*seductive*' construct which can easily become '*based on rhetoric rather than commitment*'[56].

As shall be seen in chapter 3, one particularly relevant criticism of the social licence is that its invocation undermines traditional legal licences. In relying upon the notion of a

[55] Criticisms of the social licence concept are discussed in detail in Chapter 3 at paragraphs 3.4.1 to 3.4.4
[56] K. Ruckstuhl *et al*, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', p.311

‘licence’, the concept borrows language more traditionally used in legal discourse to describe the involvement of a state recognised system of law operating to grant permissions to the activities of a person or group. Accordingly, reference to a ‘licence’ suggests that a level of importance underpins the concept that is comparable to the significance that stems from obtaining a legally awarded licence. This criticism offers that a policy maker who emphasises the importance of the social licence must be at least tacitly conceding that traditional legal approaches to regulating corporate or industry behaviour by such licences have in some way proved inadequate or failed.

It is also unclear from the 2017 and 2019 ministerial statements by Mr Wheelhouse MSP whether the Scottish Government considered whether the lack of a social licence, however defined and modelled, could be attributable to reasons *beyond* the public perception of the risks inherent in the activity. In particular, whilst their consultation considered how the legal framework would regulate fracking were it to be allowed, there was nothing in the various consultation documents that considered whether a link could exist between the absence of a social licence and the design of the prevailing legal regime isolated from the risks of the activity.

1.5. The Research Project

Given the nature of the research project, the researcher considered it only right to ask the Scottish Government for an explanation of its use of the term ‘social licence’ in its ministerial statements on the future of fracking projects. Therefore, the researcher submitted a request for information to the Scottish Government under both the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 on 6 September 2021. A number of questions were

asked, including:-

1. What was the basis of the Scottish Government's conclusion that there was no social licence for fracking in Scotland?

2. Does the Scottish Government's reliance on the social licence indicate that traditional legal approaches to regulating corporate or industry behaviour by way of licence or permit have failed?

3. To what extent did the Scottish Government consider whether the lack of a social licence, however defined and modelled, could be attributable to reasons beyond the public perception of the activity?

4. Does it follow from the Scottish Government's position on fracking that if the activity can gain and evidence a social licence, it will be supported by the Government and/or have its effective ban removed?

5. Does the Scottish Government have a position on what would need to be done by industry parties to gain a social licence for fracking as an activity?

The Scottish Government responded to the researcher's request on 1 October 2021[57]. The Scottish Government said that Talking Fracking was '*one of the most far-reaching investigations of any government, anywhere, into unconventional oil and gas*'. Further, whilst '*the concept of social licensing was not considered by the Scottish Government in the course of the unconventional oil and gas policy decision making process*', it did

[57]Energy and Climate Change Directorate, 'Parliamentary statement by former Minister for Energy, Connectivity and Islands: EIR release' (*Gov.scot*, 20 October 2021) <https://www.gov.scot/publications/foi-202100236426/> accessed 22 November 2021

feature in some responses to the Talking Fracking consultation. Of the 8,425 substantive responses received, 3,405 were published with the permission of the respondents, Of these, 66 included references to either 'social licence' or 'social license'. In short, the reference to social licence in the Ministerial statement to the Scottish Parliament on 3 October 2019 was in acknowledgement of the use of this term '*by a number of respondents to the Talking Fracking consultation in 2017*'.

Indeed, there has been some supportive academic assessment of the Scottish Government's approach to its consultation on fracking. In 2018, Watterson and Dinan published 'Public Health and Unconventional Oil and Gas Extraction Including Fracking: Global Lessons from a Scottish Government Review'[58]. This paper analysed the Scottish Government approach to consulting on fracking '*from inception to conclusion, and from procedures to outcome*'[59]. Watterson and Dinan note that a '*signal feature of the Scottish review has been the holistic and integrative approach adopted*' which in practice means '*the avoidance of fragmentation of the assessment decision into silos, and full engagement with the public to ensure that a social license exists for any actions take*'[60]. They argue that the process used by the Scottish Government, as well as its results, provide a useful generic framework for related assessments across the globe, and cite the Sottish approach as unique at a national level. Whilst not a perfect mechanism, the Scottish Government approach is assessed by the writers as comprehensive and the '*first truly national assessment of the public health and related implications*' of fracking from which '*lessons can be drawn*'[61].

[58]A. Watterson and W. Dinan, 'Public Health and Unconventional Oil and Gas Extraction Including Fracking: Global Lessons from a Scottish Government Review' (2018) 15(4) Int J Environ Res Public Health 675
[59]ibid
[60]ibid
[61]ibid

However, as per the Scottish Government response to the researcher's request for information, the social licence concept was referred to in less than 2% of the published substantive stakeholder responses. Whilst there remain a significant number of unpublished substantive stakeholder responses, it is difficult to reconcile this statistic with the definitive terms in which Mr Wheelhouse MSP stated that it was clear there was no social licence for fracking. It may be that this position would have been definitively shown to be correct were it possible to directly canvas all members of the public on fracking and mandate that they respond. It is, of course, improbable that any Scottish Government Consultation will ever result in a 100% response rate from all members of the public.

In any event, the central relevant issue for the current research is not whether the Scottish Government position on the absence of a social licence for fracking was correct. Rather, the relevance to the current research is the Scottish Government's invocation of the social licence as a concept. Positioning the lack of a social licence as relevant, and arguably central, to the Scottish Government decision to ban fracking merits significant analysis.

Based on the above, to the extent that a social licence is a pre-requisite for an activity to be lawful, it is important to understand whether a link exists between the social licence concept and the design of the legal system. For example, if such a link exists then it could follow that the Scottish Government should have considered the potential ability of legal reform to improve the prospects for a social licence coming into existence. It is within the legislative gift of the Scottish Government to attempt to reform the legal system, and not easily within their capability to change the risks inherent in

a fracking as an activity. In other words, if the necessity of a social licence is central to fracking being allowed then it may follow that the Scottish Government could consider what more they could do in theory to provide for that social licence to emerge.

Further, by invoking the social licence in its decision making, the Scottish Government has conferred a quasi-legal status upon this concept, elevating it to the level of an ideal standard above and beyond what may be achieved by instead delegating decision making powers to public authorities traditionally trusted to determine whether an activity may be carried out safely. For example, as shall be outlined in Chapter 5, there are specialist regulators and public authorities operating within Scotland who are already tasked with public engagement when deciding whether to permit certain onshore oil and gas activities. If it is the case that there is no social licence for fracking as an activity, it could be argued that this would have been clear to such regulators each time any legal permission central to fracking was applied for given the level of opposition that would have been raised.

In light of the above, the research considers the relationship between the social licence concept and law in the context of the Scottish fracking debate. Informed by the researcher's use of literal and thematic coding of academic literature as a basis for defining the social licence as an objective concept, this relationship is considered via a textual comparative content analysis of the environmental and planning law governing onshore oil and gas authorisations in Scotland. The results of this analysis are utilised by the researcher to establish and evidence a new model for conceptualising the social licence as capable of acting as a tool of measuring law.

From the perspective of a traditionalist approach to law, it will be offered that the social licence is an unobtainable phenomenon. For example, if the social licence concept is defined by reference to decisions being made directly by stakeholders, as opposed to elected representatives or regulators, such a concept may appear *theoretically* achievable but be viewed as ultimately unworkable in practice due, in part, to the plurality of views contained within a stakeholder network. Such plurality would likely result in a practical inability on the part of the network to speak with one voice when a singular decision is required.

1.6 Research questions, aims, and rationale

The following questions were addressed by the research:-

- what is the social licence?;
- can the social licence inform doctrinal analysis of black letter law?;
- can the social licence be used to analyse Scottish law insofar as it relates to environmental law or planning law governing the permissioning stage for onshore petroleum projects in Scotland?;
- what relationship, if any, exists between the social licence and law?;
- if a relationship exists, can it be expressed and understood in a model?; and
- does any utility emerge from the emerging answers to the above?

In responding to the above, the researcher aimed to:-

- critically and comparatively analyse the academic interpretation of the social licence to date;

- critically and comparatively analyse the environmental law and planning law governing the permissioning stage for onshore petroleum projects in Scotland;
- clarify the nature of the relationship between the social licence and law;
- provide a new model for understanding the social licence in a legal context; and
- outline further research consequent to the above.

The researcher's objectives were to:-

- undertake textual and thematic comparative content analysis of academic discourse on the social licence in order to provide objective and empirical evidence of the common themes and language across the multiple definitions and approaches to the concept that exist;
- evidence the rationale for the researcher's chosen approach to doctrinal analysis of Scottish environmental and planning law;
- undertake doctrinal analysis in order to explore, understand, and evidence the relationship between Scottish law and the social licence in the context of onshore petroleum authorisations;
- define and evidence the rationale for the establishment and adoption by the researcher of a new model for understanding the relationship between the social licence and law; and
- develop and demonstrate the potential for further research that builds further on the foundations developed from the above.

Chapter 2 – Methodology

The following provides an explanation of the methods adopted by the researcher and clarifies the rationale underpinning the use of a five-stage process to address the research questions. These five stages consisted of: -

(1) a literature review of the social licence concept;
(2) open coded textual and thematic comparative content analysis of the same literature;
(3) doctrinal analysis of Scottish environmental law and planning law in order to identify legislative provisions concerned with permitting onshore petroleum projects;
(4) comparative analysis of the law identified at stage three to identify any commonality with the codes produced by stage two; and
(5) use of abductive reasoning to provide a new model (termed 'the Spectrum Model') for expressing the relationship between the social licence and law, based upon observations emerging from stage four.

Each stage is detailed below, followed by a discussion of the intended impacts and outcomes of the research, its potential future utility, and its current limitations.

2.1. Methods

2.1.1. Literature review

Stage one of the research began with a desk-based review of academic literature on the origins of the social licence concept, its subsequent development, and its real

world application. Using various online academic resources that provided access to a wide variety of legal and socio-legal journals[62], the researcher searched for terms relevant to the social licence concept. From this initial search, a body of literature emerged which provided the content that was then analysed by the researcher.

The terms used to identify relevant academic research were variations on the term 'social licence'. For example, 'social licence', 'social licence to operate', and 'social licensing' were all searched for across the available online resources. This search produced100s of journal articles and research papers relevant to the social licence concept that were then used as the starting point of the literature review. From that initial identification of materials, an organic approach was taken to identifying further relevant sources. For example, if a previously undiscovered paper was cited as relevant in one of the journal articles highlighted by the key terms search it was located and then included in the literature review by the researcher.

The researcher summarised and synthesised these sources thematically in order to trace the progression of this field of study and identify variance in the definitional approach to the concept. The results of this literature review are summarised in Chapter 3.

2.1.2. Open coded textual and thematic comparative content analysis

As summarised in Chapter 3, the literature review identified significant variance across the different approaches taken within academia to defining the social licence concept.

[62] All sources relied upon by the researcher are listed in Chapter 4 at paragraph 4.1.

Accordingly, in order to produce a definitional basis for the social licence that was objective and acknowledged the academic sources reviewed, the researcher undertook an open coded textual and thematic comparative content analysis of the reviewed literature. This analysis was completed by the researcher using the NVivo software package and is summarised in Chapter 4.

Considering the many different definitions identified at stage one, this stage of the research was undertaken in order to provide objective and empirical evidence of the most common component parts of the social licence concept. Whilst many codes emerged from the initial coding review, the researcher was able to thematically group codes together to reduce the number analysed. This process is explained in Chapter 4, culminating in the identification of the most frequently recurring codes in the literature examined. As a result of the thematic grouping of codes, the most frequently recurring codes were developed such that a definition was produced for each describing in detail what each code meant in the context of the social licence. These four codes, together with their contextual definitions, were subsequently relied upon by the researcher as the basis for examining the relationship between the social licence and law in stage five, i.e. as the loci within which possible commonality or divergence between the social licence and law could be objectively considered.

A further, less-frequently occurring, code was also developed, contextually defined from the thematic grouping of related codes, and taken forward from this analysis. This was done on the basis that the code represented a common theme present in a number of sources that was of clear relevance and importance to the research; that the social licence is tied to going ‘beyond compliance’ with one’s legal obligations.

2.1.3. Doctrinal analysis of Scottish black letter law

The third stage of the research was one of doctrinal analysis in order to:-

(1) identify, analyse, and synthesise the content of Scottish environmental and planning law insofar as it relates to the permissioning stage of onshore petroleum projects; and
(2) consider the extent to which that law shares any commonality with the social licence codes that emerged from the work completed at stage one of the research.

Adopting Vogenauer's framing of comparatist method,[63] the doctrinal analysis undertaken sought to provide a statement of the content of the law insofar as it sets out the rules, procedures, and standards that must be followed where a legal entity seeks permission to carry out onshore petroleum extraction. The researcher relied upon primary and secondary legislation as the sources of law being considered. Again in line with Vogenauer's approach, these sources were judged to be the primary basis from which lawyers operating within each jurisdiction obtain their knowledge of the law and provide evidence for its existence[64]. The law analysed extended almost exclusively to primary sources in the form of black letter legislation that, when enacted, obliges parties to behave in a certain manner[65].

The researcher relied upon the Westlaw and Lexis Nexis online legal research services. These online resources provided the researcher with access to the entirety

[63]S. Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M. Reimen *et al* (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) p.886
[64]ibid, 878
[65]S. Vogenauer, "Sources of Law and Legal Method in Comparative Law, p.879

of UK legislation, including all versions of legislation from commencement date to present date. The researcher also had access to several law libraries across the UK.

Secondary sources were relied upon for doctrinal analysis of the content of the law, including law reform papers and guidance documents created by the Scottish Government and its regulatory agencies. Academic sources were also relied upon, including textbooks on environmental law and planning law in Scotland and online articles summarising specific planning law provisions.

The results of this analysis are set out in Chapter 5.

2.1.4. Comparative analysis of the relevant law

The fourth stage of the research consisted of comparative analysis of the relevant law emerging from the doctrinal analysis undertaken at stage three. A close textual reading of the law was conducted by the researcher with the specific purpose of identifying the extent of any commonality with, or divergence from, each of the five codes that emerged from stage two. This was achieved by considering each separate piece of legislation against the same set of questions developed by the researcher on the basis of the five codes.

The observations that emerged are summarised in Chapters 6 and 7.

Vogenauer references acclaimed comparatist Zweigert's advocation of an approach to defining sources of law for the purposes of comparative law as '*everything that*

shapes or helps to shape the law'[66]. Whilst it is accepted that such an open and holistic approach to what constitutes law would be ideal, restrictions were placed upon the scope of the comparative work undertaken by the researcher for reasons of practicality. Thus, the comparative stage adopted the same approach as outlined in relation to the doctrinal stage of the project in terms of the sources of law being relied upon. Again, the use of primary sources alongside the adoption of Vogenauer's framing of the comparatist exercise ensured that the researcher approached the subject as openly as was pragmatically possible.

2.1.5. Abductive reasoning

The fifth stage of the research used abductive reasoning to provide a new model for expressing and understanding the relationship between the social licence and law based upon the observations emerging from stage four. This new model has been termed the 'Spectrum Model' by the researcher.

Detail on the abductive method utilised by the researcher is provided in Chapter 8. It is then argued that the Spectrum Model explains the stage four observations. Further research exercises are then set out that could be undertaken to further develop this emerging concept.

2.2. Impacts, outcomes, and limitations

Whilst it is not the purpose of this research to advocate for an embrace of the social

[66]S. Vogenauer, 'Sources of Law and Legal Method in Comparative Law', p.879

licence concept by lawmakers, it is worth noting that embracing the social licence does not promise universal consensus. Indeed, it may be that a move towards the increased legal formalisation of the concept enables opponents and proponents to engage in active and purposeful discourse. However, even with greater stakeholder influence, it remains the case that projects could be 'awarded' a social licence where some community stakeholders remain opposed and those individuals or groups are the minority voice. Furthermore, industry may find itself unable to gain project approval despite active and legitimate engagement with the social licence concept.

Thus, the intended impacts and outcomes of this research are instead rooted only in the furtherance of academic understanding of the social licence concept insofar as it interacts with law. There are, of course, limitations that must be acknowledged.

In general, a desk based analysis of something as potentially nebulous as the social licence and its interaction with tangible and defined black letter law results in practical difficulties. For example, it is not possible for the current research to map the distinct social licence of a project because the concept exists as a dense, layered, and multi-tiered idea which reflects the myriad views that can be held by different stakeholder networks in a single community, a term itself which is difficult to define. Accordingly, an alternative approach must be taken to producing an objective and workable definition of the social licence concept that may be reasonably applied within the context of onshore petroleum projects in Scotland.

Furthermore, this research does not seek to grapple substantially with certain key terms that are a part of the literature on the social licence but not in themselves

objective. For example, the research does not consider in substantial detail the true nature of what is meant by the use of ‘stakeholder network’ as a practical alternative to the intangible and subjective use of ‘community’. At the local level it may be that, were a distinct measurement of social licence possible, a geographically defined stakeholder network may be opposed to projects that are proposed to take place within ‘their’ territory, whilst a different geographic community located elsewhere is content with that same project in provided that it does not affect them directly. Similarly, the macro-level social licence that seeks to consider a national stakeholder network, were it possible to be measured, may indicate an overall acceptance of a project insofar as the national perception may be influenced by macro level concerns such as energy security or economic goals over concerns that are viewed by the majority as micro level ‘local’ issues. A number of questions follow, such as:-

- should ‘stakeholder network’ be a term of universal consensus?
- if so, should a stakeholder network be defined at the micro-level or at the macro-level idea of a network existing in a national sense within an increasingly globalised world?
- is there a manner in which both levels can be accommodated?

The above questions are beyond the scope of the research. However, it must be acknowledged that insofar as the utility of the Spectrum Model is predicated upon there being an objective basis to the definition of social licence, it must similarly be predicated on the extent to which other relevant and connected terms can also be determined objectively.

2.3. Ethics

The research presented no ethical issues as a desk-based project.

Chapter 3 – Literature Review

The following Chapter begins by discussing the origins of the social licence, its subsequent development, and real-world application. Thereafter, the review deals briefly with a number of common themes that recur across the academic literature; a topic more substantially addressed in Chapter 4. The review concludes by acknowledging various criticisms of the concept.

3.1 Social licence origin

The origin of the social licence concept is disputed. Boutilier offers that it can be traced to correspondence sent by mining executive James Cooney in 1997[67]. Cooney was the Vice President of External Relations for Placer Dome Inc., a Canadian gold mining company that faced severe criticism over the failure of a tailings dam in the Philippines in 1996 that resulted in the release of toxic mud into a river which subsequently buried a village. Cooney, upon noticing that many mining companies were losing money due to community resistance to new projects, drew comparisons between community opposition and regulatory refusal in correspondence with World Bank officials. The metaphor of the social licence was coined in this correspondence and then used by World Bank personnel at a 1998 conference on mining and the community in Quito, Ecuador[68].

Bice finds an earlier origin in the writing of Shocker and Sethi's, produced approximately forty years prior to Cooney's correspondence, that modern business

[67]R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32(4) Impact Assessment and Project Appraisal 263-272, p.263 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.941141> accessed 19 March 2015
[68]ibid, p.264

requires a '*social contract*' to operate successfully within society[69]. It is Bice's opinion that this theoretical proposition has become progressively visible within business policies, resulting in the modern phenomenon of many transnational corporations publicly declaring the necessity of a '*social licence to operate*'[70].

Whilst the exact origin of the social licence concept is not central to the current research, an important distinction can be drawn between the different origins cited by Bice and Boutilier. Both formulations are undoubtedly similar given their mutual recognition of the impact upon industry of changing societal expectations. However, on the basis that a contract and a licence are distinct legal documents, it is the researcher's position any concept that relies separately upon these terms for metaphorical underpinning must also be distinguishable.

As shall be outlined in the discussion below, there is no universal or objective definition for the social licence across the literature. Rather, it is a malleable and nuanced concept that is approached differently across academia. In such circumstances, where the only common definitional factor across multiple approaches is the use of 'licence' to provide metaphorical underpinning, it follows that the exact choice of metaphor is important. Accordingly, in choosing to frame the interaction between stakeholders and business as akin to a 'contract', Shocker and Sethi's metaphor implies that societal approval of industry can be achieved via bilateral negotiation where both 'sides' are equal participants and agree to rules of engagement. Use of licence as the metaphor suggests something quite different; that societal approval is not something to be

[69]S. Bice, 'What gives you a social licence? An exploration of the social licence to operate in the Australian mining industry' (2014) 3(1) Resources 62–80, p.62 <http://www.mdpi.com/2079-9276/3/1/62> accessed 3 June 2016
[70]ibid, p.63

mutually negotiated and agreed, but something to be unilaterally granted by stakeholders and only where the relevant industry demonstrates their credentials to the satisfaction of stakeholders by reference to the certain criteria.

3.2 Theoretical development

Leaving aside questions of origin and metaphorical underpinning, the social licence concept has gathered momentum in the years following Cooney's 1997 usage.

In 2000, Joyce and Thomson argued that legally awarded rights to explore or mine no longer equated to universal project consent[71]. Using a grounded theory approach, they proposed that gaining a social licence to operate (SLO) was required to gain social acceptance in addition to legally awarded rights. Focusing on Latin American experiences, Joyce and Thomson cited examples in Chile, Bolivia, and Ecuador as evidence of local communities losing belief in government commitments to enforcing environmental law[72], defining the SLO as a '*non-legal construct that cannot be claimed as a product of internal corporate procedures*', instead existing only when a project is seen as having the approval or broad acceptance of society[73]. For Joyce and Thomson, approval or acceptance is said to be achieved where the affected community perceive the operator as legitimate[74].

The backdrop of Latin America is different to Scotland in the extreme, clearly

[71]S. Joyce and I. Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America' (2000) The Canadian Mining and Metallurgical Bulletin 93(1037) <http://oncommonground.ca/wp-content/downloads/license.htm> accessed 6 April 2016
[72]ibid
[73]ibid
[74]ibid

demonstrated where Joyce and Thomson identify problem areas posing significant social risk to Latin American companies as including conflict legacies and a public perception that foreign companies are treated differently[75]. Where societal risks are different, or the long-term stability of a country has been well established, it may be that the community in question will require something other than a perception of legitimacy. Indeed, credibility and trustworthiness were added to Joyce and Thomson's list of required perceptions in 2008, in a paper outlining a cumulative hierarchy model operating to rank each perception in order[76].

At the lowest level of this hierarchy, termed 'basic acceptance', all that is required is the perception of legitimacy for a basic social licence to exist. A stronger social licence, termed 'approval', is gained where operator actions are perceived as both legitimate *and* credible. Joyce and Thomson offer that the highest level of social licence involves perceptions of trust[77].

Building upon the suggestion that a social licence could exist at different levels, Thomson and Boutilier also propose a cumulative hierarchy model in their 2011 paper analysing qualitative interviews with resettled Bolivian villagers about their relationships with a mining operation over a 15 year period[78]. Thomson and Boutilier's model of the SLO is conceptualised as a pyramid, as per the diagram below:-

[75]ibid
[76]R. Boutilier, 'Frequently asked questions about the social licence to operate', p.264
[77]ibid
[78]I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) *SME mining engineering handbook* (SME, 2011) pp.1779–1796

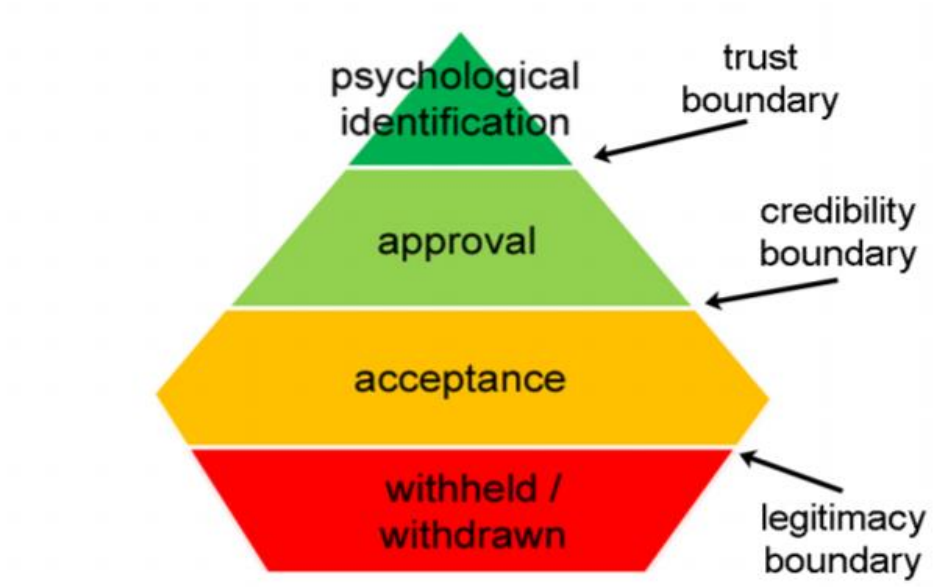

Figure 1: Thomson and Boutilier's Pyramid Model (Source: I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) SME mining engineering handbook)

At the lowest level of the above hierarchy, the social licence is withdrawn. The level above this is termed acceptance, which is followed by approval, which is followed by psychological identification. To move from one level to the next a project must demonstrate, respectively, economic legitimacy, socio-political legitimacy, interactional trust, and, finally, institutionalised trust[79].

In this model, trust is treated as a boundary criterion that, once achieved, permits the emergence of the highest level of social licence, originally termed 'co-ownership' and later changed to 'psychological identification'[80]. Again, Thomson and Boutilier define

[79]R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business' (2012) International Mine Management Proceedings 227-237, p.233 <http://www.stakeholder360.com/Boutilier_Black_Thomson_From_metaphor_to_mgmt_tool_w_AUSIMM_permission.pdf> accessed 6 April 2016
[80]ibid

the social licence as a community's perceptions of the acceptability of a company and its local operations, with the level of SLO granted to a company inversely related to the level of socio-political risk a company faces. For example, a project could face restricted access to essential resources, such as labour and raw materials, if the local community decides to boycott in direct opposition of the project's aims.

Whilst Joyce and Thomson make several suggestions as to actions that a business could take to secure or improve their social licence[81], their aforementioned work presents notable theoretical difficulties. Firstly, their work does not develop the question of measurement, i.e. establishing whether a social licence exists or has been obtained as a result of the implementation of programmes of the type conceived by the researchers. Secondly, Joyce and Thomson infer that a community can hold a singular view[82]. The likely reality is that a multiplicity of views will be held depending on a number of factors ranging from the level of education enjoyed by the community member to their economic and social status, their political persuasion, and whether the project in question offers the individual immediate benefits, such as employment opportunities or a share in profits.

The work of Thomson and Boutilier is particularly important then, in that it offers solutions to the above problems where it provides a potential mechanism for the measurement of a social licence.

Using their hierarchical concept, Thomson and Boutilier first devised a pool of two

[81]S. Joyce and I. Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America'
[82]ibid

dozen statements intended to measure the level of social licence in qualitative interviews with stakeholders[83]. This approach was modified and refined before participants were contacted and presented with a quantitative questionnaire containing each statement that they were asked to agree or disagree with using a Likert scale. Semi-structured interviews followed, allowing the researchers to compare the language used in qualitative interviews with the responses generated by the questionnaire. Through this, the researchers were able to ascertain the nature of each participant's view of the project by reference to their hierarchical model and the social licence of the participant group could be modelled.

The approach taken by Thomson and Boutilier also presents a potential solution to the question of correctly identifying and measuring the views of a single community or social grouping. As the 'community' is not a fixed concept that is transferable from location to location across all contexts, it is flawed to characterise communities as having a singular, measurable, homogenous view. Thomson and Boutilier speak of 'stakeholder networks' rather than communities, adopting a definition of stakeholders as those who could be affected by the actions of a company or who could have an effect on the company[84]. By acknowledging a multiplicity of views, Thomson and Boutilier accept that stakeholders may disagree on the level of social licence granted on a personal level, and that this must be factored in when the general level of social licence is measured.

Thomson and Boutilier are not alone in proposing a model to visually represent the

[83]R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business', p.235
[84]ibid, p.233

social licence. In 2016, noting that '*no comprehensive academic review*' of the social licence had been undertaken[85], Colton *et al* produced a paper summarising the history, definitions, and use of the social licence concept. Alongside the Pyramid Model outlined above, Gunningham *et al's* Three-Strand Model is discussed[86].

Gunningham *et al* propose that companies in '*closely watched industries*' depend upon a multi-stranded licence to operate. In their model, the three strands are 'legal license', 'social licence', and 'economic licence', i.e. the 'demands of top management, lenders, and investors[87]. This model proposes that each strand has a interactive effect. For example, an environmental activist may seek to boycott a product, which would be a denial of the social licence of said product, and at the same time attempt to utilise legal processes to stop the product from being sold. A variation on this replaces 'economic licence' with 'political licence'[88], as per Figure 2 below.

[85]J. Colton *et al*, "Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper" (May 2016) 9 (20) SPP Research Papers, p.8
[86]ibid, pp.12-15
[87]ibid, p.15
[88]J. Morrison, *The Social Licence: How to Keep Your Organization Legitimate* (Palgrave Macmillan, 2014) p.21

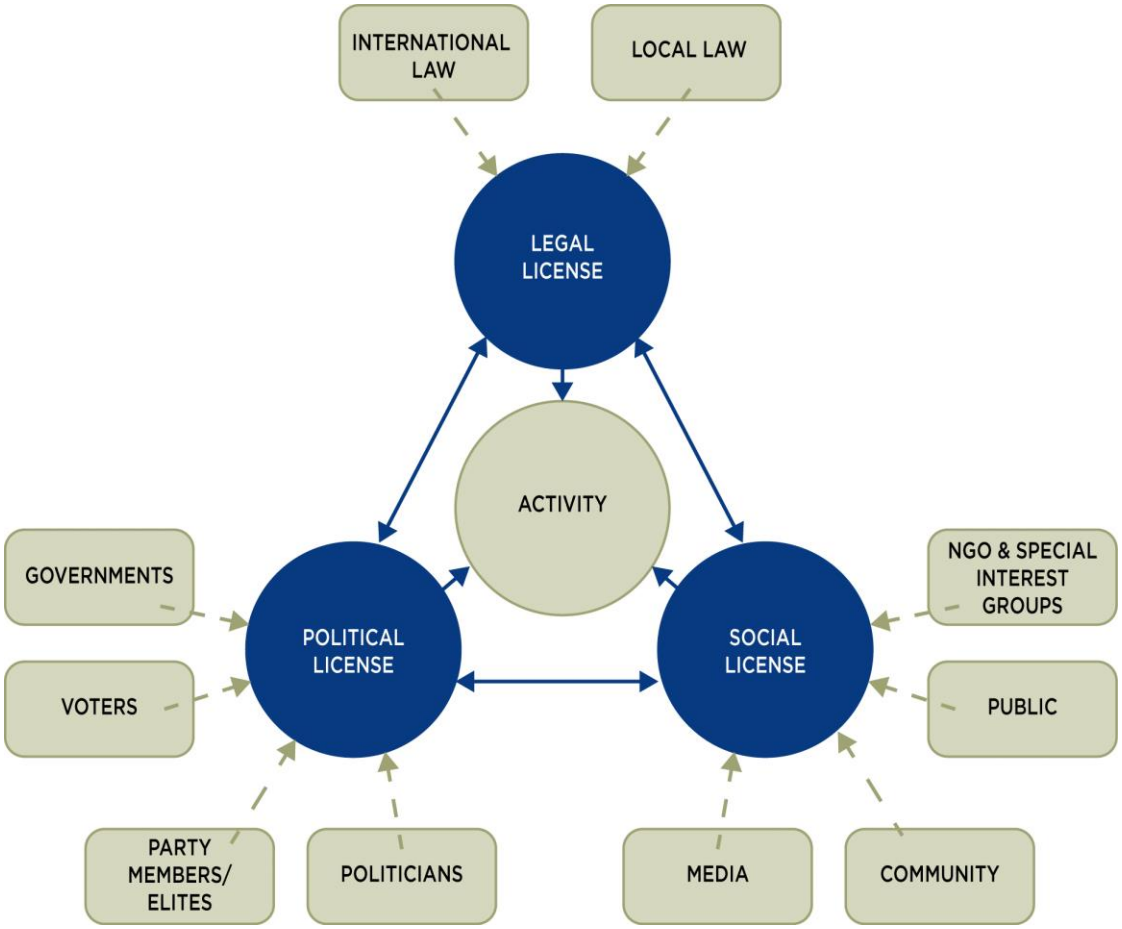

Figure 2: Gunningham et al's Three-Strand Model (Source: J. Colton et al, 'Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper')

The Pyramid Model and Three-Strand Model are not mutually exclusive. The Three-Strand Model focuses on the interaction between the Social Licence and other 'types' of licence without providing as fine detail on the breakdown of the Social Licence concept as the Pyramid Model. Accordingly, the two models could potentially be combined, such that the Pyramid Model provides micro level detail on 'what gives you a social licence?', whilst the Three-Strand Model provides macro level detail on the question of the social licence's interaction with other concepts.

Various other models exist that purport to provide a visual representation of concepts that are arguably the same in content as the social licence. For example, as per Figure 3 below, Wustenhagen *et al's* Triangle Model deals with the inter-related nature of 'social political acceptance', 'community acceptance', and 'market acceptance'[89].

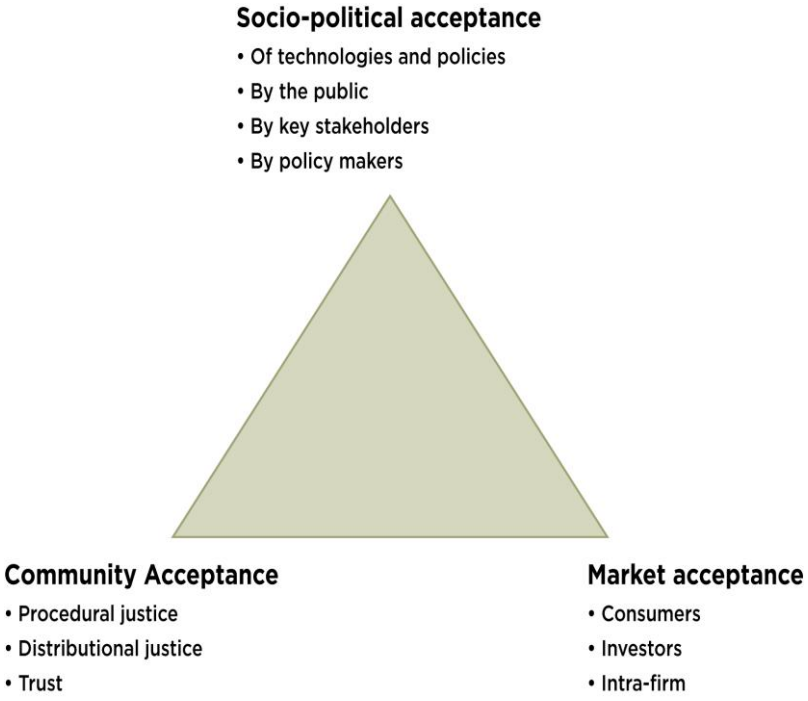

Figure 3: Wustenhagen et al's Triangle Model (Source: J. Colton et al, 'Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper)

However, whilst there is potential overlap with the social licence between all three labels on the above model, it would be wrong to state that any single label entirely captures the social licence as it has thus far been described in the current Chapter. For example, acceptance by the public is included under 'socio-political acceptance' in the Triangle Model alongside a separate label for 'community acceptance'. Similarly,

[89]J. Colton *et al*, "Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper, p.15

consumers are included under the ‘market acceptance’ label of the Triangle Model. Consumers, members of the public, and the community are arguably the same group in many contexts. Although this could suggest that the Triangle Model attempts to be more precise than the social licence concept, i.e. by breaking groups into component parts, it is the researcher’s view that there is sufficient divergence within the Triangle Model that, coupled with the absence of ‘social licence’ as an express term, renders the model distinguishable from the literature on the social licence concept.

The importance of the above point must be stressed. Had the researcher extended the literature review such that potential synonyms of the social licence or similar concepts were also searched for, the body of literature that would have emerged would have been significantly largely than is synthesised in the current Chapter. However, there is scope for further research in this specific area, i.e. to what extent is the social licence as a concept distinct from other concepts that consider how industry must manage its interactions with members of the public.

3.3. Common themes

The above discussion of the origin and theoretical development of the social licence highlights the scope for debate within the concept in terms of how it should be defined and measured. A variety of further definitions are supplemented by different examples of behaviours or processes that can be adopted to either secure or improve a social licence. Despite the presence of different approaches, common themes permeate across the literature. Identified by the researcher, these common themes are set out below as (1) transparency, trust, engagement, and perception, (2) a requirement to go beyond compliance and the social licence as fluid, and (3) practical examples of

'desirable' company behaviours.

3.3.1. Transparency, Trust, Engagement, and Perception

Curran offers that most research into what is required for a social licence to be gained finds transparency, trust and community engagement to be central components[90]. In her discussion of the social licence, she proposes that these three themes are key to achieving legitimacy as they underpin the concept's efficacy on social, environmental and political grounds. These themes are also said to underpin a company's willingness to engage genuinely, transparently and substantively with affected communities; in other words to '*walk the talk*' rather than paying only lip service to social or environmental concerns[91].

Moffat and Zhang's 2013 study of the mining sector found community trust in a company to play a key role in both securing and maintaining a social licence for a project[92]. They concluded that the required trust was comprised of two connected components in the form of '*integrity based trus*t', defined as relating to the perception that a set of principles are being adhered to, and '*competence-based trust*', defined as referring to the view that the trustee has the necessary skills to manage community interest issues appropriately[93].

A direct comparison can be made between Moffat and Zhang's assessment of the

[90]G. Curran, 'Unconventional Gas and Social Licence: Locking the Gate?' in, G. Curran, *Sustainability and Energy Politics* (Palgrave, 2015) p.137
[91]ibid, p.156
[92]K. Moffat and A. Zhang, 'The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining' (2013) Resources Policy 39(1) 61–70
[93]ibid

social licence and the definition used by Thomson and Boutilier given that both approaches emphasise the importance of trust. For Thomson and Boutilier, '*interactional trust*' involves perceptions that a company will listen, respond, engage and exhibit reciprocity with its stakeholders, whilst '*institutionalised trust*' requires mutual respect and regard between stakeholders and companies[94]. Whilst 'integrity based trust' appears to share much with 'interactional trust', there are slight differences. For example, Moffat and Zhang emphasise trust in skills and knowledge whereas Thomson and Boutilier do not.

The positions adopted above also place significant weight on the value of community or stakeholder *perceptions*. This is a crucial point to note in understanding the social licence concept, given that perceptions are not objective and can be based on misconception. This is not to argue that emphasis on perception serves to weaken the potential application of the social licence, although it would not be unreasonable to question the benefit of the concept to industries who may be worried about the impact of misinformation upon their business practices. Rather, it must be understood that the social licence is as much about providing a platform for the challenging of perceptions as it is about basing the assessment of a company's social credentials on perceptions. The above analysis is supported by Prno's 2013 analysis of international cases involving the social licence concept. Prno is clear that there can be no universal '*one size fits all*' approach given that each community is distinctly comprised of unique combinations of a variety of social, economic, and environmental factors that serve to

[94]R. Boutilier and I. Thomson, 'Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue between Theory and Practice' (2011) International Mine Management, p.4 <http://socialicense.com/publications.html> accessed 3 June 2016

condition responses to proposed projects[95]. For example, Prno offers that, while concerns regarding the sustainability of a project may appear to dominate stakeholder concerns and discourse across different projects worldwide, each community is likely to perceive these concerns differently[96]. However, despite this, Prno does offer that there are aspects to the social licence concept that are universal, placing particular emphasis on fairness in the distribution of local benefits and the consultation process[97], alongside relationships based on mutual respect as being key to the attainment and preservation of a social licence[98]. Prno does not suggest that the role played by perception undermines the utility of the concept. Rather, the role played by perception reflects the reality of the situation that businesses must seek to address via a process of transparency, trust and community engagement.

The recurrence of the above themes as being key criteria is reflected in the 2012 work of the International Energy Agency (IEA) in producing a framework labelled the '*Golden Rules*' of the social licence in so far as it is connected to unconventional gas projects[99]. The seven Golden Rules emphasise[100]:-

- the importance of undertaking and disclosing robust research before developments begin;
- careful choice of sites;
- effective well design to minimise disturbance;

[95]J. Prno, 'An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry' (2013) 38(4) Resources Policy 577–90, pp.584-585 <http://www.sciencedirect.com/science/article/pii/S0301420713000810> accessed 3 June 2016
[96]ibid, p.586
[97]ibid, pp.586-587
[98]ibid, pp.585-587
[99]IEA, *The Golden Rules for a Golden Age of Gas: World Energy Outlook: Special Report on Unconventional Gas,* (OECD/ IEA, Paris 2012) <http://www.worldenergyoutlook.org/goldenrules/> accessed 3 June 2016
[100]ibid*,* pp.13-14

- the sustainable management of storage and disposal of chemicals;
- the elimination of venting and minimisation of flaring and other emissions in order to reduce greenhouse gas emissions across the entire extraction and production cycle;
- consideration of cumulative economic, social and environmental impacts on communities; and
- 'beyond compliance' behaviour.

By collating these factors, Curran offers that the IEA framework crystallises a set of behaviours that are intended to increase public confidence in the '*harried*' unconventional gas industry[101]. Curran condenses the rules into three broad legitimacy themes:-

(1) social legitimacy, which includes transparency, accountability, and effective community engagement measures;
(2) environmental legitimacy, which demands adequate studies, disclosure, and monitoring; and
(3) economic legitimacy, which guarantees accurate information about, and sharing of, economic benefits[102].

A 2018 paper by Gough *et al* presents results of empirical research '*with the broad aim of exploring societal responses to CO2 storage, framed around the concept of social license to operate*'[103]. Their results:-

[101]G. Curran, 'Unconventional Gas and Social Licence: Locking the Gate?', p.138
[102]ibid
[103]C. Gough, "Understanding key elements in establishing a social license for CCS: An empirical approach" (2018) 68 International Journal of Greenhouse Gas Control 16-25

show that perceptions of trust and confidence in key institutions to safely manage projects are highly dependent not just on the track record of the organisations but are strongly influenced by past experiences with different technologies[104].

Further, they conclude that:-

familiarity may influence judgements of trust and accountability both positively and negatively; greater familiarity raises the consciousness of an organisation, technology or process, bringing it to the forefront of people's thoughts[105].

Gough *et al* offer eight principles[106] which may help support a social licence:-

1. understand the social context;
2. develop key arguments in context;
3. foster stakeholder networks;
4. grow offline communication networks;
5. establish online communication networks;
6. build trust and confidence;
7. different social licenses at different scales; and
8. maintaining a SLO should be treated as an ongoing process.

It can be seen from the above that differences exist even where the examined literature

[104]ibid., p.18
[105]ibid., p.18
[106]ibid, p.24

on the social licence addresses common themes. However, it would be wrong to describe these differences as a direct conflict or contradiction between researchers in terms of their observations or conclusions. Rather, the differences in treatment of shared themes by different academics are often nuanced and subtle. For example, such differences may reflect the fact that one paper has developed something in further detail which is only briefly commented upon in another paper. As shall be demonstrated below, conflict and contradiction within the relevant literature largely arises where different themes and/or concepts are being addressed.

3.3.2. Beyond compliance and the social licence as fluid

In support of the IEA's final Golden Rule, also common across the literature are themes of 'going beyond compliance' and the social licence as a fluid, malleable construct.

For example, Nelsen surveyed mining professionals and found that 90% viewed the social licence as an intangible and impermanent indicator of the '*ongoing acceptance of a company's activities by communities'*[107]*.* Parsons *et al* also surveyed mining professionals and found the same results, whilst also noting widespread perceptions that legal requirements were below the baseline standard for obtaining a social licence[108]. Examining the social licence as a tool of corporate governance using mining examples from Northern Canada, Prno and Slocombe also found that measures beyond compliance were highlighted as key indicators of success[109].

[107]J. Nelsen, 'Social licence to operate' (2006) International Journal Mining, Reclamation and Environment 20(3) 161–162 <http://www.tandfonline.com/doi/abs/10.1080/17480930600804182> accessed 6 April 2016
[108]R. Parsons *et al*, 'Maintaining legitimacy of a contested practice: how the minerals industry understands its 'social licence to operate'' (2014) 41 Resources Policy 83–90, <http://www.sciencedirect.com/science/article/pii/S0301420714000336> accessed 6 April 2016
[109]J. Prno and S. Slocombe, 'Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories', Resources Policy, 2012, vol. 37, issue 3, pp.346–357

Gunningham *et al* offer that the social licence has become increasingly important in understanding corporate behaviour and identifying the conditions in which corporations willingly go beyond their existing legal obligations to demonstrate their social and environmental credentials[110]. They describe the social licence as a concept of '*considerable significance for policy makers*', opening '*fruitful possibilities for influencing corporate behaviour via regulation that enables civil empowerment*'[111]. However, as a concept of relatively recent origin, Gunningham *et al* are careful to stress that the social licence and its policy implications have been the subject of comparatively little empirical study by students of regulation[112]. It is suggested that economic, socio-legal and policy literature on regulatory administration has largely focused on explaining corporate compliance with existing legal requirements and that only recently, and to a limited extent, has a broader literature begun to evolve[113].

hAs examples of beyond compliance behaviour, attempts to improve public participation and civil empowerment are common across the literature. For example, Bice analyses the ways in which multinational mining companies operating within Australia chose to use the language of the social licence in sustainability reports[114]. From this, Bice characterises the concept as a metaphor that attempts to encapsulate '*values, activities and ideals*' which companies must espouse to ensure successful operation[115]. Noting that '*metaphors require clear boundaries to make them meaningful*', Bice outlines certain minimum standards which would help a company

[110]S. Gunningham *et al*, 'Social licence and environmental protection: why businesses go beyond compliance' (2004) 29 Law and Social Inquiry 307–341, pp.307-308 <http://scholarship.law.berkeley.edu/facpubs/675/> accessed 27 May 2016
[111]ibid, pp.308
[112]ibid
[113]ibid
[114]S. Bice, 'What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry', (2014) Resources 3(1), 62-80
[115]ibid, p.63

obtain a social licence, ranging from upholding basic human rights to minimising environmental harm[116].

Assuming that an acceptable definition can be found by which an operator and its stakeholders are willing to work together, practical considerations about the steps that one should take in going beyond compliance to achieve a social licence inevitably follow. Boutilier *et al* are again helpful where they offer a summary of actions to be taken for an operator to begin to move through their Pyramid Model of the social licence concept. They argue that '*the process of developing and implementing a strategy for gaining and maintaining a social license can be guided by the components of the social license itself*', and that '*the sequence of goals going from no license to the level of psychological identification provides prioritisation while the factors provide substantive guidance in terms of categories of issues that must be addressed*'[117].

For example, Boutilier *et al* comment that stakeholders are unlikely to grant a project a social licence unless they believe they will receive a personal net benefit[118]. This observation is based upon the mixed methodology field work carried out by the researchers as outlined above and, accordingly, has some weight. Such a requirement may, of course, not be provided for by law in the various jurisdictional regimes which operate across the extractive industries. Accordingly, where a company is required to do so in order to obtain a social licence, such a requirement may necessitate that the company go beyond compliance, i.e. that they meet a higher standard of obligation from that which is imposed by law. Potentially positive from a business viewpoint,

[116]ibid
[117]R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business', p.231
[118]ibid

Boutilier *et al* offer that such a benefit need not be financial or even very large, and that some stakeholders are often more concerned about the prestige afforded to their own organisation[119]. From this, it may be that involvement within a consultative process would be viewed as a benefit arising from the project and satisfy the stakeholder.

As an alternative example, Boutilier *et al* note that a social licence at the level of acceptance, as per their pyramid approach, is a precarious licence because it is based only on short-term transactional trust, i.e. comparable to the type of trust exhibited where '*a diner pays for a restaurant meal with a credit card*'[120]. For trust to extend beyond a transaction, Boutilier *et al* offer that the project must be seen not only as legitimate, but also as conforming with local ideas of how a company should behave whilst contributing to the '*well-being of the region*'. To obtain this level, the researchers recommend behaviours in company representatives to '*create social capital*', such as reciprocity, listening, and promise keeping, '*combined in the cycle of listening to stakeholder concerns, planning a solution together, and collaboratively implementing the plan*'[121]. Again, such efforts will typically be beyond compliance behaviours, depending on the legal regime in place.

The work of Boutilier *et al* is impressive in that it represents a genuine effort to shift the social licence from a metaphor into a management tool, via efforts to measure the social licence and '*theorise it within the domain of business strategy and competitiveness*'[122]. However, the approach taken is not without possible

[119]ibid
[120]ibid
[121]ibid
[122]ibid, p.227

shortcomings. Whilst the various steps offered are understandable as solutions to the question of the practical steps that could be taken, the work is relatively silent as to how a third party should observe and asses the interaction between industry and stakeholders in terms of either assessing the fluidity of the social licence-oriented endeavour or the beyond compliance behaviours. For example, collaborative implementation may be, on the face of it, an attractive proposition to those who wish to become more empowered as stakeholders. However, like the social licence, 'collaborative implementation' is capable of multiple definitions and standards depending upon perspective. In other words, whilst Boutilier *et al* offer a practical approach to working with the social licence, it is the researcher's view that their suggestions lead to further questions, not limited to:-

- how collaborative should the relationship be?;
- how can collaboration be measured and assessed?;
- what decisions may be taken unilaterally by a company if collaboration is pursued?; and
- if full disclosure is provided for, is there no longer scope for a 'private' entity to enjoy rights to confidentiality?

The above questions are important not only from the perspective of those who seek to make the social licence work as a management tool, but also from the perspective of businesses weighing up whether they wish to involve themselves with such a process.

3.3.3. Practical application

Harvey and Bice offer a potential response to some of the above. They offer that the social licence concept '*cannot be defined by regulation*' and must instead be specific to individual operations and projects and based upon a site's overall social performance '*on a continuously maintained basis*'[123]. Thus, where it may previously have been acceptable to view community interaction as the responsibility of specialists, Harvey and Bice argue that real success can only be achieved where a company recognises that meaningful social engagement is the responsibility of all employees, and that all at the company understand their role and responsibilities[124]. Advocating a '*whole of business approach*', Harvey and Bice suggest the adoption of the following steps:-

- human resources taking all necessary steps to preferentially employ local people;
- contracting local service and supply;
- designing and deploying site security and access protocols which actively involve local people;
- involving local people in environmental monitoring and mitigation;
- affording local people recognition as custodians of the local landscape; and

[123]B. Harvey and S. Bice, 'Social impact assessment, social development programmes and social licence to operate: tensions and contradictions in intent and practice in the extractive sector' (2014) 32(4) Impact Assessment and Project Appraisal 327-335, p.330
[124]ibid

- management consciously recognising that a great deal of time should be directed to securing social, and particularly local, support for a business as a fundamental business driver[125].

In stressing the importance of context, Harvey and Bice repeat the assertions made elsewhere that the social licence must be fluid enough to be used differently depending upon the circumstances of any one project or industry. However, as shall be demonstrated below, this is not universally seen as a strength of the social licence concept.

In 2020, Górski noted that obtaining a social licence in relation to the extraction of hydrocarbons '*is more relevant than ever'* as public awareness of its impact on the environment and quality of life is constantly increasing[126]. Further, Górski also noted that the social licence:-

> *can be looked at in terms of the involvement of public authorities in the social licensing process, including 1) the legislative works with regard to laws affecting above-listed sectors, 2) the preparation of various plans, programs and/or strategic environmental assessment (SEA) which cover the above-listed sectors, and 3) Environment Impact Assessment (EIA) of specific projects in the above-listed sectors….[and] can be examined through the prism of procedural empowerment of stakeholders, including 1) access to information such as on the progress of the SLO-related legislative process and/or project-*

[125]ibid
[126]J. Górski, "Social Licence to operate (SLO) in the Extractive and Energy Sectors – Introduction" (2020) 1 OGEL

specific environment-related information, 2) public participation in the legislative process, preparation of environment-related plans and programmes…[127]

There has also been some study of the actual impact of the concept upon community and industry engagement when given legal status. For example, Ruckstuhl *et al* considered the use of the social licence as a legal tool in New Zealand in relation to the aquaculture, dairy and mining industries, contextualising the concept in *Te Tiriti o Waitangi*[128], an agreement signed with the Māori population in order to enshrine Māori community rights to articulate planning and permitting concerns[129][130]. The New Zealand procedure allows for Māori communities to articulate their concerns via submissions, cultural impact documents and resource management plans focused on effecting an enduring partnership between industry and community with regards to decision-making and resource use. Identifying that indigenous New Zealanders have often struggled to have their voices recognised, Ruckstuhl *et al* conclude that such legal approaches to enabling the social licence demonstrate what can be achieved when parties in dispute must continue a dialogue, locally and nationally[131]. Whilst outlining that one cannot legislate for social acceptance, Ruckstuhl *et al* conclude that the legal framework of *Te Tiriti o Waitangi* has enabled Māori impact assessment approaches to be taken seriously, a significant step forward in the assertion of Māori rights.

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[127]ibid.

[128]Te Tiriti o Waitangi, 1840

[129]K. Ruckstuhl *et al*, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', 32(4) Impact Assessment and Project Appraisal 304-314 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.929782?journalCode=tiap20> accessed 6 April 2016

[130]The principles of *Te Tiriti o Waitangi* are partnership, reciprocity, mutual benefit, active protection, and redress (see Waitangi Tribunal, 'The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal' (undated) <https://waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf -> accessed 25 May 2022

[131]ibid, p.311

In Ruckstuhl *et al*, the Māori example has been offered as possible evidence of the social licence concept's ability to produce positive and meaningful engagement via legal procedure, i.e. where it is embodied in 'legal' documents such as resource management plans that have a place and weight within the local regulatory framework. A comparison can be drawn here with the use of similar documents in the UK that seek to give voice to social or environmental issues arising from a project, such as the use of Environmental Impact Assessments (EIA) and Social Impact Assessments (SIA). However, the Māori example is unique, not only for the reasons articulated above about the context-specific nature of the social licence and the existence of multiple definitions. Perhaps most importantly, whilst Ruckstuhl *et al* present optimistic findings, indigenous groups are not conventional stakeholders in that they possess historic rights of governance, distinct constitutional entitlements, and incrementally achieved legal protections[132]. Accordingly, the transfer of lessons to a non-indigenous stakeholder group is difficult.

Curran cites a number of practical examples of the use of the social licence in the regulatory decision-making process[133]. The decision of the New South Wales Government to suspend Metgasco's legal licence to operate in May 2014[134] is one such example, with Curran highlighting the justification offered being the company's failure to undertake sufficient community engagement to earn a social licence. Curran explains that the basis of the Government's decision to rely upon the social licence concept, amongst several other reasons, was Metgasco's deemed failure to fulfil a condition of its exploration licence, namely to undertake "*genuine and effective*

[132]ibid, p.312
[133]G. Curran, 'Unconventional Gas and Social Licence: Locking the Gate?', p.147
[134]Metgasco, 'Megasco update' (*Metgasco.com.au*, 20 May 2014) <https://www.metgasco.com.au/asx-announcements/metgasco-update> accessed 25 May 2022

consultation with the community"[135].

However, the use of the social licence in the Metgasco legal setting may be distinguished from the use of documents within a planning and permitting process as described by Ruckstuhl *et al*. Where such documents present an objectively framed account of either the socio-environmental risks of a project or the concerns of stakeholders, the example offered by Curran in this instance sees the social licence being applied as a retrospective concept by which the actions of a company may be judged. Furthermore, where documents attempt to give legal weight to the social licence concept *during* a process of collaboration or consultation, the use of the social licence in the case of Metgasco came *after* the award of a traditional licence following a deemed failure to engage. In other words, the social licence was invoked as a standard by which to retroactively assess a company's outreach attempt.

Curran offers that the size, visibility and political literacy of community opposition contributed to this decision, but also emphasises the difficult position of the Government who were required to take their decision in the midst of a volatile political climate, following damaging investigations into alleged political collusion between the company and some government officials. Curran is clear when she states her view that '*ineffective consultation and community engagement was not confined to the company…It was also mirrored at the government level, reinforcing a perception of government bias towards the industry*'[136].

Given Metgasco's repeated attempts to re-emphasise its legal licence and regulatory

[135]G. Curran, 'Unconventional Gas and Social Licence: Locking the Gate?', p.148
[136]ibid, pp.148-149

authorisation, and its urging of elected officials to respond in kind[137], it is interesting to note that the Government ultimately chose to rely upon the legal licence as the basis to invoke the social licence concept.

The implications of Curran's observations are widespread, as they place a third interested party right at the heart of community-company relations; the political classes. To be clear, Curran does not limit the role of this party purely to elected officials. Rather, in developing her argument, Curran cites the comments of a Green Party MP, outside of government office, who described an anti-coal seam gas blockade as the '*physical manifestation of the social licence*'[138]. Where communities are motivated to rally against something which has been legally permitted to occur by their elected officials, Curran offers that opposition politicians are equally involved in the discourse that arises out of such action.

The above examples of law interacting with the social licence consider only the direct involvement of the state as the driver behind such interaction. However, a further example of such interaction merits a brief mention given its connection to Shocker and Sethi's 'social contract' as relied upon by Bice. Curran offers that some companies and communities opt for security in their relationship via contract law, whereby the respective parties make a bilateral, formal agreement recording each other's obligations and contributions[139]. However, for such bilateral agreements to be legally enforceable, Curran highlights the existence of enabling legislation, citing the example of the rights enjoyed by land-connected indigenous peoples via the Native Title Act in

[137]ibid, p.149
[138]ibid, p.148
[139]ibid, p.142

Australia. Indigenous Land Use Agreements in Australia and Impact Benefit Agreements in Canada are two such examples of this type of interaction between the social licence and law, such that the concept is explicitly referenced in national extraction contracts negotiated with resource developers[140]. It is arguable, however, that a reliance upon contract law is quite different to the social licence as envisaged by much of the preceding theory. As has already been discussed, contract law is reliant upon bilateral negotiation, whereas the metaphorical underpinning provided using 'licence' suggests a unilateral award made by society, albeit that is capable of being influenced by efforts to engage made by a business or industry.

3.4. Criticisms

There are, of course, a number of academics who are critical of the social licence concept for a variety of reasons. For the purposes of the current review, these criticisms are grouped into the following categories:-

- ambiguity;
- bias;
- the social licence as a PR tool; and
- negative impact on legal licences.

The literature addressing the concerns of each category is now dealt with in turn.

3.4.1. Ambiguity

A common criticism of the social licence is its apparent lack of clear criteria and the ambiguity by which it proposes to operate. For example, Beckerman argues powerfully

[140] ibid

that the concept must be more than '*an expression of social values or political preferences disguised in scientific language*' and that, in an ideal world, it would be capable of definition such that '*one could specify a set of measurable criteria*' against which individuals and groups with widely differing values, preferences, or assumptions could be judged[141].

Owen and Kemp also view the social licence concept as rendered problematic by the fact that companies position it as a key challenge '*even in the face of doubt about the operational utility of the term on the ground*'[142]. Further, they argue that '*the industry continues to hold up the idea of a 'social licence' as a plausible and viable construct*'[143] and that there is '*an absence of alternative concepts, or an unwillingness to pursue alternatives that engage the tension between short-term profit maximisation and long-term value for companies and local communities*'[144]. Wood and Williamson make similar criticisms, arguing that the application of the social licence is hampered by a lack of understanding of how its constituent elements determine its power and influence in a full range of contexts[145].

In 2021, Collins and Kumral provided a critical perspective on social licence to operate terminology for '*Canada's most vulnerable mining communities*'[146], noting that the social licence was '*developed to improve the reputation of the mining industry and to*

[141] W. Beckerman, 'Sustainable development: Is it a useful concept?' (1994) 3 Environmental Values 191–209 <http://discovery.ucl.ac.uk/17881/> accessed 3 June 2016
[142] J. Owen and D. Kemp, 'Social licence and mining: A critical perspective' (2013) Resources Policy 38(1) 29-35, p.31 <http://www.sciencedirect.com/science/article/pii/S0301420712000529> accessed 3 June 2016
[143] ibid
[144]ibid
[145] G. Lynch-Wood and D. Williamson, 'The Social Licence as a Form of Regulation for Small and Medium Enterprises' (2007) Journal of Law and Society 34(3) pp. 321-41, p.321 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6478.2007.00395.x/abstract> accessed 3 June 2016
[146]B. Collins and M. Kumral, "A critical perspective on social license to operate terminology for Canada's most vulnerable mining communities" (2021) 8 The Extractive Industries and Society

minimize the risks of communities interfering with mining activities'[147]. They argue that in Canada, '*SLO terminology sometimes conflates dire social issues of many Indigenous communities into a risk reduction exercise focussed on continuing mine operations*'[148]. Ultimately, it is their recommendation that mining companies avoid using general terminology such as social licence and instead should adopt '*tailored, comprehensive, and collaborative approaches to create symbiotic relationships with communities*'[149].

In 2018, referring to the Three-Strand Model, Brueckner and Eabrasu wrote that the social licence is broad and that it is '*tempting to agree*' that it is a '*highly contested concept…with high ethical but limited operational appeal*'[150]. However, they caution that '*the claim for [social licence] would not automatically be dropped by industry only because some scholars argue that it should be done so*' and '*by abandoning the [social licence] we implicitly accept…possible legitimacy gaps*'[151]. It is their ultimate position that '*continued adherence to the SLO, however, requires a greater sophistication of the SLO concept, for example, by way of conceptual broadening, approximation or standardization*'[152].

A 2018 critical review of the social licence of unconventional gas development in Australia by Luke *et al* provides an '*overview of…attendant public reactions…through the lens of the 'social license' concept*[153]'. Of relevance to the current research, this

[147]ibid
[148]ibid
[149]ibid, p.2
[150]M. Brueckner and M. Eabrasu, "Pinning down the social license to operate (SLO): The problem of normative Complexity" (2018) 59 Resources Policy 217-226, p.223
[151]ibid
[152]ibid
[153]H. Luke *et al*, "Unconventional gas development in Australia: A critical review of its social license" (2018) 5 The Extractive Industries and Society 648-662

review highlights '*the importance of procedural justice*' and notes that there are :-

> *many unanswered questions as to why some communities…have been swift to enforce bans on unconventional gas development, while others have not, and as to which socio-economic, political and cultural factors may have a bearing on these divergent states of play*[154].

Given such criticisms and questions, Vogel's research is particularly notable[155]. Vogel cites over 300 global, voluntary frameworks from which companies may choose to report by in order to evidence their social licence, each of which vary in the definitions used. Whilst this could be viewed as a reflection of the context-specific nature of the social licence and the strength arising from its malleable nature, it is understandable why some would adopt the alternative view that it demonstrates the social licence to be nebulous and ill-defined.

It is not unreasonable to hypothesise that the view taken as to whether flexibility is a strength or weakness will stem from the interest group being asked for their assessment. For example, from a business perspective, a great deal of emphasis is placed on certainty, given that financial performance must be forecastable to allow for meaningful project planning. Accordingly, where the situation specific nature of the requirements of the social licence presents itself, it is logical that some would view this to be a weakness or a negative. In other words, if the requirements of the social licence change from situation to situation, how can a company plan its financial outlays and

[154]ibid, p.660
[155] D. Vogel, 'Private global business regulation' (2008) 11 Annual Review of Political Science 261-282 <http://faculty.haas.berkeley.edu/Vogel/private_global_bus_reg.pdf> accessed 3 June 2016

project considerations appropriately? Similarly, how can a company be certain of the outcome of its involvement with the social licence if the concept is ambiguous enough that there are no universally agreed upon and objective standards against which company behaviour will always be judged?

However, from the perspective of a community or stakeholder network, the potential flexibility of the social licence could be seen inversely as a strength. It may be attractive to be allowed to articulate views via a process that does not categorically state what can and cannot be offered as a concern, or the process and form by which such positions must be stated. This is particularly so when it is considered that stakeholders seeking to become involved may have limited experience of advocacy, negotiation, planning, law, or the business world in general. For such a stakeholder, the social licence may be viewed as something which can provide for a level playing field.

It is offered that criticism of the social licence as ambiguous appears subjective. Where some see ambiguity and weakness, others see flexibility and strength. Neither assessment is incorrect, insofar as an objective assessment of the concept does not appear possible at this stage. Rather, both assessments may reflect the valid views of the parties whom the social licence is supposed to engage.

3.4.2. Bias

Criticisms of bias extend from concerns that other concepts are being overlooked in favour of a focus on the social licence, to criticisms that the concept is of limited use to certain business types. For example, in their 2014 paper on the social licence in the context of mining, Owen and Kemp offer that the concept reflects a bias towards local

social issues at the expense of national interests, serving only to limit discussion and debate regarding the role of the minerals industry in sustainable development and poverty alleviation[156]. It is conceded that this tension represents a challenge to the application of the social licence concept. For example, a 'local' stakeholder network may object to a project for environmental reasons that the 'national' stakeholder network may wish to permit for economic reasons. Accordingly, the appropriate framing of the stakeholder network is crucial for this reason.

Wood and Williamson conclude that social licence pressures are unlikely to bring about beyond compliance behaviour in small to medium sized enterprises, instead favouring behavioural change in large, multi-national corporations only[157]. Arguing that the social licence is best characterised as a form of regulation that draws upon norms that regulate behaviour and markets via price, and inferring a quasi-contractual relationship between the offerings of the industry in question and the implicit acceptance by society and/or its constituent groups, Wood and Williamson offer that there are sanctions for failing to comply with social licence conditions[158]. One such example is a company suffering financially should a loss of reputation follow a loss of community acceptance or approval. However, it is posited by the researchers that customers and consumers place greater emphasis on economic issues of price, quality, and availability over environmental concerns. As a result, for SMEs with relatively limited customer base or stakeholder involvement, the social licence is not viewed as a driver on the basis that smaller firms are likely to have less brand image to protect and would, accordingly, be less concerned that certain company choices

[156]J. Owen and D. Kemp, 'Social licence and mining: A critical perspective', p.31
[157] G. Lynch-Wood and D. Williamson, 'The Social Licence as a Form of Regulation for Small and Medium Enterprises' (2007) Journal of Law and Society 34(3) pp. 321-41, pp.338-341
[158]ibid

could impact upon reputation[159].

There are arguments that may be advanced to contest Wood and Williamson's assessment. Firstly, their assertion presupposes a clear separation between economic benefit and environmental protection. This can be unpicked in the context of Scottish fracking, where water is a precious natural resource and the subject of concern in terms of its usage in the fracking process. In this example, short term economic gain must be viewed alongside the economic cost of potential environmental impacts being realised, together with the costs of any clean up that may become necessary. In other words, it appears to be a generalisation to claim that customers and consumers fail to recognise the economic price of environmental damage. Rather, there are occasions where the environmental damage that may follow an accident or negligence on the part of a company may be of such cost to the customer or consumer that it becomes a relevant consideration in the engagement of services or buying of goods.

Secondly, Wood and Williamson do not acknowledge that the emergence of social media and internet activism have dramatically widened the scope for public attention to focus on the actions of companies whose actions may previously have been missed by mainstream media and news outlets. Considering this, it is possible that Wood and Williamson's proposition that the social licence is not a driver for behaviour in SMEs is now outdated, given that even the smallest of businesses can find themselves at the centre of online protest should an issue gain social media or alternative media traction. This observation should be considered alongside a separate assertion made by Wood and Williamson that SMEs differ from large firms because their individual

[159]ibid

environmental impacts are likely to be small. Whilst this assertion may be correct, it would be incorrect to assert that a small environmental impact will always lead to a proportionately small response by society.

In short, it may be that it is no longer appropriate to consider the impact of the social licence upon SMEs only by reference to their direct customer base or stakeholders. Indeed, this suggestion is recognised where Wood and Williamson assert that a firm will lose its social licence both where it accrues disapproval from those sections of society that purchase its goods and services, and if it accrues disapproval from sections that can influence purchasers[160]. As the world becomes more interconnected via increased globalisation and the spread of ever quicker telecommunications, an increasingly larger number of individuals and groups are becoming capable of influencing those who, in previous decades, may have been more difficult to reach. The example of the concerns raised by those who live near fracking sites in the US potentially spreading across the internet and informing the opinion of Scottish stakeholders is particularly relevant to the current research.

A third criticism of Wood and Williamson arises from their suggestion that a social licence can be lost only as a result of the disapproval of sections of society who can ultimately influence others or result in the company in question suffering economically. There is a third category of stakeholder that Wood and Williamson do not address; those who are affected by industry, who may draw no benefit from the goods and services provided, and are unable to influence those who do enjoy such a benefit.

[160]ibid

It is not unreasonable to hypothesise that the level of influence enjoyed by a community stakeholder may be dependent on several factors including age, social status, social network, and basic ability to access representation. For example, an elderly resident in remote area with restricted ability to contact others or make representations would be disregarded by the approach taken by Wood and Williamson in addressing when a social licence is lost. Whilst their approach may be pragmatic, given that businesses may ultimately respond only to tangible impacts, there is a moral element to the appropriate characterisation of a community or stakeholder network in the context of a social licence. Put simply, measuring a social licence based only on those who may influence a company says nothing of the worth and validity of the actual concerns raised by the influencers or, indeed, the actual actions of the company in question. Such an approach ignores the possibility that a company may be motivated to seek out those whose ability to influence is negligible because of a genuine desire on the part of the company to act in a socially conscious manner.

Two recent papers that considered the social licence in a Scottish context are relevant to the above discussion. In 2018, Billing used public comments made on planning applications to gauge the social licence of finfish aquaculture in Scotland[161]. Their results '*reveal the complexities*' of the social licence and *'shows that there are key actors which shape and drive engagement*' within communities that bring into question how much influence local communities actually have in social licence '*negotiations*'[162]. In 2021, Stephens *et al's* comparative case study of the onshore wind energy industry

[161]S. Billing, "Using public comments to gauge social licence to operate for finfish aquaculture: Lessons from Scotland" (2018) 165 Ocean and Coastal Management 401-415
[162]ibid, p.401

in Scotland and South Africa noted the following[163]:-

> *Wind energy companies which seek an SLO therefore must identify whether the communities in which they are operating require consistency with macro or micro interests, which will be governed in part by the developmental stage of the area. In less developed contexts high profile community investment will be a fundamental requirement of the SLO, regardless of the government policies facilitating this. In more developed contexts perceived consistency with national interests will be a necessary, and possibly sufficient, condition for the SLO[164].*

The above excerpts from Billing and Stephens *et al* point to different factors shaping engagement. Whereas Billing refers to key 'actors' shaping drive and engagement, Stephens *et al* refer to the developmental stage of a project as the source of influence that, at least partly, determines the interests of communities. However, both are united on one key point; context is central to the question of influence. From that, it would be incorrect to assume that the criticism of 'bias' can be applied in general terms to the social licence. The issues which the social licence offers to engage with or determine are clearly complex. Where the stakeholder group is large in its number and diverse in its viewpoints, it will be difficult to ascertain exactly who or what exerts influence over those viewpoints.

3.4.3. Undermining legally awarded licences

The social licence is regularly defined by academics as being distinctly 'non-legal'.

[163]S. Stephens et al, "The social license to operate in the onshore wind energy industry: A comparative case study of Scotland and South Africa" (2021) 148 Energy Policy, p.7
[164]ibid., p.7

However, the metaphorical implication of the term is clear. In relying upon the notion of a 'licence', the concept borrows language more traditionally used in legal discourse to describe the involvement of a state recognised system of law operating to grant permissions to the activities of a person or group. In this way, reference to a 'licence' suggests that a level of importance underpins the social licence concept that is comparable to the significance that stems from obtaining a traditional, i.e. legally awarded, licence.

The above formulation of what is meant by a 'traditional' licence represents a view of law that is regulatory, i.e. intrinsically formal and governed by procedure. However, across much of the literature reviewed such traditional forms of regulation are often criticised for not adequately protecting the environment[165,166]. For some, this alleged failure by law has led to the emergence of a 'new' form of regulation that attempts to reconcile traditional legal approaches with an understanding of socio-legal phenomena. For example, Gunningham describes the social licence in such terms, attributing its emergence as a concept to growing support for the view that societal pressure can induce '*beyond compliance*' behaviour in a company or industry, i.e. that social pressure can force operators to go beyond the basic standards required of them by traditional law[167].

However, it would be wrong to present the above characterisation of the social licence as an approach that is universally embraced across the literature. Far from being seen

[165]J. Prno and S. Slocombe, 'Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories' <http://www.sciencedirect.com/science/article/pii/S0301420712000311> accessed 6 April 2016
[166]G. Lynch-Wood and D. Williamson, 'The Social Licence as a Form of Regulation for Small and Medium Enterprises', p.321
[167]S. Gunningham *et al*, 'Social licence and environmental protection: why businesses go beyond compliance', pp.307-308

as an exciting new form of regulation that sits alongside, and potentially improves upon, traditional legal regulation, the social licence is criticised for potentially undermining the utility of law.

For example, Bice offers that much work requires to be done before we can answer the question of 'what gives you a social licence', defining the concept as a metaphor and describing it as an attempt to encapsulate '*values, activities and ideals which companies must espouse within society to ensure successful operation*'[168]. Further, Bice states that '*even metaphors require clear boundaries to make them meaningful*' before going on to outline certain minimum standards which, when demonstrated by a company, would help them obtain a social licence to operate, ranging from upholding basic human rights to working to minimise environmental harm[169]. However, there is a case to be made that many of Bice's minimum standards should already be provided for in a legal system that is designed to protect its citizens.

Crowley is one such advocate of this view. It is his suggestion that the social licence ought properly to be called '*opponent's permission*', in that it is only relevant to situations where a company has run into some form of opposition from an interest group or aggrieved party[170]. Developing this argument further, Bursey notes that the social licence '*tends to relate more to the negative drive of doing what is necessary to avoid the loss of community acceptance…than to the positive drive of striving for*

[168]S. Bice, 'What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry', p.63
[169]ibid
[170]B. Crowley, 'Crowley in the Globe: where does one apply for a 'social licence'?' (2014) The Macdonald-Laurier Institute < http://www.macdonaldlaurier.ca/crowley-in-the-globewhere-does-one-apply-for-a-social-licence/> accessed 3 June 2016

higher standards of social and environmental performance'[171]. Bursey cautions against turning attention to those who would approach the social licence as a form of public veto '*simply because they have the loudest campaign*'[172].

Bursey may be correct to caution against over reliance on the social licence as a tool by which to judge the social credentials of any one industry. Further, Bursey is persuasive when he cautions that the term 'licence' suggests a specific permission when, in fact, many positive developments only achieve a reluctant tolerance from stakeholders, even where dedicated efforts are made to gain acceptance[173]. Similarly, there is also force in the argument that we should not discard the traditional formal process on the belief that direct civil action by public interest groups represents a more democratically sound approach[174]. However, such an approach would be misguided, although it is difficult to find any academic who is in favour of such a suggestion.

There is some force to the argument that a policy maker who emphasises the importance of the social licence must be at least tacitly conceding that traditional legal approaches to regulating corporate behaviour have in some way proved inadequate or failed. For example, those who positively attribute the emergence of 'beyond compliance' behaviour to the social licence concept draw a clear distinction between (1) desirable behaviours undertaken purely as a result of legal obligations, and (2) desirable behaviours undertaken because of the desire for a social licence. In other words, it may be a simple matter of logic that the social licence concept would not

[171]D. Bursey, 'Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries' (2014) 7(2) British Council of British Columbia Environment and Energy Bulletin 1-10, p.1 <http://www.bcbc.com/content/1708/EEBv7n2.pdf> accessed 3 June 2016
[172]ibid, p.3
[173]ibid, p.8
[174]ibid, p.3

have emerged if law alone could satisfy all stakeholders in terms of environmental and social outcomes.

Whilst it is beyond the current research to consider this in detail, it should be noted that there are several reasons why traditional legal approaches could be deemed to be falling short of the standards required by societal stakeholders. For example, the black letter of the relevant legislation is only one factor in the context of a stakeholder's actual ability to exercise their participatory rights in law. A system of law that theoretically serves and satisfies the needs of all relevant stakeholders on paper will fail to meet such standards if access is limited by financial means. Alternatively, if stakeholders are unaware of their rights, or are faced with a subjectively incomprehensible bureaucracy of administrative rules when they attempt to enforce their rights, the relative perfection of the black letter law will be irrelevant. Accordingly, rather than undermine law, it may be that the emergence of the social licence identifies that there is a problem elsewhere within traditional legal approaches to regulation. In other words, it does not automatically follow that it is the social licence which undermines law; it may be that the social licence emerges where stakeholders determine that law is failing them.

3.4.4. A tool of PR

Ruckstuhl *et al* characterise the social licence as a '*seductive*' construct which can easily become '*a commercial risk management 'check-box' approach, based on rhetoric rather than commitment by the developers to authentic community agreement-*

making'[175]. This assessment would appear to be corroborated by Gunningham *et al* 's study of pulp and paper mills and their responses to environmental issues, which found the concept to be key to reputation management[176]. Recent research by Bice is particularly relevant to both critiques.

Using a content and discourse analysis examining 18 sustainability reports by 5 leading Australia based mining companies between 2004 and 2008, Bice captured a critical development period in the advancement of sustainable development and social licence discourse[177]. Her findings suggest that companies define both concepts through three broad areas of interest; the environment, social issues, and community interests. However, instead of framing the social licence as within the gift of the community, most companies framed the concept as an aim or outcome of CSR activities and policies without deeply defining the criteria by which they judge whether such outcomes have been met[178]. Thus, Bice's findings appear to demonstrate that the companies examined paid lip service to the lexicon of the social licence without attempting to deeply connect with the concept.

Parsons and Moffat offer a number of constructive criticisms of the social licence based upon their own discourse analysis of the myriad ways in which the concept is constructed across corporate reports and industry conferences[179]. Via this method, Parsons and Moffat offer that some minerals industry texts *'construct meaning in a*

[175]K. Ruckstuhl *et al*, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', p.311
[176]S. Gunningham *et al*, 'Social licence and environmental protection: why businesses go beyond compliance'
[177]S. Bice, 'What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry', p.62
[178]ibid, p.70
[179]R. Parsons & K. Moffat, 'Constructing the Meaning of Social Licence' (2014) 28(3-4) Social Epistemology 340-363, <http://www.tandfonline.com/doi/abs/10.1080/02691728.2014.922645> accessed 3 June 2016

way that downplays tensions and conflicts', and that the agency role of a stakeholders is left unclear[180]. At the same time, there is also '*much talk of maintaining and sustaining a social licence, but less of one being acquired, and less still of one being denied or diminished*', suggesting a presumption on the part of industry that a social licence will pre-exist and cannot easily be lost[181]. Underpinning this criticism, Parsons and Moffat highlight that the term is used principally by industry and government spokespeople who are able to substantially shape the meaning applied to the concept as a result[182].

Parsons and Moffat conclude that this suggests a need to rethink the appropriateness of the term itself as it does not appear to confer a particularly onerous burden, nor does it comprise the '*shift in power relations that the notion intuitively sugg*ests' [183]. However, it is important to stress that Parsons and Moffat are not of the opinion that the social licence concept ought to be abandoned altogether. Rather, they offer that if the social licence is to deal with what is a complex social relationship between stakeholders and industry, that it should be conceived of as a '*continuum of distinguishing levels*'[184].

There appear to be some limitations in the methods taken by both Bice and Parsons and Moffat. Firstly, in undertaking discursive analysis of corporate reports and industry conferences, the researchers must make several presumptions about the meaning behind the language being used in the analysed texts. Whilst it may be reasonable to

[180]ibid, p.356
[181]ibid, p.357
[182]ibid
[183]ibid
[184]ibid

assume shared lexicon and grammatical choices across a single industry, applying this method to a myriad of industries with their own intrinsic language and understanding may yield skewed results.

Secondly, it is perhaps unsurprising that Parsons and Moffat conclude that their analysis demonstrates that industry shapes the meaning of the social licence concept, given that their methodology required only an analysis of corporate reports and industry conferences. Indeed, the same critique can be applied to Bice. It is not unreasonable to assume that a wider analysis that included stakeholder views of the concept may have resulted in a more balanced assessment of who ‘owns’ or ‘drives’ the social licence concept. Such an analysis may have reduced the evidence upon which it can be claimed the social licence exists as a tool of PR.

Thirdly, and perhaps most importantly, in analysing corporate writing the researchers focus upon the views taken by the authors of the reports who may not be those individuals at the company who are tasked with driving or undertaking the initiatives that are viewed by the company as fulfilling social licence requirements. As a result, it may be that the findings are limited to only the authors of corporate literature and are not applicable to those who are at the front line and, in turn, have more of an impact upon the outcome of a social licence endeavour.

Bursey notes that, between 2007 and 2012, almost every corporate member of the International Council of Mining and Metals, the Mineral Council of Australia, the Mining Association of Canada, and the Prospectors and Developers Association of Canada used the phrase ‘social licence’ in public communications. Accordingly, the concept

appears to have gained traction, either in the form of genuine attempts to evidence social credentials or, as warned of by Bice, as a tool of PR. Indeed, Bursey acknowledges a divide between what project developers view as the social licence, '*the outcome of a commitment to corporate social responsibility*', and what others more often expect as '*something deeper, akin to demonstrable community acceptance*'[185]. Why, then, has the phrase gained such currency? Bursey offers the phrase is appealing as it evokes something for which all organisations strive; the idea of community acceptance.

3.6. Discussion

The social licence is clearly a malleable concept dependent upon perspective and circumstance. Whilst flexibility can be of use, an overly nebulous concept risks being dismissed where it is used by different actors for cross purposes. For example, returning to Bice's research of the use of the language of the social licence in corporate social responsibility reporting, a striking criticism of such reports was the apparent lack of process whereby the company concerned became assured that it had obtained a social licence to operate[186]. Given that much of social licence discourse emphasises trust and legitimacy between stakeholders and potential licensees, such a gap in the reporting appears to be a worrying indicator of the potential that a company may claim to have a social licence when it did little, if anything, to justify such a claim.

The above concern is one of the most basic underlying difficulties the social licence concept faces when its metaphorical underpinning is further explored; if the

[185]D. Bursey, 'Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries', p.1
[186]S. Bice, 'What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry', p.75

comparisons with a conventional licence are followed, who awards or grants a social licence? Similarly, by what procedure and standards of engagement should the licensee be judged? These questions were not addressed by the research.

If the social licence is malleable, nebulous, and capable of multiple different definitional approaches, how is it to be considered in relation to legislation? Traditional legal approaches to regulation are, by their very nature, based upon fixed statutory provisions that, whilst frequently open to interpretation, are intended to be an objective and enforceable black letter statement of process, standards, and roles. Accordingly, whilst a statement of the relevant law can be set out in objective terms, it may appear impossible to set out a comparable statement of what constitutes a social licence. If so, it would follow that the researcher would be uncertain that any examination of law has been undertaken by reference to the social licence concept as it should properly be understood. In other words, in the absence of black letter provisions drawn up by consensus, can the researcher state with any degree of certainty the nature of the relationship of law and the social licence?

It is the researcher's view that, despite the clear malleability of the concept evidenced above, it would be wrong to dismiss its potentially utility because of its allegedly nebulous nature. Rather, from the literature reviewed, it appears clear that a level of objectivity can be established for the purposes of examining the concept in relation to traditional legal approaches to regulation. This is done in the following Chapter via methodical consideration of the frequency with which common language is relied upon to describe the concept across the literature reviewed above.

For example, whilst the labels used may differ across the different hierarchical approaches summarised above, it appears clear from the literature that the social licence does not exist as a binary concept, i.e. with companies either enjoying a licence or being left with no such award. The emergence of a hierarchical approach could easily be misattributed to the concept being overly malleable such that it becomes too nebulous. However, as evidenced by the literature, the concept is rendered complex by the involvement of multiple stakeholders and various, often competing, concerns. Parsons and Moffat develop this argument further where they outline that, in the context of the social licence literature, '*binary notions such as 'approval', 'acceptance' and 'support' become problematic, because they oversimplify complex mental processes of weighing up a multiplicity of impacts and interested parties*'[187]. The continuum approach is supported further by Parsons and Moffat's persuasive observation that a binary definition '*fragments when conceptualised across a multiplicity of context specific issues*' [188]. As outlined above, they are not alone in adopting a hierarchical approach to the concept.

As a final comment on the literature reviewed above, it is the researcher's view that the variety of different approaches to the social licence can be further explained when the concept is recognised as dimorphic in nature, i.e. capable of formalisation as a thing to be obtained by an operator, whilst also existing separately as a measurement of societal acceptance. For example, the social licence of the Māori example, where it provides for indigenous participation in decision making, is both a measurement of the societal acceptance of a project and an objective standard in determining whether a company is permitted to operate. Similarly, in the Metgasco example the reliance upon

[187]R. Parsons & K. Moffat, 'Constructing the Meaning of Social Licence', p.357
[188]ibid

the social licence was based upon its ability to be both a measurement of stakeholder or community views and an obtainable standard by which a traditional licence could be revoked.

Chapter 4 – Coding the Literature

Building upon the general examination contained within the preceding literature review, the following Chapter details the researcher's approach to establishing objectivity and form in the social licence concept for the purposes of examining its relation to traditional legal approaches to regulation. Accordingly, this Chapter sets out the approach to, and results of, a textual and thematic content analysis of research discourse on the social licence. From this analysis, objective and empirical evidence emerges of common themes and language that exist used across multiple definitions and approaches to the social licence concept. Once established, the common themes and language that emerge are utilised by the researcher as the basis for an objective definition of the social licence to emerge and inform the analysis of traditional legal regulation that follows in the remainder of the thesis.

A combination of comparative content analysis and further literature review was used as the basis for the work set out in this Chapter. This was completed by the researcher using the NVivo software package and an open coding approach.

The coding work detailed below was completed by the researcher in July 2019. In the period from July 2019 to publication of this thesis, the researcher monitored available academic and research literature pertaining to the social licence to determine whether the coding work required to be updated. In line with the literature review set out in Chapter 3, such literature continued to be published. However, in line with the researcher's comments on saturation provided in sub-section 4.2.1. below, it was determined that the relative volume of new material compared to the material already

coded was such that any impact from further coding work would likely be of no consequence upon the findings set out below. In other words, the literature examined post completion of the coding did not appear to be sufficient or material enough to impact upon the researcher's conclusion, outlined below, that saturation had been reached in July 2019.

4.1. Sources

Using various online resources that provided access to a wide variety of academic journals, the researcher searched for terms relevant to the social licence concept. From this initial search, a body of literature emerged that was subsequently widened via an iterative process and which provided the content subsequently analysed.

Searches for source material were performed using the following online resources:-

- Science Direct – a source containing c.16M articles and self-described as '*the leading platform of peer-reviewed literature…built on the widest range of trusted, high-quality, interdisciplinary research…*'[189];
- Taylor & Francis Online – the online platform of the Taylor & Francis Group, '*one of the world's leading publishers of scholarly journals, books, eBooks, textbooks and reference works*.'[190];

[189]Elsevier, 'Science Direct' (*Elsevier.com*, 2021) <https://www.elsevier.com/solutions/sciencedirect> accessed 13 June 2021
[190]Taylor & Francis, 'About Taylor & Francis' (*Taylorandfrancis.com*, 2021) <https://taylorandfrancis.com/about/> accessed 13 June 2021

- Wiley Online Library – hosts c.6M articles and self-described as *'the world's broadest and deepest multidisciplinary collection of online resources covering life, health and physical sciences, social science, and the humanities.'*[191]*;*
- MDPI – an online collection of *'204 diverse, peer-reviewed, open access journals [that] are supported by over 35,500 academic editors.*[192]*';*
- Oxford Academic – the online platform of the Oxford University Press which '*prides itself on being both a part of and a partner in the academic community*' and '*publishes the highest quality journals and delivers this research to the widest possible audience*'[193];
- Cambridge Core – the online platform of academic content from the Cambridge University Press providing access to c.1.6M journal articles and 36,000+ books, and self-described as *'the central destination for academic research'*[194]*;*
- Springer Link – an online platform for Springer Nature containing circa 12.9M resources and self-described as *'a global publisher dedicated to providing the best possible service to the whole research community*[195]*';*
- JSTOR – a digital library providing access to c.12M academic journal articles, books, and primary sources in 75 disciplines[196];
- ResearchGate – a social networking site for researchers to share academic papers[197];

[191]Wiley Online Library, 'About Wiley Online Library' (*onlinelibrary.wiley.com*, 2021) <https://onlinelibrary.wiley.com/> accessed 13 June 2021
[192]MDPI, 'About' (*mdpi.com*, 2021) <https://www.mdpi.com/about> accessed 13 June 2021
[193]Oxford Academic, 'About us' (Oxford University Press, 2021) <https://academic.oup.com/journals/pages/about_us?> accessed 13 June 2021
[194]Cambridge Core, 'About' (Cambridge University Press) <https://www.cambridge.org/core/about> accessed 13 June 2021
[195]Springer Link, 'Springer Link' (*Springer Link*, 2021) <https://link.springer.com/> accessed 13 June 2021
[196]JSTOR, 'About JSTOR' (*JSTOR*, 2021) <https://about.jstor.org/> accessed 13 June 2021
[197]ResearchGate, 'About' (*ResearchGate,* 2021) <https://www.researchgate.net/about> accessed 13 June 2021

- Emerald Insight – the online portfolio of Emerald Publishing Limited, containing *'over 300 journals, more than 2,500 books and over 1,500 teaching cases'*[198]*;* and
- Google Scholar – a web search engine that indexes the full text or metadata of online academic journals and books[199].

An initial search for the following terms on the above platforms was carried out by the researcher; social licence, social license, social licence to operate, social license to operate, social licencing, social licensing, and SLO (a commonly used acronym of 'social licence to operate'). This initial search yielded a significant number of results. For example, searching only for social licence on ScienceDirect yielded 1,109 results across several different sources from 1972 to 2019, the vast majority of which were research articles (886). Alternatively, searching for the same term on Taylor & Francis Online yielded 640 articles across a similar date range. Accordingly, the researcher had to refine and reduce the material to achieve (1) a manageable number of texts, that (2) were relevant to the subject matter and discipline.

The first step taken was to cross reference the search results of each separate online resource to remove duplicates. Following this, the date range for the search was then narrowed down to approximately 20 years, beginning from the most cited origin of the term as set out in the preceding literature review; James Cooney's apparent first coinage of social licence in 1997[200]. As a third step, the search was further narrowed

[198]Emerald Insight, 'Who we are' (*Emerald Publishing*, 2021) <http://www.emeraldgrouppublishing.com/about/index.htm> accessed 13 June 2021
[199]Google, 'Google Scholar' (*Google*, 2021) <https://scholar.google.com/> accessed 13 June 2021
[200]R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32(4) Impact Assessment and Project Appraisal 263-272, p.263

by restricting the search terms to the specific fields of title, abstract, and keywords. As a fourth step, the search was also further narrowed to include research articles only.

As a final step, the search was further narrowed by restricting the context within which the concept of the social licence was being considered. For example, the researcher discovered several articles referencing the social licence concept in the context of medical intervention. Accordingly, the researcher narrowed the terms of reference of the search to specifically cover only those areas that were deemed to be of most relevance. This resulted in a slightly different search being undertaken on each resource, as the search options offered differed.

For example, Taylor and Francis online offered the option to filter search results by specialist subject and the following were chosen – (1) law, (2) earth sciences, (3) economics, finance, business and industry, (4) environment and agriculture, (5) environment and sustainability, (6) social sciences, (7) urban studies, and (8) humanities. As an alternative example, the following subjects were filtered for using JSTOR – (1) business development studies, (2) labour and employment relations, (3) management and organisational behaviour, (4) language and literature, (5) philosophy, (6) law, (7) environmental science, (8) agriculture, (9) communication studies, (10) environmental studies, (11) public policy and administration, (12) sociology, and (12) urban studies.

The above approach to refining and refocusing the initial search resulted in 62 papers being identified and taken forward by the researcher. These papers are listed in Annex 3.

4.2. Review

The 62 papers identified by the researcher were loaded into NVivo, a qualitative data analysis computer software package designed for qualitative researchers working with rich text-based and/or multimedia information, where deep levels of analysis on small or large volumes of data are required.

Coding was performed in NVivo 12 by a single coder. Each document produced by the above search was read in full once with the primary purpose of identifying the main areas of the document that dealt with the question of defining a social licence. A first run of coding was undertaken as part of this first read through of the document, with a second run of coding undertaken on a second read through focussed on those areas identified in the first. A third run of coding was undertaken utilising the search function contained within the software. This allowed the researcher to search the text for specific codes, and references to social licence, social license, social licence to operate, social license to operate, social licencing, social licensing, and SLO. It is offered that three iterative coding runs has allowed for more certainty that the material has been fully coded and understood.

An open coding approach was initially used by the researcher. Open coding has been described as '*an essential methodological tool for qualitative data analysis*' and an '*intensive interplay of an interpretive or interrogatory and often intuitive process between researcher and data*'[201]. Through open coding, raw data is analysed in order that distinct events, incidents, words, or phrases in the data can be given conceptual

[201]A. Mills et al (eds), *Encyclopedia of Case Study Research* (SAGE Publications, 2010) pp.156-157

labels or identifiers[202]. Thereafter, such labels or identifiers can be grouped together to form categories and subcategories, with each representing a '*unit of information with properties that can then be examined*'[203].

In other words, open coding is an analytical process wherein textual data is broken up into discrete parts and labelled (i.e. 'coded'[204]) allowing the coder to continuously compare and contrast different sources of data via a process of collation. For example, if two sources of data are coded by a single researcher adopting a uniform coding approach, the codes that emerge from this exercise may then be examined to consider the extent to which common language or themes exist across the two sources.

In the current research, the codes were taken from the actual language used within the text as opposed to being generated by the researcher's attempts to simplify or condense language. Whilst it is offered that this approach allows for subtlety to emerge and a nuanced understanding to be gained in a subject matter where such aspects are key to the debate around the concept, the overarching reason for this approach was the scientific importance of reflecting the actual words used within the text as opposed to the meaning that those words may convey. This better allows for an objective coding approach to be taken that can be repeated by others[205]. The meaning conveyed by words is subjective to the reader and the aim of this part of the research is to, so far as it is possible, add objective universality to the work. As will be explained below, thematic grouping of codes was undertaken in parallel.

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[202]ibid
[203]ibid
[204]*"A code in a qualitative inquiry is most often a word or short phrase that symbolically assigns a summative salient, essence-capturing and/or evocative attribute for a portion of language-based or visual data"* – see J. Saldaña, *The Coding Manual for Qualitative Researchers* (SAGE Publications, 2013) p.3
[205]A. Brymen, *Social Research Methods* (Oxford University Press, 2008) pp.288-289

The researcher coded each text solely insofar as that text dealt with the question of defining a social licence. This meant that the texts were coded both where they sought to summarise the state of academic writing to date, and where they sought to differentiate from, or add to, academia on the concept. As a result, concepts from those texts which are most regularly cited across the literature coded by the researcher appear more regularly in the data. The researcher actively chose to adopt this approach. For example, if Text A was the first to define the social licence in terms of 'engagement', where that text was referred to in subsequent academic literature coded by the researcher it was also coded again into the dataset produced. The purpose of this was not to objectively confirm which definitions have gained most traction. Rather, the purpose of this research exercise *in general* was to establish the number of occurrences of each code across the sample material, even where the usage was a reference to another paper, to establish which codes appeared most frequently.

The above represents the approach taken to 'positive' definitions of the concept, i.e. texts which accept the social licence as an established phenomenon capable of definition. However, the researcher also coded each text for examples of 'negative' definitions of the concept, i.e. where the existence of the social licence as a phenomenon is questioned, critiqued, or deemed incapable of definition. This approach was taken on the basis that (1) the researcher does not attempt to define the concept himself, (2) there is value in understanding what commentators say the social licence is not as much as there is value in understanding what commentators say the social licence is, and (3) the researcher does not wish to take a position on whether the social licence as a phenomenon is a positive or a negative.

4.2.1. Saturation

Whilst 62 papers were loaded into NVivo for the purposes of coding, the researcher ultimately coded 30 papers before saturation was observed. This observation was based upon analysis of the data available to the researcher in the context of the purpose of the coding exercise, i.e. objective identification of the most frequently recurring codes, as opposed to identification of any and all unique codes that could be discovered from the entirety of the available material.

After paper 30 was coded, the researcher observed that no new codes had been created from paper 25 onwards. Upon review of the remaining material, it was identified that only a limited number of new codes would likely be created if coding were to continue. Furthermore, it was identified that the cumulative impact of further coding would either result in a broadly uniform increase in frequency regarding existing codes already identified by the researcher, or a negligible increase in the frequency of specific codes. This was determined from the data already collected, i.e. the most frequently appearing codes were unlikely to change given the volume of appearances in the literature already observed.

After paper 30 was coded, 546 codes were listed in NVivo 12 as the cumulative total of all codes created from each source. Once repeat codes were removed, this resulted in 349 unique codes being listed before any attempt was made to further reduce the number by grouping codes thematically or by objective synonyms. After a process of thematic grouping and grouping by synonym, it became clear that the most frequently recurring codes would not be altered. It was determined that continued coding would have no meaningful impact upon the statistical significance of the data already

gathered given the purpose of the coding exercise. This process of thematic grouping and grouping by synonym reduced the number of codes to 51.

As the purpose of the coding was to identify common components of the social licence across the literature, it was also considered that the utility of the research would not be adversely impacted if a more frequently observed component was inadvertently missed. This was on the basis that the completed coding at source 30 provided objective evidence that the codes accurately captured appeared with such frequency across the literature that it would be reasonable to state that they were commonly cited components of the social licence concept. In other words, any analysis based upon the codes as a representation of the commonly cited components of the concept would still be legitimate even if a more frequently appearing code could have been included within said analysis. Whilst not a reason in of itself to cease coding, considering the observations outlined above regarding the likely insignificant statistical impact arising from further coding, this consideration formed part of the researcher's determination that saturation had been achieved *for the purposes of the research.*

4.2.2. Results

A table of results is provided in Annex 4 that contains the 51 codes produced the process thematic grouping and grouping by synonym referred to above. Each code is listed with its corresponding frequency in terms of (1) sources found to include the code, and (2) the aggregate number of instances each code was found across the sources. Table 1 below represents the top 8 results obtained when the data is sorted by the number of sources coded to include each specific code out of the sample of 30

(8 results are shown on the basis that 5 results were tied on 18 sources).

Code	**Number of sources that included code (x/30)**	**Cumulative frequency across all sources**
Acceptance	25	69
Trust	21	53
Communities	20	41
Legitimacy	18	60
Criticisms	18	59
Environment as special	18	46
Stakeholders	18	30
Approval	18	22

Table 1 – Literal coding results (Source: current research)

As an indication of the most frequently appearing codes, the above results are potentially misleading on the basis that there were multiple codes in the data that conveyed similar concepts that, if grouped together, would change the order of the data shown in Table 1. For example, whilst ‘Stakeholders’ was coded in 18 out of 30 papers on an objective and literal coding approach, it could be grouped with multiple other codes that convey a similar concept such as ‘Communities’, ‘Society’, ‘Stakeholder Network’, and ‘Affected Groups’. Accordingly, the codes were grouped thematically under a single parent code, and the top 5 results in terms of frequency are shown in Table 2 below:-

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Consent (Parent Code)	27	145
Stakeholders (Parent Code)	26	114
Engagement (Parent Code)	21	77
Relation to Law	24	71
Trust	21	53

Table 2 – Thematic results (Source: current research)

To allow for the original meaning of the terms as used within the literature to be retained and taken forward alongside a thematic grouping approach, it is important to breakdown the parent codes as per tables 3 - 6 below.

As discussed in further detail below, the terms ‘parent code’ and ‘child code’ are used to distinguish between the same label being applied to a literally observed code and a thematically grouped code. For example, in Table 3 below consent appears as both a parent code where it refers to the cumulative total and frequency of all codes thematically grouped under consent as a label. At the same time, as consent was literally coded it also appears in Table 3 as a ‘child’ code.

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Consent (Parent code)	27	145
	Consisting of	
Consent (Child code)	5	41
Acceptance	25	69
Approval	18	22
Social Licence as tacit	6	7
Withheld	3	3
Psychological Identification	3	3

Table 3 – Consent parent code (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Stakeholder (parent code)	26	114
Consisting of		
Stakeholders (child code)	18	30
Communities	20	41
Society	9	16
Public	6	11
Stakeholder network	6	9
Civil society	5	5
Affected Groups	2	2

Table 4 – Stakeholder parent code (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Relation to Law	24	71
Consisting of		
Connected to Law	12	34
Separate to Law	12	20
Beyond Compliance	11	17

Table 5 – Relation to Law (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Engagement (Parent code)	21	77
	Consisting of	
Engagement (Child code)	11	16
Relationships	9	15
Communication	6	25
Consultation	5	6
Informed	5	7
Partnerships	4	4
Shared Values	2	2
Collaboration	1	2

Table 6 – Engagement parent code (Source: current research)

Trust was not grouped thematically with any other code as it appeared across a significant number of sources as a single code in its own right.

4.2.3. Why focus on the 'Top 5' Codes?

The purpose of the research was to understand the relationship between the social licence and law, as opposed to developing a universal definition that considers all aspects of the various definitional approaches used across academia. Whilst all literal codes could have theoretically been taken forward to the next stage and examined in the context of a legal system, it was the researcher's view that:-

1. this was impractical due to the volume of literal codes created; and
2. the purpose of the research would still be served by relying upon the most frequently cited components of the concept.

Further, in grouping the codes thematically, it was also considered that the top 5 codes presented in Table 3 actually consisted of 26 connected codes when separated out.

4.2.4. Why group codes thematically?

As has already been observed, the question ‘what is a social licence?’ produces an answer that is complex, malleable, and often appears nebulous. Whilst this reflects the nature of the concept, it was the researcher’s assessment that any analysis of black letter law by reference to the social licence would be limited in the absence of an objective and tangible concept to ‘search for’ within the legal texts being examined. In particular, the researcher was mindful that the selection of one academic definition over a competing definition risked applying artificial weight to one conceptualisation of the social licence over several others. Alongside the coding exercise, the researcher grouped codes thematically in order to mitigate this potential problem and allow for objective definitions to be established that could be relied upon for the purposes of the examination of law summarised in Chapters 5, 6, and 7.

Upon completion of the coding, the various codes produced were reviewed to identify those codes which could, *prima facie*, be related. This review was based on the language used in the sources coded, i.e. whether there were codes that appeared together frequently or utilised the same component concepts. However, the approach

taken to identifying each parent code varied depending upon the concept being considered.

For example, in relation to the ‘Consent’ parent code, potentially related codes were identified and a broad definition was arrived at to act as a guide for identifying further related codes. From grouping ‘Consent’ with ‘Acceptance’ and ‘Approval’, the researcher considered that ‘Consent’ as a parent code could be broadly defined as *‘a stakeholder signalling or giving permission for something to happen*’ as this was the key definitional aspect shared by all three. Upon identifying a guide definition for the parent code and grouping together all related codes that were covered by the guide definition, a more detailed definition of the meaning behind the parent code subsequently emerged.

For the avoidance of doubt, the researcher did not seek to codify the approaches to defining the social licence concept or attempt to simplify its complex nature. Rather, the researcher adopted a process whereby the data could ultimately be expressed in a tangible and objective manner. This was deemed an important requirement given that several sources were observed to be dealing with substantively similar concepts that, if not grouped thematically, risked being relegated to the lower level of the data set in terms of frequency and representation. For example, if the related concepts of ‘Acceptance’ and ‘Approval’ were not thematically grouped they could be viewed as a less important definitional component of the social licence concept compared to a more straightforward component that appeared regularly across the sources considered.

The various approaches to identifying a suitable parent code where codes have been grouped thematically are set out throughout the analysis that follows.

4.3. Consent

Code	**Number of sources that included code (x/30)**	**Cumulative frequency across all sources**
Consent (Parent code)	27	145
	Consisting of	
Consent (Child code)	5	41
Acceptance	25	69
Approval	18	22
Social Licence as tacit	6	7
Withheld	3	3
Psychological Identification	3	3

Table 3 – Consent parent code (Source: current research)

As shall be seen below, ‘Consent’ as a parent code is markedly complex when compared with the other codes identified as constituting the rest of the ‘Top 5’ codes found. Accordingly, a large volume of the material below focusses on properly addressing how consent is understood across the source material. As the remaining codes, which are addressed separately, are relatively simpler to understand in comparison, less space is devoted to analysis of their constituent child codes.

As outlined above, the researcher adopted ‘Consent’ as the name of the parent code even though there was a literal code already termed ‘Consent’ within the available data. This was done on the basis that it was clear from the language used that, although consent was not always expressly referred to, the concept being discussed could be thematically grouped with others under this broad thematic heading. Accordingly, a separation is made between ‘Consent (Parent Code)’ and ‘Consent (Child Code)’ where it is only the child code that represents express references to the concept of ‘consent’.

For example, in their examination of the social licence in the context of the Peruvian Bagua tragedy, de Jong and Humphreys provide that *‘By demonstrating consent, subordinate groups introduce a moral dimension to power relations by granting social approval to the exercise of power by those who wield it.’*[206] In this context it should be noted that the writers explicitly set out the type, form, and level of consent that they believe is required; ‘social approval’. Accordingly, this source was coded separately for both ‘consent’ and ‘approval’ at the child code level on the basis that the writers, albeit briefly, treat the two concepts as separate, i.e. consent is demonstrated by granting social approval. In the same source, de Jong and Humphreys provide that *‘A principle of international law that is particularly relevant to input legitimacy (or procedural fairness) is free, prior and informed consent (FPIC)’*[207]*.* It should be noted that in this quote the type, form, and level of consent is not referenced. Accordingly, this source was coded for ‘consent’ at the child code level without any coding as to the type, form, and level of consent.

[206]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru' (2016) 89 Forestry 552, p.554
[207]ibid, p.555

The above approach was repeated across the literature. For example, in their consideration of the extent to which the social licence could be informed by social acceptability research in Australian forests, Ford and Williams also write about consent without going into detail about the type, form, and level of consent. In a review of relevant literature, Ford and Williams set out that there are two broad ways in which the 'metaphor' of a social licence is used to describe relations between business and society; *'the first is a more instrumental use describing social relations in positive terms, and the second involves a more morally based concern with the relationship between business activities and social expectations*[208]*'.* Ford and Williams then provide that these *'two uses of the term have been linked to different types of social contract, consent-based and more justice-based, respectively.'*[209]*.* That there may be different types, forms, and levels of consent is not considered. Accordingly, this source was coded under 'consent' without any coding as to the type, form, and level of consent.

It should be clear from the above that the approach taken to literal coding of the source material was based on the actual words used. What may not be apparent is the approach taken to the thematic grouping of each objectively arrived at literal code. Firstly, as outlined above and demonstrated by de Jong and Humphreys, there were some sources where consent was referred to as a concept alongside type, form, and level as a separate concept. Secondly, where the type, form, or level of consent was referred to on its own in the source without any prior establishment that the writer believed themselves to be dealing with the concept of consent, the researcher

[208]R. Ford and K. Williams, 'How can social acceptability research in Australian forests inform social licence to operate?' (2016) 89 Forestry 512, p.513
[209]ibid

considered the language used by the writer and their framing of the concept when deciding whether to code the source under the parent code, using the 'guide' definition of consent set out above. From this, a consistent picture emerged via iteration of those concepts that could be grouped together thematically as dealing with 'Consent (parent code)'.

As 'Consent (child code)' only appeared in 5 of the 30 sources reviewed, and most often in conjunction with another thematically linked code, its main use was as a guide for the purposes of thematic grouping of other linked codes.

4.3.1. Acceptance

Of the 30 different sources coded, the idea of acceptance as a part of the social licence appeared most frequently, cited in 25 sources on 69 occasions. Common to each source was the idea that without public acceptance it is very difficult for operators to be effective or profitable. Also common to each source was the idea that acceptance is based upon a stakeholder weighing the benefits and negative impacts of the activity and using that as their basis for whether to grant acceptance.

For example, Moffat and Zhang[210] state their belief that acceptance by the public and various stakeholders has become essential for mining operations and the industry more broadly in Australia, a view supported by Everingham[211] and Yongvanich and

[210]A. Zhang and K. Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia' (2015) 44 Resources Policy 25, p.26
[211]J. Everingham, 'Towards social sustainability of mining: The contribution of new directions in impact assessment and local governance' (2007) 57 Greener Management International 2007 91-103

Guthrie[212]. In their examination of Australian citizens, they write that:-

> *public attitudes toward mining, most particularly how citizens perceive mining associated benefits and costs, should be important considerations for successful mining developments and mining related policy making*[213]*.*

From this starting point, they are able to produce a conceptual model that explains the process that underpins a public stakeholder's selection of and weighting of the benefits and impacts of developments, which in turn, influences the extent to which they are willing to offer acceptance. Their key conclusion can be summarised as follows:-

> *as long as benefits are perceived as outweighing costs, there is sufficient reason for the public to view mining activities favourably and accept them…On the other hand, if mining activities create negative impacts that impinge adversely upon individual and societal wellbeing, and the public perceive that such costs outweigh the benefits, public support for mining developments is likely to decrease due to more negative attitudes*[214]*.*

Moffat and Zhang are not alone in forming this conclusion. De Jong and Humphreys outline that a community is *'more likely to grant a SLO to mining projects if the business provides benefits to the local community, such as employment opportunities'*[215]. Similarly, Heikkinen *et al* state that the acquisition of a social licence does not '*rest on*

[212]K. Yongvanich, and J. Guthrie, 'Legitimation strategies in Australian mining extended performance reporting' (2007) 11(3) Journal of Human Resource Costing & Accounting 156-177
[213]A. Zhang and K. Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia', p.27
[214]ibid
[215]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru', p.555

legal facts' but is instead dependent on a clear acceptance from the wider public[216]. It is offered that by framing the social licence in this way, Heikkinen *et al* are tacitly placing emphasis on what the public view is as a *perception* of a contestable reality away from what other stakeholders or operators may wish to present as a legal, observable, objective fact. This would place Heikkinen *et al* firmly in line with Gehman *et al* who, in their comparative analysis of newspaper coverage of fracking wastewater practices, expressly state that acceptance is directly informed by stakeholder perception; *'Although there is no single consensus definition of SLO, it is generally defined as the extent to which a project, company or industry is perceived by stakeholders as being acceptable and legitimate'*[217].

Gehman *et al* provide that a company obtains a social licence once it has gained the '*broad acceptance of society to conduct its activities*'[218]. They too describe the process of reaching acceptance on the back of a balancing exercise of risk and reward, concluding that oil and gas operators and regulators can '*better tailor their strategies and policies*' by '*understanding which stakeholder concerns are most salient in particular places and times*'[219]. Therefore, alongside the idea that acceptance is based on a risk versus reward analysis, there also emerges the view that context is key. This view is repeated in *Constructing the Meaning of the Social Licence*, when Parsons and Moffat write that the social licence is typically theorised as comprising ongoing acceptance or approval, and that *'social acceptance for mining activities is increasingly*

[216]H. Heikkinen *et a*l, 'Challenges in acquiring a social licence to mine in the globalising Arctic' (2013) 52 Polar Record 399, p.400
[217]J. Gehman *et al*, 'Comparative Analysis of Hydraulic Fracturing Wastewater Practices in Unconventional Shale Development: Newspaper Coverage of Stakeholder Concerns and Social License to Operate' (2016) 8 Sustainability, p.2
[218]ibid, p.4
[219]ibid, p.18

conditional and tenuous'[220]. Again, the context within which acceptance is sought is key.

As referred to in the preceding literature review, it is also worth noting that the prevalence and frequency of these terms is largely linked to the influential work of Thomson and Boutilier who, in 2011, identified three normative components to the social licence (legitimacy, credibility, and trust) and four levels of social licence (withdrawal, acceptance, approval, and psychological identification)[221]. Thomson and Boutilier believe acceptance to be the lowest level of social licence which can be obtained by a project. Acceptance in this context can be both tacit and express. Where it is express, acceptance is based on a project being seen as legitimate.

Other academics have broadened the scope of acceptance beyond the above terms. For example, rather than a tentative willingness to let the project proceed, Jijelava and Vanclay are clear that acceptance should be defined to include circumstances when '*local communities are not actively opposed to a project*'[222]. It is offered that this goes further than Thomson and Boutilier in that it extends the definition of acceptance to include those who could be against a project proceeding but have not actually done anything to communicate their opposition. Whilst this failure to communicate opposition could be linked to a host of reasons not related to willingness on the part of the opposed person (e.g. disability restricting opportunity to meaningfully oppose, lack of resources, lack of forum, etc), Jijelava and Vanclay's approach to this opens the

[220]R. Parsons and K. Moffat, 'Constructing the Meaning of Social Licence' (2014) 28 Social Epistemology 340, p.341
[221]I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) *SME mining engineering handbook* (SME, 2011) pp.1779–1796
[222]D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model' (2018) 73 Environmental Impact Assessment Review 31, p.32

door to tacit acceptance through inaction being an accepted form of consent under the social licence.

It is also worth noting two further consistent threads across the source material that are linked; the ideas that (1) acceptance must be gained or achieved, and (2) acceptance must be maintained. For example, Prno & Slocombe write that a social licence for a mining project exists when it has *'the broad, ongoing approval and acceptance of society'* and that a social licence is *'issued by society as a whole'*[223]. In a similar vein, Ford and Williams present the social licence as a useful metaphor and focal point for those seeking to find new ways to achieve ongoing acceptance[224].

Tied to this, Salzmann *et al* conceptualise the social licence in terms of the degree of match between stakeholders' expectations and the company's actual behaviour, again suggesting that it is through engagement between these two distinct phenomena that the level of social licence is established[225]. This is supported by the work of Parsons and Moffat, who found that '*quality of interactions between company personnel and community members, and procedural fairness were stronger predictors of trust and acceptance than perceptions of impacts'*[226]*.*

Owen and Kemp also utilise a definition of the social licence that allows for tacit signals

[223]J. Prno and D. Scott Slocombe, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 Resources Policy 346, p.346
[224]R. Ford and K. Williams, 'How can social acceptability research in Australian forests inform social licence to operate?, p.512
[225]O. Salzmann *et a*l, 'Corporate License to Operate (LTO) – Review of the Literature and Research Options' (2006) CSM Project Forum for Corporate Sustainability Management Forum for Corporate Sustainability Management IMD International Institute for Management Development IMD <https://studylib.net/doc/8811124/corporate-license-to-operate--lto--%E2%80%93-review-of-the-litera...> accessed 10 June 2020
[226]R. Parsons *et al*, 'Integrating impact and relational dimensions of social licence and social impact assessment' (2014) 32 Impact Assessment and Project Appraisal 273, p.274

that there is a presence or absence of a critical mass of public consent[227]. They offer that this may range from reluctant acceptance to a relationship based on high levels of trust, in line with the writing of Thomson, Boutilier, and Joyce. They are clear that a social licence only exists where industry has earned it.

Heffron *et al* go further than others when they write that *'At its simplest the 'social licence to operate' (SLO) refers to an energy company's' obligations to achieve societal acceptance of their activities'*[228]. By citing obligations, Heffron *et al* open the possibility that the social licence is not voluntarily obtained nor freely awarded. Rather, the social licence in this conceptualisation can be arrived at via a company satisfying a pre-defined checklist of various duties regardless of stakeholder response. Gallois *et al* support this in *The Language of Science and Social Licence to Operate* where they provide that it is industry response *'combined with their previous track record for responsive practice*' that ultimately determines their legitimacy[229].

4.3.2. Approval

Based on what is outlined above, the fact that approval appeared in 18 out of 30 sources coded, and at a much lesser frequency than acceptance, can now be explained.

Firstly, whilst acceptance has been defined by some academics to include the absence of opposition, approval as a concept must include a form of action by the person who

[227]J. Owen and D. Kemp, 'Social licence and mining: A critical perspective' (2013) 38 Resources Policy 29
[228]R. Heffron *et al,* 'The emergence of the 'social licence to operate' in the extractive industries?' (2018) Resources Policy, p.1 <https://www.sciencedirect.com/science/article/pii/S0301420717304786> accessed 10 Jun 2020
[229]C. Gallois *et al*, 'The Language of Science and Social Licence to Operate' (2016) 36 Journal of Language and Social Psychology 45, p.46

is being deemed to be approving a project. Thomson and Boutilier are proponents of this view, stating that the approval level is '*characterised by stakeholder support for the project and a resistance to the ideas disseminated by critics of the project*'[230]. If acceptance includes tacit consent, acceptance by its nature becomes broader in terms of the number of stakeholder responses to a project it must include.

Secondly, in the various models which conceptualise the social licence as a concept with multiple levels, forms, and types of consent, if approval is a step up from acceptance in terms of the 'strength of the social licence' it would make sense that it is achieved less frequently by operators seeking a social licence. This is on the basis that, as has been observed above, many academics characterise the social licence as something that must be earned in an increasingly contentious space.

If one considers the social licence as a concept wherein consent is expressed at differing levels, much of the analysis of the academic writing on acceptance is transferable to the extent that approval is seen as the next stage in the evolution of a project or industry's social licence. In other words, to reach approval a project or industry must first reach acceptance and build from there. Accordingly, what was written previously on the connection between legitimacy and acceptance, the fact that acceptance must be earned, and the ongoing nature of the engagement required, should conceivably also be pre-requisites for the earning of a social licence based on approval.

[230]R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business' (2012) International Mine Management Proceedings 227-237, p.233 <http://www.stakeholder360.com/Boutilier_Black_Thomson_From_metaphor_to_mgmt_tool_w_AUSIMM_permission.pdf> accessed 13 June 2021

The above is reflected across the writing where the reference to acceptance is made in tandem with the reference to approval. For example, Joyce and Thomson are cited by Boutilier as making the first attempt to define the social licence in 2000[231]. He outlines that they provided a definition which proposed the social licence to exist when a project is seen as having '*the approval, the broad acceptance of society*'[232]. Alternatively, where approval is written about in isolation from acceptance, it is still tied to those same concepts of engagement, earned, and maintained, as demonstrated by Heikkinen *et al* where they write that approval is only achieved by '*actively communicating your intentions and plans and what the impact of your business will have on the surrounding community*'[233]*.* It is offered that this lends further credibility to the researcher's decision to group these concepts thematically.

In Baumber's paper '*Energy cropping and social licence: What's trust got to do with it?'* the social licence is again said to be:-

> *based on an analogy with a formal regulatory licence, evoking the idea of an approval process that must be followed, a set of conditions that must be met and a degree of certainty that is provided to an activity's proponent*[234]*.*

Baumber's reference to a set of conditions that must be met is noteworthy. A traditional legal licence can itself be designed to be more or less onerous and prescriptive on the licence holder. When this is understood, and the idea of the social licence as

[231]ibid
[232]ibid
[233]H. Heikkinen et al, 'Challenges in acquiring a social licence to mine in the globalising Arctic', p.406
[234]A. Baumber, 'Energy cropping and social licence: What's trust got to do with it?' (2018) 108 Biomass and Bioenergy 25, p.26

analogous is maintained, it is possible to conceive of a more prescriptive and onerous process being part of the explanation as to why there is a difference between acceptance and approval as levels of the social licence awarded to a project or industry. As one licence holder may have separate obligations to another licence holder under the same legal regime, one social licence holder may have fulfilled different obligations to another social licence holder such that they were able to obtain a social licence that was different in its 'degree of certainty'.

Returning to Thomson and Boutilier's identification of three normative components of the social licence (i.e., legitimacy, credibility, and trust) and four levels of social licence (i.e. withdrawal, acceptance, approval, identification with the project psychologically), the substantive difference between acceptance and approval is that approval is obtained when credibility is established. If the project or industry is perceived only as legitimate, the level of social licence that exists will likely only be one of acceptance. This is an example of the 'degree of certainty' that Baumber refers to. Thomson and Boutilier believe that as one moves up the levels of social licence, the strength of the social licence is increased. Offering a simpler analysis, Jijelava and Vanclay describe the approval level as existing '*when local communities view a project positively*'[235].

4.3.3. Psychological Identification

The highest level of consent conceived of under the model offered by Thomson and Boutilier, psychological identification was originally termed co-ownership. As with

[235]D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model', p.32

acceptance and approval, it is a form of consent in some of the social licence literature reviewed that, as a pre-requisite, assumes that the various requirements to obtain acceptance and approval have already been met. Again, there is no need to repeat what that means under this sub-heading. Furthermore, that it appeared in fewer sources with far less frequency is again explained by the analysis for the same trend that was seen in moving from acceptance to approval.

Jijelava and Vanclay can be again referred to for a simple description of what psychological identification has been taken to mean; they explain it as a local community strongly supporting and welcoming a project[236]. A slightly more detailed description is offered by Parsons and Moffat who set out that trust must be established before psychological identification can be achieved[237]. The preceding literature review Chapter has already dealt with psychological identification as a concept.

4.3.4. Defining Consent

In terms of establishing a concept that can be taken forward to the analysis of law that follows this Chapter, Parsons and Moffat write that the social licence '*can be seen as an intangible construct associated with acceptance, approval, consent, demands, expectations and reputation*'[238]. They also provide a helpful summary of the relationship between the social licence and consent that has emerged through the research; *'…where social licence is effectively withheld or withdrawn, characterises the lowest level…progresses upwards through 'acceptance', where a project is*

[236]ibid
[237]R. Parsons and K. Moffat, 'Integrating impact and relational dimensions of social licence and social impact assessment', p.274
[238]ibid

considered legitimate by stakeholders, to 'approval', where credibility is established, and to 'psychological identification', where trust is established'[239].

Returning to the definition of consent in the context of the social licence, the following is taken forward for the purposes of the analysis of law that follows:-

In the context of the Social Licence, consent is the broad conceptual heading which conveys the principle that a stakeholder may give, both explicitly and tacitly, permission for something to happen, through both action and inaction on their part, and may also withdraw permission. The type, form, and level of consent given will vary depending upon context, which can be influenced by various factors including the risk and reward of the action occurring and the type of interaction between the stakeholder and the individual or group seeking permission. Although not an exhaustive list, examples of this concept that emerge across the reviewed literature include acceptance, approval, and psychological identification.

[239]ibid

4.4. Stakeholder

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Stakeholder (parent code)	26	114
	Consisting of	
Stakeholders (child code)	18	30
Communities	20	41
Society	9	16
Public	6	11
Stakeholder network	6	9
Civil society	5	5
Affected Groups	2	2

Table 4 – Stakeholder parent code (Source: current research)

'Stakeholder' was adopted as a parent code on the basis of consistent references across the source material to the idea that for each activity and/or project there are individuals and groups who, for various reasons, are connected to the activity and/or project. For example, depending upon the context, for a social licence to emerge those individuals or groups must indicate their consent. Alternatively, those individuals or groups must at least be sufficiently engaged with the activity or industry in question in order to evidence tacit consent through lack of opposition.

Individuals or groups may be deemed to be impacted or affected by the proposed product or activity, at either a local 'micro' level or at a national/supra-national 'macro'

level. However, regardless of the importance given to their role or the place afforded to them by the procedure followed or the definition used, the existence of such individuals and or groups is almost universally acknowledged across the source material.

It was observed that the most common term used to describe such individuals or groups was ‘Communities’ followed by ‘Stakeholder (child code)’. This is not surprising as the social licence is commonly theorised as comprising ongoing acceptance or approval from the local community and other stakeholders who can affect profitability. Further, ‘Stakeholder Network’, which was identified in the preceding literature review, was coded in only 6 out of 30 sources.

However, whilst an argument could be made that a literal approaching to coding would utilise ‘Communities’ as the parent code for the purposes of thematic grouping given its widespread usage, it is offered that ‘Stakeholder’ and ‘Stakeholder Network’ are so closely related in literal terms such that they can be grouped together. As explained in the preceding literature review ‘Stakeholder Network’ can almost be thought of as the plural term for the singular ‘Stakeholder’.

In order to establish the ‘guide’ definition that allowed the researcher to begin grouping these codes thematically once the coding was complete, it would be misleading to suggest that there was a definition offered within the source material of ‘Stakeholder’ which could be utilised. Rather, stakeholder was largely a term that was used in conjunction with many other words in a list format that attempted to give some shape and meaning to the nebulous and intangible concepts of ‘society’ and ‘community’.

Where stakeholder was not listed, by cross referencing those groups and/or individuals listed against the approach taken in other sources it was simple to find an alternative source where stakeholder was the general name given to the interests being represented.

For example, Gunningham *et al* define the social licence as *'the demands on and expectations for a business enterprise that emerge from neighbourhoods, environmental groups, community members, and other elements of the surrounding civil society'*[240]*.* Whilst there is no usage of stakeholder here, primacy is not given to any of the groups or individuals contained in this list. This is mirrored where Heikkinen *et al* describe a social licence as being borne out of '*interactions between policy actors, market actors and civil society (for example local communities) in a multi-scale setting'*[241]*.* Again, no usage of stakeholder and no primacy given to the groups of individuals listed. However, Mercer-Mapstone *et al,* building upon the work of Moffat *et al*[242], Prno and Slocombe[243], and Thomson and Boutilier[244], write that the social licence is *'according to several authors, an ongoing and fluid level of acceptance by stakeholders'*[245]*.* The terms used in the sources cited by Mercer-Mapstone et al were *'affected communities', 'broader civil society',* and *'local communities*', i.e. those individuals and groups identified above. Accordingly, across the literature reviewed 'Stakeholders' became something of a shorthand, catch-all term to indicate 'everyone

[240]S. Gunningham *et al*, 'Social licence and environmental protection: why businesses go beyond compliance' (2004) 29 Law and Social Inquiry 307–341, pp.307-308 <http://scholarship.law.berkeley.edu/facpubs/675/> accessed 27 May 2016
[241]H. Heikkinen *et al,* 'Challenges in acquiring a social licence to mine in the globalising Arctic', p.400
[242]K. Moffat *et al*, 'The social licence to operate: a critical review' (2016) 89 Forestry 477
[243]J. Prno and S. Slocombe, 'Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories', pp.346–357
[244]I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) *SME mining engineering handbook* (SME, 2011)
[245]L. Mercer-Mapstone *et al*, 'Conceptualising the role of dialogue in social licence to operate' (2017) 54 Resources Policy 137, p.138

else' not directly a part of the business seeking a social licence.

Examples of the above abound. Gunningham *et al* suggest that a social licence is essentially a set of demands and expectations, held by local stakeholders and broader civil society, for how a business should operate[246]. C. Cullen-Knox *et al.,* when discussing stakeholder engagement reference '*the values of a collective group that underpin a social licence'* and provide that there is *'a growing likelihood that non-state actors are directly involved in governance and may even instigate regulatory action'*[247]. Gunster and Neubauer provide that:-

> *for the most part, industry continues to acknowledge the importance of social licence insofar as it reflects ongoing corporate commitments around stakeholder engagement, community consultation and serving the public good*'[248].

Van Putten *et al* provide that the social *licence 'refers to the initial approval and ongoing acceptance of resource extraction or industrial activity by local communities and other stakeholders affected by such activities'*[249].

Accordingly, rather than begin with a guide definition as per the other thematic parent codes, stakeholders as a parent code emerged through an iterative process of comparison between sources. The definition that is taken forward from this is

[246]S. Gunningham *et al*, 'Social licence and environmental protection: why businesses go beyond compliance'
[247]C. Cullen-Knox *et al*, 'Contemporary Challenges in Environmental Governance: Technology, governance and the social licence' (2017) 27 Environmental Policy and Governance 3, p.8
[248]S. Gunster and R. Neubauer, '(De)legitimating extractivism: the shifting politics of social licence' (2019) 28 Environmental Politics 707, p.709
[249]I. van Putten *et al*, 'The emergence of social licence necessitates reforms in environmental regulation' (2018) 23(3) Ecology and Society <https://www.ecologyandsociety.org/vol23/iss3/art24/> accessed 21 November 2021

misleading in its apparent simplicity; *'A stakeholder is a person and/or group with an interest in something'.* The true complexity is in deciding: (1) what counts as an interest, (2) where those interests rank compared to other stakeholders, and (3) why does having an 'interest' matter?

The latter question is addressed by Boutilier who observes that the concept of the social license presumes that stakeholders have the power and influence, either alone or in coalitions, to either stop projects or impose severe costs upon them[250]. Indeed, there is some clear cross-over with law in this regard. Whilst many of the sources reviewed referred to examples of civil unrest impacting upon the profitability and/or operation of an activity or project, as will be seen in the following Chapters, there is provision in Scottish environmental and planning law for stakeholders to have a formal role. Accordingly, whilst it may be a live issue for social licence theorists, from a Scottish legal perspective the question of the power to influence based on interest is not difficult to answer.

In terms of deciding what counts as an interest and where those interests rank, Parsons and Moffat provide a useful starting point insofar as they demonstrate that relational elements of the social licence are inextricably linked to the way impacts are experienced[251]. However, even this leads to further questions that are beyond the scope of this research; e.g. how are experiences of impacts to be measured? what counts as an impact? is a direct environmental impact enough to class the impacted individual as a stakeholder? what about an indirect economic impact?

[250]R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32 Impact Assessment and Project Appraisal 263, p.270
[251]R. Parsons *et al*, 'Integrating impact and relational dimensions of social licence and social impact assessment', p.274

4.4.1. Defining stakeholders

Returning to the definition of stakeholders in the context of the social licence, the following was taken forward for the purposes of doctrinal analysis of law that follows:-

In the context of the social licence, a stakeholder is a person and/or group with an interest in the contested business, activity, project, or industry. Interest is broadly deemed to be related to impact upon the person and/or group. Whilst there is no process for ranking impacts or importance of stakeholders, references to the concept of the community and local interests outnumber references to macro-level stakeholders. References to the concept of stakeholder in tandem with the environment as special in the context of the social licence outnumber references to the concept of the stakeholder in tandem with economic interests. Stakeholders have the power and influence, either alone or in coalitions, to either stop projects or impose severe costs upon them.

4.5. Trust

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Consent (Parent Code)	27	145
Stakeholders (Parent Code)	26	114
Engagement (Parent Code)	21	77
Relation to Law	24	71
Trust	21	53

Table 2 – Thematic results (Source: current research)

As outlined above, ‘Trust’ is not part of a thematically grouped parent code due to the frequency with which it was observed as a distinct literal code.

Heikkinen *et al* offer that the social licence has *‘two important and interconnected dimensions that are characteristic of the multi-sited nature of modern mining: transparency and trust’*[252]. De Jong and Humphreys similarly provide that a social licence can be ‘*withdrawn at any time should a business lose the trust of the community within which it operates*’[253]. To them, the concept of trust is central to all decision-making procedures related to obtaining an SLO[254]. Indeed, both sources are part of a chorus of voices across the source material that agree on this, ranging from Mercer-Mapstone *et al*’s simple suggestion that trustworthy dialogue involving communities is important[255] to Thomson and Boutilier’s more complex conceptualisation wherein trust is the key to unlocking psychological identification once legitimacy and credibility are established[256].

Drawing on the work of Poppo and Shepker[257], and Moffat and Zhang[258], de Jong and Humphreys define trust as the reliance of one actor on the truth, honesty, and integrity of another[259]. This is a definition which is attractive in its simplicity, particularly when compared to the approaches taken by others. For example, Moffat and Zhang distinguish between integrity-based trust, which is created through adherence to

[252]H. Heikkinen *et al*, 'Challenges in acquiring a social licence to mine in the globalising Arctic', p.407
[253]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru’, p.553
[254]ibid, p.555
[255]L. Mercer-Mapstone *et al*, 'Conceptualising the role of dialogue in social licence to operate', p.138
[256]I. Thomson and R. Boutilier, ‘Social licence to operate’ in: P. Darling (ed) SME mining engineering handbook
[257]L. Poppo *et al*, ‘Repairing public trust in organisations’ (2010) 13 Corporate Reputation. Review 124–141
[258]K. Moffat and A. Zhang, ‘The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining’,
[259]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru’, p.555

principles by the party seeking to be trusted, and competence based trust, which is based on views held by those giving their trust of the skills and knowledge exhibited by the party seeking to be trusted[260].

Whilst ‘Trust’ has not been thematically grouped with other codes, there are a number of codes that are linked to, or seen as complimentary to, the concept. For example, for trust to be a part of the social licence definition it must imply that stakeholders have a role to play as the trustors and that engagement is the vehicle by which the trustees will obtain the trust required. Indeed, all the sources cited above make this basic point throughout. However, there are several codes that are less obviously connected that repeatedly appear in connection with trust.

Mercer-Mapstone *et al* cite research that has found social acceptance to be based on trust insofar as it is established via perceived impacts, governance, legitimacy, and fairness[261]. De Jong and Humphreys refer to transparency as being a key part of maintaining trust, stating that a trustee who takes advantage of the vulnerabilities of the trustor through failure to disclose information properly risks consequences for their relationship[262]. Where this happens, the trustee risks withdrawal of their social licence, or a weakening of the level of social licence granted; all of which are codes contained within ‘Consent (parent code)’. De Jong and Humphreys note that other academics argue that a stronger form of trust will emerge when the interactions between the trustor and trustee are regular and where the community feels a strong sense of

[260]K. Moffat and A. Zhang, ‘The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining’, p.62
[261]L. Mercer-Mapstone *et al*, 'Conceptualising the role of dialogue in social licence to operate', p.139
[262]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru’

ownership in the work. Again, these are examples of further re-iteration of codes already reviewed; ‘Stakeholders’, ‘Engagement’, and ‘Consent’.

As referenced above, it is Thomson and Boutilier who most clearly map out the role that trust plays in relation to the other component parts forming their conceptualisation of the social licence, i.e. the co-existence of trust with other boundary criteria in the form of legitimacy and credibility. They map out that to achieve legitimacy and reach acceptance a company must convey alignment with community values, to achieve credibility and reach approval a company must transparently engage in open dialogue with community members, and to achieve psychological identification a company must achieve trust via fulfilling commitments, keeping promises, and integrating the community as a party with co-responsibility for the project.

Further examples of concepts connected to trust abound. Parsons and Moffat build on Warhurst’s[263] relation of the process of a community granting a social licence to ‘*the establishment of meaningful partnerships between operations, communities and government based on mutual trust’*[264]*.* De Jong and Humphreys refer to honesty and integrity as central to the maintenance of trust and refer to procedural fairness as central to the generation of trust ‘*between actors*’[265]. Cullen-Knox *et al* go a step further and specify the context within which trust will be lost or gained, citing *‘confidence in industry’s or government’s willingness or capacity to adequately protect the*

[263]A. Warhurst, ‘Corporate citizenship and corporate social investment: drivers of tri-sector partnerships’ (2001) 1 Journal of Corporate Citizenship 57
[264]K. Moffat and A. Zhang, ‘The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining’, p.62
[265]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru’, p.555

environment in the absence of societal pressure'[266] as a central theme in the contemporary social licence literature and an explanation for the concept's growing significance.

It is clear from the source material reviewed that the importance placed upon trust is not isolated to the world of academia. Prno and Slocombe[267], and Moffat and Zhang[268], each write about the open recognition observed by them of companies willing to work closer with communities to secure a social licence via consultative practices designed to cultivate trust with local stakeholders affected by development. In their case study on the 2013 halting of the Khudoni Hydroelectric Power Plant in the Svaneti region of Georgia, Jijelava and Vanclay conclude that (1) having a social licence is essential to such projects existence, and (2) in this case the social licence was lost, in part, through a failure to maintain legitimacy and trust[269].

4.5.1. Defining trust

In terms of establishing an objective definition that can be 'searched for' in the analysis of black letter law that follows, the difficulty with 'Trust' is not rooted in the concept itself but instead within the myriad associated concepts that are cited as key component parts of obtaining and/or maintaining trust. Indeed, the definition of 'Trust' as a concept can be stated in both simple and complex terms that ultimately convey the same message, best summarised by De Jong and Humphries as the idea that trust

[266]C. Cullen-Knox *et al*, 'Contemporary Challenges in Environmental Governance: Technology, governance and the social licence', p.6
[267]J. Prno and D. Scott Slocombe, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories'
[268]A. Zhang and K. Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia'
[269]D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model',

is defined as the reliance of one actor on the truth, honesty, and integrity of another[270].

The codes most commonly co-located with trust in the source material reviewed were transparency, stakeholders, engagement, credibility, perceptions, impacts, legitimacy, governance, procedural fairness, consent, honesty, and environmental protection. Some of these codes are already present in the definitions being taken forward above, e.g. stakeholders, engagement, and consent are already addressed. Taking forward those concepts which are not already provided for, and building on the attractive simplicity of De Jong and Humphrey's definition, the following was taken forward as the definition of trust:

In the context of the Social Licence, trust is defined as the reliance of one actor on the truth, honesty and integrity of another, evidenced, obtained and maintained via transparent and procedurally fair processes wherein environmental protection is central, both in terms of the perceived impacts from the activity being considered and the governance processes in place for mitigation and/or removal of such impacts.

[270]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru', p.555

4.6. Engagement

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Engagement (Parent code)	21	77
	Consisting of	
Engagement (Child code)	11	16
Relationships	9	15
Communication	6	25
Consultation	5	6
Informed	5	7
Partnerships	4	4
Shared Values	2	2
Collaboration	1	2

Table 6 – Engagement parent code (Source: current research)

Engagement in the context of the social licence was observed to refer to (1) the fact of being involved, and (2) to the process of encouraging people to be interested and/or involved. For example:-

- Zhang and Moffat write about *'community engagement and consultation',* describing it as a '*process which ordinary citizens may not have the knowledge and resources to meaningfully participate in'*[271]*;*

[271]A. Zhang and K. Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia', p.29

- Mercer-Mapstone *et al* found that 'dialogue' is '*an engagement mechanism central to the attainment of a social licence*'[272]*; and*
- Owen and Kemp argue that a cultural shift is required such that industry uses a constructive approach *to 'collaboration or engagement'* with stakeholders as a means of bringing companies and communities closer together, minimizing conflict, building relationships of collaboration and trust, and cultivating perceptions of common interest and shared values[273].

Whilst the concept of engagement was clearly set out in the source material on a relatively uniform basis, a more challenging issue that did not receive uniform treatment was the question of what represents acceptable, meaningful, or appropriate engagement. In other words, the source material differed on the qualities that are required for engagement to *count* towards a social licence. Similarly, the source material also differed on what gives the concept of engagement its power.

Hall and Jeanneret[274], and Thomson and Boutilier[275] write that businesses seek to engage with stakeholders to create a positive reputation. In a similar vein, Owen and Kemp offer that engagement via the social licence concept provides a means of bringing companies and communities closer together that minimises conflict[276]. Whitton *et al* argue that engagement can result in trust-based relationships where industries, businesses, activities etc can obtain community backing[277], a view which

[272]L. Mercer-Mapstone *et al*, 'Conceptualising the role of dialogue in social licence to operate', p.138
[273]J. Owen and D. Kemp, 'Social licence and mining: A critical perspective', p.34
[274]N. Hall and T. Jeanneret, 'Social licence to operate: an opportunity to enhance CSR for deeper communication and engagement' (2015) 20 Corporate 213–227
[275]I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) *SME mining engineering handbook*
[276]J. Owen and D. Kemp, 'Social licence and mining: A critical perspective',
[277]J. Whitton *et al*, 'Shale gas governance in the United Kingdom and the United States: Opportunities for public participation and the implications for social justice' (2017) 26 Energy Research & Social Science 11

aligns closely with Thompson and Boutilier's conceptualisation of the highest level of the social licence being one of psychological identification. In short, the power of engagement would appear to be largely viewed to be based on activating 'community buy-in', an attractive proposition for a business or industry worried that a lack of community support could scupper their plans. Prno and Slocombe also write about the need to ensure positive company reputation[278].

How can engagement be seen as acceptable, meaningful, and appropriate, such that it legitimately secures the power that it seductively promises? De John and Humphries argue that a community is more likely to grant a social licence if the business in question '*provides benefits to the local community, such as employment opportunities*'[279]. Accordingly, meaningful engagement for them includes a process of agreeing a social licence on the basis that communities can *'shift the amount and type of responsibility that a business owes to the community by, for example, arguing for an increased share of the benefits from business operations (such as investment in community amenities)'.* In other words, engagement in the context of the social licence is '*a form of bargain between a business corporation and one or more social groups*'.

De Jong and Humphries offer an answer to what represents acceptable, meaningful, and appropriate engagement that, *prima facie*, appears legitimate. However, there are multiple alternatives across the source material. For example, Wheeler argues that meaningful engagement signifies a negotiation process in which local communities '*receive and accept assurances that the social, economic and environmental benefits*

[278]J. Prno and S. Slocombe, 'Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories',
[279]W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru', p.555

of what is proposed outweigh the potential impact'[280]. Wheeler is less focussed on the idea of a specific benefit being negotiated. Rather, the benefits must outweigh the impact.

Alternatively, Whitton *et al* associate engagement with 'participation', i.e. the idea that it is not enough to say that engagement has taken place where the stakeholders concerned did not actively respond, particularly at the local level[281]. Mercer-Mapstone *et al* provide a similar argument, providing that engagement strategies *'through which relationships might be built are of utmost importance'* and citing dialogue as an example where dialogue is the process through which relationships are development[282].

The literature reviewed above can be reconciled where it is understood that each source largely suggests that acceptable, meaningful, and appropriate engagement arises through relationship building based on collaboration, even if the output of that collaboration is different depending upon whose model of trust is preferred. For example, Gunster and Neubauer provide that companies who openly recognise the need for social licence will have more chance of success upon expressing a willingness and desire to work closer with community stakeholders by adopting a range of consultative practices[283]. Mercer-Mapstone et al agree, writing that '*companies that engage in inclusive dialogue are likely to take a deeper approach to*

[280]S. Wheeler, 'Global production, CSR and human rights: the courts of public opinion and the social licence to operate' (2015) 19 The International Journal of Human Rights 757, p.766
[281]J. Whitton et al, 'Shale gas governance in the United Kingdom and the United States: Opportunities for public participation and the implications for social justice'
[282]L. Mercer-Mapstone *et al*, 'What makes stakeholder engagement in social licence "meaningful"? Practitioners' conceptualisations of dialogue' (2018) 27 Rural Society 1-17, p.3
[283]S. Gunster and R. Neubauer, '(De)legitimating extractivism: the shifting politics of social licence' (2019) 28 Environmental Politics 707, p.711

building a social licence that is sustainable and stable, interviewees suggested'[284]*.*

Similarly, Prno and Slocombe note that the social licence can also been seen as a institution where expectations of both parties are negotiated, i.e. between mining companies and local communities, throughout the mining lifecycle[285]. Prno and Slocombe add that 'negotiated' should be used loosely here *'and refer only to the general process by which each party's expectations are made apparent and incorporated (or not)'* as the process consists of *'both formal (e.g., face-to-face negotiation of agreements) and informal (e.g., community expectations may be implicit and embedded in wider cultural norms not immediately apparent to a mining company) activities'*[286]*.*

4.6.1. Defining engagement

In terms of a final definition for 'Engagement (parent code)' to be taken forward to the doctrinal analysis stage, the following was adopted:-

The concept of engagement in the context of the social licence refers to the fact of being involved and the process of encouraging people to be interested and/or involved, with multiple process and vehicles for engagement available that, depending upon the perspective of the actors involved, will impact on the extent to which the engagement is deemed acceptable, meaningful, and appropriate.

[284]L. Mercer-Mapstone et al, 'What makes stakeholder engagement in social licence "meaningful"? Practitioners' conceptualisations of dialogue'
[285]J. Prno and D. Scott Slocombe, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories', p.348
[286]ibid

4.7. Relation to Law

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Relation to Law	24	71
	Consisting of	
Connected to Law	12	34
Separate to Law	12	20
Beyond Compliance	11	17

Table 5 – Relation to Law (Source: current research)

'Relation to Law' as a thematic grouping is straightforward:-

1. a number of sources referenced there being a relationship between law and the social licence;
2. a number of sources referenced the social licence as being distinctly non-legal; and
3. a number of sources invoked the concept of 'beyond compliance' as an idea that can only be understood in the context that law provides for a minimum threshold to be judged 'basic' compliance.

For example, citing Mason[287], Zhang and Moffat highlight examples of poor management of mining impacts due to a lack of government capacity and conflicting

[287]N. Mason, 'Environmental governance in Sierra Leone's mining sector: A critical analysis' (2014) 41 Resources Policy 152–159

priorities in legislation[288]. Further, Zhang and Moffat note that people are less willing to accept mining, even when the environmental impact was perceived as low, when governance is perceived as weak. Separately, several examples have already been noted above from Latin American where the public administration itself was deemed not to hold a social licence as opposed to the operator. Whilst each example here makes a distinct point, they are connected insofar as they relate the social licence in some meaningful way to law.

Compared to the other codes that have been examined above, the value in this thematic grouping is not to provide a definition of a concept that can be 'searched' for in the doctrinal analysis that follows. However, as the purpose of the research is to consider the relationship between law and the social licence, the actual value of this thematic grouping should be clear insofar as it provides a broad statement of the views already expressed on the relationship between law and the social licence. As above, those views can be broadly divided into three groups; (1) there is a connection between law and the social licence, (2) the social licence is non-legal, and (3) a social licence is gained via going 'beyond compliance'. Each of these groups is now described in turn.

4.7.1. The Social Licence is Connected to Law

Parsons and Moffat write that the social licence as is a '*nebulous idea'* and then note that '*the social licence is contrasted with a statutory licence: it is intangible and*

[288]A. Zhang and K. Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia', p.29

unwritten, and cannot be granted by formal civil, political or legal authorities'[289]. Syn takes a similar approach describing the intangible, vague and unpredictable nature of a social licence as compared with a legal licence[290].

Each of these approaches effectively use the law as a metaphorical tool, so as to give shape and form to something that is not immediately objective or tangible. Insofar as there may be a connection between law and the social licence, it is offered that this is the lowest level of connection that could be achieved, i.e. that the social licence is akin to, but not necessarily part of, law.

A step beyond this would be to characterise the social licence as a tool that can be used by those who are attempting to traverse the legal system in pursuit of a certain goal. For example, Murphy-Gregory views the contestation of a business' claim to having a social licence as a tactic to pressure state actors into taking a harsher stance on industry regulation[291]. In a similar vein, but viewed from the opposite perspective, Prno and Slocombe argue that '*government regulation can act as a significant driver of community participation in the mining sector and motivate corporate actors to obtain a SLO*'[292]. Whilst both sources examine the social licence from the perspective of different actors, both are ultimately concerned with the ability of the social licence and law to impact upon the other, i.e. that law could change the social licence, or that the social licence could change law. Such a relationship is supported by research

[289]R. Parsons & K. Moffat, 'R. Parsons et al, 'Integrating impact and relational dimensions of social licence and social impact assessment', p.374
[290]J. Syn, 'The Social License: Empowering Communities and a Better Way Forward' (2014) 28 Social Epistemology 3-4
[291]H. Murphy-Gregory, 'Governance via persuasion: environmental NGOs and the social licence to operate (2018) 27(2) Environmental Politics 320–340
[292]J. Prno and S. Slocombe, 'Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories', p.350

completed by Gunningham *et al* that identified that the fear of new regulations being imposed was at least one of the key drivers for positive corporate responses to social licence pressure[293].

An alternative conceptualisation of the relationship between law and the social licence is that law provides the lowest threshold that a company or industry will be required to meet. This is distinct from the idea that the social licence is about going beyond compliance. Rather, the idea in this context is that it is possible for compliance with legal provisions to be 'good enough' for a social licence to emerge.

For example, Jijelava and Vanclay provide that for a project to achieve acceptance from the local community its legitimacy has to be established '*in legal/administrative, economic and social terms*' where legal/administrative legitimacy relates to:-

> *the perception by the local community that there is sufficient justification for the project (i.e. that it is needed) and that all relevant administrative procedures have been conducted in a fair and reasonable manner*[294].

For them, it is possible that this may go beyond the requirements defined in national law depending upon context. Similarly, Ruckstuhl *et al* cite the legal framework of *Te Tiriti o Waitangi* as enabling the same situation for the Māori people of New Zealand; *'it is the legal framework of the Treaty…that has enabled Māori impact assessment*

[293]S. Gunningham et al, 'Social licence and environmental protection: why businesses go beyond compliance'
[294]D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model', p.32

approaches to be taken seriously[295]'. Heffron *et al* also see the social licence as possible addition to the legal and/or environmental permit or licence granted to the energy company by the mineral or landholder[296].

The final conceptualisation from the source material is the idea that the social licence has emerged because of a failure on the part of law. Arguing that the emergence of the social licence necessitates reforms in environmental regulation, van Putten *et al* provide that public trust and legitimacy in environmental regulation has eroded over time and needs to be reimagined to better fulfil this purpose. They argue that although operators and regulators both have a part to play in building public trust:-

> *public engagement and confidence in the activities that impact the sustainability of common pool natural resources should be primarily (and most easily) established through formal environmental regulatory and assessment processes*'. For them, this would '*reduce the need for SLO and allay undue reliance on unclear requirements associated with it*[297].

4.7.2. The Social Licence is Separate to Law

Rather than consist of multiple conceptualisations, the views expressed in relation to this code were almost entirely uniform; in simple terms, the social licence is a non-legal concept. The examples from the literature are very clear in this regard. For example, Heikkinen et al state quite clearly their view that '*the acquisition of a SL to*

[295]K. Ruckstuhl et al, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', 32(4) Impact Assessment and Project Appraisal 304-314, p.311
[296] R. Heffron et al, 'The emergence of the 'social licence to operate' in the extractive industries?' (2018) Resources Policy
[297] I. van Putten *et al*, 'The emergence of social licence necessitates reforms in environmental regulation', p.1

mine does not rest on legal facts but is dependent on a clear acceptance from the wider public'[298].

Joyce and Thomson argue that the social licence is beyond any direct legal or government accountability[299]. Similarly, Cullen-Knox *et al* refer to the social licence as a social obligation '*outside the law*'[300] whilst Wheeler provides that the social licence is about '*business practice and regulation outside the realm of the legal…in the absence of a structure of legal enforcement*'[301]. Summarising the origins of the social licence as a concept, Gunster and Neubauer outline that '*the traditional foundations of corporate, industrial hegemony – government sanction and economic benefits – were no longer enough to legitimate extractivist development, especially in the eyes of local communities*' leading to the question '*if current government laws, policies and regulations are not safeguarding the public interest, why not?*'[302]

4.7.3. Beyond Compliance

Where found via coding, 'Beyond Compliance' generally conveyed the idea that social licence stakeholders are no longer satisfied by what is provided for in law as the minimum for obtaining a formal licence, contract, or legal right to operate. Instead, to get stakeholder buy-in, those seeking a social licence must be seen to do more, go further, and volunteer to take on additional obligations[303]. Examples cited in the

[298]H. Heikkinen et al, 'Challenges in acquiring a social licence to mine in the globalising Arctic', p.400
[299] S. Joyce and I. Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America' (2000) The Canadian Mining and Metallurgical Bulletin 93(1037)
[300]C. Cullen-Knox et al, 'Contemporary Challenges in Environmental Governance: Technology, governance and the social licence', p.4
[301]S. Wheeler, 'Global production, CSR and human rights: the courts of public opinion and the social licence to operate', p/765
[302]S. Gunster and R. Neubauer, '(De)legitimating extractivism: the shifting politics of social licence' (2019) 28 Environmental Politics, 711
[303]S. Gunningham et al, 'Social licence and environmental protection: why businesses go beyond compliance'

literature include the provision of employment opportunities to local communities, negotiating directly with local communities in parallel with formally recognised public bodies, sharing of economic benefits arising from the activity in question, focussing on long term sustainability and addressing issues such as decommissioning at the initial consultative stage, providing for environmental benefits and improved local amenity in the area, and mitigation of impacts above legislative standard .

4.7.4. Accommodating the above in the next stage of analysis

It was determined by the researcher that the frequent appearance of the 'relation to law' code resulted from a combination of the following 'type' of references in the literature to legal concepts and/or law generally:-

1. using law as a metaphor to give shape to the social licence concept;
2. criticism of perceived failures in law necessitating the need for a social licence,
3. in advocacy of the view that law and the social licence may be connected concepts; and
4. in advocacy of the view that the social licence is distinctly non-legal.

As the purpose of the coding was to establish an objective basis for examination of the social licence concept in terms of its relation to law, it was determined that the 'relation to law' code would naturally be accommodated to a large extent in subsequent stages of the research. However, it was considered that the identification of 'Beyond Compliance' as a code merited specific examination. This was on the basis that it represented a significant challenge to the research, i.e. that the social licence in some

way exists beyond law.

For example, for ‘Beyond Compliance’ to mean something it must be the case that there is a pre-determined threshold in law representing compliance, i.e. that the social licence begins where law ends. In other words, ‘beyond compliance’ as a code presents a direct challenge to any assertion that there even is a relationship between law and the social licence given that it implies that stakeholders are no longer satisfied by what is provided for in law and are looking elsewhere for influence.

The following definition of beyond compliance in the context of the social licence was therefore taken forward by the researcher:-

‘Beyond compliance’ conveys the idea that social licence stakeholders are no longer satisfied by what is provided for in law in order to obtain a formal licence, contract, or legal right to operate. Instead, to get stakeholder buy in, those seeking a social licence must be seen to do more, go further, and volunteer to take on additional obligations, i.e. they must go beyond compliance.

4.8. Summary

Via a process of objective literal coding and thematic grouping, five codes were identified and selected to provide an objective answer to the question ‘what is a social licence?’. Four of the five codes selected represented the most commonly cited components of the social licence across the source material considered and, as such, were considered to be the most appropriate basis for a considering the relationship between law and the social licence via the doctrinal and comparative methods set out

in the preceding methodology. The fifth code, ‘beyond compliance’, was selected not on the basis of common frequency across the source material but on the basis that it represented a significant challenge to the research, i.e. that the social licence in some way exists beyond law.

To recap, the codes selected, and there associated definitions, were as follows:-

- Consent - *the broad conceptual heading which conveys the principle that a stakeholder may give, both explicitly and tacitly, permission for something to happen, through both action and inaction on their part, and also withdraw permission. The type, form, and level of consent given will vary depending upon context, which can be influenced by various factors including the risk and reward of the action occurring and the type of interaction between the stakeholder and the individual or group seeking permission. Although not an exhaustive list, examples of this concept that emerge most frequently across the reviewed literature are acceptance, approval, and psychological identification.*
- Stakeholders - *a person and/or group with an interest in the contested business, activity, project, or industry. Interest is broadly deemed to be related to impact upon the person and/or group. Whilst there is no process for ranking impacts or importance of stakeholders, references to the concept of the community and local interests outnumber references to macro-level stakeholders. References to the concept of stakeholder in tandem with the environment as special in the context of the social licence outnumber references to the concept of the stakeholder in tandem with economic interests. Stakeholders have the power*

and influence, either alone or in coalitions, to either stop projects or impose severe costs upon them.

- Trust - *the reliance of one actor on the truth, honesty and integrity of another, evidenced, obtained and maintained via transparent and procedurally fair processes wherein environmental protection is central, both in terms of the perceived impacts from the activity being considered and the governance processes in place for mitigation and/or removal of such impacts.'*
- Engagement - *the fact of being involved and the process of encouraging people to be interested and/or involved, with multiple process and vehicles for engagement available that, depending upon the perspective of the actors involved, will impact on the extent to which the engagement is deemed acceptable, meaningful, and appropriate.*
- Beyond Compliance - *conveys the idea that social licence stakeholders are no longer satisfied by what is provided for in law in order to obtain a formal licence, contract, or legal right to operate. Instead, to get stakeholder buy in, those seeking a social licence must be seen to do more, go further, and volunteer to take on additional obligations, i.e. they must go beyond compliance.*

As discussed, the above five codes, together with their definitions, represent an attempt by the researcher to provide an objective answer to the question 'what is a social licence?'. Accordingly, these codes, together with their definitions, were utilised by the researcher as the objective basis against which to consider law in order to address the question 'what is the relationship between the social licence and law?'. This process is described in further detail in Chapter 6.

Chapter 5 – Identifying the relevant law

5.1. Introduction

A company seeking to frack for shale gas in Scotland, were fracking to currently be allowed, would require to interact with a complex legal framework consisting of multiple different permits, stakeholders, and public bodies. The purpose of the current Chapter is to detail this framework in order to provide context and grounding for the Chapter that follows, wherein the framework is examined in relation to the five key codes taken forward from the preceding Chapter on coding the social licence.

Accordingly, this Chapter provides a summary of the following:-

1. the primary sources of law, i.e. the specific legislative controls within Scots law that correspond to the risks associated with fracking, each risk having already been identified in the introduction; and
2. the roles and responsibilities of the various public bodies that undertake functions in relation to the operation of the legislative controls identified.

The picture provided below is not a complete summary of all primary and secondary sources of law relating to both environmental and planning law, but rather it covers those most relevant to a project involving hydraulic fracturing for shale gas. For example, the Pollution Prevention and Control (Scotland) Regulations 2012 ('PPC') are considered in detail in this research on the basis that they are a key legislative vehicle for the state to formally confer its permission upon industrial activities that result in pollutant emissions to air. However, some emissions to air are also caught by

the provisions of the Clean Air Act 1993, which allows for Local Authorities to control emissions which are not otherwise caught under PPC. The key difference is that where PPC is primarily a permissioning regime (i.e. the operator seeks a permit and is granted the same upon meeting certain provisions), the Clean Air Act 1993 empowers Local Authorities to investigate pollution, serve notices where its provisions are breached, and report persons to the Procurator Fiscal for prosecution. Accordingly, the Clean Air Act 1993 is outside the scope of the current research on the basis that it does not operate to confer permission, it operates to regulate behaviour through 'after the event' style intervention.

As the social licence is concerned with giving form to the concept of societal permission being expressed through means that are outside traditional legal approaches to state permission, the current research focuses on law where it also acts to confer permission. Whilst there may be a relationship between the social licence and that law which sits outside of the scope of the focus of permissioning, it is offered that the current approach is justified by the prima facie direct comparisons that exist between legal and non-legal 'permissions'. Furthermore, there is a desire to limit what is considered relevant law in order that the research is sufficiently focussed and precise. The possibility of further research utilising a broader scope of relevant law does exist, however, as outlined in Chapter 8.

5.2. Public bodies

The exploitation of oil and gas resources typically occurs in four key phases[304,305]:-

1. **exploration** – the use of seismic surveys to provide information about geological structures and exploratory drilling to verify the presence of reserves);
2. **appraisal** – the assessment of exploration prospects using extended well tests and additional drilling to determine if reservoir development is economically feasible);
3. **development and production** – the development of field infrastructure and the production of hydrocarbons from the reservoir until economically feasible reserves are depleted; and
4. **decommissioning, restoration and aftercare** – the abandonment of wells, the removal of surface installations and the restoration of the site.

The current research focusses on the legal framework that governs the earlier stages in a petroleum project life cycle that consist of conceptualisation of the project through to legal authorisation being granted to commence the project, i.e. stages 1 to 3 above. Oil and gas operators will, across the life cycle of an onshore project, interact with a wide variety of public bodies as they navigate the framework of regulation that exists in Scotland. The scope of the current research, insofar as it deals with public bodies that regulate environmental and planning law in Scotland, is focussed primarily on the

[304]M. Alramahi, *Oil and gas law in the UK* (Bloomsbury Professional 2013) pp.8-10
[305]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework* (November, 2016) p.8 <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2018/09/unconventional-oil-and-gas-regulation-workshop/documents/unconventional-oil-and-gas-regulation-workshop---overview-of-the-current-regulatory-framework/unconventional-oil-and-gas-regulation-workshop---overview-of-the-current-regulatory-framework/govscot:document/?forceDownload=true> accessed 11 September 2020

roles and responsibilities of those parties set out in Table 7 below[306].

[306]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework,* pp 3-5

Public Body	Relevant responsibilities
Scottish Government/ Scottish Ministers	Legislate for the granting and regulation of onshore licences, determine their terms and conditions, and regulate the licensing process, including administration of existing licences.
Scottish Environment Protection Agency (SEPA)	Responsible for pollution prevention and control, protection of the water environment, and control of major accident hazards (with the Health and Safety Executive). Also a statutory consultee for major planning applications, Environmental Impact Assessments (EIAs), Strategic Environmental Assessments (SEAs), and minerals applications.
NatureScot	Licensing authority for wildlife and provides advisory role with regard to natural habitats. Also a statutory consultee for SEAs, EIAs, proposals that could affect Sites of Special Scientific Interest, National Scenic Areas, Special Protection Areas, and Special Areas of Conservation.
Planning Authorities/ Local Authorities	Planning Authorities are responsible for determining applications for planning permission. Local Authorities are responsible for air quality, waste management, and investigating and taking appropriate action where an activity is causing a statutory nuisance.

Table 7 – Relevant public bodies (Source: current research)

5.3. The Petroleum Act 1998

The Petroleum Act 1998 is the main legislative vehicle for conferring the right to explore for and exploit petroleum onshore in Scotland. Some of its provisions are now summarised to provide necessary background, but it is not taken forward to the next stage of the research, the analysis of the relevant law done in Chapter 6, for reasons outlined below.

On 9 February 2018, sections 47 to 49 of the Scotland Act 2016 devolved several new powers to the Scottish Ministers, including powers to:-

- legislate for the granting and regulation of onshore licences;
- determine the terms and conditions of onshore licences; and
- regulate the onshore licensing process, including administration of existing onshore licences (excluding regulation of the consideration payable, which remains a reserved matter).

In order to achieve this, the Petroleum Act 1998 was amended in order to provide that the Scottish Ministers may:-

- grant licences to search and bore for and get petroleum to such persons as they think fit; and
- pass regulations prescribing (1) the manner in which applications for licences can be made and by which persons, (2) the information to be included in or

provided in connection with any such application, and (3) model clauses which shall be incorporated in any such licence[307].

Such licences contain model clauses that are provided for by way of legislation, covering issues including term, licensed area, measurement of petroleum obtained from the licensed area, the keeping of accounts, and working obligations[308][309]. The Petroleum Act 1998 also provides that, as soon as practicable after granting a licence, the Scottish Ministers shall publish notice of the fact in the Edinburgh Gazette stating (a) the name of the licensee; and (b) the situation of the area in respect of which the licence has been granted[310].

The Petroleum Act 1998, and the licences to explore and exploit that may be granted thereunder, are not designed with environmental matters, planning, or public consultation principally in mind. Rather, the principle objective of the Petroleum Act 1998 is the maximisation of economic recovery of UK petroleum[311]. However, the ability of an operator to conduct petroleum activities under such a licence is subject to the operator gaining a number of other formal permissions, including environmental authorisations and general planning permission. On that basis, the Petroleum Act 1998 is not taken forward for the purposes of the current research, given that it is concerned with law which may properly be considered to consist of rules relating to environmental or planning considerations. This body of law, i.e. the *relevant law* for the purposes of the research, is now synthesised below.

[307]Scotland Act 2016, s 48
[308]G. Gordon, 'Petroleum Licensing', in Greg Gordon, John Paterson and Emre Üşsenmez (eds), *Oil and gas law : current practice and emerging trends* (2nd edn, Dundee University Press 2011) 4.10 to 4.17
[309]Petroleum Act 1998, Sch 1, paras 1 to 27
[310]ibid, s 4(4A)
[311]ibid, s 9A

5.4. Environmental Law

5.4.1. Background and principles

Scotland has a highly developed system of environmental law that has been shaped over its long history by domestic and international politics alongside influential academic writing[312]. In recent decades, a number of crucial underlying principles have emerged to shape policy and law making[313]. For example, in its February 2019 consultation paper titled *Consultation on Environmental Principles and Governance in Scotland*[314]*,* the Scottish Government provided a non-exhaustive list of the environmental principles that influence environmental policy at the EU and Scottish levels, including:-

- the UN Rio Declaration on Environment and Development 1992, which established 27 principles to guide sustainable development, including the integration principle (as well as the precautionary and polluter pays principles)[315];
- the UN Convention on Biological Diversity 1992, which enshrined the principle of sustainable use and the ecosystem approach[316];
- the UN Aarhus Convention 1998, which established a number of principles in relation to rights of the public with regard to the environment, including access

[312]G. Little, 'Principles, sources and institutions of environmental law in Scotland' in: F McManus (ed), *Environmental Law in Scotland* (Thomsons/W Green, 2007) paras 2.01-2.05
[313]ibid, para 2.05
[314]The Scottish Government, *Consultation On Environmental Principles and Governance In Scotland* (February, 2019) <https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/pages/3/> accessed 10 September 2020
[315]United Nations Conference on Environment and Development*, Rio Declaration on Environment and Development* (A/CONF.151/26 (Vol. I) 1992) <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> accessed 10 September 2020
[316]United Nations, *United Nations Convention On Biological Diversity*, (1992) <https://www.cbd.int/doc/legal/cbd-en.pdf> accessed 10 September 2020

to environmental information, public participation in environmental decision-making and access to justice[317];

- the Paris Agreement on Climate Change, which ingrained into its terms the principle of non-regression[318]; and
- the Treaty on the Functioning of the EU, which enshrined in law the precautionary principle, polluter pays principle, prevention principle, and rectification at source principle as the four specific environmental principles to underpin the development of EU environmental policy[319].

Following the UK's withdrawal from the European Union on 31 January 2020, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 was passed by the Scottish Parliament. In short, this act enables the Scottish Government to provide for Scots law to stay aligned to future EU law where it deems it 'appropriate'[320]. The act copies the following core principles underpinning green standards in the EU into Scottish law[321]:-

- the principle that protecting the environment should be integrated into the making of policies;
- the precautionary principle as it relates to the environment;
- the principle that preventative action should be taken to avert environmental damage;

[317]The UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice, *The Aarhus Convention* (Aarhus, 1998)
[318]United Nations Conference of the Parties, The Paris Agreement, (December 2015) <https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf> accessed 10 September 2020
[319]Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[320]The European Union (Continuity) (Scotland) Act 2021, s.1(2)(f)(ii)
[321]ibid, s.13

- the principle that environmental damage should as a priority be rectified at source; and
- the principle that the polluter should pay.

Further, the act sets up a new public body to monitor these standards; Environmental Standards Scotland[322]. Amongst other things, this new body shall monitor public authorities' compliance with environmental law, and the effectiveness of environmental law in terms of how it is implemented and applied[323].

It is beyond the scope of the current research to account for and analyse the whole range of environmental principles that have been established in international agreements. However, two principles are briefly addressed below given their clear thematic resonance with the social licence. These principles are:-

- **the public participation principle**, which seeks to ensure that environmental decision making is fair, transparent and shaped via public access[324]; and
- **the integration principle**, which seeks to ensure that the design and operation of governmental and regulatory structures is appropriately influenced by environmental policy[325].

It is offered that it is these two principles which share the clearest commonality with the social licence concept. Where the social licence concept acknowledges the ability

[322]ibid, s.19
[323]ibid, s.20
[324]G. Little, 'Principles, sources and institutions of environmental law in Scotland', para 2.01
[325]ibid

of stakeholders to influence decision making, the public participation principle provides an underlying legal foothold, albeit at the level of ‘principle’, by which stakeholder views find acknowledgement in the legal process. Furthermore, the social licence concept is often expressed as a phenomenon of great potential in terms of public empowerment provided that it does not operate in a vacuum; i.e. for the social licence to be meaningful it must co-exist with the full disclosure of all relevant information to stakeholders who desire the opportunity to have account taken of their views. The integration principle, in seeking to ensure that the legal process is shaped by principles such as sustainable development and polluter pays, also emphasises the value of a legal regime with societal benefit at its heart.

There are, of course, material differences between the concept of ‘principles’ and the actual substance of black letter law. For example, whilst a principle may act as a guide that underpins the design of the law maker, there is no guarantee that the legal text which emerges from the pen of that law maker will be a pure and undiluted expression of that principle in law. Alternatively, whilst a principle may assist a court seeking to correctly interpret the written law where there is a clear link between that principle and the legislation in question, there is no guarantee that two independent minds will arrive at the same interpretative conclusion when trying to read black letter law alongside principles.

Accordingly, it must be acknowledged that there are objective limits of seeking to establish a link between the social licence and the black letter law via examination of underlying principles of law. However, this does not mean that the principles underpinning law may be set aside for the purposes of the current research. There are

two key observations that must be acknowledged. Firstly, it is important to recognise the roles that principles play in interpreting law where law is unclear. Secondly, it is important to remember that the social licence is itself a phenomenon with no agreed upon rules of conduct, evidence, or procedure. The social licence is itself both a collection of principles (e.g. consent, trust, engagement, etc) and something that is driven by principles (e.g. where it is mobilised by stakeholders seeking the right to be heard on an issue of direct impact). Therefore, it must be observed that both the relevant law for the purposes of the research and the social licence share the basic common feature of being *related to* similar principles. Any attempt to establish the relationship between law and the social licence that ignores this fundamental commonality ignores a significant mutual starting point.

Of course, it must also be acknowledged that the first point of divergence between law and the social licence is in the law's ultimate expression of its principles within written text and enforceable pronouncements, versus the nebulous and intangible expression of the social licence summarised in the preceding Chapter. Accordingly, the current research does not dwell on the observation that both the social licence and law are phenomena underpinned by the idea of principles; it is the relationship post divergence from principles that is considered in most detail.

5.4.2. Primary sources of environmental law: an overview

As a legislative system that includes devolved regions with control over their own environmental laws and planning system, the UK does not contain a single regulatory body with absolute control over onshore petroleum extraction. Rather, distinct administrative regimes are in place across England, Wales, Scotland and Northern

Ireland. However, each UK region contains a regulatory regime that is markedly similar in content. Furthermore, as certain key aspects of UK policy and law-making remain reserved to Westminster, an overarching nexus exists.

The Scottish Parliament has broad legislative and policy responsibilities under the Scotland Act 1998 for a range of environmental protection and nature conservation functions, including:-

- integrated pollution prevention and control;
- land use planning controls;
- water quality and habitat improvement; and
- waste management[326,327].

However, powers reserved to Westminster, whilst not directly related to environmental protection, planning policy or law making, will regularly impact upon the above. For example, taxation and economic policy are reserved to Westminster[328], whilst onshore oil and gas licensing has recently been devolved to the Scottish Parliament[329]. Accordingly, should the UK government seek to stimulate oil and gas exploration by way of a tax incentive, a decision outside the scope of Scottish devolved powers over licensing, a side effect of this will be that any affected regions may require to adapt in preparation for increased industrial activity of the type incentivised.

In broad terms, the UK as a whole has a goal setting approach to regulation that

[326] Scotland Act 1998, sch 5 parts I and II
[327]G. Little, 'Principles, sources and institutions of environmental law in Scotland', para 2.14-2.16
[328]Scotland Act 1998, sch 5
[329]Scotland Act 2016, s 47

requires operators to ensure and demonstrate that risks are reduced to a level 'as low as reasonably practicable'[330]. As outlined above, in pursuit of this approach the regulatory regimes in place across each region are markedly similar. For example, in each UK region, environmental authorisations will be required from the relevant environmental authority[331], who also acts as a statutory consultee in the planning process. Similarly, a connecting regulatory nexus in terms of health and safety requirements is provided by the Health and Safety Executive's (HSE) remit across Scotland, England, and Wales[332], with HSENI in Northern Ireland a separate regulatory agency[333]. HSE/HSENI regulate to ensure the operator is managing the health and safety risks throughout the life cycle of the operation from design, construction, operation, and maintenance, through to decommissioning and abandonment, whilst their specialist inspectors scrutinise well design and construction plans[334].

Within Scotland, local authorities have responsibility for air quality, waste management, and taking appropriate action where an activity is causing a statutory nuisance, such as smoke, fumes, gases, dust, steam, or odour[335]. SEPA also has duties regarding local air quality management and IS a statutory consultee on, environmental impact assessments (EIAs) and strategic environmental assessments

[330]DECC, *Onshore oil and gas exploration in the UK: regulation and best practice (Scotland)* (DECC, 2013) pp.6-7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265984/Onshore_UK_oil_and_gas_exploration_Scotland_Dec13_contents.pdf> accessed 11 September 2020
[331]ibid
[332]The Health and Safety Executive, 'Our Role as a Regulator' *HSE* <https://www.hse.gov.uk/enforce/our-role-as-regulator.htm> accessed 11 September 2020
[333]The Health and Safety Executive for Northern Ireland, 'About HSENI' *HSENI* <https://www.hseni.gov.uk/about-hseni> accessed 11 September 2020
[334]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework*, p.4
[335]ibid, p 3

(SEAs), which are detailed below[336]. Together with HSE, SEPA is also the competent authority for the Control of Major Accident Hazard Regulations ('COMAH') regime[337]. Onshore petroleum extraction projects could potentially come into scope of the COMAH Regulations if they produce, store or handle significant quantities of dangerous substances[338]. All of the above are discussed in further detail below.

As mentioned earlier, Scottish Ministers have the power to grant and regulate onshore licences to search, bore for, and get petroleum within the Scottish onshore, and to determine the terms and conditions of such licences. Providing access to land for these purposes is also now devolved.

Local authorities and SEPA are also tasked with regulating onshore petroleum extraction activities. This is done largely via the operation of various statutory regimes that are each specifically designed to deal with certain risks or hazards. Each regime regulated by SEPA specifies the documentation required to be held on public register and, in some cases, the time scale for this information to be held. Applications for environmental permits are made available by SEPA on its public register and website, together with supporting documents[339]. Furthermore, all permits issued are accompanied by monitoring requirements where outlined in the permit, and also placed on the public register[340].

In addition to the aforementioned statutory regimes, the regulation of onshore

[336]ibid, pp 3 - 4
[337]ibid, p 4
[338]ibid
[339]ibid, p 11
[340]ibid

petroleum extraction activities is also achieved via the planning system. For example, whilst the Management of Extractive Waste (Scotland) Regulations 2010 ('MEWS') is administered through planning permission by the local planning authority, where these Regulations apply to onshore petroleum activities SEPA will be consulted[341]. SEPA will consult with local authorities on applications where it considers the proposal is likely to have a significant adverse effect on the water environment or interests of other users[342].

5.4.3. Primary sources of environmental law: Air and Climate

PPC is the primary legislative vehicle providing for measures to control specified emissions to air in Scotland from industry. The PPC Regulations contain a list of all activities that come within its scope[343], including refining of natural gas[344]. Accordingly, if an operator wishes to undertake this activity, they will require to obtain a permit from SEPA under the PPC Regulations[345]. That permit will contain a number of provisions that seek to control emissions to air and require monitoring by the operator and by SEPA. Compliance with these provisions will be key to the operator being allowed to continue with the activity for the duration that they hold their PPC permit[346].

Additional controls can also be placed upon any activities which may be deemed 'directly associated activities' to the activity listed in the PPC Regulations which forms the basis for the operator requiring to obtain a permit[347]. For example, vehicle

[341]The Management of Extractive Waste (Scotland) Regulations 2010, reg 12(2)
[342]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg 13(4)(c)
[343]The Pollution Prevention and Control (Scotland) Regulations 2012, schs 1 and 2
[344]ibid, sch 1, s 1, para 1(a)
[345]ibid, reg 11
[346]ibid, regs 55 and 56
[347]ibid, reg 2

movements at the site of an activity (the 'installation') could be included within the controls of a permit.

The provisions within EA95 related to Local Air Quality Management (LAQM) and National Air Quality Strategy (NAQS) are also relevant to the current research given the air quality concerns previously noted in relation to fracking. Within EA95, the following provisions are present:-

- section 82 provides that every local authority shall review the air quality within its area, both at the present time and the likely future air quality;
- section 83(1) obliges local authorities to designate any relevant areas where the air quality objectives are not (or are unlikely to be) being met as Air Quality Management Areas (AQMAs);
- once an AQMA is declared, section 84 obligates the local authority to develop and implement a plan (Air Quality Action Plan) to improve air quality in that area; and
- part IV of EA95 requires the Secretary of State to publish a NAQS.

As shall be outlined in the following Chapter, there are further provisions in the 1995 Act in relation to the above that provide for both public participation and general information sharing.

5.4.4. Primary sources of environmental law: Water

Where operators wish to abstract water for high volume fracking directly from either

surface or groundwater, a water abstraction licence from the environmental regulator is required[348,349]. Such a licence will only be granted provided that the proposed quantities can be abstracted in a way that does not harm the environment or the interests of other water users[350,351].

The Water Environment (Controlled Activities) (Scotland) Regulation 2011 ('CAR') is the primary legislative vehicle for protecting the water environment in Scotland. Similar to PPC, a number of activities are covered by the provisions within CAR, including abstraction of water from surface water or groundwater (two regularly cited concerns regarding the component activities of fracking)[352]. If SEPA considers that the activity in question is likely to have a significant adverse impact on the water environment then the application can be refused[353].

Other key component activities involved in fracking are similarly caught by the provisions contained within CAR. Alongside abstraction of water from surface water or ground water, CAR also regulates to prevent or minimise the potential water hazards associated with borehole construction, operation and decommissioning[354]. More generally, CAR regulates activities which are *'liable to cause pollution of the water environment; or result in the direct or indirect discharge, and any activity likely to cause a direct or indirect discharge, into groundwater of any hazardous substance or other*

[348]The Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework, pp.16 - 18
[349]The Water Environment (Controlled Activities) (Scotland) Regulation 2011, reg 3(b)
[350]Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework, pp.16 - 18
[351]The Water Environment (Controlled Activities) (Scotland) Regulation 2011, reg 15(1)
[352]ibid, reg 3
[353]ibid, reg 15(3)
[354]ibid, sch 3 part 1 activity 3

pollutant'[355]*.*

The net effect of the above is that a hypothetical operator seeking to frack in Scotland would likely require to have a CAR authorisation given that a number of component activities of fracking are caught within its scope. Whilst there are a number of different types of CAR authorisation that can be obtained, it is likely that a hypothetical operator would require a water use licence[356] given the significance of the activity. To obtain that authorisation, the operator would be required to provide information to SEPA in order that it may carry out a risk assessment to determine whether any potential impact on the water environment was tolerable[357]. For example, if the risks to the water environment were deemed acceptable then a licence could be issued to allow a borehole to be constructed, subject to conditions relating to, for example, maintenance or monitoring[358].

A CAR authorisation is also required where there is a discharge of treated water into the water environment Scotland. Accordingly, an operator seeking to frack would require to comply with discharge concentrations limits for particular contaminants imposed by SEPA to ensure any discharge of treated water does not result in a reduction in '*quality class or water quality standards'*[359]*.*

In addition to the above, where the proposed activity would involve the release of substances below the water table, or have the potential to cause such a release, SEPA

[355]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework*, p.17
[356]The Water Environment (Controlled Activities) (Scotland) Regulation 2011, reg 8
[357]ibid, reg 11
[358]ibid, sch 3 part 1 activity 3
[359]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework*, p.21

will only consider granting an authorisation when it is '*satisfied that the water environment can be protected from pollution and that the environmental objectives are not compromised*'[360]. This is directly relevant to fracking, given the substances contained within fracking fluid and the possibility of an underground leak resulting in contamination of the surrounding areas.

5.4.5. Primary sources of environmental law: Land

The risk of soil contamination arising is currently regulated through a number of different legislative instruments, many of which are outside the scope of the current research. For example, the management and remediation of contaminated land is regulated by Part IIA of the Environmental Protection Act 1990. However, the 1990 Act deals with historic contamination as opposed to legislation concerned with the idea of giving permission to an operator to undertake certain activities. Similarly, the Environmental Liability (Scotland) Regulations 2009 operate to confer liability on operators following significant damage to protected species and natural habitats, the water and environment, and land. However, the 2009 regulations apply post the occurrence of an incident as opposed to at the stage permission to act is generally sought by an operator.

Accordingly, much of the environmental law in Scotland pertaining broadly to the protection of land is *responsive* to incidents. However, that said, indirect soil contamination is prevented through a number of the measures identified above that are contained within CAR. Furthermore, the impact of PPC is that a hypothetical

[360]ibid, p.19

operator seeking to frack would also be required to consider and reduce any impact on soil from the relevant activity being undertaken as part of their PPC permit[361]. Whilst there is also a requirement within PPC permits for ongoing reporting that includes soil assessments, these obligations are post-permission requirements and, as such, outside the scope of the current research[362].

5.4.6. Primary sources of environmental law: NORM

Subject to limited exceptions[363], activities involving radioactive substances are regulated in Scotland by SEPA under the Environmental Authorisations (Scotland) Regulations 2018 ('EASR'). These regulations provide that such activities may require to be expressly authorised depending upon the level of radioactive substance involved and the nature of the activity.

Under EASR, there are four types of authorisation; general binding rules (GBR)[364], notification[365], registration[366]; and permit[367].These levels of authorisation are designed to reflect the level of risk inherent in the activity being carried out. At the lowest level of risk, GBRs are a set of mandatory rules that cover specific low risk activities set out in EASR. At the next level of risk sit activities that, whilst they do not require a formal authorisation in the form of a registration of permit, must be notified to SEPA in

[361]The Pollution Prevention and Control (Scotland) Regulations 2012, reg 23(2)
[362]See reg 48(2) of the Pollution Prevention and Control (Scotland) Regulations 2012 for an example. This obligates the operator, upon applying to surrender their permit, to produce a report describing the condition of the site affected by the surrender (the "closure report"), identifying in particular any changes from the condition of the site as described in previous reports.
[363]Ministry of Defence (MoD) sites in Scotland are exempt from the provisions of Environmental Authorisations (Scotland) Regulations – see Scottish Environment Protection Agency, 'Nuclear industry' (*SEPA*) <https://www.sepa.org.uk/regulations/radioactive-substances/nuclear-industry/> accessed 12 September 2020
[364]The Environmental Authorisations (Scotland) Regulations 2018, reg 10
[365]ibid, reg 11
[366]ibid, reg 15
[367]ibid, reg 20

advance of being carried out. Activities that carry a higher level of risk require registrations and permits that contain strict conditions that must be complied with by the operator.

As naturally occurring radioactive materials ('NORM') are present in many geological formations, including oil- and gas-bearing rock strata[368], a hypothetical operator seeking to frack could be required to navigate EASR in order to be lawfully authorised to operate. For example, the disposal of water or sediments returning to the surface containing NORM above thresholds defined in EASR would be within scope. Similarly, borehole drilling that resulted in drilling mud and/or cuttings being brought to the surface containing NORM would be within scope, as would any produced water abstracted from geologic formations containing NORM. Fluid returning to the surface from such formations during fracking, i.e. via the flowback of fracking fluid, may also contain NORM and be within scope.

Prior to the effective banning of fracking by the Scottish Government, SEPA previously adopted the position that unless the drilling operator can demonstrate, by measurements, that the concentrations of NORM are below the threshold values, all developments will require an authorisation before the operator accumulates or disposes of any wastes that containing NORM[369]. This position was adopted prior to the introduction of EASR when the relevant legislation in force WAS the Radioactive Substances Act 1993 (RSA). SEPA has not been required to revisit this position.

[368]The Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework, p 23
[369]ibid

5.4.7. Primary sources of environmental law: Light, Noise and Odour

A PPC permit will contain measures to control noise, where the activities covered under the permit are the source of the noise[370]. For example, noise from vehicle movements at a potential PPC installation could form part of the relevant considerations of SEPA in deciding whether to grant a permit to an applicant.

Odour impacts will be similarly covered under the PPC permit, provided the activities listed in the permit are the source of the odour[371]. A hypothetical operator seeking to frack with a PPC permit would be required to take appropriate preventative measures against pollution such that no signification pollution should be caused by the operator[372], including odour.

More generally, odours may be viewed as a statutory nuisance under Part III of the Environmental Protection Act 1990 should complaints arise. Again, this is outside the scope of the current research as it allows for a local authority response to complaints post permission being granted to the activity.

5.4.8. Primary sources of environmental law: Biodiversity, Flora and Fauna

Under the Conservation (Natural Habitats &c.) Regulations 1994 ('CNHR'), a 'competent authority' must not authorise a plan or project unless it can show that the

[370]See definitions of "emission" and "noise" in regulation 2 of The Pollution Prevention and Control (Scotland) Regulations 2012
[371]ibid
[372]The Pollution Prevention and Control (Scotland) Regulations 2012, reg 21(2)

plan or project will not adversely affect the integrity of a 'European site'[373,374]. The vehicle for making this assessment is known as a Habitat Habitats Regulations Appraisal (HRA), and 'competent authority' is defined to include '*…any Minister, government department, public or statutory undertaker, public body of any description, or person holding a public office*'[375]. For example, local authorities are competent authorities regarding planning applications, and SEPA is a competent authority for the purposes of CAR.

Loss of habitat and habitat fragmentation that could affect a Natura site[376] should also be subject to an HRA[377]. Again, the competent authority must decide whether there is enough evidence to conclude that the proposals won't have adverse effects on a Natura site's integrity.

If an HRA concludes that there is the potential for an adverse effect, a competent authority can potentially consent to a proposal if it is able to show that (1) there are no alternative solutions, (2) the plan or project is imperative, and (2) it is of overriding public interest to grant consent[378]. Where a proposal may impact upon European

[373]The Conservation (Natural Habitats &c.) Regulations 1994, reg 48(5)
[374]See regulation 10 of the Conservation (Natural Habitats &c.) Regulations 1994 - "European site" means *"(a) a special area of conservation, (b) a site of Community importance which has been placed on the list referred to in the third sub-paragraph of Article 4(2) of the Habitats Directive, (c) a site hosting a priority natural habitat type or priority species in respect of which consultation has been initiated under Article 5(1) of the Habitats Directive, during the consultation period or pending a decision of the Council under Article 5(3), (d) an area classified pursuant to [Article 4(1) or (2) of Council Directive 1979/409/EEC on the conservation of wild birds3 or] 2 Article 4(1) or (2) of the Wild Birds Directive; or (e) a site […]4 included in a list of sites proposed under regulation 7(1)"*
[375]The Conservation (Natural Habitats &c.) Regulations 1994, reg 6
[376]Natura 2000 is a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat type. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under the Birds Directive (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds) and the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora).
[377]Land Use Consultants Ltd, *Environmental Report for the SEA of the Scottish Government's Preferred Policy Position on Unconventional Oil and Gas in Scotland* (Final Report, October 2018) p.241 <https://www.gov.scot/publications/partial-business-regulatory-impact-assessment-unconventional-oil-gas-policy/> accessed 18 September 2020
[378]ibid, reg 85C

Protected Species[379], a licence must be granted by NatureScot before any other consent may be determined[380].

In a 2018 report produced for the Scottish Government, it was noted that the areas that could be lost to development were fracking to occur in Scotland could result in habitat being lost in 'locations where existing habitat is more important to local habitat networks or for supporting habitat connectivity to designated biodiversity sites'. This observation was based on the prospective area identified for unconventional oil and gas development in Scotland. Accordingly, it appears highly likely that HRA would be a feature of the consenting process for fracking in Scotland were it to be allowed.

5.4.9. Primary Sources of Environmental Law: Seismic activity

For a period, the UK Government used a 'traffic light system' requiring the cessation of operations where seismic events with a magnitude of 0.5ML or greater are induced. However, this system is no longer in use since the Government ended support for fracking in England in November 2019[381]. An equivalent system in Scotland was not introduced given the moratorium and subsequent effective ban.

5.4.10. Primary Sources of Environmental Law: Major Accident Hazards

Whilst its technical effect is not to provide a formal authorisation akin to those granted under PPC or CAR, the substantive effect of COMAH should be noted. For the reasons

[379]Animals and plants species listed in Annex IV of the Habitats Directive that are afforded protection under the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended).
[380]ibid regs 44 - 45
[381]BEIS, *Government ends support for fracking* (BEIS, 2 November 2019) <https://www.gov.uk/government/news/government-ends-support-for-fracking> accessed 13 September 2021

outlined below, it is offered that the substantive effect of COMAH is equivalent to the effect of a permissioning regime such that both should be considered part of the relevant law for the purposes of the current research.

COMAH aims to prevent major industrial accidents which can cause serious damage/harm to people and/or the environment. It does this by requiring operators to put in place necessary measures[382], have accident prevention policies[383], emergency plans[384], produce safety reports[385], and provide information to the public[386]. Where these measures are deficient, the enforcement authority (HSE and SEPA acting as a joint Competent Authority) can prohibit operation[387]. Whilst Regulation 3(d) provides that COMAH does not apply to *'the exploitation, namely the exploration, extraction and processing, of minerals in mines and quarries, including by means of boreholes',* COMAH does apply to the following:-

- onshore underground gas storage in natural strata, aquifers, salt cavities and disused mines;
- chemical and thermal processing operations and storage related to those operations;
- operational tailings disposal facilities, including tailing ponds or dams; and
- lower tier and upper tier establishments (i.e. establishments where a dangerous substance is present in a quantity equal to or in excess of the

[382]The Control of Major Accident Hazards Regulations 2015, regs 8(b) 11(b)
[383]ibid, reg 7
[384]ibid, reg 8(d), part 4
[385]ibid, part 3
[386]ibid, regs 17-19
[387]ibid, reg 22(b)

quantity listed in COMAH that results in the establishment coming within the scope of COMAH)[388].

Accordingly, whilst COMAH would not apply to a hypothetical fracking site in Scotland directly insofar as the exploitation of minerals is being carried on, COMAH could in theory apply depending upon whether any of the immediately aforementioned activities are being carried on. Whether the quantity threshold would be reached is unclear, given that no fracking has occurred in Scotland to date. However, it should be noted that in the Scottish Government's 2016 '*Unconventional Oil and Gas: Regulatory Workshop Overview of the Current Regulatory Framework*, COMAH was directly cited as relevant legislation for the purposes of understanding how fracking would be regulated were it to be permitted; '*Some sites could potentially come into scope of the COMAH Regulations if they produce, store or handle significant quantities of dangerous substances*'[389].

Where COMAH applies, the hypothetical fracking operator will be required to take all measures necessary to prevent major accidents and limit the consequences for human health and the environment[390]. Furthermore, they will be required demonstrate to HSE and SEPA as the joint Competent Authority that control measures have been taken to prevent major accidents[391], as identified by the operator, and that mitigatory action is in place should an accident occur[392].

[388]ibid, reg 3
[389]The Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework, p.4
[390]The Control of Major Accident Hazards Regulations 2015, reg 5(1)
[391]ibid, reg 5(2)
[392]ibid, reg 26

Under COMAH, a major accident could involve a release of substance, fire or explosion resulting from uncontrolled developments involving one or more dangerous substance that causes serious danger to human health or the environment, whether immediate or delayed, inside or outside the site[393]. Dangerous substances covered by the COMAH Regulations include named substances (eg hydrogen, ammonium nitrate), and generic categories with:-

- health hazards, including acute toxics;
- physical hazards, including explosives and flammable liquids and gases;
- environmental hazards, acute and chronic hazards to the aquatic environment; and
- others that react with water, including those that evolve toxic or flammable gases[394].

A full list of dangerous substances and relevant threshold quantities is provided within COMAH, and there are two thresholds for dangerous which vary for different categories of substances[395]. If an operator stores or uses more than the lower threshold for a dangerous substance their site is classed as a lower tier establishment[396]. If an operator stores or uses more than the higher threshold their site is an upper tier establishment[397].

[393]ibid, see definition of 'major accident' in reg 2
[394]ibid, see definition of 'dangerous substance' in reg 2
[395]ibid, sch 1
[396]ibid, see definition of 'lower tier establishment' in reg 2
[397]ibid, see definition of 'upper tier establishment' in reg 2

Where COMAH applies, all operators must:-

- notify the competent authority, of the basic details or their operation, such as the address of the establishment, site activities and the dangerous substances on site (a breakdown is required for petroleum products)[398];
- prepare a major accident prevention policy (MAPP)[399]; and
- develop a safety management system (SMS)[400].

In addition, upper-tier operators must:-

- prepare a safety report and update it every five years or following any significant changes or new knowledge about safety matters[401];
- prepare and test an internal emergency plan for the site[402];
- supply information to the local authority for external emergency planning purposes[403]; and
- provide certain information to the public about the activities[404].

5.4.11.Primary Sources of Environmental Law: Waste

There are several legislative regimes in Scotland that, together, account for the jurisdiction's regulatory response to the issue of waste generally. For example, the

[398]ibid, reg 6
[399]ibid, reg 7
[400]ibid, reg 7(7)
[401]ibid, reg 8
[402]ibid, reg 11
[403]ibid, reg 12
[404]ibid, reg 17

majority of waste management facilities are licensed by way of a Waste Management Licence ('WML') issued under the Waste Management Licensing Regulations 1994. However, some waste management activities fall outwith these Regulations (e.g. landfilling, incineration and disposal of hazardous waste) and are covered under the PPC regime[405]. Section 34 of the Environmental Protection Act 1990 places additional obligations on waste producers, carriers and any person within the chain of persons handling waste to consider the manner in which they deal with the material.

In short, there is an established waste management *industry* in Scotland that currently operates under the above regimes. As the purpose of the current research is not to consider the regulation of this industry, care is taken below to identify the waste regimes that relate to specific risks arising from fracking. Accordingly, whilst it is possible that fracking as an industry at the macro level could contain stakeholders that require a WML or the authorisation to carry waste (i.e. stakeholders providing such services to fracking operators), the current research considers only that legislation which responds directly to control waste risks caused by the specific activity of fracking.

Waste resulting from the prospecting, extraction, treatment and storage of minerals must be managed in accordance with the provisions of MEWS[406]. Any extractive waste produced by fracking (e.g. produced waters, drilling muds, fracking fluid flowback) would be caught by MEWS, meaning that the local authority will require this waste to be managed in a way that minimises risk to human health and the impact on the

[405]The Pollution Prevention and Control (Scotland) Regulations 2012, sch 1 s 5.2
[406]The Management of Extractive Waste (Scotland) Regulations 2010, see definition of 'extractive waste' in reg 2 and reg 4

environment[407].

For mining waste activities, UK operators must submit a waste management plan, the purpose of which is to prevent or reduce the production of extractive waste and its harmfulness, and the environmental regulator (I.e. SEPA in Scotland) may restrict or prohibit the use of any substances posing an environmental risk[408]. As already detailed above, any discharge of treated water in Scotland requires a CAR licence.

5.5. Planning Law

5.5.1. Background and principles

A 'planning system' is typically used within a jurisdiction in order to provide for the decision making processes that will control future developments and the use of land. Underground operations, as well as above ground development, can only be undertaken in Scotland once planning permission has been granted, subject to the developer obtaining whatever permits or licences may be required by the relevant regulatory body or bodies that provide oversight of activities at each development[409]. As with the principles underlying environmental law in Scotland summarised above, it is also necessary to understand the underlying principles of Scottish planning law. In their 2009 *'A Guide to the Planning System in Scotland'*, the Scottish Government outlined that the Scottish planning system is designed to:-

[407]ibid, reg 11
[408]ibid
[409]The Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework, pp.3, 8, and 9

- balance competing demands to make sure that land is used and developed in the public's long term interest; and
- help increase sustainable economic growth[410].

The above has been frequently restated by the current Scottish Government, albeit reforms have taken place since the 2009 guide was published. For example, in 2017 the Scottish Government stated that Scotland needed *'a more responsive and flexible approach to planning in Scotland*'[411] and that '*to fully realise a more enabling role for planning, our current system needs to change*'[412]. However, in explaining its reforms the Scottish Government also emphasised its ongoing commitment to inclusive growth, with people at the heart of the system underpinned by community empowerment:-

> *'Alignment and closer integration of planning with community planning can and should help to improve outcomes for communities. It is important that people have a say in the changes that affect their places and, equally, we must also be able deliver the inclusive growth that our economy requires and the housing that current and future generations need'*[413]*.*

The result of the recent reforms is the Planning (Scotland) Act 2019, which the Scottish Government currently cites on its' website as central to the creation of a modern

[410]The Scottish Government, *A Guide to the Planning System in Scotland* (The Scottish Government, 2009) p.2 <https://www.gov.scot/publications/guide-planning-system-scotland/> accessed 15 September 2020
[411]The Scottish Government, *Review of the Scottish Planning System – Planning Bill* (The Scottish Government, June 2017) p.4 <https://www.gov.scot/publications/places-people-planning-position-statement/> accessed 15 September 2020
[412]The Scottish Government, 'Places, People and Planning consultation: Scottish Ministers' position statement' (*gov.scot*, 29 June 2017) <https://www.gov.scot/publications/places-people-planning-position-statement/> accessed 15 September 2020
[413]ibid

planning system that involves *'people'* and an *'important element in a wider programme of work aiming to strengthen planning's contribution to inclusive growth and empowering our communities'*[414]*.* Whilst it could be offered that the concept of 'inclusive growth' is different to 'sustainable economic growth', the Scottish Government also provides that *'by bringing people together and looking at places 'in the round', planning is uniquely well placed to make these connections so that we respect, enhance and sustainably use Scotland's many assets'*[415]*.* Furthermore, the Scottish Government website currently provides that *'the aim of the planning system is to deliver a planning service that is efficient, inclusive, fit for purpose and sustainable…[playing] a key role in delivering high-quality places for Scotland… [balancing] competing demands to make sure that land is used and developed in the public's long-term interest'*[416]*.*

It is important to ask what is meant by the terms 'sustainable economic growth' and 'inclusive growth', given that sustainable economic growth is stressed in the 2009 guide as being the '*main purpose of the Scottish Government'*, and inclusive growth is clearly central to the quotes outlined above. Whilst there is no universal definition for either term or policy consensus on the correct approach to their implementation, at their simplest they convey the intention that the planning system should help build a growing economy but at the same time protect the environment for future generations and make sure that communities can enjoy a better quality of life. There is an obvious overlap here with the environmental principle of sustainable development discussed in the preceding section.

[414]ibid
[415]ibid
[416]ibid

As part of its aim to increase sustainable economic growth, the Scottish Government published an updated version of 'Scottish Planning Policy' ('SPP') in December 2020, the purpose of which was to set out national planning policies which reflect Scottish Ministers' priorities for operation of the planning system and for the development and use of land[417]. However, following a legal challenge at the Court of Session the December 2020 SPP was removed. Accordingly, the current SPP remains the predecessor to the December 2020 version; an SPP published by the Scottish Government in 2014[418].

The SPP is a statement of Scottish Government policy on how nationally important land use planning matters should be addressed across the country[419]. It sits alongside, amongst other things[420], the National Planning Framework ('NPF'), which provides a statutory framework for Scotland's long-term spatial development and sets out the Scottish Government's development priorities for the next 20 to 30 years[421].

The current NPF (NPF3) was published by the Scottish Government in November 2014[422] and sets the context for development planning in Scotland by providing a framework for the spatial development of Scotland as a whole. The Scottish Government is currently working on its replacement, NPF4, and published a position statement in November 2020 setting out its current thinking on the issues that it will

[417]The Scottish Government, 'Scottish Planning Policy' (The Scottish Government, December 2020) <https://www.gov.scot/publications/scottish-planning-policy/documents/> accessed 13 September 2021
[418] The Scottish Government, 'Scottish Planning Policy - Legal' (The Scottish Government, December 2014) <https://www.gov.scot/publications/scottish-planning-policy/> accessed 13 September 2021
[419]The Scottish Government, 'Scottish Planning Policy', p.2
[420]ibid
[421]ibid,p.3
[422]The Scottish Government, *Ambition.Opportunity.Place: Scotland's Third National Planning Framework* (The Scottish Government, 23 June 2014) <https://www.gov.scot/publications/national-planning-framework-3/> accessed 15 September 2020

need to address[423]. Of particular relevance to this research, the Scottish Government's position statement on NPF4 notes that it does not support fracking in Scotland and confirms that this will position be included within NPF4[424].

Policies within the SPP set out the planning issues that development proposals are expected to address, and policies specific to mineral extraction are contained within the 'Promoting Responsible Extraction of Resources' section[425]. The SPP directly provides for the preparation of development plans, contains requirements regarding the design of a development, and sets standards for the determination of planning applications and appeals. As a statement of Ministerial priorities, the content of the SPP is a material consideration that carries significant weight, though it is for the local decision-maker\planning authority to determine the appropriate weight in each case[426].

5.5.2. From principles to practice: the Macro level

Whilst the rules and process governing planning in Scotland are further detailed below, for present purposes it must be understood that Scottish planning is far from centralised. Rather, planning decisions are normally made at a local level, i.e. by the local authority within the boundaries of which a proposed development or project will take place if approved. Whilst it is possible for the Scottish Government to 'call in' a particular planning matter from a local authority in order to decide upon it directly, there

[423]The Scottish Government, *Scotland's Fourth National Planning Framework Position Statement* (The Scottish Government, 26 November 2020) <https://www.gov.scot/publications/scotlands-fourth-national-planning-framework-position-statement/documents/> accessed 13 September 2021
[424]ibid, p.2
[425] The Scottish Government, 'Scottish Planning Policy', pp.52-55
[426]Town and Country Planning (Scotland) Act 1997, s 25

exist a number of formal documents provided by the Scottish Ministers to promote consistency in the application of policy across Scotland whilst also allowing for sufficient flexibility to reflect local circumstances.

Accordingly, there are a number of key stakeholders involved in Scottish planning law who fall into the following four groups:-

1. parties seeking planning consent;
2. interested stakeholders;
3. Local Planning Authorities; and
4. the Scottish Government.

Groups 3 and 4 can be collectively referred to as the 'decision makers', for it is they who ultimately have the power to decide whether or not consent is granted to a planning application. Both the Scottish Government and the various Local Planning Authorities regularly issue guidance on planning, such that there are a broad number of sources from which to draw conclusions about the broad principles of planning law in Scotland.

Primary responsibility for planning in Scotland sits with local authorities (there are currently 32) and the two national park authorities[427]. These 34 entities are collectively referred to as 'planning authorities' and administer the following:

[427]The Cairngorms, and Loch Lomond and the Trossachs

- development planning (i.e. the creation and maintenance of their development plan);
- development management (i.e. decisions guided by policies in the development plan); and
- enforcement (i.e. where development is not carried out correctly)[428].

In addition to the above, the Planning etc (Scotland) Act 2006 established four Strategic Development Planning Authorities (SDPAs) to prepare and keep under review strategic development plans for their areas[429]. Each SDPA is made up of between two and eight planning authorities and is required to consult and engage with the community and interested parties[430]. There are currently four SDPAs[431]:-

- Aberdeen City and Shire SDPA;
- Glasgow and the Clyde Valley SDPA;
- SDPA for Edinburgh and South East Scotland – SESplan; and
- SDPA for Dundee, Perth, Angus and North Fife – Tayplan.

A variety of Scottish regulatory agencies are involved in the development plan process and in planning decision making as a statutory consultee. For example, SEPA and NatureScot both have duties to engage in the development plan[432]. Similarly, Historic

[428]The Scottish Government, 'Planning and architecture: Overseeing the planning system' (*gov.scot*, undated) <https://www.gov.scot/policies/planning-architecture/overseeing-planning-system/> accessed 15 September 2020
[429]Planning etc. (Scotland) Act 2006, s 2
[430]ibid
[431]The Scottish Government, *Strategic Development Plan Areas* (The Scottish Government, 2013) para 4 <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2013/03/circular-1-2013-strategic-development-plan-areas/documents/00416936-pdf/00416936-pdf/govscot%3Adocument/00416936.pdf> accessed 15 September 2020
[432]The Scottish Government, 'Planning and architecture: Development plans' (*gov.scot*, undated) <https://www.gov.scot/policies/planning-architecture/development-plans/> accessed 15 September 2020

Environment Scotland (HES) must also be informed of any changes to conservation areas[433].

Development Plans can be divided into Strategic Development Plans (SDP) and Local Development Plans (LDP). SDPs are produced by the SDPA regions in order to address region wide cross boundary issues, whereas LDPs are required for each local authority to allocate sites, either for new development or sites to be protected, and detail various policies that impact upon local planning decisions. Both types of plan may be accompanied by Supplementary Guidance, and a Development Plan Scheme is produced every year by all planning authorities in Scotland in order to set out their programme for preparing and reviewing their development plans. To ensure a level of consistency across development plans, the Scottish Government published the Development Plan Service Standard together with a Development Plan Preparation Guide in 2016[434].

Development Plans set out the factors that specific proposals will need to address, such as the following (each of which is listed due to its direct relevance to fracking):-

- disturbance, disruption and noise, blasting and vibration, and potential pollution of land, air and water;
- impacts on local communities, individual houses, sensitive receptors and economic sectors important to the local economy;
- benefits to the local and national economy;

[433]ibid
[434]ibid

- cumulative impact with other mineral and landfill sites in the area;
- effects on natural heritage, habitats and the historic environment;
- landscape and visual impacts, including cumulative effects;
- transport impacts; and
- restoration and aftercare (including any benefits in terms of the remediation of existing areas of dereliction or instability)[435].

Before a public plan or programme can be adopted, the Environmental Assessment (Scotland) Act 2005 ('EASA') requires those that are likely to have significant environmental effects to be subject to Strategic Environmental Assessment (SEA)[436]. An SEA is intended to systematically assess and monitor the significant environmental effects of public strategies, plans and programmes. The 2005 Act seeks to ensure that expertise and views are sought at various points in the process from SNH, SEPA, Historic Environment Scotland and the public[437]. The act also requires a public statement that outlines how opinions and views have been considered in the final plan or programme[438].

Finally, permitted development rights are a national grant of planning permission which allow certain building works and changes of use to be carried out without having to make a planning application. Development orders allow for the Secretary of State, by regulations or by order, to provide for the granting of planning permission for specified developments or for development of any specific class. This may be done on an

[435]The Scottish Government, 'Scottish Planning Policy' p.53
[436]Environmental Assessment (Scotland) Act 2005, s 1
[437]ibid, s 3 & ss 14 - 17
[438]ibid, s 18

unconditional basis or subject to such conditions or limitations as may be specified in the order. The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 provides that certain classes of development are permitted via this process.

For example, under the 1992 Order the following mineral exploration activity is permitted under class 53; '*development on any land during a period not exceeding 28 consecutive days consisting of (a) the drilling of boreholes, (b) the carrying out of seismic surveys, or (c) the making of other excavations for the purpose of mineral exploration, and the provision or assembly on that land or adjoining land of any structure required in connection with any of those operations*'. However, development on any land consisting of the drilling of boreholes, and the provision/assembly of any structure required in connection with those operations, still requires planning permission where it is for the purpose of petroleum exploration[439]. Furthermore, permitted development rights do not apply where a development requires an environmental impact assessment[440].

5.5.3. From principles to practice: the Micro level

In the preceding section of this Chapter, it was possible for the researcher to synthesise the relevant law for the purposes of the research by specific reference to both the hazards of fracking and their impact on different environmental media. This approach was rendered possible by the design of Scottish environmental law; it is

[439]The Town and Country (General Permitted Development) (Scotland) Order 1992, classes 53 and 54
[440]The Scottish Government, *Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework,* p.10

currently a fragmented system of various authorisations, permits, and licences that respond directly to a variety of different environmental risks. However, as outlined above, Scottish planning law is more holistic in the sense that a hypothetical operator seeking to frack in Scotland would potentially only need to engage in one process with one planning authority in order to obtain planning permission, subject to the possibility of Scottish Ministers using their call in powers. Therefore, in order to further synthesise the relevant law for the purpose of the research relating to planning, a different approach is taken below. As opposed to synthesis by reference to separate environmental risks and their regulatory responses, relevant planning law is now further synthesised by outlining the general process that a hypothetical operator would require to complete to obtain planning permission in Scotland.

Planning Authorities are responsible for determining applications for planning permission where required under the Town and Country Planning (Scotland) Act 1997. This act states that planning permission is required for the carrying out of any development of land, with 'development' defined to include the carrying out of building, engineering, mining or other operations in, on, over or under land[441]. Accordingly, were fracking to be allowed in Scotland, under the current planning system planning authorities would consider planning applications for all surface works associated with a fracking development. Furthermore, planning permission would need to be considered and granted separately for each of the exploration, appraisal and production phases and any requirements relating to local amenity, such as noise and lighting, will be covered by the inclusion of specific conditions within the planning permission. The 1997 Act also requires planning applications to be determined in

[441]Town and Country Planning (Scotland) Act 1997, ss 26 and 277

accordance with the relevant development plan unless material considerations indicate otherwise[442].

Were a hypothetical operator seeking planning permission for the exploration stage, the relevant planning authority would determine whether an Environmental Impact Assessment (EIA) is required. At present, an EIA must be carried out for certain developments listed within The Town & Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011. Development of a type listed in Schedule 1 of the 2011 Regulations always requires EIA, whilst development of a type listed in Schedule 2 requires EIA if it is likely to have significant effects on the environment by virtue of factors such as its size, nature or location. In determining whether a particular development is of a type listed in Schedule 1 or 2, the Scottish Government has directed planning authorities to have regard to the ruling of the European Court that the EIA Directive has a '*wide scope and broad purpose*'[443].

In a 2018 report instructed by the Scottish Government on its preferred policy position on fracking, it was concluded that any application for planning permission to carry out fracking would likely be accompanied by an EIA[444]. The EIA would describe the likely significant effects of operations on the environment, including on biodiversity[445].

As outlined above, the Scottish Ministers are able to intervene in planning decisions[446].

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[442] Ibid, ss 25 and 37(2)

[443]The Scottish Government, Planning Circular: The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (Scottish Planning Series Planning Circular 1/2017, 16 May 2017) para 19 <https://www.gov.scot/publications/planning-circular-1-2017-environmental-impact-assessment-regulations-2017/pages/3/> accessed 18 September 2020

[444] Land Use Consultants Ltd, *Environmental Report for the SEA of the Scottish Government's Preferred Policy Position on Unconventional Oil and Gas in Scotland* p 241

[445]ibid, p.104

[446]Town and Country Planning (Scotland) Act 1997, s 46

The Scottish Ministers may also become involved in planning matters in cases where a planning application is refused due to the fact that planning applicants may appeal to them[447].

Whilst a decision on a planning application or an appeal by ministers is final in terms of the route that an application takes through what is broadly referred to as 'planning law' by Scottish legal practitioners, parties may ultimately seek to judicially review this final decision to the Court of Session. However, judicial review is beyond the scope of the current research.

Finally, it should be noted that pre-application consultation ('PAC') is a statutory requirement, which must be undertaken in advance of any planning application being submitted, for developments that are categorised as being either 'major' or 'national' developments[448]. It would appear likely that this would include hypothetical fracking development, on the basis that major developments include:-

- any type of development that is mentioned in schedule 1 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011, e.g. groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres;

[447]Ibid, ss 47 - 48
[448] Town and Country Planning (Scotland) Act 1997, ss 35A – 35C

- in the case of business and general industry, storage and distribution, development where the floor area of the site is 10,000 square metres or more, or the total area of the site is 2 hectares or more;
- in the context of waste management facilities, development where the capacity of facility is 25,000 tonnes or more;
- in the context of minerals development, development where the total area of the site is 2 hectares or more; and
- in the context of other developments not classed within any single class outlined above, development where the gross floor space of any building, structure or erection constructed as a result of such development is 5,000 square metres or more, or the total area of the site is 2 hectares or more.

5.5.4. From principles to practice: Community Empowerment

The Community Empowerment (Scotland) Act 2015 was introduced by the Scottish Government with, amongst other intentions, the aim of '*enhancing community involvement in community planning*'[449]. The Scottish Government states that *'the spirit of the Act is one of improving outcomes for communities, encouraging and promoting dialogue, tackling inequalities, and supporting the increased participation of those whose voices are less heard or who face additional barriers'*[450]*.* It is offered that this aim brings the Act within the scope of the current research.

The obligation on Local Authorities to participate in community planning was first

[449]The Scottish Government, *Participation Requests under the Community Empowerment (Scotland) Act 2015 Guidance* (The Scottish Government, April 2017) p.3 <https://www.gov.scot/publications/community-empowerment-participation-request-guidance/> accessed 18 September 2020
[450]ibid

introduced into Scottish law via the provisions of the Local Government in Scotland Act 2003. This act defines community planning as a process:-

> *by which the public services provided in the area of the local authority are provided and the planning of that provision takes place (a) after consultation (1) among all the public bodies (including the local authority) responsible for providing those services; and (2) with such community bodies and other bodies or persons as is appropriate; and (b) after and by way of such co-operation among those bodies and persons as is appropriate*[451].

The Community Empowerment (Scotland) Act 2015 lists all the public authorities which take part in community planning and places new duties on them[452]. These authorities form a Community Planning Partnership (CPP) for each local authority area which must publish a local outcomes improvement plan (LOIP)[453]. A LOIP sets out the CPPs local outcome priorities for improvement[454]. Under the 2015 Act, CPPs must support community bodies to participate in all parts of the process, in the development, design and delivery of plans and in review, revision and reporting of progress[455].

The 2015 Act makes a number of changes to community planning, in particular by expanding the number of public sector bodies that are subject to community planning duties. In the 2003 Act, the public sector bodies within scope of the duty in addition to the local, were limited to the Health Board, Scottish Enterprise / Highlands and Islands

[451]Local Government in Scotland Act 2003, s 15(1)
[452]Community Empowerment (Scotland) Act 2015, sch 1
[453]ibid, s 4(5)
[454]ibid, s 6
[455]ibid, ss 6 and 14

Enterprise, Police Scotland, the Scottish Fire and Rescue Service, and the Regional Transport Partnership. Schedule 1 to the 2015 Act expands this list to include, amongst other public sector bodies the following organisations: -

- HES;
- National Park authorities;
- SEPA; and
- NatureScot.

In addition to listing new public sector bodies subject to community planning duties, the 2015 Act also places a number of new duties upon them in addition to the general duty to facilitate community planning. These duties include:-

- co-operating with other partners in carrying out community planning[456];
- taking account of LOIPs in carrying out its functions[457];
- contributing such funds, staff and other resources as the CPP considers appropriate to improve local outcomes in the LOIP and secure participation of community bodies throughout community planning[458]; and
- facilitating community planning and taking all reasonable steps to ensure the CPP conducts its functions effectively and efficiently[459].

The Act also introduces 'participation requests' into law; a process by which community groups can make requests to public bodies that they be engaged with in consultation

[456]ibid, s 14(2)
[457]ibid, s 14(5)
[458]ibid, s 14(3)
[459]ibid, s 13(1)

in relation to service improvement ideas[460]. Thereafter, the public body is required to publish a report on the engagement and consultation, the role of the community group, and whether service improvements followed[461].

5.6. Summary

The relevant law identified above was taken forward by the researcher and examined in detail via a close textual reading, the results of which are set out in Chapters 6 and 7. The purpose of this close textual reading will be to identify the extent of any commonality between the relevant law and each of the five codes identified in Chapter 5 as forming an objective answer to the question 'what is a social licence?', i.e. consent, stakeholder, trust, engagement, and beyond compliance.

Accordingly, the following sources of environmental law in Scotland will be taken forward by the researcher:-

- Environment Act 1995 (EA95);
- The Pollution Prevention and Control (Scotland) Regulations 2012 (PPC);
- The Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR);
- The Environmental Authorisations (Scotland) Regulations 2018 (EASR);
- Climate Change (Scotland) Act 2009 (CCSA);
- The Management of Extractive Waste (Scotland) Regulations 2010 (MEWS);
- The Conservation (Natural Habitats &c.) Regulations 1994 (CNHR);

[460]ibid, part 3
[461]ibid, s 31

- Environmental Assessment (Scotland) Act 2005 (EASA); and
- The Control of Major Accident Hazards Regulations 2015 (COMAH).

With regards to planning law, the following component parts of the planning law framework have been identified as requiring consideration; national planning framework, development plans, community empowerment, development orders, pre-application consultation, planning permission, and environmental impact assessment. The law underpinning these component parts of the process is set out in the following sources of planning, which are also taken forward for consideration in Chapter 6:-

- The Town and Country (General Permitted Development) (Scotland) Order 1992
- The Town and Country Planning (Scotland) 1997 Act (as amended)
- The Town and Country Planning (Development Planning) (Scotland) Regulations 2008
- The Town and Country Planning (Grounds for declining to follow recommendations) (Scotland) Regulations 2009
- The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013
- The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017; and
- Community Empowerment (Scotland) Act 2015.

Each of the above legal instruments represents a black letter expression of how the law should operate in theory. Whilst there may be a gap between theory and practice

due to a number of factors that are external to the black letter design of law, it is beyond the scope of this research to consider the impact of such a gap on the relationship that may exist between law and the social licence.

Finally, whilst permitted development rights would be unlikely to apply in the hypothetical context of Scottish fracking, such rights guaranteed by way of a development order are included in the following Chapter. This is done in order to ensure that (1) the analysis of law that follows includes all current components of the Scottish planning system that could theoretically apply were fracking to be allowed, and (2) insofar as the relationship between law and the social licence is considered in the context of planning law, all component parts of planning law are included such that all approaches taken in planning law are considered.

Chapter 6 – Analysing the relevant law

6.1. Introduction

The following two Chapters set out the results of the researcher's analysis of relevant law synthesised in the preceding Chapter. This analysis was conducted by the researcher 'through the lens' of the five headline codes created from the coding review undertaken in Chapter 4, namely; (1) consent, (2) stakeholders, (3) engagement, (4) trust, and (5) beyond compliance.

A close textual reading of the black letter law was conducted by the researcher with the specific purpose of identifying the extent of any commonality with, or divergence from, each of the five codes. As these five codes were found to be the most frequently recurring across the literature on the social licence, it was the researcher's position that the relationship between law and the social licence would become clearer by searching for provisions in the relevant legislation that either (1) share the same purpose or underpinning as the codes, or (2) appear to either contrast with, or actively work against, the same.

The observations set out in this Chapter, and Chapter 7, form the basis of the model that is developed by the researcher in Chapter 8. The current Chapter sets out the specific legislative provisions identified by the researcher utilising the above approach and includes comparative analysis of the same. Thereafter, Chapter 7 examines these specific provisions by direct reference to the five codes. Accordingly, Chapters 6 and 7 should be read consequentially.

6.2. Objectivity and subjectivity

In *Doctrinal Research: Researching the jury*, Hutchison writes that doctrinal analysis '*requires an ability to work within accepted discipline standards and rules to achieve a high level of interpretation and critique*'[462]. Further, Hutchison states that '*the research output is to a great extent predicated on the authors identity*'[463] and '*as with all research endeavours, the individual doctrinal scholar's theoretical stance towards the topic can be a pervasive influence in determining the questions being researched'*[464].

Cognisant of the above, and of criticisms that doctrinal research represents an '*insider's view*'[465], the researcher approached the law being analysed by first asking objective questions that are capable of being repeated by others. Whilst this then resulted in subjective questions arising from the nature of the task at hand, the researcher has attempted to explicitly acknowledge such subjectivity where it arises in the material set out below. Accordingly, the subjective questions are grouped into two categories by the researcher.

Firstly, there are questions that arise which are subjective in the sense that the answers to them are open to interpretation. For example, in considering the stakeholder code the researcher first undertook a literal search for the term 'stakeholder' within the relevant legislation. Thereafter, the researcher searched for terms within the legislation that appeared to be the same as, or similar to, stakeholder.

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[462] T Hutchinson, "Doctrinal Research: Researching the Jury" in D. Watkins and M. Burton (eds*), Research Methods in Law (Routledge, 2013) p 13*
[463] ibid, pp 15-16
[464] ibid
[465] N. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press, 1984),

‘The public’ was identified as a term within the legislation that appeared to be similar to stakeholder in the context of conveying rights to third parties beyond operator/applicant and relevant public authority. Whilst it is offered that it is difficult to argue that such use of ‘the public’ as a term is dissimilar to use of stakeholder, this is nevertheless a subjective question.

Secondly, there are questions that arise which are subjective in the sense that they relate to either the personal experience of those involved or their assessment of the rights afforded to them. For example, the trust code is defined in part as *‘the reliance of one actor on the truth, honesty and integrity of another, evidenced, obtained and maintained via transparent and procedurally fair processes’*. It is possible to ask objective questions of law with this code in mind, such as ‘what does the law *provide for* in terms of process?’. However, it is not possible to fully consider this code without subjective questions emerging given the inclusion of subjective terminology as ‘transparent’ and ‘fair’, e.g. ‘how fair is the process?’.

Similarly, the engagement code is defined as including processes which ‘*depending upon the perspective of the actors involved, will impact on the extent to which the engagement is deemed acceptable, meaningful, and appropriate’.* Again, doctrinal research can establish what those processes are, but it cannot on its own establish whether those processes are likely to be deemed acceptable, meaningful, or appropriate. There is an exception to this; if it can be demonstrated via doctrinal analysis of law that the provisions of the relevant legislation operate to exclude interested or affected parties, it naturally follows that no engagement is provided for such that the excluded stakeholder would likely deem the law to be lacking in meaning

from their perspective.

By acknowledging these aspects of subjectivity at the outset of the Chapter, and making clear the process adopted, where subjective questions are considered it is intended that the reader will be conscious that the observations offered may be open to a different interpretation. Furthermore, it is also intended to aid the identification of subjective questions to which there is no answer that can reasonably emerge from doctrinal analysis alone. This will be developed further in a subsequent Chapter that considers what further research is required to test the conclusions reached in the current thesis.

To guide the analysis in light of issues regarding objectivity and subjectivity, the researcher created several questions using the definition of the codes as a basis. Each separate piece of legislation synthesised as relevant in the preceding Chapter was approached with the purpose of answering those questions, which are detailed below, in order that:-

(1) an objective base of observations could be established before any subjective questions were considered;
(2) the legislation could be objectively compared against both the codes and the rest of the law being analysed;
(3) the analysis could be repeated by the researcher in order to test any observations made;
(4) clear and informed debate may be had as to the validity of any subjective observations that follow thereafter; and

(5) gaps may legitimately emerge for the purposes of future research.

The above may be further understood by reference to the example of the stakeholder code. As a result of the coding exercise summarised in Chapter 4, the stakeholder code was defined by the researcher as:-

> *'A person and/or group with an interest in the contested business, activity, project, or industry. Interest is broadly deemed to be related to impact upon the person and/or group. Whilst there is no process for ranking impacts or importance of stakeholders, references to the concept of the community and local interests outnumber references to macro-level stakeholders. References to the concept of stakeholder in tandem with the environment as special in the context of the social licence outnumber'.*

Based on the above definition, the researcher asked following objective questions for the purposes of analysing the relevant law through the lens of the stakeholder code:-

- Is stakeholder a defined term in the legislation?
- Is it otherwise used in the legislation without definition?
- Is interest a defined term?
- Is it otherwise used in the legislation?
- Is impact a defined term?
- Is it otherwise used in the legislation?
- Is there a formal process for ranking stakeholders?

- Are there references to the environment that coincide with references to stakeholders?
- Are there references to economic interest that coincide with references to stakeholders?
- Are there references to the concept of the community?

Once answered, the above objective questions naturally led the researcher to ask several subjective questions of the first type summarised above, i.e. are there are any other terms in the legislation that are the same as, or similar to, the terms found within the stakeholder code. Once these subjective questions of terminology and usage are answered, the context within which each relevant term is found becomes key.

For example, it is not enough to claim overlap between the social licence and law on the basis that it can be demonstrated that the legislation examined contains references to 'the general public' that coincide with references that equate to their interests and/or the impacts they experience. Further questions must be asked that focus on the context within which these questions are situated. This context is central to the task of properly comparing the social licence concept and law, as it is central to fully demonstrating the actual rights conferred by the law on those parties who are properly to be considered stakeholders.

6.3. Chapter structure

In order to aid dissemination and provide for a clear structure, the relevant law is subcategorised into the following:-

1. legislation primarily concerned with environmental permitting, i.e. PPC, CAR, and EASR;
2. other relevant environmental legislation, i.e. C(NH)R, COMAH, MEWS, and EA95; and
3. legislation concerned with planning.

As the legislation concerned with environmental permitting consists of various distinct regimes that operate in parallel and are triggered depending on the specific activity being carried out, the level of risk, and/or the environmental medium concerned, it is possible to disseminate observations by working through each separate piece of legislation in a sequential process. However, by comparison, the relevant planning law identified in the preceding Chapter operates as a cohesive whole, i.e. there are multiple provisions across different pieces of legislation that may operate simultaneously depending upon the matter being considered.

Furthermore, across the relevant planning legislation, there are provisions which apply at a micro level (i.e. on an activity by activity/site by site/development by development basis) and provisions which apply at a macro level (i.e. those provisions which introduce broader obligations and rights relating to macro level concerns which can, in turn impact on micro level matters). For example, at the macro level of planning law in Scotland sit the legislative provisions governing the creation, maintenance, and effect of (1) a National Planning Framework ('NPF'), and (2) development plans ('DP'). At the micro level sits control of planning through legislative provisions requiring that planning permission ('PP') is obtained before certain activities may be lawfully commenced. As shall be outlined below, at various stages both the NPF and DPs must

be considered at the micro level when planning applications are considered.

Similarly, there are micro and macro level distinctions to be made in the sub-category of ‘other relevant environmental law’. For example, the Control of Major Accident Hazards Regulations 2015 (‘COMAH’) provide for certain regulatory obligations to apply on a site by site basis depending on the level of hazardous material being stored at each site. In that regard, it can be seen to operate at the micro level. By comparison, the Climate Change (Scotland) Act (‘CCSA’)2009 operates at the macro level given that it is the process by which the Scottish Government sets national targets for greenhouse gas emissions. It has the potential to impact on activities depending upon how restrictive the target is that is set and its implication for those activities which result in emissions of greenhouse gases.

Accordingly, the observations made regarding the legislation that deals with environmental law are disseminated via comparison between different pieces of legislation that govern discrete, yet comparable, issues. The observations regarding planning law are instead disseminated via consideration of the macro level and the micro level process to which multiple pieces of legislation may apply. For the purposes of the current research, the Community Empowerment Scotland Act 2015 (‘CE’) is included at the macro level of planning in terms of the provisions it contains that provide for public involvement in decision making generally. Development orders (‘DO’) are also included at the macro level given that they may be used by the Scottish Government to grant a blanket permission of certain activities without the need for specific planning permission from the relevant planning authorities.

There is some unavoidable cross-over between the above sub-categories given the overlap between environmental law and planning law where permission to operate is considered. As the sub-categories above are adopted for the dual purpose of grouping *prima facie* similar legislation whilst creating a useful structure for the dissemination of observations, the current research does not require that a strict doctrine be established for the 'correct' sub-categorisation of legislation. Multiple different approaches could be taken to sub-categorisation of relevant law; the point is to provide meaningful observation of the provisions of the law as they apply to the codes regardless of where the relevant legislation sits within the structure of the Chapter.

Separately, as shall be demonstrated below, the same legislative provisions are regularly relevant to multiple social licence codes. For example, whilst 'stakeholders' is a code in its own right, the other codes have the concept of stakeholders embedded with them, e.g. engagement as a code relates to engagement *with stakeholders*. Accordingly, legislative provisions identified as relevant to the stakeholder code are likely to be relevant to the engagement code. This aspect of overlap impacts upon the Chapter structure, as care must be taken to avoid unnecessary repetition when dealing with each code in isolation.

In light of this, the researcher has adopted a two stage approach below. Firstly, the relevant legislation within each sub-category of law is examined in order to identify those provisions which are relevant to the current research. Thereafter, each code is considered separately. This approach reduces the amount of repetition considerably as there is no need to repeat the process of identifying relevant law each time a new code is considered.

6.4. Methodological limitations

It is important to state at this stage that there are questions about the legislation that are relevant to the exercise of considering law in the context of the social licence that go beyond the skill of the researcher. For example, the law analysed frequently provides for the establishment and maintenance of a public register that requires disclosure of certain information. Where the law mandates disclosure of scientific or technical information, it is not possible for the researcher to consider whether such information will be of practical use to someone seeking to engage with the process of authorising onshore petroleum activities. As a lawyer, the researcher is not qualified to assess the quality of such provisions.

However, an inability to analyse the quality or usefulness of the scientific or technical detail mandated by legislation is by no means fatal to the task at hand. It is enough for present purposes to state that the existence of public register provisions demonstrates the art of the possible. Whilst it may be that a technically qualified researcher would identify significant gaps in the material that must be placed on the register, it is conceptually important for the purposes of considering the social licence that a public register exists. If the material listed is insufficient in order to fully inform, that does not detract from the potential that a public register provides in terms of aiding information sharing. In other words, the basic principle of providing information is of more relevance to the current research than analysing the quality of that information. However, there is scope for further cross disciplinary research in this area.

It is also important to state at this stage that the purpose of the research is not to examine the efficacy of any one legislative approach over another insofar as it seeks

to fulfil a stated purpose. For example, it is beyond the scope of the current research to ask whether it is more or less effective to rely upon use of General Binding Rules ('GBRs') in legislation as opposed to a requirement to permit all activities within the scope of the legislation in question. However, those same GBRs are relevant where they place any requirement upon operators to follow a process that brings them within the sphere of the codes, e.g. if there was a requirement in a GBR to inform all stakeholders of their intention to carry out an activity. As a result, there are questions on the design and implementation of law which are not considered that, in a subsequent research exercise, could add further substance to the principal question of the relationship between law and the social licence. Again, this is developed further in Chapter 8.

Finally, it is beyond the scope of the current research to consider all legal provisions that apply *once an activity has started or has been permitted*. This is on the basis that the researcher seeks to consider relevant provisions *up to the point that an activity begins for the first time or is permitted to begin*. For example, it is not relevant to the current research that there are detailed provisions on surrendering PPC permits. This is because the surrender relates to the end of the activity; a stage at which the social licence for an activity is arguably moot because, it must be assumed, the activity has ceased or will shortly cease.

6.5. Relevant provisions - environmental permitting

When the environmental permitting legislation is examined through the lens of the five codes, the provisions which are most commonly marked as relevant are those which relate to:-

1. public participation in decision making;
2. information sharing, i.e. via the use of public registers and advertisement/service of notices; and
3. the imposition of obligations on third parties, e.g. off-site conditions.

These three themes recur throughout the rest of the relevant legislation examined in this Chapter and the range of approaches taken will become key. It is in the environmental permitting legislation where the emergence of these themes is most stark. However, there are, often subtle, differences in drafting which lead to notable differences in practice.

6.5.1. PPC

The following provisions within The Pollution Prevention and Control (Scotland) Regulations 2012 ('PPC') were marked as directly relevant to the research and broadly relate to information sharing: -

- Subject to exceptions that protect commercial confidentiality, national security, and legal privilege, a public register must be made available by SEPA at all reasonable times for inspection *'by the public free of charge'* and SEPA must also *'afford to members of the public facilities for obtaining copies of entries, on payment of reasonable charges'*[466].
- The list of information that the register must contain includes (1) all particulars of any application made to SEPA for a permit, (2) any representations made by

[466]The Pollution Prevention and Control (Scotland) Regulations 2012, reg 64(3)

any person in response to advertisements, and (3) all particulars of any permit granted by SEPA, and the reasons on which the decision is based[467].

- The register must also contain (1) all particulars of any application made to SEPA for the variation, transfer or surrender of an existing permit, (2) all particulars of any advertisement of the same, and (3) any representations made by any person in response to advertisement of a the same, unless the respondent requested their representation be excluded from the register.

The following provisions were marked as directly relevant to the research and broadly relate to public participation in decision making: -

- The Scottish Ministers or SEPA must, before making, revising or revoking standard rules, i.e. rules which apply to an installation or any mobile plant within the scope of PPC, consult *'(a) those persons appearing to the authority to be representative of the interests of those communities likely to be affected by the proposed rules, revision or revocation, …and (c) such other persons as appear to the authority to be likely to be affected by or otherwise have an interest in the proposed rules, revision or revocation*'[468].
- SEPA must, within 14 days of receiving an application for a PPC permit, give notice of the application (enclosing a copy to) *'such other persons as the Scottish Ministers may direct'*[469]

[467]ibid, at sch 9
[468]ibid, at reg 38
[469]The Pollution Prevention and Control (Scotland) Regulations 2012, reg 13(e)

- In the case of a permit to operate a Part A installation[470], the particulars for an application to SEPA for a permit must include (1) a site report, (2) where the permit will authorise an activity that involves the use, production or release of a relevant hazardous substance, a baseline report, (3) a description of the installation or mobile plant, the PPC activities listed to be carried out, (4) any other directly associated activities to be carried out on the same site as an installation, and (5) information on the nature, quantities and sources of foreseeable emissions from the installation or mobile plant into each environmental medium, and a description of any foreseeable significant effects of the emissions on the environment and on human health[471].
- Where SEPA makes a draft determination of an application for a Part A PPC permit, the draft must be published on the SEPA website and by any other means considered appropriate, and the advertisement must *'explain that any person may make written representations to SEPA in a 28 day period beginning with the date of the advertisement, and give the address for receiving such representations'*[472].
- Where representations are made, SEPA must give notice of its final determination and include in the public register a copy of the final determination together with *'information on the reasons and considerations on which the determination is based, including information about the public participation process'*[473].

[470]"Part A installation" means an installation where an activity listed under the heading "Part A" in any section of Part 1 of Schedule 1 of the Pollution Prevention and Control (Scotland) Regulations 2012, reg 13(e) is carried out. "Part B installations are also provided for in the regulations, as are solvent installations.
[471]The Pollution Prevention and Control (Scotland) Regulations 2012, sch 4 para 1
[472]ibid, sch4 para 23(1)(c)
[473]ibid, sch4 para 23(1)(d)(ii)

- Public consultation as per the above is also required for all draft determinations of variations resulting in (1) a substantially changed installation, (2) a change to an emission limit value (ELV) due to significant pollution; and (3) an ELV being included in a permit that derogates from what would normally be provided[474].
- SEPA must, within 14 days of receipt of a notice of appeal by an applicant/operator regarding a determination, give notice to (a) any person who made a representation to SEPA in connection with the matter where the appeal is against a matter which was subject to public consultation, and (b) any other person whom SEPA considers it appropriate to notify[475].
- SEPA may grant a permit in respect of specified waste management activities '*only if it is satisfied that the applicant is a fit and proper person to carry out that activity*' [476]. SEPA must determine whether a person is a fit and proper person by reference to ability of a person to fulfil the conditions of the permit which apply, or will apply, to the carrying out of that activity. As there is no restriction on the content of representations allowed by those persons responding to draft determinations, it is therefore open to the public to raise concerns about an applicant's status as fit and proper.

The following provisions were marked as directly relevant and broadly relate to the imposition of obligations on third parties: -

[474]ibid, sch 7 paras 4 and 7
[475]ibid, sch 8 para 3
[476]ibid, para 18(1)(a)

- SEPA may include in a permit a condition requiring an operator to carry out works or do other things in relation to land not forming part of the site of the installation (an 'off-site condition'), whether or not the operator is not entitled to carry out such works or to do that thing in relation to the land[477].
- A person whose consent would be required to carry out such works, or to do that thing, must grant (or join in granting) the operator such rights in relation to the land as will enable the operator to comply with an off-site condition[478].
- Before granting a permit subject to an off-site condition, SEPA must give notice to *'every person appearing to SEPA'* to be the owner, tenant, or occupier of land where rights will have to be granted by that person to the holder of the permit if the proposed off-site condition is included in the permit. The notice must describe the proposed off-site condition, the nature of the works, and the representation period for the relevant person to make representation to SEPA[479].
- Compensation may be payable for loss and damage being incurred as a result of conditions being imposed by SEPA, via a PPC permit, on the 'relevant interest' of a third party[480], i.e. an 'interest in land in respect of which rights have been granted by the grantor under regulation'[481].

It should be noted that there is no basis for the public to appeal either (1) a decision reached on a permit or licence determination, or (2) a decision to remove something from the public register for reasons of commercial confidentiality. Persons who would

[477]ibid, reg 24(1)
[478]ibid, reg 24(2)
[479]ibid, sch 4 para 16
[480]ibid, sch 6
[481]ibid, sch 6

otherwise wish to appeal will find their only potential legal remedy lies in judicial review.

6.5.2. CAR

Whilst PPC imposes a requirement upon operators that all activities within the scope of PPC be carried out under a permit, there are three levels of authorisation within The Water Environment (Controlled Activities) (Scotland) Regulations 2011 ('CAR'); General Binding Rules (GBRs), Registrations, and Licences[482].

As GBRs represent a set of mandatory rules which cover specific low risk activities, operators conducting activities complying with the rules do not require an application to be made to SEPA to either (1) register the activity or (2) obtain a water use licence[483]. For small-scale activities that individually pose low environmental risk to the water environment but, cumulatively, can result in greater environmental risk, operators must apply to SEPA to register these activities under CAR[484]. At the top end of the risk scale, site-specific conditions are set within CAR 'water use licences' to protect the water environment from activities that pose a higher risk[485].

The impact of this difference is that there are a number of smaller scale, low risk activities authorised under CAR to which public consultation rules do not apply as undertaking an activity in compliance with a GBR triggers no requirement in CAR to consult with the public.

[482]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, regs 6–8
[483]ibid, reg 6 and sch 3
[484]ibid, reg 7 and sch 10 part 2
[485]ibid, reg 8

The following provisions were marked as directly relevant to the research and broadly relate to information sharing:-

- Similar provisions are included in CAR as in PPC for the maintenance of a public register and both legal privilege and commercial confidentiality can be claimed by any individual or business in order to stop publication. However, there is no provision in CAR for restricting disclosure on the grounds of national security[486].
- As with PPC, amongst other matters the register must contain (1) all particulars of any application made to SEPA for a new authorisation, or the transfer or surrender of an existing authorisation, (2) all particulars of any advertisement of the same, and (3) any representations made by any person in response to such an advertisement, unless the respondent requested their representation be excluded from the register[487].
- If SEPA receives an application for a CAR licence it may, if it considers that the activity has or is likely to have a significant adverse impact on the water environment or the interests of '*other users of the water environment'*, (a) publish such details of the application as it considers appropriate on its website; and (b) require the application to be advertised[488].
- Such advertisement must explain *'that any person affected or likely to be affected by, or having an interest in, the application may make representations to SEPA in writing within 28 days beginning with the date of the advertisement'*[489].

[486]ibid, reg 37
[487]ibid, sch 8
[488]ibid, reg 12
[489]ibid, reg 13(4)(c)

The following provisions were marked as directly relevant to the research and broadly relate to public participation in decision making:-

- SEPA must consider all written representations that are duly made in connection with an application[490].
- Where a third party representation is made, before it determines an application SEPA must *'serve notice of its proposed determination on any person who has made a third party representation in respect of the application specifying that that person may, within the period of 21 days beginning with the date of service of the notice'* and *'notify the Scottish Ministers in writing that that person objects to SEPA's proposed determination'*[491].
- If SEPA determines an application in respect of a controlled activity that SEPA considers likely to have a significant adverse impact on the water environment, SEPA must make available to the public as soon as reasonably practicable (a) its decision, (b) the main reasons for it, (c) the matters considered in making it, and (d) if the application is granted, details of any conditions imposed upon the applicant[492].
- SEPA must, within 14 days of receipt of a notice of appeal by an applicant/operator, give notice of it to (a) any person who made representations to SEPA with respect to the subject matter of the appeal; and (b) any person who appears to SEPA to be affected or likely to be affected by, or have an interest in, the subject matter of the appeal[493].

[490]ibid, reg 13(5)
[491]If the Scottish Ministers confirm that they do not intend to direct SEPA to refer the application to them for their determination, SEPA may determine the application. If the Scottish Ministers decide to determine the application they may direct SEPA accordingly.
[492]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg 15(6)
[493]ibid, sch 9 para 6

- SEPA may only grant a water use licence if (a) a person has been identified who will be responsible for securing compliance with the authorisation and the conditions specified in it; (b) it is satisfied that person will secure such compliance; and (c) it is a condition of that authorisation that that person secures such compliance[494]. Again, there are no restrictions on the content of representations by those who are allowed to make representations. As such, it is open to respondents to comment on the suitability of the proposed responsible person as part of the public consultation process that applies in cases of potential significant adverse impact on the water environment.
- Whereas PPC contains the 'fit and proper person' test summarised above in relation to specified waste management activities, there is no direct equivalent for activities in CAR.

The following provisions were marked as directly relevant and broadly relate to the imposition of obligations on third parties:-

- By serving a notice on the relevant responsible person or operator for a water use licence, SEPA may require that work is carried out by them in relation to land outwith their ownership or control[495]. However, '*any person whose consent is required before that work may be carried out must grant, or join in granting such rights in relation to any land as will enable the notice to be complied with*'[496].

[494]ibid, reg 8(6)
[495]ibid, reg 34(1)
[496]ibid, reg 34(2)

- Before serving the responsible person or operator with the notice requiring that they carry out work, SEPA must consult such persons '*insofar as it is reasonably practicable*' that appear to it to be the owner or occupier who will be affected by the notice, and/or any person who might otherwise be required to grant or join in the granting of rights[497].
- A failure by SEPA to comply with the above consultation obligation will not render invalid any notice served on the relevant responsible person or operator[498].
- Compensation may be available[499] for loss and damage being incurred as a result of conditions being imposed by SEPA on the 'relevant interest' of a third party '*in land or waters in respect of which rights have been granted*'[500].

The above provisions are a clear example of a regulator being empowered by legislation to force third parties to agree to work being carried out and/or grant such rights as are required to enable the work. Accordingly, whilst CAR utilises the concept of 'consent' in terms of the language of these provisions, the type of consent produced by these provisions is not freely given. On that basis alone, it would be reasonable to argue that this is not 'consent' in terms of the concept that is referred to throughout the social licence literature previously reviewed, i.e. if the third party has no choice to say no then it cannot be properly termed consent. Further, SEPA's consultation obligation in this context is heavily caveated; (1) they must only consult owners, occupiers, and those who will be required to grant rights (i.e. not all interested or affected parties), and (2) a failure to consult has no impact on the validity of the notice requiring the work

[497]ibid, reg 34(3)
[498]ibid, reg 34(4)
[499]ibid, sch 7 para 4
[500]ibid, sch 7 para 1

be undertaken.

As with PPC, there is no basis for the public to appeal either (1) a decision reached on a determination, or (2) a decision to remove something from the public register for reasons of commercial confidentiality. Persons who would otherwise wish to appeal will find their only potential remedy lies in judicial review.

6.5.3. EASR

In the Environmental Authorisations (Scotland) Regulations 2018 ('EASR'), something of a hybrid approach taken between the provisions of PPC and CAR. For example:-

- As with CAR, there are levels of authorisation in the form of GBRs, Registrations, and Permits. However, there is also a further level of authorisation that sits between GBR and Registrations termed 'Notifications', where operators must notify SEPA that they are undertaking an activity that is governed by GBRs but represents a slightly higher risk[501].
- As with PPC, when revising standard conditions SEPA must consult '*such persons as it considers appropriate*'[502] and SEPA must also consult '*such persons as it thinks fit*' before publishing or revising guidance on which activities are subject to which level of authorisation[503].

[501]The Environmental Authorisations (Scotland) Regulations 2018, part 3
[502]ibid, reg 34
[503]ibid, reg 66(4)

- A public register is also maintained that is subject to commercial confidentiality, legal privilege, and national security, with comparable information made available as in PPC and CAR when disclosure is not otherwise excluded[504].
- Compensation may again be payable for loss and damage being incurred as a result of conditions being imposed by SEPA, via an authorisation, on the 'relevant interest' of a third party[505].
- The same appeal provisions apply, i.e. (1) there is no scope for third party appeal of determinations and (2) SEPA must, within 14 days of receipt of a notice of appeal of a determination give notice to (a) any person who made a representation to SEPA in connection with the matter where the appeal is against a matter which was subject to public consultation, and (b) any other person whom SEPA considers it appropriate to notify[506].
- Where public consultation takes place, comparable provisions exist within EASR as with CAR and PPC that allow for respondents to comment upon applicant suitability. In particular, SEPA must not grant or vary a registration or permit unless it is satisfied that the applicant (a) is the person who has or will have control over the regulated activity; and (b) is a 'fit and proper person' to be in control of the activity[507].

However, the approach to public consultation is unique in EASR insofar as it provides SEPA with an additional element of discretion as to whether or not consultation is required. As with CAR, SEPA must consider all representations made during the

[504]ibid, regs 38 – 45
[505]ibid, sch 2 part 2
[506]ibid, sch 4 para 6
[507]ibid, regs 18(3) and 23(3)

relevant consultation period[508]. However, for any new permit applied for under EASR, public consultation will occur where at least one of the following three criteria are met[509]:-

1. public consultation is specifically required by the technical schedule of the EASR;
2. the permit, where granted, will authorise for the first time, a regulated activity which has the potential to cause significant environmental harm; or
3. SEPA determines that a consultation should take place.

The net effect of the above is that there are some activities under EASR which will always require public consultation before they are authorised, i.e. where the technical schedule of EASR expressly obligates SEPA or where the permit will authorise for the first time an activity with potential to cause significant harm. Again, this is different to PPC where all new permits must be consulted upon. It is also different to CAR given the inclusion of automatic consultation based on the technical schedule without power or influence vested in the relevant authority to exercise discretion in such cases.

This discretion is extended where EASR defines 'public consultee' as '*a person whom SEPA* ***considers*** *is affected by, is likely to be affected by, the application*'[510]. It follows that the grant of public consultee status under EASR is entirely within the discretion of SEPA, albeit a discretion that is fettered by a requirement to include those considered to be 'affected'.

[508]ibid, sch1 para 8(6)
[509]ibid, sch1 para 7(3)
[510]ibid, sch1 para 8

The language used in EASR compared to CAR is worth noting where consultation is undertaken in EASR based on the second criteria listed above. Where CAR refers to '*significant adverse impact*' on the water environment, EASR refers to '*significant environmental harm*' arising from a '*first time*' authorisation[511]. There may be little, if anything, between the two approaches to conceptualising the risk as environmental 'harm' as opposed to 'adverse impact', and both pieces of legislation require there to be a significant level of the same before the relevant provisions are triggered. However, the use in EASR of 'first time' suggests the possibility that public consultation may not be repeated for subsequent applications to authorise activities that have previously been consulted upon and authorised.

Finally, a different approach is taken in EASR to defining commercial confidentiality. The term 'legitimate economic interest' is used with the result that information that may normally be subject to disclosure on a public register can be commercially confidential '*to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest*'[512].

6.5.4. Discussion

A lay person may assume that, if all that is changing is the environmental media being protected or the risk being controlled, the material provisions of the law as it deals with the rights afforded to them would remain consistent in terms of public participation in decision making. Indeed, at a very high level, the main difference between PPC and

[511]ibid, sch1 para 7(3)
[512]ibid, reg 40

CAR relates to the environmental medium which the legislation aims to protect. However, whilst there may be several logical reasons underpinning the approaches taken and their differences, the key point for the purposes of the current research is simply to note that meaningful differences do exist.

The approach to public participation in decision making provides the clearest example of such differences. Under PPC, if an application is duly made SEPA will circulate copies to consultees for review and comment, and the operator must advertise the application for public consultation. However, public consultation will only take place in CAR in licence cases where SEPA considers that the controlled activity '*has or is likely to have a significant adverse impact on the water environment or the interests of other users of the water environment'*[513]*.* Under EASR, unless consultation is mandated by the technical schedule of the act, the decision to consult is at SEPA's discretion view given that a public consultee is defined under the act to include persons considered by SEPA to be affected or likely affected.

Accordingly, the participatory rights afforded to the public are nuanced across the legislation:-

- In PPC, **any person** may make written representations to SEPA in a 28 day period beginning with the date of the advertisement of a draft determination;
- In CAR, where a licence application has the potential of resulting in a significant adverse impact to the water environment, **any person affected or likely to be**

[513]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, regs 13(1) and 15(6)

affected by, or having an interest in, the application may make representations to SEPA; and

- In EASR, public consultees are persons **whom SEPA considers are affected by, is likely to be affected by,** the application.

The above three examples show that at present/at the date of writing[514] a spectrum of approaches has been implemented across the legislation in terms of public participation. At one end of the spectrum any person may make written representations and all activities are regulated by way of permits, i.e. PPC. At the other end of the spectrum, some activities do not require a permit and a person is afforded the status of public consultee provided that SEPA *considers* that they are affected by, or are likely to be affected by, the application, i.e. EASR.

Somewhere in between these two poles sits CAR wherein:-

- there is no automatic right to participate in consultation;
- not all activities require a permit/licence; but
- unlike EASR, there is nothing in the legislation which states that the status of public consultee is dependent on SEPA's consideration of the status of the person in terms of the effect of the application upon them.

[514] The Scottish Government intend to introduce an integrated system of all environmental authorisations in Scotland via the EASR. The EASR will eventually integrate, as far as possible, the authorisation, procedural and enforcement arrangements relating to water, waste management, radioactive substances, and pollution prevention and control. Once all phases of the framework are completed, it may be that there is an entirely streamlined process for public participation instead of the nuanced approach set out above. See SEPA, 'Environmental Authorisations (Scotland) Regulations 2018' (sepa.org.uk, undated) <https://www.sepa.org.uk/regulations/how-we-regulate/environmental-authorisations-scotland-regulations-2018/> accessed 4 June 2021

Both CAR and PPC would appear to allow persons to become involved in consultation by reason that they self-identify as affected or interested, as opposed to being deemed to be so by SEPA. However, EASR allows SEPA to disregard the representations of persons that they do not consider should be granted public consultee status.

It should be noted that there is no obligation on the relevant authorities under PPC to have regard to, or to respond directly to, any representations made by the public regarding draft determinations. Rather, all that is required is for '*information on the reasons*'[515] to be provided explaining why SEPA's final decision was made and for the public participation process that was followed to be set out. Accordingly, it is theoretically possible for the relevant authorities to acknowledge that representations were made but then base their decision entirely on other factors. This clearly differs from the provision in CAR explicitly requiring that SEPA '*consider*' such representations. Whilst the actual effect on the process may be negligible in practice, it remains an important distinction from a doctrinal perspective. Failing to comply with an obligation that is specifically provided for within CAR should, on the face of it, have a stronger basis for complaint in than would be the case for the same approach being taken to a representation under PPC where there is no specific obligation explicitly requiring that representations be considered.

Separately, as would be expected, the concept of environmental impact recurs repeatedly across the environmental permitting legislation. In PPC there are requirements placed upon permit holders to *'reduce emissions and the impact on the*

[515]The Pollution Prevention and Control (Scotland) Regulations 2012, sch 7 paras 4(4), 7(1), 10(1), and 23(1)

environment as a whole'[516] via the adoption of the most effective and advanced stage in the development of activities and their methods of operation. There are also obligations on SEPA to carry out environmental inspections based on a systematic appraisal of risk that considers '*the potential and actual impacts on human health and the environment*[517]'. In CAR, local interests and macro-level interests, from the perspective of persons, groups, and/or the public, are considered alongside '*impact on the water environment*'. As above, where CAR refers to '*significant adverse impact*' on the water environment, EASR refers to '*significant environmental harm*' arising from a 'first time' authorisation.

However, the legislation considered does allow for a reduction in standards from an environmental perspective for economic reasons. The following examples from PPC are offered:-

- activities involving waste oils must be compliant with certain conditions '*so far as technically feasible and economically viable*'[518]; and
- SEPA may permit emissions to exceed a fugitive emission limit provided that *'(a) it is not technically and economically feasible to comply', '(b) SEPA ensures that the operator of the installation uses the best available techniques in respect of those emissions',* and *'(c) SEPA is satisfied that there are no significant risks to human health and the environment'*[519]*.*

[516]ibid, see definition of "best available techniques" in reg 4 and requirement in reg 21(2) that all installations and mobile plant should be operated in such a way that all the appropriate preventative measures are taken against pollution, in particular through application of the best available techniques, and no significant pollution is caused.
[517]ibid, reg 54(8)(a)
[518]ibid, reg 31(1)
[519]ibid, sch 2 para 8

Similarly, CAR does not provide a blanket prohibition for reasons of environmental protection on activities that SEPA considers will have, or be likely to have, a significant adverse impact on the water environment. Rather, when SEPA determines such an activity it must[520]:-

- assess the indirect effects of that impact on any other aspects of the environment likely to be significantly affected;
- consider any likely adverse social and economic effects of that impact and of any indirect environmental effects identified; and
- consider the likely environmental, social and economic benefits of the activity.

Again, EASR is different. It requires that SEPA must take three general aims into account when carrying out its functions under the act[521]:-

- to prevent or, where that is not practicable, to minimise environmental harm;
- to prevent and to limit the consequences of accidents which could have an impact on the environment; and
- to use resources in a sustainable way, in the carrying on, and decommissioning, of regulated activities and following cessation of the carrying on of the regulated activity.

Whilst there are not the same provisions as found in CAR, there is still provision within EASR that brings economic factors and social factors within scope of SEPA's

[520]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg 15(1)
[521]The Environmental Authorisations (Scotland) Regulations 2018, reg 9

considerations. Under EASR, SEPA must exercise its relevant functions in relation to radioactive substances activities to ensure that the radiation protection of individuals subject to public exposures is '*optimised*'[522]. Optimisation is defined in the legislation '*keeping the magnitude of individual doses, the likelihood of exposure and the number of individuals exposed as low as reasonably achievable taking into account the current state of technical knowledge and economic and social factors*'[523].

6.6. Relevant provisions – other environmental legislation

The provisions marked as relevant in the environmental legislation analysed below are largely relate to:-

1. public participation in decision making; and
2. information sharing.

Whilst still present, provisions imposing obligations on third parties are not as common compared to the legislation already considered. This is unsurprising, given that the legislation considered below either (1) does not provide for the creation of a permitting regime, or (2) does not deal with the authorisation of specific activities. For example, the environmental permitting legislation imposed obligations on third parties where it required operators to do things in permits that could only be done with the consent of third parties, e.g. off-site conditions.

[522]ibid, sch 8 para 26(1)
[523]ibid, sch 8 para 3(1)

6.6.1. CNHR

In The Conservation (Natural Habitats, &c.) Regulations 1994 ('CNHR') the following provisions were found to be relevant:-

- In relation to the classification of Special Protection Areas and the creation of land use plans, CNHR provides that the Scottish Ministers *'may give any person the opportunity of (a) making written representations to, or (b) being heard by, a person appointed by them'*[524].
- Where this occurs, any person being heard by the appointed person *'may— (a) be represented by another person, (b) call persons to give evidence, (c) make written representations before or at the hearing, (d) put questions to any person who gives evidence at the hearing, including any person who gives expert evidence'*[525].
- The Scottish Ministers must have regard to the report of an appointed person when deciding whether to so classify a site as a Special Protection Area, or in its Assessment of implications and land use plans[526].
- A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which *'(a) is likely to have a significant effect on a European site in Great Britain…(either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site…shall also, if they consider it*

[524]The Conservation (Natural Habitats, &c.) Regulations 1994, reg 9C(1)
[525]ibid, reg 9C(2)
[526]ibid, reg 9C(3)

appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate'[527].

- Whilst the authority shall only agree to a plan or project after having ascertained that it will not adversely affect the integrity of the European site, this is subject to considerations of overriding public interest, i.e. If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest the competent authority may agree notwithstanding a negative assessment of the implications for the site[528]. Overriding public interests may be of a social or economic nature.
- the expression 'competent authority' includes any Minister, government department, public or statutory undertaker, public body of any description or person holding a public office. The expression also includes any person exercising any function of a competent authority in the United Kingdom[529].
- Where a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site, or a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment, the '*Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected*'[530].

There are also duties on the Secretary of State and all planning authorities to compile and maintain a register of European sites for free public inspection '*at all reasonable*

[527]ibid, reg 48
[528]ibid, reg 49
[529]ibid, reg 6
[530]ibid, reg 53

hours'[531]. The Secretary of State must make arrangements such that the register must specify[532]:-

- special areas of conservation, as soon as they are designated;
- sites of Community importance, until they are designated as special areas of conservation;
- any site hosting a priority natural habitat type or priority species in respect of which consultation is initiated under the Habitats Directive, during the consultation period or pending a Council decision;
- areas classified by under the Wild Birds Directive, as soon as they are so classified; and
- any site in Scotland included in a list of sites proposed as eligible for identification as of Community importance.

A planning authority in Scotland must keep available at their principal office for free public inspection a register of all the European sites of which they have been given notice under CNHR[533]. They '*may*' also keep available at any other of their offices for free public inspection such part of the register '*as appears to them to relate to that part of their area in which such office is situated*'[534].

6.6.2. MEWS

In The Management of Extractive Waste (Scotland) Regulations 2010 ('MEWS'), the

[531]ibid, reg 11
[532]ibid, reg 11(2)
[533]ibid, reg 15(1)
[534]ibid, reg 15(2)

following provisions were found to be relevant:-

- 'the public' is defined to mean '*one or more natural or legal persons and associations, organisations or groups made up of such persons*', whilst 'the public concerned' includes the public *'affected or likely to be affected by, or having an interest in, the environmental decision-making'*[535]*;*
- where the planning authority receives notification of a substantial change at a waste facility, or decides to undertake a review in respect of a waste facility, it shall consult SEPA and shall give the public concerned *'an opportunity to express comments and opinions to it before it completes the review'*[536]*;*
- the public concerned *'will be provided with early and effective opportunities to participate in the preparation and review of the external emergency plan',* albeit MEWS also provides that '*the department which is responsible for emergency planning referred to in regulation…shall determine how [that] is best achieved*'[537].
- Information on safety measures and the action required in the event of an accident at the site must be provided by the operator to the public concerned, free of charge, and that information must contain at least all matters specified in Schedule 4 of MEWS. This must be reviewed by the operator at least every three years and updated as necessary[538].

[535]The Management of Extractive Waste (Scotland) Regulations 2010, reg 2
[536]ibid, reg 17(5)
[537]ibid, reg 20
[538]ibid

6.6.3. COMAH

In COMAH, the following provisions were found to be relevant:-

- a definition of 'the public' is provided for, defined as '*one or more persons…*[including] *their associations, organisations or groups*'[539];
- internal emergency plans and external emergency plans prepared for the purposes of COMAH must communicate *'the necessary information to the public and to the services or authorities concerned in the area*[540]*';*
- in preparing an external emergency plan the local authority must consult such members of the public and other persons as it considers appropriate[541];
- competent authorities (i.e. the HSE and SEPA) must provide prescribed information to the public in relation to every establishment within the scope of COMAH, including an explanation in simple terms of the activity or activities undertaken at the establishment, and the hazard classification of the relevant dangerous substances involved at the establishment with an indication of their principal dangerous characteristics in simple terms[542]; and
- competent authorities must also make further prescribed information available to the public in relation to every 'upper tier' establishment within the scope of COMAH, including general information relating to the nature of the major accident hazards, including their potential consequences on human health and

[539]The Control of Major Accident Hazards Regulations 2015, reg 2
[540]ibid, reg 11(c)
[541]ibid, reg 13(7)(e)
[542]ibid, reg 17(1)

the environment, summary details of the main types of major accident scenarios and the control measures to address them[543].

The timing requirements that apply to the information sharing provisions above are notable. The competent authority must ensure that the information is made available to the public within a reasonable period of time from '*the date on which the establishment becomes subject to COMAH*'[544] and '*from the date on which the establishment becomes an upper tier establishment*'[545]. Accordingly, there is scope within COMAH for many of its provisions to apply *post* operations commencing. This is on the basis that the application of COMAH is triggered by the site or installation in question reaching a certain threshold in terms of the quantity of hazardous material being stored therein.

It should also be noted that the scope for the competent authority to take action under COMAH and prohibit operations before commencement is restricted. Firstly, the competent authority can only prohibit operations where the measures taken by the operator for the prevention and mitigation of major accidents are 'seriously deficient'[546]. This is a higher standard than could have otherwise been provided for in the legislation, i.e. use of 'deficient' on its own would represent an easier hurdle for the authority to overcome in seeking to justify regulatory intervention.

Secondly, whilst the competent authority can prohibit the commencement of operations if the operator has not submitted COMAH required information within '*the*

[543]ibid, reg 17(2)
[544]ibid, reg 17(3)
[545]ibid, reg 17(4)
[546]ibid, reg 23

specified time', this power is somewhat fettered by the fact that the legislation more often than not requires information within a '*reasonable period*'[547]. In the absence of a prescribed deadline, the competent authority may be less likely to issue a prohibition notice that may be challenged on the basis that the use of '*reasonable period*' allows for an argument to follow on the interpretation of what is reasonable in the circumstances. It should also be noted that, as this power relates to the commencement of operations, it would offer nothing in the case of operations that had been ongoing prior to reaching a COMAH threshold and becoming subject to COMAH requirements.

6.6.4. EA95

In the Environment Act 1995 ('EA95') the following provisions were noted as relevant:-

- In preparing or modifying a National Air Quality Strategy under EA95, the Secretary of State shall *'consult such bodies or persons appearing to him to be representative of the interests of industry as he may consider appropriate; and such other bodies or persons as he may consider appropriate'*[548]*.* His duty thereafter is to take duly made representations into account[549].
- Air quality review and assessment reports, Air Quality Management Assessment (AQMA) declaration proposals, and the preparation or revision of an action plan should be consulted upon by Local Authorities with *'such bodies appearing to the authority to be representative of persons with business*

[547]ibid, reg 23(2)
[548]Environment Act 1995, s 80(6)
[549]ibid, s 80(7)(a)

interests in the area to which the review or action plan in question relates as the authority may consider appropriate'[550] and *'such other bodies or persons as the authority considers appropriate'*[551].

- Where the Secretary of State makes Directions re Local Air Quality Management these must be published *'in such manner as the body or person giving it considers appropriate for the purpose of bringing the matters to which it relates to the attention of persons likely to be affected by them and (a) copies of the direction shall be made available to the public'*[552].

The 1995 Act also provides for public access to information. As well as the reports on which they are required to consult, local authorities must make available copies of orders designating an AQMA; and action plans[553]. However, nothing in the 1995 Act requires a local authority to make available all the material it collected for its review and assessment of air quality. Local authorities only have to make available a summary report[554].

As the provisions of EA95 that relate to the current research effectively only serve to restrict the amount of certain chemicals that are permitted in the air, EA95 cannot have a direct impact on a hydraulic fracturing activity unless the level set for a chemical was zero and the chemical was an unavoidable by-product of the activity. It follows that EA95 provides for a narrower range of influence over activities than, for example, CAR or PPC, where either (1) the activity may not be permitted, or (2) specific constraints

[550]ibid, sch 11 para 1(2)(h)
[551]ibid, sch 11 para 1(2)(j)
[552]ibid, s 85(6)
[553]ibid, s 11 para 4
[554]ibid, sch 11 para 4(2)

on the activity could be provided for in its authorisation.

It should also be noted that the AQM regime has significantly less regulatory 'bite' than the other legislation considered in this Chapter. Local authorities are not legally required to meet the air quality objectives but must do all that is reasonably possible in pursuit of them and report on progress annually[555]. SEPA, acting with the approval of the Scottish Ministers[556], has reserve powers to require local authorities to take action where they are failing to make sufficient progress[557].

6.6.5. CCSA

CCSA is an outlier insofar as the relevant environmental legislation is concerned on the basis that it uses the term 'stakeholder' within its text. The 2009 act provides that the Scottish Ministers must lay a programme before the Scottish Parliament setting out the arrangements for involving employers, trade unions and '*other stakeholders*' in meeting their objectives in relation to adaptation to climate change[558]. Whilst stakeholder is not a defined term, the context within which it was used would appear to indicate that a broad definition could apply that would fit the stakeholder code identified for the purposes of the current research.

The 2009 act is also an outlier where it contains multiple references to community that share commonality with the social licence literature usage of the same term. Communities are referred to on five occasions, but there is no definition provided

[555]ibid, ss 82 – 84
[556]ibid, s 85(1)(b)
[557]ibid, s 85(3)
[558]Climate Change (Scotland) Act 2009, s 53(2)(a)(iii)

outside of the context in which community is used in the text itself. For example:-

- The Scottish Ministers must have regard to certain target setting criteria, including '*social circumstances, in particular the likely impact of the target on those living in poorer or deprived communities*[559]*…the likely impact of the target on those living in remote rural communities and island communities*'[560];
- The Scottish Ministers' plan must, with reference to the just transition principles, '*set out the Scottish Ministers' proposals and policies for supporting the workforce, employers and communities in those sectors and regions*'[561]; and
- The Scottish Ministers must lay a report before the Scottish Parliament on each Chapter of the most recent climate change plan that '*contain(s) an assessment of progress towards implementing the proposals and policies set out in that Chapter, including proposals and policies for supporting the workforce, employers and communities*'[562].

It should be noted that on each occasion where community is used as a term, there is no provision of new rights to a defined group. Rather, the use of community coincides with descriptions of the actions that must be taken by the Scottish Ministers. Accordingly, the legislation does not need to grapple with the task of identification of a clearly delineated unit that can be legitimately cast as a community for the purposes of conferring rights or obligations on the same. It follows that a more nebulous and all-encompassing approach to the term may be adopted.

[559]ibid, s 2B(1)(g)
[560]ibid, s 2B(1)(i)
[561]ibid, s 35(20)(b)
[562]ibid, s 35(b)(2)

The following provisions were also marked as relevant to the current research:-

- The Scottish Ministers must establish a panel to be known as a 'citizens assembly' made up of such persons as the Scottish Ministers '*consider to be representative of the general populace of Scotland*'[563] in order to (1) consider how to prevent or minimise, or remedy or mitigate the effects of, climate change; (2) make recommendations on measures proposed to achieve the emissions reduction targets; and (3) make recommendations about such other matters in relation to climate change as the Scottish Ministers may refer to the assembly, provided reference of those matters has been approved by resolution of the Scottish Parliament[564].
- In preparing a climate change plan, the Scottish Ministers must have regard to (a) the just transition principles, defined as the importance of taking action to reduce net Scottish emissions of greenhouse gases in a way which '…*develops and maintains social consensus through engagement with workers, trade unions, communities, non-governmental organisations, representatives of the interests of business and industry and such other persons as the Scottish Ministers consider appropriate*'[565].

6.6.6. EASA

In the Environmental Assessment (Scotland) Act 2005 ('EASA'), the following provisions were found to be relevant:-

[563]ibid, s 32A(2)
[564]ibid, s 32A(5)
[565]ibid, s 35C(1)

- Responsible authorities must keep a copy of determinations made under the act, and any related statement of reasons, available at their principal offices for inspection by the public at all reasonable times and free of charge. They must also display a copy of the determination and any related statement of reasons on the authority's website[566].
- Within 14 days of the making of the determination, they must secure the taking of such steps as they considers appropriate (including publication in at least one newspaper circulating in the area to which the plan or programme relates) to bring to the attention of the public (i) the title of the plan or programme to which the determination relates; (ii) that a determination has been made; (iii) whether or not an environmental assessment is required in respect of the plan or programme; and (iv) the address (which may include a website) at which a copy of the determination and any related statement of reasons may be inspected or from which a copy may be obtained[567].
- If an environmental report is required, within 14 days of its preparation the responsible authority must keep a copy of the relevant documents available at the authority's principal office for inspection by the public at all reasonable times and free of charge[568], and display a copy on the authority's website[569].
- They must also secure the publication of a notice (i) stating the title of the plan or programme to which it relates; (ii) stating the address (which may include a website) at which a copy of the relevant documents may be inspected or from which a copy may be obtained; (iii) inviting expressions of opinion on the relevant documents; and (iv) stating the address to which, and the period within

[566]Environmental Assessment (Scotland) Act 2005, s 10(2)
[567]ibid, s 10 (2)(c)
[568]ibid, s 16(2)(b)
[569]ibid, s 16(2)(c)

which, opinions must be sent. The period must be of such length as will ensure that those to whom the invitation is extended are given an early and effective opportunity to express their opinion on the relevant documents[570].

- In the preparation of a qualifying plan or programme, the responsible authority shall take account of every opinion expressed[571].
- As soon as reasonably practicable after the adoption of a qualifying plan or programme, the responsible authority must make available a copy of (i) the plan or programme; (ii) the environmental report relating to it; and (iii) other related info including the title and date of adoption, at the authority's principal office for inspection by the public at all reasonable times and free of charge[572]. It must also secure the taking of such steps as it considers appropriate to bring the aforementioned information to the attention of the public[573] and display a copy of the same on the authority's website[574].

The 2005 Act also contains detailed criteria for determining the likely significance of effects on the environment which are relevant to the stakeholder code. The criteria for determining the significance of effects includes consideration of the:-

> *characteristics of the effects and of the area likely to be affected, having regard, in particular, to…the risks to human health and the environment…the value and vulnerability of the area likely to be affected…and the effects on areas or landscapes which have a recognised national, Community or international*

[570]ibid, s 16(2)(a)
[571]ibid, s 17(b)
[572]ibid, s 18(1)
[573]ibid, s 18(1)(b)
[574]ibid, s 18(1)(c)

protection status[575]*.*

It should also be noted that the Act prescribes that environmental reports must include information on the likely significant effects on the environment, including on such issues as *'population…human health…cultural heritage'*[576]*.*

Whilst the 2005 Act contains provisions that may ultimately require environmental assessment to be carried out for qualifying plans or programmes, the assessment process is broken down into stages of (1) pre-screening, (2) screening, and (3) the preparation of an environmental report. The public right to be consulted is only present at the stage (3). Accordingly, when the environmental report is prepared, there is no right to participate in the pre-screening or screening stages. Given that these stages may result in the exemption of a plan or a programme from the requirement to prepare an environmental report, it may be argued that the non-involvement of stakeholders early in the environmental assessment process results in the relevant law diverging entirely from the social licence as a concept. However, at the very least, there are information sharing provisions throughout the process that potentially enable stakeholders to become more fully informed even if their ability to influence only applies at the report stage.

6.6.7. Discussion

As with the environmental permitting legislation, significant volumes of information are placed on public registers via the provisions summarised directly above. Again, there

[575]ibid, sch 2 para 2
[576]ibid, sch 3 para 6

are some exceptions that would restrict the visibility of all relevant information.

It is notable that the legislation considered above regularly confers wider discretion on the relevant authorities in the context of public participation in decision making than was observed in the environmental permitting legislation. This is both in terms of provisions setting out (1) when public participation is required, and (2) what steps must be taken when public participation is required.

For example, CNHR provides that the competent authority shall '*if they consider it appropriate, take the opinion of the general public;'* before deciding to authorise a plan or project which is likely to have a significant effect[577]. If they do consider it appropriate, it is entirely for that authority to decide the steps which will be taken to take the opinion of the general public. It follows that, on the basis of the black letter law alone, even in cases where the opinion of the general public is deemed worth taking, a competent authority may choose to restrict the manner in which the opinion is taken, e.g. to exclude certain stakeholders by inviting opinions from specific groups or persons only. Under CNHR it is similarly for the relevant authority to decide when public participation should occur in relation to land use plans and classification of special areas; authorities '***may*** give *any person the opportunity of (a) making written representations to, or (b) being heard by, a person appointed by them'*[578]*.*

Discretion under CNHR is not limited to public participation. In terms of remedying negative impacts on the environment, the obligation on the Secretary of State to ensure '*necessary compensatory measures*' appears broad enough to confer

[577]The Conservation (Natural Habitats, &c.) Regulations 1994, reg 48
[578]ibid, reg 9C(1)

discretion when combined with the objective of ensuring that '*overall coherence…is protected*'[579]. The use of '***overall*** *coherence*' suggests that a degradation in some areas could be balanced with higher standards in others such that the total results of the regime are coherent; a term which itself means that absolute compliance with standards is not required.

CNHR is not an outlier in conferring significant discretion to the relevant authorities. As summarised above:-

- In MEWS, where consultation on external emergency plans is provided for, it is for the '*the department which is responsible for emergency planning*' to decide upon the steps that will be taken to achieve public consultation[580];
- In COMAH, when preparing an external emergency plan the local authority must consult such members of the public and other persons as it '*considers appropriate*'[581]; and
- In EA95, if the Secretary of State '*decides to*' he shall '*consult such bodies or persons appearing to him to be representative of the interests of industry as he may consider appropriate; and such other bodies or persons as he may consider appropriate*'[582]. This has something of a double effect in terms of the discretion it affords, i.e. the Secretary of State can (1) decide to consult, and (2) decide who it is appropriate to consult.

[579]ibid, reg 53
[580]The Management of Extractive Waste (Scotland) Regulations 2010, reg 20
[581]The Control of Major Accident Hazards Regulations 2015, reg 13(7)(e)
[582]Environment Act 1995, s 80(6)

The above examples of discretion are clear and easy to understand given that they are explicit, e.g. in CNHR the central term that conveys discretion is 'may' as opposed to 'must', which would obligate public consultation if it were used instead. In other examples, the discretion is more subtle. For example, in CCSA the Citizens Assembly is made up of such persons as the Scottish Ministers '*consider to be representative of the general populace of Scotland*'[583]. Whilst this may appear to a lay person a straightforward task, and the relatively brief amount of text dedicated to this process in the legislation would appear to confirm such an appearance, the reality is that this is a significantly subjective undertaking that conveys considerable discretion on the Scottish Ministers.

Another subtle example from CCSA is the requirement to have regard to the just transition principles when preparing Scotland's climate change plan. Again, a lay person may look at this provision in CCSA, note the reference to social consensus through engagement with various named bodies, and conclude that there is greater scope for their own involvement in decision making as a result of the legislation. However, the reference to this principle does not confer rights or obligations upon third party stakeholders such as members of the public. There is no obligation on the Scottish Ministers to achieve social consensus through engagement, or greater rights for public consultation. Accordingly, 'having regard' to the just transition principles is not the equivalent of a provision mandating public consultation. Rather, it is a relatively low bar which can be overcome by the Scottish Ministers merely showing that some thought, however brief, was consciously given to the principles such that they were taken into account.

[583]Climate Change (Scotland) Act 2009, s 32A(2)

The relevance of the above to the current research is straightforward. By comparison to the above, the social licence literature describes a malleable concept within which the views of the entire stakeholder network related to an activity or industry can be expressed, regardless of what the law provides for public participation. It seems reasonable to suggest that the social licence concept will have more intrinsic potency from the perspective of a lay person where the law would appear designed to enable decision makers to decide against public consultation rather than explicitly require public consultation.

Whilst it is accepted by the researcher that public guidance and official policy may require public participation beyond that which is provided for in the black letter law, this acceptance is made on the basis that such policy and/or guidance is separate to and external from the black letter law. A common criticism of the social licence concept, as commented upon in the preceding literature review, is that it undermines or ignores law. However, it is offered that a stakeholder who sees that their involvement in a matter is dependent upon policy and/or guidance, and not enshrined in law, cannot be readily criticized for seeing in the social licence the possibility of power and influence not otherwise afforded to them. At the very least, the criticism that the social licence undermines law appears to be weakened when the researcher has shown that the social licence offers a direct avenue for public involvement that the law ultimately leaves to the discretion of public authorities or government.

6.7. Relevant provisions – macro level planning law

Again, the provisions which are most commonly marked as relevant in the legislation analysed below are those which relate to:-

1. public participation in decision making; and
2. information sharing.

Whilst still present, provisions imposing obligations on third parties are not as common in macro level planning law compared to the environmental permitting legislation.

6.7.1. National Planning Framework

The relevant law relating to the National Planning Framework ('NPF') is contained within the 1997 Act (as amended). The following provisions were found to be relevant to the research:-

- Before preparing a revised framework, the Scottish Ministers must prepare and publish their participation statement. The participation statement is an account of *'(a) when consultation as regards the proposed revised framework is likely to take place, (b) with whom they intend to consult…,(c) the steps to be taken to involve the public at large in the consultation, and (d) the likely form of the review'*[584].
- Planning authorities must be consulted together with various other agencies and bodies as provided for within the act and *'such persons or bodies who the Scottish Ministers consider have a role in the delivery of the outcomes'*[585].
- The Scottish Ministers may not adopt a revised NPF until a draft of it has been approved by resolution of the Parliament. Before a revised NPF can be laid before Parliament for approval, the Scottish Ministers must— (a) consult in

[584]Town and Country Planning (Scotland) Act 1997, s 3AB(4)
[585]ibid, s 3AB(4)(b)(iv)

accordance with their participation statement, (b) lay before the Scottish Parliament a copy of the draft of the revised framework, (c) have regard to any representations about the draft of the revised framework that are made to them within no more than 120 days of the date on which the copy of the draft of the revised framework is laid before the Parliament[586].

- If, as a result of consultation, it appears to the Scottish Ministers that it is appropriate to change the whole or any part of their proposals, they must undertake such further consultation with respect to the changes as they consider appropriate[587].
- As soon as practicable after the National Planning Framework as revised has been adopted, the Scottish Ministers are to publish it[588].

As an indication of what may be provided in the participation statement for at the next National Planning Framework review, the participation statement for the current National Planning Framework review (culminating in NPF3) provided that the Government would ensure that[589]:-

- stakeholders are involved in framing the consultation process;
- arrangements for participation are inclusive, open and transparent;
- information is available early and through a range of formats and locations to allow full consideration; and
- feedback will be provided promptly on the conclusions drawn.

[586]ibid, s 3CA
[587]ibid, s 3CA(5)
[588]ibid, s 3CA(7)
[589]The Scottish Government, *National Planning Framework 3: Participation Statement* (The Scottish Government, January 2014) para 13 <https://www2.gov.scot/Resource/0044/00441807.pdf> accessed 29 September 2020

However, is important to be clear about the extent of the rights conferred upon stakeholders as a result of the above. As the obligation under the legislation is to consult in accordance with their participation statement, if the participation statement contains broad statements of intent, or sets nebulously defined goals, it will represent a low threshold to overcome in terms of satisfying the obligation in law. The four provisions summarised above from NP3 are open to interpretation such that there would only be narrow grounds for action against the Scottish Ministers on the grounds of failing to comply with the 1997 Act, e.g. if stakeholders were not involved at any stage despite a commitment to their being involved in framing the consultation process. The contents of the participation statement are ultimately a matter of policy meaning that the legal rights conferred by way of the 1997 act to stakeholders will also be a matter of policy when the next review of the NPF begins.

6.7.2. Development plans

Within the 1997 Act and the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 ('the 2008 Regulations') the following provisions were found to be relevant in the context of development plans ('DP'):-

- A main issues report must include information '*sufficient to secure*' that what is proposed can *'readily be understood by those persons who may be expected to desire an opportunity of making representations to the authority with respect to the report',* and that *'such representations can be meaningful'*[590]*.*

[590]Town and Country Planning (Scotland) Act 1997, s 9(3)(a)

- The relevant authority must have regard to such representations as timeously may have been made to them as respects their main issues report[591].
- Once a proposed plan is published, any person who duly made representations is provided with notification of where the copy of the proposed plan is available for inspection and at what reasonable times[592].
- After the deadline for response to the proposed plan is passed, the relevant authority may modify the proposed plan to take account of representations made timeously or submit it (whether or not modified) to the Scottish Ministers[593].
- An SDP must be submitted to the Scottish Ministers together with *'(i) a note of such representations as were timeously made to the authority and of whether those representations are taken account of in the plan (and if so to what extent), (ii) a report as to the extent to which the authority's actings with regard to consultation and the involvement of the public at large have conformed with (or have gone beyond the requirements of) their current participation statement, and (iii) a copy of their proposed action programme for the plan'*[594].
- Where no modifications are proposed, an LDP must be submitted to the Scottish Ministers together with *'(i) a report as to the extent to which the authority's actings with regard to consultation and the involvement of the public at large have conformed with (or have gone beyond the requirements of) the authority's current participation statement, and (ii) a copy of their proposed action programme for the plan'*[595].

[591]ibid, ss 10(1)(a) and 18(1)(a)
[592]ibid, ss 10(1)(c) and 18(1)(c)
[593]ibid, ss 10(3)(a) and 18(3)(a)
[594]ibid, s 10(3)
[595]ibid, s 18(4)

- Where modifications are proposed the relevant authority must publish the proposed LDP as modified and give notice as may be specified in regulations. However, if the authority consider that modifications are required that would change the underlying aims or strategy of the proposed plan they are not to modify it (or submit it or publish it unmodified) but are to prepare and publish a new proposed LDP[596].
- Whilst the Scottish Ministers may only direct the relevant authority to consider modifying a proposed LDP, the Scottish Ministers may approve (in whole or in part) or reject a proposed SDP[597]. If they modify an SDP which has not been so examined they must *'(i) publish in such manner as they think fit the modifications they intend to make and the reasons for making them, and (ii) consult with regard to the modifications…such other persons (if any) as they consider appropriate'*[598].

The provisions around representation timeously made but not taken account of are notable. Using a proposed SDP as an example[599]:-

- On receiving a proposed SDP, the Scottish Ministers are to direct that a person appointed by them examine the proposed plan if representations timeously made were not taken account of (or not fully taken account of) and have not been withdrawn[600].

[596]ibid, s 19A(6)
[597]ibid, ss 13 and 20(5)
[598]ibid, s 13(4)
[599] The same process largely applies to proposed LDPs. However, instead of the Scottish Ministers directing the appointment, it is for the planning authority to request an appointment- see s.19(1) of the Town and Country Planning (Scotland) Act 1997
[600]ibid, s 12(1)

- This is advertised in a local newspaper within the SDPA[601].
- The appointed person is firstly to examine the extent to which the planning authority's actings with regard to consultation and the involvement of the public at large as respects the proposed plan have conformed with (or have been beyond the requirements of) the participation statement of the authority which was current when the proposed plan was published[602].
- This process can result further steps to be directed by the Scottish Ministers to the SDPA requiring consultation '*involving the public at large*'[603], and may in turn result in the amendment of the SDP[604].

The legislative provisions underpinning DPs, APs, and SG were also considered by the researcher. Whilst there is nothing in the relevant law relating to DPs that provides a role for stakeholders in their creation, there is some potential for a wider audience to be involved in the creation of APs as the 1997 act provides that the authority preparing the AP are to seek the views of, and have regard to any views expressed by *'such persons as may be prescribed'*[605]. The 2008 regulations provide that '*any person whom that authority proposes to specify by name in the action programme*' is a prescribed person for the purposes of the 1997 Act regarding APs[606].

The provisions relating to supplementary guidance are more inclusive in terms of the involvement of stakeholders than those relating to DPs or AP. The authority proposing to adopt and issue SG are to take '*such steps as will in their opinion secure— (a) that*

[601]ibid, s 12(4)
[602]ibid, s 12A(5)
[603]ibid, s 12A(1)
[604]ibid, s 12A(6)
[605]ibid, s 21(3)(b)
[606]The Town and Country Planning (Development Planning) (Scotland) Regulations 2008, reg 25(b)

adequate publicity of the proposal is given in their district or as the case may be in their strategic development plan area, (b) that persons who may be expected to wish to make representations to the authority about the proposal are made aware that they are entitled to do so, and (c) that such persons are given an adequate opportunity of making such representations'[607]*.* The authority must, before adopting and issuing the supplementary guidance, consider any such representations timeously made to them[608].

6.7.3. Community empowerment

The following broad subjects, as provided for within the Community Empowerment (Scotland) Act 2015, were noted to be relevant in relation to the current research in the context of community empowerment ('CE'):-

- National outcomes;
- Community planning; and
- Community participation requests.

In the context of national outcomes, the following was noted:-

- Before determining the national outcomes, or when carrying out a review of the national outcomes, the Scottish Ministers must consult *'such persons who appear to them to represent the interests of communities in Scotland, and (ii) such other persons as they consider appropriate'*[609].

[607]Town and Country Planning (Scotland) Act 1997, s 22(3)
[608]ibid, s 22(5)
[609]Community Empowerment (Scotland) Act 2015, s1(5)

- When consulting the Scottish Parliament on the national outcomes, the Scottish Ministers must also lay before the parliament a document describing any representations received and whether, and if so how, those representations have been taken account of in preparing the draft national outcomes[610].

In the context of community planning, the following was noted:-

- When carrying out community planning, the local authority and certain persons listed in schedule 1 of the act must (a) participate with each other, and (b) participate with any community body in such a way as to enable that body to participate in community planning[611].
- Each community planning partnership must *'(a) consider which community bodies are likely to be able to contribute to community planning having regard in particular to which of those bodies represent the interests of persons who experience inequalities of outcome which result from socio-economic disadvantage, (b) make all reasonable efforts to secure the participation of those community bodies in community planning, and (c) to the extent (if any) that those community bodies wish to participate in community planning, take such steps as are reasonable to enable the community bodies to participate in community planning to that extent'*[612].
- For the area of each local authority, the following parties must facilitate community planning - the local authority, the Health Board, Highlands and Islands Enterprise, the chief constable of the Police Service of Scotland, the

[610]ibid, s1(6)
[611]ibid, s4(3)
[612]ibid, s4(6)

Scottish Fire and Rescue Service, Scottish Enterprise, and South of Scotland Enterprise[613].

- The Scottish Ministers must promote community planning when carrying out any of their functions which might affect (a) community planning, or (b) a community planning partner[614].

In the context of participation requests the following was noted:-

- A community participation body may make a request to a public service authority to permit the body to participate in an outcome improvement process[615].
- In making such a request, the community participation body must (a) specify an outcome that results from, or is contributed to by virtue of, the provision of a service provided to the public by or on behalf of the authority, (b) set out the reasons why the community participation body considers it should participate in the outcome improvement process, (c) provide details of any knowledge, expertise and experience the community participation body has in relation to the specified outcome, and (d) provide an explanation of the improvement in the specified outcome which the community participation body anticipates may arise as a result of its participation in the process[616].
- The authority must agree to the request unless there are reasonable grounds for refusing it[617]. However, they may decline to consider a new request where

[613]ibid, s13(2)
[614]ibid, s16
[615]ibid, s22(1)
[616]ibid, s22(2)
[617]ibid, s24(5)

it relates to matters that are the same, or substantially the same, as matters contained in a previous participation request (a 'previous request'), and (c) the previous request was made in the period of two years ending with the date on which the new request is made[618].

- In deciding whether to agree to or refuse the participation request, the relevant authority must take into consideration, amongst other things, whether agreeing to the request mentioned in subsection would be likely to promote or improve— (i) economic development, (ii) regeneration, (iii) public health, (iv) social wellbeing, or (v) environmental wellbeing[619].

6.7.4. Development orders

Given the nature of development orders ('DO'), there were no legislative provisions identified by the researcher as relevant to the codes. This is because development orders allow for the Secretary of State, by regulations or by order, to provide for the automatic granting of planning permission for specified developments or for development of any specific class, i.e. to the exclusion of *direct* participation of third-party stakeholders in planning determinations. However, whilst there would remain the potential for *indirect* third-party stakeholder involvement via the scrutiny of the Scottish Parliament given that the above process is implemented through legislation, i.e. a suitably motivated third-party stakeholder could seek to influence the legislative process via the lobbying of MSPs, this is a political route and, as such, beyond the scope of the research.

[618]ibid, s27(1)
[619]ibid, s24(3)

Whilst relevant legislative provisions demonstrating commonality with the social licence codes have not been found, development orders remain within scope for the purposes of the discussion that follows.

6.7.5. Discussion

By allowing the automatic granting of planning permission for specified developments or for development of any specific class, development orders arguably represent the clearest example of law being designed in a manner that is diametrically opposed to the participation principles of the social licence concept. Accordingly, development orders are noted in the current research as an example of the art of the possible in relation to law; it is possible to design and implement laws with the explicit purpose of allowing law makers the discretion to decide in total isolation from the views of third-party stakeholders. This is not offered as a unique observation in the current research but rather to further demonstrate the potential for law to act as a tool of disengagement and potentially enhance the attractiveness of the social licence as a concept to disengaged stakeholders.

Separately, compared to the environmental legislation, the level of scrutiny appears greater in the macro level planning law in relation to the question of the extent to which public participation in decision making is *actually* afforded by the relevant authorities each time a decision is taken by them. For example, an SDP must be submitted to the Scottish Ministers with (1) a note detailing whether representations are taken account of in the plan (and if so to what extent), and (2) a report as to the extent to which the authority's actings with regard to consultation and the involvement of the public at large have conformed with (or have gone beyond the requirements of) their current

participation statement. If representations timeously made were not taken account of there are detailed provisions requiring an appointed person to examine the planning authorities actions which can ultimately lead to further steps being directed by the Scottish Ministers. Similarly, when consulting the Scottish Parliament on the national outcomes, the Scottish Ministers must also lay before the parliament a document describing any representations received and whether, and if so how, those representations have been taken account of in preparing the draft national outcomes.

An important point can be made at this stage by returning to the provisions of PPC, wherein there was no specific duty to have regard to representations. Again, whilst it may be that the practical effect is such that the relevant authorities under PPC still have regard in any event, this is materially different from the above where a failure to actually have regard, as mandated for in law, will result in the appointment of a person to review the participation process and potentially recommend re-opening consultation.

It is also offered that the legislation relating to the above is drafted in a manner that appears to acknowledge the level of public interest in planning may be greater than the level of public interest in environmental permitting. For example, there is wider use of provisions requiring information be made available in a manner that is explicitly required to be understandable to the persons who would be expected to read the information.

There also emerges from this sub-category the use of proactive engagement obligations with regards to community planning. For example, the local authority and

certain persons listed in the CE must participate with each other and any community body to enable participation in planning. Furthermore, the community planning partnership isn't just required to advertise that a consultation process is ongoing, they are obligated to actively make all reasonable efforts to secure participation of community bodies. This is arguably enhanced by duties on many of the relevant authorities to facilitate community planning, and the presumption in favour of granting community participation requests unless there are reasonable grounds for their refusal.

6.8. Relevant provisions – micro level planning law

The themes of (1) public participation in decision making, and (2) information sharing continue to appear below. As with the macro level planning law, there would appear to be greater emphasis on providing information in a way that is understandable to a lay person.

6.8.1. Pre-application consultation

Where a Pre-Application Consultation ('PAC') is required, it is noted that the prospective applicant for planning permission must consult as respects a proposed application *'every community council any part of whose area is within or adjoins the land where the proposed development is situated and in doing so is to give a copy of the proposal of application notice to the community council'*[620]*.* Furthermore, the prospective applicant must also *'hold at least one public event where members of the public may make comments to the prospective applicant as regards the proposed*

[620]The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, reg 7(1)

development'[621]*.*

Proposed applicants must also publish in a local newspaper '*circulating in the locality in which the proposed development is situated a notice containing*'[622]:-

- a description of, and the location of, the proposed development;
- details as to where further information may be obtained concerning the proposed development;
- the date and place of the public event;
- a statement explaining how, and by when, persons wishing to make comments to the prospective applicant relating to the proposal may do so; and
- a statement that comments made to the prospective applicant are not representations to the planning authority and if the prospective applicant submits an application there will be an opportunity to make representations on that application to the planning authority.

The obligation to hold a at least one public event where members of the public may make comments is the first example in the relevant law reviewed thus far of a proactive engagement obligation being imposed upon an operator/applicant that goes beyond basic disclosure of information or service of initial notices informing potentially interested or impacted parties of the activities being considered. In this way, a comparison can be made between the proactive engagement obligation observed in the Community Empowerment (Scotland) Act 2015 and set out below.

[621]ibid, reg 7(2)(a)
[622]ibid, reg 7(2)(b)

As shall be noted, the relevant obligations in the 2015 Act include a requirement on community planning partnerships to '*make all reasonable efforts to secure…participation*'[623]. This represents a goal setting approach, where the focus of the legal drafting is on the end result, the obligation is to take all reasonable efforts, but the question of actual steps is left to the obligated party to determine. The obligation under PAC is prescriptive, i.e. if no-one turns up to the meeting then the operator/applicant will still be deemed to have complied with their obligation if they took the steps outlined above even if the participation was not secured as a result.

6.8.2. Planning permission

The procedure on applications for planning permission ('PP') contains the following relevant provisions:-

- The applicant must give notice in a prescribed form to any person who is the owner of any land to which the application relates or an agricultural tenant. In the case of a minerals application) the obligation differs slightly in that notice must be given to the person who is *'to the applicant's knowledge, the owner'*[624];
- In the case of a minerals application the planning authority must give notice of the application by affixing a notice to objects situated in the vicinity of the land to which the development relates that must *'(a) be displayed so as to be easily visible to and legible by members of the public; (b) be left in position for not less than 7 days; (c) state that an application for planning permission has been made to the planning authority and give a brief description of the proposed*

[623]Community Empowerment (Scotland) Act 2015, s 46(b)
[624]The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, reg 15

development and its location; (d) state how the application, plans or drawings relating to it and other documents submitted in connection with it may be inspected; and (e) state that representations may be made to the planning authority and include information as to how any representations may be made and by which date they must be made (being a date not earlier than 14 days beginning with the date of the notice)'[625].

- Where it is not possible for the planning authority to carry out notification as outlined because there are no premises situated on the neighbouring land to which the notification can be sent, the planning authority must publish a notice in a prescribed form in a newspaper circulating in the locality in which the neighbouring land is situated[626].
- A list of applications must be kept that includes *'(a) the reference number given to the application by the planning authority, or as the case may be, the Scottish Ministers; (b) the site location; (c) the name of the applicant and, where an agent is acting for the applicant, the name and address of that agent; (d) a description of the proposed development to which the application relates; and (e) the date of expiry of the period…within which application may not be determined'*[627]. The list of applications must also to contain a statement as to how further information in respect of an application may be obtained from the planning authority.
- The planning authority must send to every community council in their district at weekly intervals a list of (a) all applications made to the authority during the previous week; and (b) all applications made to the Scottish Ministers in

[625]ibid, reg 18
[626]ibid, regs 20(1) and 20(2)
[627]ibid, reg 21(4)

respect of land within the district of the planning authority which were notified to the planning authority during the previous week together with a statement as to how further information in respect of an application may be obtained from the planning authority[628].

- The planning authority must publish the list of applications on their website and are to make the list of applications available for inspection at their principal office and at public libraries in their district[629]. The planning authority must also make the list sent to community councils available for inspection at their principal office and at public libraries in their district.
- Before determining an application for planning permission the planning authority must consult the community council, if any, within whose area the development is to take place where the community council informs the planning authority that it wishes to be consulted or if the development is likely to affect the amenity in the area of the community council[630]. The planning must give not less than 14 days' notice and must not determine the application until after the expiration of that period[631].
- Before determining an application for planning permission for national developments and major developments which are significantly contrary to the development plan, the planning authority are to give to the applicant and to persons who submit representations to the planning authority in respect of that application an opportunity of appearing before and being heard by a committee of the authority[632].

[628]ibid, reg 23
[629]ibid, regs 22 and 23(2)
[630]ibid, sch 5 para 6
[631]ibid, reg 25(2)
[632]Town and Country Planning (Scotland) Act 1997, s 38A(1)

- In determining any application, the planning authority shall take into account any representations relating to that application which are duly received by them[633].
- The planning authority must as regards give to the applicant 'a decision notice' of their decision on the application and *'inform every authority, person or body who made written representations in respect of the application (and provided an address) of their decision on the application and where a copy of the decision notice is available for inspection*[634]*'.*

It should also be noted that the Scottish Minister's may direct that a planning authority must consult with '*such authorities, persons or bodies as are specified in the direction before granting or refusing an application for planning permission in any case or class of case specified in the direction*'[635]. They may also direct that a planning authority must give *'to such other persons as may be prescribed in the direction such information as may be so prescribed with respect to applications for planning permission made to the authority, including information as to the manner in which any such application has been dealt with'*[636]*.*

The 1997 Act also allows the Scottish Ministers to direct that a planning application, or particular class of planning application, be referred to them for their decision[637]. Once an application is called-in, Scottish Ministers effectively become the planning authority for that application.

[633]ibid, s 38(1)
[634]The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, reg 28(1)(b)
[635]ibid, reg 30
[636]ibid, reg 31
[637]Town and Country Planning (Scotland) Act 1997, s 46

6.8.3. Environmental Impact Assessment

The following provisions from The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 were found to be relevant: -

- An Environmental Impact Assessment ('EIA') report must include a non-technical summary of information regarding[638]: -
    - the site, design, size and other relevant features of the development;
    - likely significant effects of the development on the environment;
    - the features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; and
    - the reasonable alternatives studied by the developer, which are relevant to the development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment
- Where, in relation to an EIA application the developer submits to the planning authority or the Scottish Ministers, as the case may be, an EIA report the planning authority or the Scottish Ministers, as the case may be, must publish as soon as possible a notice which[639]:-
    - provides details of the arrangements for public participation in the decision making procedure including a description of how notice is to be given of any subsequent submission by the developer of additional

[638]The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, reg 5(2)(e)
[639]ibid, reg 21(2)(g)

information and how representations in relation to that additional information may be made; and

- states the nature of possible decisions to be taken in relation to the application and provide details of the authority by which such decisions are to be taken[640].

- The notice referred to above must be published (a) on the application website; (b) in The Edinburgh Gazette; and (c) in a newspaper circulating in the locality in which the proposed development is situated. The planning authority must also (a) place a copy of the EIA report in the public register together with a copy of the related application; and make copies of the EIA report and other documents submitted with the application available for inspection on the application website, and at an office of the planning authority where the register may be inspected[641].
- Where an EIA application is determined, the planning authority must, as soon as reasonably practicable, (1) inform the public of the decision and where a copy of decision notice may be inspected by publishing a notice on the application website or in a newspaper circulating in the locality in which the land is situated or by such other means as are reasonable in the circumstances; and (2) make a copy of the decision notice available for public inspection (i) at an office of the planning authority where the register may be inspected; and (ii) on the application website[642].

[640]ibid, reg 21(2)(h)
[641]ibid, reg 21(3)
[642]ibid, reg 31

6.8.4. Discussion

Certain prescriptive requirements are present in the relevant micro level planning law provisions summarised above that have not otherwise been observed thus far in this Chapter. Of particular interest, there are no directly comparable provisions within the environmental legislation examined to the following: -

- the obligation on applicants in cases of pre-application consultation to hold at least one public event where members of the public can make comments to the prospective applicant;
- the duty to affix on applicants to affix notices to objects situated in the vicinity of the land to which the development relates in the case of a minerals planning application;
- the duty on the relevant planning authority to send to every community council in their district a list of (1) all applications made to the authority, and (2) all applications made to the Scottish Ministers in the previous week;
- the obligation on the planning authority to consult the community council on planning permission applications; and
- the provision of a non-technical summary of information in the case of an EIA that includes *'the reasonable alternatives studied by the developer'*[643].

The use of mandatory public consultation in the case of an EIA is also noteworthy. Whilst there are mandatory public consultations in the case of PPC permits, as outlined above there is scope under CAR and EASR for certain authorisations to be

[643]The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, reg 5(2)(e)

granted without public consultation. Again, from the perspective of a lay person this may not appear logical given that EIA, PPC, CAR, and EASR all deal with developments and or activities that may have an impact on the environment. For example, how would a lay person interpret their being excluded from a consultation under CAR or EASR but included under EIA, when the material difference to that lay person may only be the environmental medium being affected? As outlined above, this is an important consideration when considering the relationship between law and the social licence; the public perception of the rights afforded to them by law could have some impact upon the likelihood of them seeing value in the social licence concept.

As with the preceding sections of this Chapter, no attempt is made by the researcher to consider the strengths and/or weaknesses of these provisions in terms of their intended outcome compared against the intended outcomes of the environmental legislation. Again, all that is noted for the purposes of the current research is (1) the scope for material difference in law insofar as it provides for public participation in decision making and the provision of information, and (2) the potential for a lay person to make a comparison between the rights afforded to them and find them to be inconsistent.

6.9. Summary

As outlined in the introduction to this Chapter, a close textual reading of the black letter law was conducted by the researcher with the specific purpose of identifying the extent of any commonality with, or divergence from, each of the five codes. The current Chapter has detailed a significant volume of specific legislative provisions identified by the researcher as relevant to the question of commonality and divergence, and has

comparatively analysed these same legislative provisions. In Chapter 7, these specific provisions are further analysed by direct comparison to the five codes.

Chapter 7 – Comparing the law with the social licence codes

The specific legislative provisions identified in Chapter 6 were further analysed by the researcher by reference to the five codes of consent, stakeholder, trust, engagement, and beyond compliance. A continuation of the work summarised in Chapter 6, this was done in order to identify the extent of any commonality with, or divergence from, each of the five codes. As these five codes were found to be the most frequently recurring across the literature on the social licence, it was the researcher's position that the relationship between law and the social licence would become clearer by searching for provisions in the relevant legislation that either (1) share the same purpose or underpinning as the codes, or (2) appear to either contrast with, or actively work against, the same.

Whereas Chapter 6 set out the specific legislative provisions identified as relevant to the question of commonality from a close textual reading, the current Chapter deals with the observations that arose from the researcher's analysis of those same provisions 'through the lens' of the five headline codes created from the coding review undertaken in Chapter 4.

For all codes except 'beyond compliance', observations were made based on the objective and subjective question approach set out at the beginning of Chapter 6 (see 'Objectivity and Subjectivity' at 6.2. above). Where these observations are set out below, this is followed each time by a discussion of what the observations indicate in terms of the relationship between law and the code being considered.

Whilst the codes produced in Chapter 4 were ordered (1) consent, (2) stakeholder, (3)

trust, (4) engagement, and (5) beyond compliance, this order was based on the prevalence identified in the academic literature reviewed as per Table 2, which is reproduced below.

Code	**Number of sources that included code (x/30)**	**Cumulative frequency across all sources**
Consent (Parent Code)	27	145
Stakeholders (Parent Code)	26	114
Engagement (Parent Code)	21	77
Relation to Law	24	71
Trust	21	53

Table 2 – Thematic results (Source: current research)

However, it should be noted that a different order is used going forward, namely stakeholder, engagement, consent, trust, and beyond compliance. This order relates to the volume of legislative provisions identified as relevant to each code, and the extent to which each code could be considered via desk-based research. For example, and as set out below, there is a limit to the extent to which desk-based research may consider the commonality between legislative provisions and trust. By comparison, a desk-based research exercise may fully consider the extent to which ‘stakeholder’ as a concept is found within the same legislative provisions.

7.1. Stakeholder

The following definition of the stakeholder code was reached in Chapter 4: -

A person and/or group with an interest in the contested business, activity, project, or industry. Interest is broadly deemed to be related to impact upon the person and/or group. Whilst there is no process for ranking impacts or importance of stakeholders, references to the concept of the community and local interests outnumber references to macro-level stakeholders. References to the concept of stakeholder in tandem with the environment as 'special' in the context of the social licence outnumber references to the concept of the stakeholder in tandem with economic interests. Stakeholders have the power and influence, either alone or in coalitions, to either stop projects or impose severe costs upon them.

It is important to re-iterate that the scope of the stakeholder code is limited to third party stakeholders, i.e. those persons who are neither (1) potential operators/applicants for authorisation under the legislation analysed, or (2) authorities tasked with deciding upon, or advising upon, whether such authorisations should be granted. This approach is taken to narrow the scope of enquiry in order that it aligns with one of the main underlying principles of the social licence concept; that it is akin to consent being given, implied or expressed, by the stakeholder networks that are interested in/impacted by an activity.

Table 8 below provides a broad binary overview of the answers to the objective questions set out in the introduction to Chapter 6.

Key	Environmental permitting			Other relevant environmental Legislation						Planning law						
Yes / No / N/A	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
Is stakeholder defined?																
Is it used in the legislation?																
Is interest a defined term?																
Is it used in the legislation?																
Is impact a defined term?																
Is it used in the legislation?																
Are stakeholders ranked?																

Table 8 – Stakeholder questions objective (source: current research)

Whilst these questions were asked in order to form an objective basis from which to undertake more subjective analysis, a few observations can be made from the above:-

- ‘Stakeholder’ as a literal term was prevalent across the social licence literature reviewed by the researcher but was not meaningfully found within the legislation. It appears only in the CC column in Table 8 and its usage was limited therein.
- The legislation is largely consistent in (1) its usage of interest and impact without specific definitions, and (2) the absence of stakeholder as a term. It is unsurprising that ‘impact’ is defined in EIA given that it is a key part of understanding what is meant by ‘Environmental Impact Assessment’ as a documented part of the process.
- Whilst interest was not a defined term within the legislation reviewed, its explicit usage was identified in 8 out of 9 pieces of ‘environmental law’ legislation, and 3 out of 7 ‘planning law’ sources.
- A similar observation can be made of impact, with its usage being identified in 8 out of 9 pieces of environmental law legislation, and 4 out of 7 planning law sources, but a formal definition only provided twice.
- No formal processes for ranking stakeholders were observed. This includes DO on the basis that it operates to exclude all stakeholders, meaning that all stakeholders are treated identically.

The objective questions asked by the researcher serve as a useful starting point in considering the relevant law through the lens of the stakeholder code. However, there are limitations in taking a wholly literal approach to the task of considering the relevant

law in the context of the stakeholder code. The researcher synthesised a significant body of law in Chapters 5 that was found to contain varied provisions broadly relating to stakeholders as per the doctrinal analysis set out in Chapter 6. Accordingly, consideration of these provisions solely based on the *literal* words of contained within the definition of the stakeholder code could inadvertently result in subtle and nuanced differences being missed by the analysis. For example, if the researcher only searched the relevant legislation for the presence of the literal term ‘stakeholder’, this approach would risk ignoring the use of synonyms to represent the same concept.

Table 9 below sets out the binary answers to further questions addressed by the researcher considering the above.

Key	Environmental permitting			Other relevant environmental legislation						Planning law						
Yes / No / N/A	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
Use of stakeholder synonyms?																
Use of interest synonyms?																
Use of impact synonyms?																
Indirect ranking of stakeholders?																
Use of 'community' or synonyms thereof?																

Table 9 – Stakeholder questions subjective (source: current research)

A yes/no binary answer oversimplifies what are often substantive differences underpinning the same answer across two different pieces of legislation. However, several observations can be made:-

- whilst stakeholder as a term was not observed in a 'literal' reading of the text, comparable terms such as 'public' were found when an interpretative reading was undertaken;
- in most of the legislation analysed, terms were found that were similar to interest and impact;
- 'indirect' ranking of stakeholders was observed; and
- the concept of 'community', both in a literal and interpretive sense (i.e. the use of concepts akin to the broad idea of 'a community') did not appear in a majority of the sources reviewed.

If the answers set out in tables 1 and 2 are combined, a clear message emerges from the exercise of considering the relevant law through the stakeholder lens; stakeholders are provided for in such a multiplicity of ways that context is key. The discussion below focuses on the observations outlined above.

7.1.1. Criteria and discretion

The language of the social licence and the language of the relevant law appears to be objectively different insofar as it attempts to address third parties, both as individuals and as a group. This, in turn, regularly results in meaningful practical differences between what the law provides for by way of stakeholder involvement and what the

social licence promises to those who engage with it as a concept.

In the provisions summarised above, the right in law to participate as a stakeholder often turns on whether the stakeholder in question would satisfy certain criteria, e.g. having an interest or being impacted in some way by the activity. It was also observed that the right in law to participate was often a matter of discretion for the relevant authority empowered under the legislation in question, both in terms of (1) the stakeholder being viewed by the authority as an appropriate consultee, and (2) the steps to be taken to accommodate consultation. A clear example of this can be seen when comparing DO with PPC. In PPC, it is enshrined in law that anyone may make written representations to SEPA in a 28 day period beginning with the date of the advertisement of a draft determination. However, DOs entirely exclude stakeholder views such that the DO can automatically grant planning permission to all developments which are within its scope.

It would be wrong to suggest that PPC and DO provide the two archetypes for the other relevant legislation to follow. Across all the legislation examined above, the involvement of stakeholders in decision making was, more often than not, based on criteria and discretion. As set out above, the following list of examples of criteria being set by the legislation is highly illustrative:-

- In CAR, where a licence application has the potential of resulting in a significant adverse impact to the water environment, **any person affected or likely to be affected by, or having an interest in**, the application may make representations to SEPA;

- In EASR, public consultees are persons **whom SEPA considers are affected by, are likely to be affected by**, the application.
- In MEWS, the 'public concerned' includes the criteria that they must be **affected or likely to be affected by, or having an interest in, the environmental decision-making**.
- In PAC, geographic criteria are used given that every community council any part of whose area is within or adjoins the land where the proposed development is situated must be consulted. Furthermore, the requirement to hold at least one public event has a geographic element on the basis that advertisement of such an event must be done via a newspaper **circulating in the locality.**

The following examples of discretion are also illustrative of the myriad of approaches taken to stakeholder involvement:-

- In CNHR, the Scottish Ministers **may give any person the opportunity of (a) making written representations.**
- In EA95, it is for the Secretary of State to decide whether or not to consult such other bodies or persons **as he may consider appropriate** on National Air Quality Strategy.
- In NPF, the Scottish Ministers must consult with those who they **consider have a role in the delivery of the outcomes** and in accordance with their own participation statement.

There are two pieces of legislation which are considered separately; CE and CCA. It

is offered that both take a different approach to that which has already been noted above. It is also notable that the most regular usage of 'community' as a concept was found within both.

CE provides for a number of *proactive* obligations on its relevant authorities that are not seen elsewhere in the law analysed thus far. For example, each community planning partnership must '*make all reasonable efforts to secure the participation*' of community bodies in community planning, and '*take such steps as are reasonable*' to enable the community bodies to participate in community planning to that extent. Amongst a number of obligated authorities, the local authority must also '*facilitate community planning*'. Whilst the author of this research has suggested that PPC is the environmental permitting regime that affords the widest scope for public participation, it should be noted that there are no comparable provisions in PPC with the above. For example, there are no proactive obligations to seek out potential participants and take steps to ensure that they are involved beyond advertising the draft determination.

CCA also provides for a process that is not seen elsewhere in the law analysed where it provides for a Citizens Assembly. In order to sit on the Citizens Assembly a stakeholder must be appointed by the Scottish Ministers on the basis that they are '*representative of the general populace of Scotland*'. Any person living in Scotland could make a claim to satisfy this criterion. However, this is a subjective question that is entirely a matter for the Scottish Ministers to decide.

PP and EIA are relatively straightforward by comparison to the above in that, whilst there is an element of geography involved in the service and affixation of notices, both

processes provided for broad public involvement. In both PP and EIA, it is entirely for the stakeholder to decide for themselves whether or not to become involved in a matter and make representations. The weight afforded to those representations may differ depending upon the interests or impacts of relative stakeholders, but as a matter of law those interests and impacts are not a pre-requisite criteria for public involvement, nor is there discretion afforded to the authorities to exclude.

In light of the above, the following statements can be made:-

- The relevant law is inconsistent in terms of its approach to defining ‘stakeholders’, with no universal approach taken across the provisions that have been considered;
- Some of the relevant legislation operates to restrict public participation, others provide for a level of public participation;
- Interest and impact are regularly used as criteria that must be met before participatory rights are afforded to stakeholders;
- Where interest and impact are used as criteria, it is normally a matter for the relevant authorities to decide whether the stakeholder has a legitimate ‘interest’ or claim to ‘impact’; and
- Compared to public participation, information sharing, i.e. via public registers, was not dependent on criteria being satisfied.

Given that the social licence concept is malleable enough to allow for anyone to potentially self-define as a stakeholder, the above represents a clear divergence between the social licence and law. Although the language being used is often similar,

i.e. both law and the social licence refers to interests and impacts, the social licence does not envisage an authority deciding that a stakeholder is not sufficiently interested or impacted. Indeed, proponents of the social licence concept may reasonably argue that the point of, and potency of, the social licence is that it offers influence to those who find themselves outside of the rights and influence offered to other stakeholders who meet the criteria within formal law.

However, it is also important to note that the above demonstrates that law *can* be drafted in a way which is closer to the social licence in terms of its practical effect. For example, it appears relatively uncontroversial to suggest that the use of DO to grant planning without stakeholder involvement shares no commonality with the social licence concept. However, based on what has been observed thus far, it would be wrong to suggest that there is no commonality between the social licence and the process of obtaining planning permission in the absence of a DO. As outlined above, planning permission as a process confers a significant opportunity for the public at large to become involved in decision making. Accordingly, insofar as the stakeholder code is concerned, there are grounds for saying that planning permission as a legal process is, to a point, coherent with the principles of the social licence when viewed through the stakeholder lens.

7.1.2. The ranking effect

Where the legislation analysed contains criteria upon which one's formal recognition in law as a stakeholder is based, this in turn will result in an *indirect ranking* of stakeholders even if the law itself provides a level playing field for all the stakeholders

that are in scope. As noted above, the right in law to participate as a stakeholder often turns on whether the stakeholder in question would satisfy certain criteria, e.g. having an interest or being impacted in some way by the activity. It was also observed that the right in law to participate was often a matter of discretion for the relevant authority empowered under the legislation in question, both in terms of (1) the stakeholder being viewed by the authority as an appropriate consultee, and (2) the steps to be taken to accommodate consultation.

Whilst there was no formal process for ranking stakeholders within the provisions analysed, this is only true for those stakeholders who are accepted or invited into the process either by meeting the criteria for being an interested or impacted party, or via the discretionary use of power by the relevant authority. This results in the creation of at least two tiers of stakeholder; those who are included as a stakeholder by satisfying legal criteria or by use of regulatory discretion, and those who are not. For example, it is possible for a person to self-identify as a stakeholder in relation to a specific activity regulated by EASR yet not meet the criteria within the legislation to be deemed sufficiently interested or impacted, or find themselves the beneficiary of discretion in terms of what the law provides.

Accordingly, any advocate of the utility of social licence concept who emphasises a need for all stakeholders to be informed, engaged, and able to participate or influence projects, may find that CAR and EASR are limited. Compared to PPC, CAR and EASR both have the effect of affording *only some* stakeholders the right to be heard whilst excluding others. Where embracing the social licence concept may serve to legitimise for some actors the taking of direct action to stop an activity (e.g. via protest, boycott,

or some other form of action), the relevant legislation may provide that same stakeholder with the right to be heard only if they meet certain criteria. That right to be heard does not thereafter translate into direct control over the outcome of the process; at best the relevant authority determines the matter in favour of the consultee, and in those cases where the consultee is not favoured, there may be some costs incurred by the operator in having to follow the procedure and deal with public consultation.

Using COMAH as an alternative example, it will be recalled that when preparing an external emergency plan the relevant local authority must consult such members of the public and other persons as it considers appropriate. It follows that, depending upon the view taken by the relevant local authority, an individual who lives outside of a local authority area yet feels passionate about the effects of an activity being contemplated by that local authority would appear less likely to have their views considered. At the very least, by living outside of the local authority area the stakeholder has less ability to influence the process via local democracy than the stakeholder living within its boundaries who will be given an opportunity to express themselves at local elections.

As the primary legislative vehicle for controlling major accident hazards one could argue that COMAH limits the level of public involvement that is otherwise seen in other legislation analysed above. For example, PPC requires that all regulated activities be carried out under a permit and provides the public with participatory rights in decision making. From the operator's perspective, PPC is a regulatory hurdle that must be reckoned with before operations may lawfully commence. There is no directly comparable role played by COMAH. Whilst the public may obtain information under

its provisions, and are potentially consulted, they are largely excluded by comparison.

The answers set out in Table 8 appeared to indicate that the law operates such that it does not rank stakeholders. If the law does operate in such a way this would represent a clear parallel with the stakeholder code, which contains a requirement that there be no process for ranking. However, Table 9 indicates that, far from there being no ranking, the effect of the legislation was an indirect ranking of stakeholders. This difference can be explained. In Table 8, the question asked is whether the law expressly provides for a ranking of stakeholders, i.e. where the law includes provisions for stakeholders, does it rank the stakeholders that are involved? This is materially different from the question that is asked in Table 9, which focuses on the consequences of the relevant legal provisions on all stakeholders, i.e. on stakeholders in the widest sense possible and potentially beyond the scope of those only acknowledged as stakeholders by the legislation.

That the above two questions can be asked helps to demonstrate a key difference between the relevant law and the social licence concept. The framing of these two questions acknowledges that law imposes boundaries upon itself when it is drafted to provide specific definitions for classes or groups of people. The social licence, in the absence of a universal definition, is boundless by comparison. There may be legitimate, practical, and pragmatic reasons why the relevant law summarised above regularly sets criteria, or relies on discretion, in its assessment of a person's status as stakeholder. It may also be the case that there would be less potency in, or need for, the social licence concept were the law to rely upon the widest definition of stakeholder possible, e.g. if the relevant law provided that anyone can participate in decision

making and all representations must be fully considered and responded to by the decision maker. Again, the point is to note the very real difference that arises between the law and the social licence when one considers the effect of legal drafting that selects to apply boundaries via definitions that the social licence does not impose upon itself.

There is one further dimension to the question of indirect ranking that can be most clearly seen in the context of EASA; the limitations of using macro level legislation to influence micro level activities. This further complicates the issue of indirect ranking given that it is at the macro level where the broadest approach to allowing for public participation was observed, compared to the micro level where criteria and discretion was more prevalent.

As a piece of legislation that operates at the macro level of environmental law in Scotland, the ability for stakeholders to rely upon the provisions of EASA in order to influence policy and/or decision making regarding specific activities or industries is limited. To be of assistance to stakeholders who would seek to restrict activities from taking place, said stakeholders would require to be proactive and well informed enough to understand that by becoming involved at the macro level they can influence micro level decisions.

For example, opponents of fracking would only be able to rely on EASA to influence any environmental reports that were legally required of plans or programmes by a relevant authority, wherein those plans or programmes the adoption of fracking was being considered. Even then, were they able to rely upon EASA to make

representations at the environmental report stage, the ultimate obligation on the responsible authority is to only to take account of both the environmental report and consultation responses in its preparation of the plan or programme.

This is arguably less direct an ability to influence than is otherwise provided under the relevant law discussed elsewhere in this Chapter; a responsible authority could consider the environmental report and consultation responses but decide that the contested industry or activity will be appropriately regulated by the environmental permitting regime outlined above together with other relevant environmental legislation. In other words, the macro level general approval of the industry may be obtained on the basis that regulation at the micro level is where stakeholders can find security that their environmental concerns will be addressed.

In light of the above, the following statements can be made:-

- Where stakeholders are provided for in law there is no direct ranking of stakeholders provided that any criteria established in the drafting are met by the stakeholders in question.
- Where the legislation analysed contains criteria upon which one's formal recognition in law as a stakeholder is based, this in turn will result in an indirect ranking of stakeholders even if the law itself provides a level playing field for all the stakeholders that are in scope.
- Whether the legislation operates at the macro or micro level will further impact upon the level of ranking of stakeholder views, given that a stakeholder utilising macro level provisions will be less able to directly influence a specific activity

than a stakeholder who is able to utilise micro level provisions that directly regulate the activity.

- The above statements are inconsistent with the stakeholder code.

7.1.3. Environment 'as special'

The environment 'as special' recurred throughout the social licence literature such that it was embedded within the definition underpinning the stakeholder code. At a high level, the relevant law would appear to be drafted in a way which is consistent with this idea. As has already been observed above, this is unsurprising given that the central focus of environmental law generally and the importance placed upon environmental concerns in Scottish planning law, as evidenced by the presence of EIA.

However, whilst there is broad consistency in the acknowledgement and treatment of the environment, it would be wrong to conclude that the law analysed has the sole central purpose of environmental protection. For example, in the environmental permitting regimes the following was observed:-

- examples in PPC and EASR wherein economic considerations could impact permit conditions[644] and information disclosure[645];

[644]The Pollution and Prevention and Control Regulations 2012, see (1) reg 31(1), wherein it is provided that activities involving waste oils must be compliant with certain conditions "*so far as technically feasible and economically viable*"; and (2), sch 2 para 8, wherein it is provided that SEPA may permit emissions to exceed a fugitive emission limit provided that, amongst other things, "*…it is not technically and economically feasible to comply…*"

[645]The Environmental Authorisations (Scotland) Regulations 2018, see reg 40, wherein information that may normally be subject to disclosure on a public register can be commercially confidential "to the extent that its disclosure would…prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest"

- the balancing exercise provided under CAR where, in cases of significant adverse impact on the water environment, SEPA must still consider the likely environmental, social and economic benefits of the activity[646]; and
- provision in EASR that SEPA must prevent or '*where that is not practicable*' minimise environmental harm[647].

There were similar examples of the law being drafted such that a certain level of harm of risk could be said to be tolerated in the case of both the 'other environmental law' and the relevant planning law. For example:-

- there is no general provision in COMAH that states that an operator cannot operate unless it is compliant with COMAH. Rather, the competent authority must prohibit the operation, or bringing into operation of any establishment, installation or storage facility, or any part of any establishment, installation or storage facility where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient;
- in CNHR, a plan or project can be agreed to, notwithstanding a negative assessment of the implications for a European site, as can a decision be made, or a consent, permission or other authorisation granted. Where this occurs the '*Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected*'[648].

[646]The Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg 15(1)
[647]The Environmental Authorisations (Scotland) Regulations 2018, reg 9
[648]The Conservation (Natural Habitats, &c.) Regulations 1994, reg 53

- The AQM regime provided for in EA95 does not impose an obligation on local authorities to actually meet air quality objective. Rather, they must do all that is reasonably possible in pursuit of them and report on progress annually.
- If a DO is used to automatically authorise certain types of development without further consultation this could, in theory at least, result in the environmental concerns being overlooked in specific cases.

However, it is offered that the above examples are not inconsistent with the stakeholder code insofar as the treatment of the environment as special is concerned. The social licence literature recognises that there will, of course, always be the possibility that stakeholders could seek to support the activities of a person seeking to be authorised to operate. Whilst the environment is viewed as special, it is not universally viewed as a trump card which can be used to overrule all other representations and views. It is offered that the effect of the provisions outlined above is such that there is a general presumption in favour of protecting the environment, with scope for an alternative approach to be taken.

For example, EIA and EASA processes must still be complied with even if the end result is that environmental risks are minimised as opposed to eradicated entirely. Similarly, across the environmental permitting regimes a process must first be undertaken before lower standards are permissible. Accordingly, whilst there is scope for lower environmental standards, it would be wrong to characterise this as unfettered discretion vested in the hands of decision makers to the exclusion of public views.

In light of the above, it is offered that the law appears consistent with the stakeholder

code in its treatment of the environment as special.

7.1.4. The absence of community

There are references to the concept of the community within the legislation examined. However, the context within which these references are made is key. As outlined above, ‘community’ is not commonly used where legislation attempts to deal with consultation rights being afforded to the public, nor is it used where legislation grants rights on persons by reference to their interest in certain activities or the impact of the same.

Where the social licence refers to community empowerment, the law more regularly refers to individual empowerment of the ‘person’. This is understandable given the practical constraints of legal drafting. For example, law must be meaningfully enforceable when it deals in rights, duties, and obligations. It is offered that community is a term that is incapable of being clearly defined, such that if rights, duties, and obligations were ‘given’ to a community there would be no clarity as to who the community was. A community council is different given that it is made up of representatives meaning that there is a direct route to accountability and enforceability where rights, duties, and obligations are conferred.

This is not to say that the net effect of legislation is to do nothing for ‘communities’. Rather, the use of community as a concept is more commonly found at the macro level and in the context of obligations being imposed upon relevant authorities to take account of, or act in a certain way towards communities.

It follows from the above that references to the concept of the community and local interests do not outnumber references to macro-level stakeholders in the relevant law. However, it would be wrong to view this as a divergence from the stakeholder code. Rather, based on the relevant law summarised above, it would be correct to state that there is no division between micro and macro level interests in the law that has been considered, i.e. interest is used as a broad and all-encompassing term. Furthermore, there is nothing stopping stakeholders who are given a participatory role from citing community concerns in their representations.

It may be that a review of all representations made under the relevant law to date would demonstrate a greater prevalence of micro level concerns, and references to the community, than to macro level concerns. Accordingly, this element of the stakeholder code cannot be assessed by the black letter law alone; it is entirely possible that the effect of the law as current drafted is such that there is coherence with the code in terms of the representations that have been facilitated by the public participation provisions summarised above.

Accordingly, the following statements can be made:-

- Where the law does provide some individual stakeholders with a level of potential influence, it does not commonly provide the same to coalitions such as ‘the community’.
- The community as a concept is used at the macro level in the context of obligations imposed upon relevant authorities.

- There is no division between macro and micro level interests in the relevant law. This does not mean that there is inconsistency between the law and the social licence concept as the key point is that all representations are permissible once stakeholder status in law is confirmed.

7.2. Engagement

The following definition of the engagement code was reached in the coding Chapter:-

the fact of being involved and the process of encouraging people to be interested and/or involved, with multiple process and vehicles for engagement available that, depending upon the perspective of the actors involved, will impact on the extent to which the engagement is deemed acceptable, meaningful, and appropriate.

The above code contains certain subjective elements that are beyond the scope of doctrinal research and, thus, beyond the scope of the current research. For example, the perspective of the actors involved, i.e. the stakeholders, operators, applicants, and relevant authorities, cannot be considered in a black letter law exercise. Similarly, it is entirely a subjective matter for those same actors whether engagement is deemed acceptable, meaningful, or appropriate.

However, there remain a number of important tasks that must be undertaken via doctrinal analysis of black letter law before the perspective of the actors involved could be properly considered. As engagement is process driven, i.e. it is an interaction between parties, doctrinal research must be undertaken to establish the processes

that are provided for in law. Furthermore, doctrinal research can compare and contrast those processes in order to consider whether there is likely to be consistency or coherence from a stakeholder perspective. For example, it has already been observed above that a lay person who assumes that law will provide for universal rights of participation will find that this assumption is incorrect. As demonstrated in the discussion of the stakeholder code, from a lay perspective it could reasonably appear that participatory rights change where the only meaningful difference is the environmental medium being affected. As stakeholder perspective is central to the social licence, understanding the reality of the stakeholder's place in the process of engagement provided for by law goes some way to understanding the nature of the relationship between law and the social licence.

In light of the above, the observations below focus on the question of the *processes* provided for in law that can be said to relate to engagement. It is important to re-iterate that there is unavoidable overlap between the engagement code and the stakeholder code, such that some of the observations already made in the discussion of the stakeholder code are relevant to the engagement code. This is because the engagement code is essentially focussed on engagement *with* stakeholders. Accordingly, some of the questions set out in the tables below have already been partially addressed.

For the purposes of establishing a starting point for analysing the relevant law through the lens of the engagement code, the following objective questions were asked in relation to information sharing:-

1. Does the law provide for public disclosure of information, e.g. via public register or by legislative process?
2. If yes, are there any exemptions or exceptions?
3. Is information sharing mandatory between operators and stakeholders prior to the relevant authority making **any** decisions to authorise activities or approve plans?
4. If no, is information sharing of this type mandatory prior to **some specific** decisions?
5. Is information sharing mandatory between relevant authorities and stakeholder prior to the relevant authority making **any decisions** to authorise activities or approve plans?
6. If the answer to question 5 is no, is information sharing of this type mandatory prior to **some specific** decisions?

The following objective questions were asked in relation to stakeholder participation in decision making:-

1. Are **all** stakeholders entitled to participate at some stage in **all** decisions before they are taken?
2. If no, are **some** stakeholders entitled to participate at some stage in **all** decisions before they are taken?
3. If no, are **some** stakeholders entitled to participate at some stage in **some** decisions before they are taken?
4. If no, do the relevant authorities have discretion as to whether stakeholder participation should occur?

5. If the answer to any of questions 7 to 10 is yes, must the relevant authorities **always** take stakeholder representations into account?
6. If no, is there an express obligation on the relevant authorities to take stakeholder representations into account in **specific examples**?
7. Is there any obligation on the relevant authorities to explain the public participation processes undertaken by them?
8. Where the relevant authority makes a decision, are they obliged to explain their reasoning to stakeholders?
9. Do stakeholders have the right to appeal decisions or assessments made by the relevant authorities?

The list of questions asked of the legislation outlined above is significantly longer and more complex than the questions in tables 8 and 9 that related to the stakeholder code. This is an unavoidable consequence of (1) a desire to provide binary answers in tabular form in order that patterns across the legislation may be observed, and (2) the need to focus on processes provided for in law for the reasons outlined above. Binary answers to the above questions are set out at tables 10 and 11 below, together with abbreviated versions of the questions.

It has already been observed above that the relevant law contains a broad variety of processes, with some of the legislation providing for a number of processes within a single statutory instrument. Accordingly, the questions outlined above are drafted in recognition of the fact that a number of different approaches to public participation and information sharing can exist within a single piece of legislation. For example, CNHR contains almost identical provisions dealing with stakeholder representations being

taken in relation to the classification of Special Protection Areas and the creation of land use plans. However, the provisions within CNHR are different insofar as they deal with stakeholder representations being taken for the purposes of HRA. It follows that it would be insufficient to ask an overly simple question when analysing CNHR, such as ‘does the law mandate information sharing between the relevant authorities and stakeholders prior to the relevant authority?’. There is no binary answer to this question because CNHR, i.e. ‘the law’ in the context of the question, is made up of multiple processes.

Key Yes / No / N/A	Environmental permitting			Other relevant environmental legislation						Planning law						
	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
1. Mandatory public disclosure of info obtained via legislation?																
2. Exemptions from or exceptions to the above?																
3. Pre-decision, operator to stakeholder info sharing is always mandatory?																
4. If not, operator to stakeholder info sharing is sometimes mandatory?																
5. Pre-decision, authority to stakeholder info sharing is always mandatory?																
6. If not, operator to stakeholder info sharing is sometimes mandatory?																

Table 10 – Information sharing questions (Source: current research)

Key	Environmental permitting			Other relevant environmental legislation						Planning law						
Yes / No / N/A	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
7. Full stakeholder participation in decisions?																
8. Some stakeholders participate in all decisions?																
9. Some stakeholders participate in some decisions?																
10. Do authorities have discretion to allow stakeholder participation?																
11. Must authorities always consider stakeholder representations?																
12. Authorities sometimes required to consider representations?																
13. Authorities must explain their public participation processes?																
14. Authorities must explain their decisions to stakeholders?																
15. Stakeholders have the right to appeal decisions?																

Table 11 – Stakeholder participation questions (Source: current research)

Based on the relevant law identified by the researcher, it is offered that there are three processes that recur with the most regularity across the relevant legislation. These three processes are:-

1. the disclosure of information to the public generally, usually via public register;
2. the direct provision of information to stakeholders, e.g. via mandatory advertisement or service of notices prior to determination by a relevant authority; and
3. the participation by stakeholders in decision or assessment making by relevant authorities.

The questions outlined in tables 10 and 11 above can be categorised within each of these three processes as follows:-

- questions 1 and 2 relate to the general disclosure of information, i.e. via public register;
- questions 3 to 6 relate to the direct provision of information to stakeholders; and
- questions 7 to 15 relate to stakeholder participation in decision or assessment making.

Whilst the remainder of this section will consider each process separately, some general observations can now be made.

7.2.1. General observations

Tables 10 and 11 demonstrate that when the relevant law is analysed through the lens

of the engagement code, the picture that emerges demonstrates the myriad of different approaches that exist. For example, DO contains zero processes that relate to either (1) the direct provision of information to stakeholders, or (2) their participation in decision or assessment making. Whilst there is disclosure of information generally in the context of DO, this relates to the publication of each DO via legislative process and the resulting confirmation to the public of the scope of each order. Accordingly, viewed through the lens of the engagement code, it would be difficult to argue that there is any meaningful overlap between the principles and functions of DOs and that of the social licence concept, where the elements that are missing from DOs are so crucial.

By way of comparison, PP as a process shows significant potential insofar as it may be possible to argue that it shares the same principles as the social licence concept. PP as a process provides for the disclosure of information to the public generally, the direct provision of information to stakeholders, and the participation by stakeholders in decision or assessment making by relevant authorities. Furthermore, the extent to which PP provides for this is generally not constrained by black letter law, nor is it a question of discretion vested in a relevant authority. Where the law requires an applicant to obtain planning permission:-

- as per question 3, information sharing between applicant and stakeholders must occur prior to determination;
- as per question 5, information sharing between the relevant authorities and stakeholders must occur prior to determination;

- as per question 7, all stakeholders are entitled to participate at some stage in the determination of the application;
- as per question 11, there is an express obligation on the relevant authorities to take stakeholder representations into account;
- as per question 13, there is an obligation on the relevant authorities to explain public participation processes undertaken by them; and
- as per question 14, where the relevant authority makes a determination, there is an obligation on the relevant authority to explain their reasoning to stakeholders.

Once planning permission is required, the drafting of the relevant law is such that, on the basis of the text alone, any member of the public could become informed and involved. Whilst the practical reality or experience of stakeholders who seek to become involved in the process may differ from what the law states they are entitled to, insofar as doctrinal analysis is concerned there is a clear commonality between the process in theory and the social licence concept.

However, whilst the emerging picture is one of myriad approaches, broad similarity in approach can be observed in two of the sub-categories of sources used by the researcher when identifying the relevant law for the purposes of the current discussion.

Firstly, it can be seen that the environmental permitting legislation provides for almost identical answers across all 15 questions, with only question 12 showing PPC to take a different approach. This difference was noted in the discussion of the relevant provisions of the environmental permitting legislation; PPC does not contain an

express provision requiring that stakeholder representations be considered prior to determination. As outlined above, the actual effect on the process may be negligible in practice.

Secondly, it can also be seen that the answers in tables 10 and 11 that relate to macro level planning law processes are broadly similar. The NPF answers are slightly different on the basis that there exists a level of discretion in stakeholder involvement in the review of an NPF compared to provisions in the other macro level planning law processes that mandate for some stakeholders to be automatically involved in some processes.

The fact that similar processes exist across the two sub-categories above is unsurprising. At a high level, it should be expected that the processes that exist within environmental permitting legislation would be largely similar. Similarly, again at a high level, it should be expected that macro level legislation would rely upon similar engagement processes. Furthermore, the researcher intentionally grouped these sources; if there was not a level of similarity then it may be that the grouping was badly informed. However, what should not be lost at this stage is that the answers in tables 10 and 11 indicate only the broad nature of the processes. As observed in the discussion of the stakeholder code, there are often differences in delivery.

The lack of similarity observed in the other two sub-categories of law may also be explained at this stage. Firstly, ‘other relevant environmental law’ was adopted as a sub-category to cover a broad variety of legislation that did not otherwise neatly fit together. It follows that it is not surprising that the processes observed at a high level

are different; each piece of legislation exists for separate purposes compared to the shared purpose of 'environmental permitting'. Secondly, the provisions grouped under 'micro-level planning law' largely come from the same piece of legislation and are, in fact, different processes within planning law in their own right. It is unsurprising that they would be dissimilar given that they are component parts of a category of law more commonly labelled 'control of development'. Whilst the researcher has separated 'control of development' into its component parts for the purposes of considering specific planning processes, it is wrong to infer from this that PP exists in isolation from DO, PAC, or EIA. Accordingly, it would be wrong to infer any observations from the lack of similarity in tables 10 and 11 across the micro level planning law sub-category.

7.2.2. General information disclosure

It can be seen from tables 10 and 11 that, across each source, the law provides for public disclosure of information in some material way. Broadly speaking, there are two ways in which this disclosure is achieved:-

- via maintenance of a public register; and
- via the Scottish Parliament.

Again, a level of consistency was observed within the sub-categories of law adopted by the researcher. For example, each piece of environmental permitting legislation contains provisions requiring SEPA to (1) make a public register available at all reasonable times for inspection by the public free of charge, and (2) afford members of the public facilities for obtaining copies of entries, on payment of reasonable

charges. Each register must include all particulars of any application made to SEPA, any representations made by any person in response to advertisements, and all particulars of any authorisations granted by SEPA and the reasons on which the decision is based.

Similar provisions exist in the micro level planning provisions that deal with control of development, i.e. PP, PAC, and EIA. Again, it has already been noted above that a list of applications must be kept by the relevant planning authorities that includes, amongst other entries, the site location and a description of the proposed development to which the application relates.

Alternatively, the macro level planning provisions largely provide for general dissemination of information via the Scottish Parliament. For example, it has already been noted that the Scottish Ministers may not adopt a revised NPF until a draft of it has been approved by resolution of the Parliament. Similarly, where CE provides for the creation of national outcomes, the Scottish Ministers must also lay before the Parliament a document describing any representations received and whether, and if so how, those representations have been taken account of in preparing the draft national outcomes.

The sub-category of ‘other environmental legislation’ contained a mixed approach, with regular usage of public register provisions together with notable examples of disclosure to the Scottish Parliament. This possibly reflects the fact that a mixture of micro and macro level processes are included within this sub-category of sources. For example, CNHR provides that a planning authority in Scotland must keep available at

their principal office for free public inspection a register of all the European sites of which they have been given notice under CNHR. Similarly, EASA provides that responsible authorities must keep a copy of determinations made under the act, and any related statement of reasons, available at their principle offices for inspection by the public at all reasonable times and free of charge. It is offered that these examples relate to micro level matters when compared to the processes covered by CCA, which provides for disclosure via the laying before the Scottish Parliament a report detailing progress towards implementing proposals and policies.

Where the relevant legislation provides for the disclosure of information by an applicant, operator, or public authority, much of the information covered is highly technical in nature. As acknowledged in the preceding section on limitations, the researcher is not qualified to comment on whether or not the information currently prescribed for disclosure is of sufficient standard to be of meaningful assistance to a stakeholder who was seeking to become well informed enough about a matter in order that they could then engage with the process of making representations about its determination. However, some important observations as to whether the disclosed information is useful can still be made at this stage.

Firstly, the timing requirements that apply to general information sharing provisions are important insofar as the engagement code is considered. This is for a relatively simple reason; information disclosed *after* a contested activity or development is permitted will be of limited use to stakeholders. For example, whilst almost all of the sources considered provide for disclosure before the contested activity or development is determined, COMAH requires the competent authority to ensure that

the information is made available to the public within a reasonable period from '*the date on which the establishment becomes subject to COMAH*'[649]. Whilst this is a result of the fact that COMAH is triggered on the basis of thresholds being met, it nonetheless serves as a useful example of the practical constraints that legal drafting must deal with but which the social licence concept can avoid by reason of its intangible quality. The nature of COMAH is such that stakeholders cannot use its provisions to influence operations at a site unless and until it becomes a COMAH site. It is essentially a piece of legislation that enables stakeholders to become *informed* as opposed to a piece of legislation that enables them to become *involved.*

Secondly, it would be wrong to think of the information being disclosed as only being relevant for the purposes of the specific authorisation, development, or plan being considered. For example, it is of use to stakeholders in future cases that PPC, CAR, and EASR each provide for a public register that includes any representations made by any person in response to advertisements, all particulars of any authorisation granted, and the reasons on which the decision is based. Whilst the stakeholders may have been unable to influence the outcome in the example to which the material on the register relates, the availability of that same material provides them with something of a precedent to consider the next time a similar application is made. At the very least, if a stakeholder can understand the reasoning behind a previous decision in a similar case they can approach the next case by focussing on that reasoning.

Thirdly, and building on the point directly above, it would also be wrong to think of the information being disclosed as existing in a vacuum. When a stakeholder seeks to

[649]The Control of Major Accident Hazards Regulations 2015, reg 17(3)

make representations under PPC, he is not restricted to relying solely on material that is already on the PPC register. Whilst this may seem an obvious point it is important to state that stakeholders may rely on anything they deem relevant when they are empowered to make representations. The question of the weight attached to the representation is a separate matter, but there are easily conceivable scenarios where a stakeholder may point to macro level matters, such as climate change targets, whilst using micro level processes to make their representations to the relevant authorities, such as through objecting to planning permission being granted for a development. Whilst the researcher has set out his observations throughout this Chapter by focussing on specific processes, in the context of information disclosure the total result of all processes together must not be lost.

Fourthly, there is a clear difference between a public register of specific documents and disclosure of information via reports. The former provides for disclosure of primary sources, whereas the later provides for disclosure of a secondary summary. For example, under EA95 local authorities must make available the reports on which they are required to consult in relation to air quality, but they are not required to make available all the material collected for its review and assessment - only a summary. It follows that there is, in theory at least, the potential for gloss or selectivity where disclosure is conducted via reports. It is, of course, accepted that there are some instances where a report is required on the basis that the information being disclosed relates to a statement by the relevant authorities of something not otherwise contained in primary sources, such as progress towards certain goals as per the example in CCA.

Finally, whilst only observed in a minority of sources, the constraints that operate on disclosure in PPC, CAR, and EASR must be acknowledged given that they provide clear examples of law actively acting to restrict information sharing. Whilst the social licence concept does not necessarily mandate full and automatic disclosure of all information to all stakeholders, it is unarguable that the more a legislative framework acts to suppress the disclosure of information the less chance there is of demonstrating commonality with the social licence principles.

For example, as noted above, EASR provides an exception to disclosure on the basis of commercial confidentiality. The specific provision states that disclosure may be objected to by the applicant '*to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest*'[650]. Although not impossible, it is difficult to see commonality between law and the social licence concept where law provides for the prevention of disclosure on the basis of 'legitimate economic interest' being protected. A stakeholder who is denied information on this basis may form the view that the law has decided to uphold private interests above public interests, or has decided to uphold economic interest over environmental interest. Whilst it is currently unlikely to be tested in light of the effective ban on fracking fluid, it is conceivable that the disclosure of all substances used in fracking fluid could be objected to by an applicant in order to protect a legitimate economic interest if said applicant could show that its fracking fluid gave it some form of commercial advantage over other operators.

[650]The Environmental Authorisations (Scotland) Regulations 2018, reg 40

Again, it is offered that, taken as a whole, much of the above demonstrates that legal drafting is about 'the art of the possible'. There is no reason why the constraints on disclosure provided for in PPC, CAR, or EASR could not be removed if there was sufficient political backing for amendment of legislation. For the same reason, there is also no barrier in legal drafting or law blocking more widespread use of public registers in tandem with mandatory disclosure of all primary sources recovered by relevant authorities in exercising their functions. In this sense, the only meaningful difference between law and the social licence in relation to general information sharing is that the former must be drafted to reflect the will of the legislature whilst the latter need not consider whether restrictions should be placed on information sharing that protect private interests.

In light of the above, the processes within the relevant law *at present* appear consistent with the engagement code insofar as they provide for general disclosure of information. However, there is nothing intrinsic to the character of law that requires that the above statement will always be correct. There is no reason why, if the necessary political will exists, law cannot be altered to provide for either (1) more widespread information sharing, or (2) greater constraints on information sharing.

7.2.3. Direct disclosure to stakeholders

It is important to state firstly what is meant by 'direct disclosure'. In the context of the relevant law, direct disclosure means an obligation on a party to send information by direct means (e.g. such as a notice) to the known address of a recipient. For the purposes of the current research, placement of a notice or advertisement in a newspaper is deemed to be included within the definition of direct disclosure. By

comparison, disclosure via public register or parliamentary process is deemed to be indirect.

Direct disclosure to stakeholders can be broken down into two information transactions, (1) the direct provision of information from operator/applicant to stakeholders, and (2) the direct provision of information from relevant authority to stakeholder. As shown in the binary answers to questions 3 to 6 in Table 10 the picture is again one of alternative approaches across the relevant law analysed.

As per questions 3 and 4, the question of direct disclosure of information from operator/applicant to stakeholder was not applicable in 7 out of 16 sources (i.e. CNHR, EA95, CC, EASA, NPF, DP, and CE). This is for the simple reason that the sections of each source relevant to the current research did not deal with the rights or obligations of operators/applicants. For example, EA95, CC, NPF, and DP each provide for macro level processes undertaken by a relevant authority as opposed to an operator or applicant. Whilst CNHR does contain some licensing provisions, these have not been included within the current research as relevant. Of the 9 sources where the question was applicable, direct provision of information from operator/applicant to stakeholders was found in 7 sources.

As per question 3, only MEWS and PP contain provisions mandating information sharing between applicant and stakeholders prior to the relevant authority making a determination. As MEWS essentially feeds into the decision of planning authorities considering planning permission applications, it is unsurprising that both of these sources would contain the same disclosure provisions.

As per question 4, 6 sources contain provisions mandating information sharing between applicant/operator and stakeholders prior to the relevant authority making certain specific determinations. The 5 sources are PPC, CAR, EASR, COMAH, PAC, and EIA.

The only source that did not contain provisions mandating information sharing between applicant/operator and stakeholders at some stage was DO. Given that DOs can be used to either pre-authorise or rule out development without the need for application, this is unsurprising.

The question of direct disclosure of information from relevant authority to stakeholders was applicable to all sources. As per question 5, there are 4 sources where it can be said that the relevant law mandates information sharing between the relevant authorities and stakeholders prior to the relevant authority determining or making an assessment of **any and all** activities, developments, or plans. These sources are COMAH, MEWS, DP, and PP.

As per question 6, there are 9 sources where it can be said that the relevant law mandates information sharing between the relevant authorities and stakeholders prior to the relevant authority determining or making an assessment of certain specific activities, developments, or plans. These sources are PPC, CAR, EASR,CNHR, CC, EASA, NPF, CE, and EIA.

The two sources where there is no provision for direct disclosure of information from relevant authority to stakeholders are EA95 and DO. Again, DO is explained by the

nature of its underlying purpose of pre-determining planning matters, and it should be noted that public information is enabled to some extent through the legislative process. In the context of EA95, whilst there are provisions requiring the publication of information it should be recalled that the relevant provisions summarised above (1) provided the Secretary of State with significant discretion, and (2) where they related to information sharing, required only that local authorities make copies of certain documents available, i.e. there was no proactive duty to disclose *directly.*

In light of the above, the following observations are offered:-

- Disclosure by operator or applicant to stakeholder is not featured within all sources.
- Where such disclosure is featured, the relevant law presently tends to mandate direct disclosure in specific circumstances as opposed to a blanket requirement that direct disclosure is the default in all circumstances.
- Disclosure by relevant authority to stakeholder is featured in all sources.
- In the context of disclosure by relevant authority to stakeholder, the relevant law presently tends to mandate direct disclosure in specific circumstances as opposed to a blanket requirement that direct disclosure is the default in all circumstances.

As with the discussion regarding general information disclosure above, there is nothing intrinsic to the character of law that requires that the above statements will always be correct. There is no reason why, if the necessary political will exists, law cannot be altered to provide for either (1) greater use of direct and proactive disclosure to

stakeholders, or (2) greater constraints on such disclosure.

In the majority of the processes considered, stakeholders are provided with relevant information via a level of direct disclosure. However, on the basis that the researcher is not technically qualified to comment on the usefulness of that information, the research is not able to state whether the current direct disclosure provisions would fully enable a stakeholder to become meaningfully involved in decision making. Accordingly, it is offered that the relevant law at present is at least capable of being viewed as consistent with the engagement code insofar as it provides for direct disclosure of information, provided that the information is viewed as useful by a suitably qualified person.

7.2.4. Stakeholder participation

As per the above, questions 7 to 15 relate to stakeholder participation in decision or assessment making. These questions can be further divided as follows:-

- questions 7 to 10 relate to the extent, if any, that the relevant law provides for stakeholder participation;
- questions 11 to 14 relate to the existence of obligations upon the relevant authorities that are ancillary to stakeholder participation; and
- question 15 relates to rights of appeal.

The most straightforward observation that can be made based on tables 10 and 11 relates to question 15 where it can be seen that none of the relevant sources of law

contain provisions that equate to stakeholders being given the right to appeal decisions or assessments made by the relevant authorities. Again, it must be stressed that the current research does not consider judicial review, which may be open to stakeholders as a route of challenge. That said, regardless of whether judicial review would be open to stakeholders, there are a number of further observations that arise from the absence of stakeholder appeals within the relevant law that directly relate to the task of examining said law through the lens of the social licence codes.

Recourse to judicial review is an additional 'layer' of law on top of what is already a potentially complex legal process for stakeholders to become involved in. Furthermore, raising formal judicial review proceedings could be seen as cost-prohibitive for a number of stakeholders. By comparison to the rights of stakeholders, operators/applicants *are* regularly afforded the right to appeal the decision or assessment made by the relevant authority across the relevant law examined. There is a logic in the argument that if operators/applicants are afforded the right to appeal within the relevant law, stakeholders who made representations should be afforded similar rights.

The existence of the right to appeal in law serves as a recognition in law that the wrong decision may sometimes be made and that, on occasion, further review is reasonable. If the definition underpinning the engagement code is revisited, it cannot be said that the absence of appeal rights is coherent with the social licence given that the engagement code specifically provides for *'the fact of being involved…with multiple process and vehicles for engagement'.*

As per questions 7 to 10, where the relevant law does provide for stakeholder participation the binary answers in tables 10 and 11 can be summarised as follows:-

- stakeholder participation in decision or assessment making was found in all 16 sources;
- as per question 7, only MEWS and PP potentially provide **all** stakeholders with the entitlement to participate at some stage in the determination or assessment by the relevant authorities of any and all activities, developments, or plans;
- thereafter, as per question 8, CC is the only source of law wherein it can be observed that **some specific** stakeholders are entitled to participate at some stage in the determination or assessment by the relevant authorities of any and all activities, developments, or plans;
- as per question 9, the majority of sources provide that **some specific** stakeholders are entitled to participate in the determination or assessment by the relevant authorities of **some specific** activities, developments, or plans (i.e. PPC, CAR, EASR, EASA, DP, CE, PAC, EIA); and
- as per question 10, ultimate discretion vested in the relevant authorities as to the level of stakeholder participation was observed in CNHR, EA95, and NPF.

Again, an examination of the relevant law demonstrates that a mixed approach is taken. As per similar observations made above, this may be explained in part by the fact that the relevant law examined (1) contains a mixture of micro and macro level processes, and (2) covers a broad scope of different purposes. Furthermore, whether legislation can be said to provide wide stakeholder participation turns entirely on the approach taken by that legislation to the question of defining what a stakeholder is in

each context. As per the stakeholder code discussion, the law can operate to impose definitions that exclude certain persons who self-identify as stakeholders from being defined in law as such. Where this occurs, it follows that the scale of stakeholder participation provided for will be narrower than it could otherwise have been had a broader initial definition of stakeholder been used in framing the engagement process. It has been observed throughout this Chapter that the perspective of a hypothetical lay person must be considered given that part of the appeal of the social licence concept is that it is malleable enough that it can conceivably offer participatory status to an infinitely wide audience. From the perspective of the lay stakeholder, it appears reasonable to suggest that there may be an expectation of universality in the approach taken in law to the possibility of stakeholder involvement or decision making. For example, CNHR provides that stakeholder participation in the creation of land use plans is a matter of discretion vested in the Secretary of State, whilst similar process in DP, such as the creation of the main issues report, contain legally guaranteed stakeholder participation rights. What logical reason could be offered to a lay stakeholder to explain why their involvement in certain matters under CNHR should be at the discretion of the Secretary of State whilst *prima facie* similar processes in DP should provide for legally guaranteed participatory rights?

A further dimension must be considered at this stage in the discussion; proactive engagement. It has already been observed above that CE places goal setting proactive obligations on its relevant authorities that are not seen elsewhere in the law analysed. PAC is similar where it obliges operators/applicants to take certain steps culminating in the holding of a public meeting where stakeholders can attend and make representations directly.

It is recognised that there may be various practical reasons why the remainder of the relevant law instead relies only upon an initial invitation to become engaged that may be issued via notice in a newspaper, public register, or (in some cases) by direct service upon interested or impacted parties. It is also recognised that there may be policy considerations that underpin the decision not to impose upon operators/applicants obligations that would mandate proactive engagement across all engagement processes already outlined above. However, it does not appear unreasonable to suggest that a hypothetical lay person may find it inconsistent that the law places proactive engagement obligations upon parties in some instances, but does not in other seemingly comparable instances. For example, the absence of similar obligations in PPC to those in PAC has already been discussed above. From the lay perspective, both PPC and PAC as processes exist to control either activities or developments at the permissioning stage; why should it be that where planning permission is sought the obligation is for more proactive engagement compared to permission from the environmental regulator?

Where stakeholder participation is provided for, in terms of the existence of obligations upon the relevant authorities that are ancillary to stakeholder participation it can be observed in tables 10 and 11 that:-

- as per question 11, only MEWS and PP contain an express obligation on the relevant authorities to always take stakeholder representations into account;
- as per question 12, in the majority of sources there is an express obligation on the relevant authorities to take stakeholder representations into account in specific examples (CAR, EASR, CNHR, EA95, CC, EASA, NPF, DP, and CE);

- as per question 13 there is obligation on the relevant authorities to explain public participation processes undertaken by them in the majority of sources (PPC, CAR, EASR, MEWS, CC, EASA, NPF, DP, CE, and EIA); and
- as per question 14, where the relevant authority makes a decision or an assessment, there is an obligation on the relevant authority to explain their reasoning to stakeholders in the majority of sources of law (PPC, CAR, EASR, EASA, NPF, DP, CE, PP, and EIA).

An important distinction must be made between the first two bullet points immediately above. The reason why MEWS and PP stand separately from the other sources in this context relates entirely to the fact that their engagement processes are open to all stakeholders. Accordingly, the obligation within the engagement processes to take stakeholder representations into account extends to all stakeholders who choose to participate. As an alternative comparison, it must be recalled that there are a number of levels of authorisation that exist within both CAR and EAS(R), the most basic of which, GBR, can be obtained by an operator without the need to make a formal application to SEPA. As there is no formal application to SEPA for activities authorised via GBR, there is no formal process by which those activities are considered by PPC on a case by case basis, and it follows that there is no process to submit stakeholder representations to on a case by case basis. Accordingly, it cannot be said that CAR and EAS(R) contain an express obligation mandating SEPA to always take stakeholder representations into account; if the activity is carried out under a GBR there is no process for representations to be made on a case by case basis.

As per the above example, it would be wrong to take from tables 8 to 11 that across

the legislation there is a widespread absence of stakeholder participation with corresponding obligations on the relevant authority to take representations into account. In general, where the relevant law provides for stakeholder participation there is a corresponding obligation to take representations into account, explain public participation processes, and explain the reasoning behind decision making. Notable examples of a different approach being taken, such as in PPC, have already been addressed above.

One key part of engagement as a process that is absent from the relevant law is the weight that must be afforded to each stakeholder representation. Again, there may be entirely rational and practical reasons for law being drafted in this manner. As evidenced by the regulatory guidance for CAR, it may be that the majority of the relevant law is supplemented by guidance that sets out the decision making process, the relevant weight to be accorded to each matter, and whether there is a default position. Such guidance is beyond the scope of the current research. However, it would seem to be uncontroversial to state that a stakeholder is more likely to be listened to by the relevant authority if they can make informed representations. Accordingly, the practice of information sharing is as crucial an aspect in its own right as the provisions that enable stakeholder participation.

Therefore, it is of use to stakeholders that a number of ancillary obligations are placed on the relevant authorities where their participation in decision making or assessment making is provided for in law. For example, as observed above, a stakeholder who understands why a decision has been taken is likely to be better informed as to what representations are necessary if they chose to make representations the next time a

similar matter is considered by the relevant authority. As an alternative example, a stakeholder who can review the public participation processes undertaken by a relevant authority in a previous similar matter may better understand the rights they will be afforded in the matter currently proceeding through the same engagement process. Perhaps most importantly, a stakeholder who is given the reason for a decision is more likely to understand, and even accept, the decision than a stakeholder who is given no such reason.

In light of the above, the following observations are offered:-

- the myriad of approaches to stakeholder participation demonstrates that law has the flexibility to be drafted such that it is consistent with the stakeholder code;
- however, the myriad of approach to stakeholder participation could easily appear inconsistent to a lay person trying to navigate a complex framework;
- the relevant law at present appears consistent with the engagement code but, as a result of (1) limited use of proactive engagement obligations upon operator/applicant and relevant authorities, and (2) the existence of discretion vested in decision makers as to the level of stakeholder participation afforded, it does not mandate the same level of interaction with stakeholders as the social licence concept;
- the absence of stakeholder appeal rights in the relevant law, even allowing for judicial review as an alternative route, represents a significant divergence in principles between the law and the engagement code;

- as the right to be heard and the right to be listened to are two separate things, the right to participate in law must co-exist with the right to be informed in order to improve the prospects that a stakeholder will view the engagement processes provided to them in law as meaningful; and
- where stakeholder participation is provided for, the relevant law generally tends to place a number of ancillary obligations upon relevant authorities that are useful from the stakeholder perspective.

7.3. Consent

A binary table setting out answers to questions arising from the consent code is not provided in this section on the basis that it would represent unnecessary duplication of questions already addressed in tables 8 to 11 above. This is developed in further detail below.

The following definition of the consent code was reached in the coding Chapter:-

the broad conceptual heading which conveys the principle that a stakeholder may give, both explicitly and tacitly, permission for something to happen, through both action and inaction on their part, and also withdraw permission. The type, form, and level of consent given will vary depending upon context, which can be influenced by various factors including the risk and reward of the action occurring and the type of interaction between the stakeholder and the individual or group seeking permission. Although not an exhaustive list, examples of this concept that emerge most frequently across the reviewed literature are acceptance, approval, and psychological identification.

Broken down into its component parts, it can be seen that key elements of the above definition have already been discussed in the analysis of the relevant law through the lens of both the stakeholder and engagement codes. For example:-

- the extent to which stakeholders are included within the relevant law has been addressed by the researcher through the analysis of relevant law through the lens of the stakeholder code; and
- the '*type of interaction between the stakeholder and the individual or group seeking permission'* provided by law has been addressed by the researcher through discussion of the various engagement processes across the relevant law.

From the discussion thus far, it can be stated that a myriad of approaches are taken within the relevant law to the question of (1) defining stakeholders for the purposes of the provisions of said relevant law, and (2) providing processes of engagement for the purposes of the provisions of said relevant law. Both of these observations are relevant to examining the law through the lens of the consent code insofar as the consent code places emphasis on stakeholder involvement.

Accordingly, it is relevant to the consent code that, whilst the significant majority of the sources of law provided for stakeholder involvement, an indirect ranking of stakeholders was observed that impacted upon whether or not a 'self-defined' stakeholder could take part in said engagement processes. Where a stakeholder is excluded by operation of the law, the law must be seen as lacking commonality with the consent code insofar as that specific stakeholder is concerned. The stakeholder

who has no rights in law to be heard has no vehicle in law with which to give, both explicitly and tacitly, permission for something to happen.

For example, as has been observed above, at one end of the spectrum of approaches to stakeholder engagement sits control of development through planning permission. It has been observed that this provides for the widest approach to stakeholder involvement in the relevant law examined and appears to have most in common with the stakeholder and engagement codes as a result. At the other end of the spectrum of approaches, control of development through development orders entirely excludes stakeholders such that it shares little to no commonality with the codes considered thus far. It follows that control of development through planning permission must be seen as the process in law which is most consistent with the consent code, whilst control of development through development orders is least consistent.

Returning to the component parts of the consent code, with respect to control of development through planning permission it can be observed that:-

- as all stakeholders may choose to become involved, all stakeholders may explicitly state in their representations where they give permission for development to occur, accept that development will occur, approve of the development, or actively campaign for the development; and
- as there are no rules on the content of representations, all stakeholders who choose to become involved can reference any factor that they deem relevant, including the risk and reward of the development occurring.

Subject to the caveats already provided for above that (1) the relevant law contains elements of stakeholder ranking and (2) some stakeholders may be excluded by the relevant law such that they are not entitled to make representations, the above two bullet points are not unique to control of development through planning permission. In the relevant law examined, where stakeholder representations were provided for there were no restrictions on the number of representations that could be made or the content of those representations.

Accordingly, it is offered that similarity with the consent code is effectively 'unlocked' where the relevant law provides for (1) stakeholder involvement via (2) multiple engagement channels that include the right to make representations prior to determination or assessment making by a relevant authority. The extent to which there is commonality with the consent code turns on the approach that the relevant law takes to defining stakeholders; a wider approach to defining stakeholders will allow for greater commonality. Similarly, mandatory requirements in law that stakeholder consultation take place will also allow for greater commonality, as opposed to discretion vested in the relevant authorities as to whether or not to hold a consultation at all. The presence of the various ancillary obligations set out above, i.e. to explain decision making, take representations into account, explain participation processes, will further strengthen any claim that law is underpinned by the same principles as the consent code.

However, it would be wrong to conclude from the above that the researcher is of the view that the relevant law is wholly consistent with the consent code. The above discussion only indicates that law is at least *capable* of being drafted such that it is

consistent with the consent code insofar as the code requires a vehicle through which stakeholder views can be expressed. However, the relevant law examined by the researcher is significantly different from the consent code where stakeholder views are **not** expressed, regardless of the presence of engagement vehicles where such views **could** be expressed.

It must be stressed that the social licence 'view' of stakeholder consent includes the possibility that a stakeholder may tacitly object or withdraw permission. Returning again to the definition of the code, consent is '*the broad conceptual heading which conveys the principle that a stakeholder may give, both explicitly* ***and tacitly,*** *permission for something to happen, through both action* ***and inaction on their part****, and also withdraw permission'*. Therefore, questions must be asked as to how the relevant law deals with an absence of stakeholder participation in order to understand its relation to the consent code.

Across all of the sources of law considered, where stakeholders do not take part in the engagement processes that are available to them the operating presumption of law is one of tacit stakeholder consent, i.e. that the stakeholder is not concerned with the development or, at the very least, is not motivated enough to voice concerns. Combined with the fact that in the significant majority of sources there were no proactive obligations upon the relevant authorities or operators/applicants to maximise stakeholder participation in the decision making or assessment making process, this is a clear point of divergence between law and the consent code.

Again, there may be multiple practical and logical reasons why the relevant law is

drafted such that the absence of stakeholder representations is taken as an indication of tacit consent, as opposed to an indication of an absence of approval. For example, it would appear unlikely that, given the volume of different applications considered by a relevant authority at any one time, a system based on a requirement to evidence stakeholder consent would meaningfully work. However, there is a logic in the argument that, if the default in law is that the absence of stakeholder engagement will be used to infer an absence of opposition, there should be greater use of the type of proactive engagement obligations used in CE and PAC. The researcher offers no opinion; all that matters for the purposes of the current research is that the law in this context can be seen to be meaningfully different to the social licence approach to tacit consent.

In light of the above, the following observations are offered:-

- Law has the *potential* to be drafted such that it is consistent with the consent code insofar as express or explicit consent is concerned;
- This may happen where law provides for stakeholder involvement via multiple engagement channels that include the right to make representations prior to determination or assessment making by a relevant authority, with no limit imposed regarding the content of representations.
- The wider the definition of stakeholder used within the relevant law, the greater the overlap with the consent code.
- Greater presence of mandatory information sharing by relevant authority and operator/applicant prior to the period for representations will further increase the level of similarity between law and the consent code.

- The absence of stakeholder representation where such representation was possible in law currently results in a presumption that there is tacit consent amongst stakeholders. Paired with an absence of proactive engagement obligations, the approach taken by the relevant law to tacit consent is inconsistent with the social licence approach to consent generally.

7.4. Trust

Again, a binary table setting out answers to questions arising from the consent code is not provided in this section on the basis that it would represent unnecessary duplication of questions already addressed in tables 8 to 11.

The following definition of the trust code was reached in the coding Chapter:-

the reliance of one actor on the truth, honesty, and integrity of another, evidenced, obtained and maintained via transparent and procedurally fair processes wherein environmental protection is central, both in terms of the perceived impacts from the activity being considered and the governance processes in place for mitigation and/or removal of such impacts.

As with the engagement code, much of the above is subjective in nature and not capable of being directly examined as part of a doctrinal exercise. For example, the view of stakeholders as to the '*truth, honesty, and integrity*' of other '*actors*' cannot be ascertained from an examination of legal provisions. Similarly, a black letter law exercise cannot assess the extent to which parties involved in legal processes find them to be transparent or procedurally fair.

However, the law can be examined via a doctrinal exercise in order to understand the extent to which it is drafted such that it *potentially* enables the emergence of trust. As per tables 1 to 3 above, the current research has already considered:-

- the basis upon which the relevant law approaches the task of identifying stakeholders;
- the engagement rights afforded to stakeholders and the obligations imposed upon operators/applicants and the relevant authorities; and
- the processes within the relevant law that allow for stakeholder involvement by way of information sharing or participation in decision making.

The extent to which the relevant law can potentially enable greater trust will depend on the specific provisions and their treatment of the above matters.

To avoid repetition, in general terms it has been observed that from the many approaches observed to the above, law is flexible enough such that it can be drafted so as to be consistent with the stakeholder and engagement codes. For example, multiple approaches have been observed insofar as the relevant law approaches the task of identifying stakeholders. However, an all-encompassing approach to stakeholder definition *has* been observed in the application of PP wherein participatory rights are afforded to 'the public'. Similarly, proactive engagement obligations upon operators/applicants are highly uncommon but this approach has still been observed within PAC. Perhaps most importantly in the context of the trust code, whilst ancillary obligations are not always provided for, where stakeholder participation is provided for the relevant law generally tends to place a number of ancillary obligations upon

relevant authorities that are useful from the stakeholder perspective, including the obligation to explain decision making.

Where a stakeholder is excluded from the relevant law it follows that the law does less for the excluded stakeholder in terms of providing transparent and procedurally fair processes from which trust may emerge. This is true where the law is either drafted (1) to specifically allow for exclusion or (2) to provide discretion to the relevant authorities. For example, EASR defines 'public consultee' as '*a person whom SEPA considers is affected by, is likely to be affected by, the application*'[651]. As discussed above, this potentially allows for parties to be excluded who consider themselves affected but are not considered by SEPA to have such status. As an alternative example, in EA95 it is for the Secretary of State to decide whether or not to consult such other bodies or persons '*as he may consider appropriate*'[652] on National Air Quality Strategy. Again, this potentially allows for exclusion of stakeholders not considered appropriate for the purposes of consultation.

It is a matter of simple logic that trust as a concept will not be well serviced in the case of a hypothetical stakeholder who looks to the law for an ability to influence and finds themselves excluded. This is on the basis that the trust code is not specific to the relationship between the stakeholder and the operator/applicant, but applies to all actors in the process of decision or assessment making. In other words, stakeholder involvement in law is important to establishing trust between the stakeholder and the relevant authority. Whether the excluded stakeholder will find their view of the 'truth, honesty, and integrity' of the relevant authority affected is a subjective question that is

[651]The Environmental Authorisations (Scotland) Regulations 2018, sch1 para 8
[652]Environment Act 1995, s 80(6)

beyond the scope of the current research. However, using the EA95 example, if the Secretary of State decides not to consult on National Air Quality Strategy it follows that, at the very least, an opportunity to engage with stakeholders is lost.

It is also offered that the presence of proactive engagement obligations upon operators/applicants, as per PAC, are more likely than not to help establish a relationship of trust with stakeholders. Provided that such proactive obligations were underpinned by the principles of transparency and procedural fairness, it seems relatively uncontroversial to state that early inclusion of stakeholders in an open discussion with operators/applicants provides greater potential for trust to emerge than would otherwise be the case. In that regard, it is relevant to the trust code that examples of proactive engagement obligations across the relevant law were not common.

It is important to stress that the exclusion of stakeholders from making representations does not result in a total absence of commonality between the law and the trust code. Whilst stakeholder representations have been discussed above as a key engagement process, they are not the only vehicle for engagement found within the relevant law. In that regard, it must again be stated that the relevant law tends to provide for general information sharing via use of public register, and direct disclosure of information in specific circumstances for specific stakeholders. It is beyond the current research as to whether information sharing provisions on their own would suffice from the perspective of a hypothetical stakeholder in terms of enabling the emergence of trust between all actors.

In light of the above, the following observations are made:-

- multiple approaches to stakeholder involvement in law have been observed thus far in the current Chapter;
- subjective assessment by stakeholders, operators, and relevant authorities, are central to understanding law through the lens of the trust code;
- a doctrinal analysis can consider law's potential for enabling trust; and
- where law provides for wider stakeholder participation, i.e. via broad inclusion of all stakeholders via both participative engagement in decision making and informative engagement in aiding understanding, it has a greater potential of being capable of helping trust to emerge between actors such that law could be viewed as potentially consistent with the principles of the trust code.

There is an important caveat to the above observations; it is entirely possible that true 'trust' cannot emerge where engagement and disclosure is mandated by law as opposed to undertaken by actors purely as a show of good faith. For example, a stakeholder may be more likely to think positively of an operator who discloses information that they are not legally required to disclosure. It is offered that it is equally possible that an operator who is able to demonstrate a record of unblemished compliance with legal obligations of disclosure will win favour with stakeholders, particularly if there are other operators in the same industry who are regularly found in breach of the same obligations. Ultimately, this is a subjective matter that is beyond the scope of the current research, which seeks only to establish that law is *potentially* capable of providing a platform for behaviours to be evidenced or information to be disclosed that could form the basis of trust.

7.4.1. Transparency and procedural fairness

Whilst much of the analysis underpinning the trust code has already been conducted in the discussion regarding tables 1 to 3 above, the extent to which the relevant law is transparent and procedurally fair has not featured thus far. This is considered below. The relevant law is an expression of the rules and process that will be applied by the relevant authorities empowered to do so under the provisions of said rules and processes. In that regard, by being expressed in black letter format that is capable of reproduction, disseminated widely, and made available to the public via various different sources, it can be said that there is an intrinsic transparency to law from a doctrinal perspective. Furthermore, compared to the significant malleability of the social licence concept where there are no universally agreed upon rules of conduct and emphasis instead on general principles required of various actors, the appearance of law as transparent appears enhanced.

However, it is important to make a distinction between transparency of law at a macro level and transparency of its effect at a micro level. For example, whilst it has already been stated that use of DOs appears to have little in common with the social licence codes, it is transparent from a macro level doctrinal perspective that DOs are provided for in law alongside the process by which they may be produced. Accordingly, the use of DOs as a macro level *legal process* does have an element of transparency even if the micro level *end result* is less transparency in developments where DOs apply.

It is offered that examination of the relevant law shows it to be transparent from a macro level In the context of information sharing in terms of establishing rights, obligations, and process., stakeholder expectations can be meaningfully informed

from considering the provisions as to what information will be available and when. All of the sources of law examined provide for general public disclosure of information, most regularly via public register disclosure. Where exceptions apply to disclosure via public register there are provisions in the relevant legislation that require the relevant authorities to add notices to the register outlining that a matter has been removed and the basis for its removal, e.g. the removal of information on the grounds of confidentiality in PPC, CAR, and EASR. Similarly, where the question of direct disclosure is applicable, the relevant law presently tends to mandate direct disclosure in specific circumstances to specific stakeholders. The provisions setting out the direct disclosure obligations upon operators/applicants and the relevant authorities are clear, such that stakeholders expectations can be meaningfully informed.

Examination of the relevant law shows it may be less transparent from a micro level in the context of stakeholder participation, although this is not without potentially good reasons of practicality. It has already been demonstrated that, where stakeholder participation is provided for, the relevant law generally contain obligations on the relevant authorities to (1) take stakeholder representations into account, (2) explain public participation processes undertaken by them, and (3) explain their reasoning to stakeholders. However, as outlined above, there is nothing within the relevant law as to the weight that the relevant authorities must afford different representations. Whilst this may be developed in guidance, as per the example in CAR, from a doctrinal perspective the law cannot be said to be transparent on this point given that the relevant law does not attempt to deal with this point.

There are two important caveats that apply to the above observations. Firstly, a black

letter law examination must, to a certain extent, take at face value that the provisions of the legislation will be complied with in practice. The reality in practice may be somewhat divorced from the black letter law. This is not a criticism of the relevant authorities but a recognition that a legal drafting almost assumes that its terms will operate in an ideal world where operators/applicants will at all times understand their legal obligations and comply with them. Furthermore, legal drafting cannot always accommodate the emergence of new activities or novel techniques that have not previously been the subject of regulation. Accordingly, it is unavoidable that elements of divergence from the law will emerge in its practice. Indeed, the existence of appeal provisions in law recognises the possibility of human error which, if uncorrected, would effectively amount to an error in law being allowed to stand.

Secondly, transparency is not a binary absolute. For example, the perspective of a stakeholder as to the transparency of the law will be informed, in part at least, by experience. It has already been commented upon above that there exist provisions that enable disclosure via public register to be blocked on grounds of commercial confidentiality. Again, from a macro level doctrinal perspective, it is transparent that the rules governing this element of the process are clearly stated within the relevant legislation. However, a stakeholder who finds information is excluded on grounds of commercial confidentiality is unlikely to view their experience as one of transparency. From their micro level perspective, the main interest is sight of the information as opposed to sight of the rules explaining that some information may be excluded from the register.

The second caveat above demonstrates a methodological limitation imposed by use

of doctrinal analysis alone. The relevant law can be examined in order to understand what processes exist, but it cannot be fully examined via a doctrinal exercise if the purpose is to assess whether the relevant law fosters or enables trust. Accordingly, the researcher is able to set out those elements of the relevant law which could potentially be viewed as aiding transparency, but is not able to form a judgement on whether they will in turn enable trust between actors. As procedural fairness is an entirely subjective concept, this element of the trust code is not capable of being considered in the current research.

7.5. Beyond compliance

The final code is ‘beyond compliance’, defined in the coding Chapter as: -

conveying the idea that social licence stakeholders are no longer satisfied by what is provided for in law in order to obtain a formal licence, contract, or legal right to operate. Instead, to get stakeholder buy in, those seeking a social licence must be seen to do more, go further, and volunteer to take on additional obligations, i.e. they must go beyond compliance.

For reasons that will be outlined below, it is the view of the researcher that the recurrence of ‘beyond compliance’ within the coded literature is of fundamental importance to understanding the relationship between law and the social licence. However, the task of considering the law through the lens of ‘beyond compliance’ is markedly difficult on the basis that its central principle is based on a significant detachment from law, i.e. that operators obtain a social licence by going beyond what is provided for in law.

The nature of the relationship between law and the beyond compliance code is one of establishing boundaries. The clearest example of this is where law prescribes that certain actions must be taken before an application will be seen as duly made. If an operator is required to do A, B, and C as a result of legislation, from the perspective of the beyond compliance code any steps taken in order to do A, B, and C would not be relevant to the social licence of that operator. However, if the same operator took steps D, E, and F in addition to A, B, and C, from the perspective of the beyond compliance code steps D, E, and F can be advanced as evidence on the part of the operator that they are serious about obtaining a social licence to operate. As an example, it has already been noted above that in certain planning matters a PAC must be held. Where the law mandates a PAC must be held, it cannot be claimed to be undertaken by the operator in an attempt to go beyond compliance. However, if a PAC were held in circumstances where the law did not require the operator to do so, this could be claimed as an attempt by that operator to go beyond compliance.

Law is not always designed in such prescriptive terms as the hypothetical example provided for above. Across the relevant law considered in the current research, goal setting approaches to legal drafting have been common, i.e. where the law does not prescribe specific steps but instead specifies the end goal that must be taken. For example, under CE, community planning partnerships must make '*all reasonable efforts*' to secure the participation of certain community bodies in community planning. Whilst secondary guidance may clarify what steps could be undertaken by a community planning partnership in satisfaction of this obligation, it remains a matter for the partnership to decide its own approach. Accordingly, it is possible that a number of different approaches could be taken by community planning partnerships in

satisfaction of the same legal obligation.

A goal setting approach to legal drafting conceptually *closer* to beyond compliance in that (1) the obligated party must design and implement its own approach, and (2) by comparison to others with the same obligation it may be possible for the obligated party to show that they took more steps than would have been necessary for bare minimum compliance. Furthermore, if the consequences to the operator arising from a failure to comply are significant, it is reasonably foreseeable that an operator will be motivated to take a number of steps in order to assure its compliance that it may otherwise have not been motivated to take. Although it is beyond the scope of the current research, it is also possible that the perspective of a stakeholder may be more likely to be positively influenced by an operator who is obligated to engage with an ultimate goal and design its own approach to compliance, than it is by an operator who is complying with a prescriptive list of actions and going no further.

However, whilst conceptually closer, goal setting obligations in law remain *obligations in law*. By their very nature they cannot be offered by an operator as evidence of a desire to go beyond legal obligations. Similarly, where legislative reform results in additional legal obligations being placed upon an operator, that operator can no longer point to those obligations as evidence of beyond compliance even if they represent actions the operator was taking long before reform made the actions a legal requirement.

Across the codes examined in the current Chapter, elements of commonality with the relevant law have been observed as have examples of divergence. However, in each

of the previously considered codes it has been possible to conclude that, based upon examples found within the relevant law, legal drafting has the potential to be approached such that it is conceptually aligned with the definitions underpinning the codes examined. For example, stakeholders within PP being defined as 'the public' generally has repeatedly appeared as an indication of the law being theoretically capable of giving all stakeholders a right of involvement in decision making. However, unlike all other codes examined, law does not have any potential to be drafted such that it could theoretically require an operator to go beyond compliance.

Leaving aside the practical difficulties that would be encountered in (1) drafting such an obligation, and (2) enforcement by the relevant authorities, any attempt to obligate 'beyond compliance' behaviour would immediately bring that behaviour within the realm of black letter law. The motivation behind the behaviour would ultimately be traced back to a need to comply with law, as opposed to a desire to show good faith towards stakeholder networks and win over dissenting voices.

As 'beyond compliance' effectively means 'beyond law', none of the legal provisions outlined above can be reasonably considered through the lens of the 'beyond compliance' code. Why, then, was this code was brought forward for inclusion within the current analysis, given that it is a doctrinal black letter law exercise? Whilst its treatment in the current Chapter is brief, a number of important observations are made at this stage in the research for the purposes of the Chapter that follows wherein a conceptual model for understanding the relationship between law and the social licence is set out. These observations are as follows:-

- whilst law and the beyond compliance code are both concerned with the actions taken by operators, law is incapable of being examined through the lens of the 'beyond compliance' code;
- this is on the basis that to attempt to do so would result in the establishment of a paradox wherein the researcher was searching within the law for examples of either (1) legal requirements to go 'beyond law', or (2) agreement with the idea that legal compliance is not enough to satisfy legal obligations;
- as a result, the beyond compliance code relies upon law in order to have form and substance, i.e. an operator can only identify steps that would be viewed as 'beyond compliance' by understanding what it is obligated to do in law;
- the above is applicable to both a prescriptive and a goal setting approach to legal drafting; and
- there is no potential for the above paradox to be cured via alternative legal drafting as legislating for operators to be required to adopt beyond compliance actions results in those actions being tied to legal obligations and, as a result, no longer conceptually capable of being described as undertaken in an attempt to go beyond law as a bare minimum.

7.6. Summary

In this Chapter, each separate code was considered in light of the relevant provisions identified in Chapter 6. For all codes, except 'beyond compliance', a number of observations were offered based on the objective and subjective question approach undertaken by the researcher. These observations will be utilised in the following Chapter to identify and explain the nature of the relationship between the social licence

and law in the context on onshore petroleum authorisations in Scotland. Further, a new conceptual model will be put forward to visually represent this relationship, termed the ‘Spectrum Model’ by the researcher, and aid demonstration of the future utility of this research.

Chapter 8 – The Spectrum Model

8.1 Introduction

The following Chapter sets out the researcher's own approach for expressing and understanding the relationship between law and the social licence concept; named the Spectrum Model. The formulation of this model results from the work undertaken by the researcher in (1) reviewing the social licence literature, (2) coding the same sources, and (3) examining the relevant law through the lens of the codes.

Before the model is set out, the researcher's reliance on abductive reasoning is explained.

8.2 Abductive reasoning

Throughout this thesis the researcher has attempted to acknowledge all instances of research gaps in terms of the scope of the exercise, the data collected, and the technical ability of the researcher:-

- As an example of a gap in scope, it was noted in both the methodology Chapter and the Chapter dealing with examination of relevant law that the scope of the research is limited to black letter law and, therefore, does not attempt to consider whether the application of black letter law in practice is different.
- As an example of a gap in the data collected, for reasons of practicality in the current research the relevant law was examined by reference to a smaller number of thematically grouped codes than were capable of being produced

from the literature coded.

- As a gap in the technical ability of the researcher, it was noted in the preceding Chapter that the researcher did not have the skills required to consider the sufficiency of the content of various legal provisions that provided for disclosure of technical and scientific information by certain parties.

it is acknowledged that the existence of gaps in the research must result in questions being asked about the credibility and reliability of the model. Furthermore, it is also acknowledged that the model is subject to change, or even deletion, depending upon how those gaps are 'filled' at a later point when further research may be completed. However, it is not accepted that the existence of gaps deals a fatal blow to the model that follows. This is on the basis that the researcher relies upon abductive reasoning.

In order to understand what is meant by abductive reasoning, it is helpful to first set out definitions of the two most widely used forms of logical reasoning, namely deductive reasoning and inductive reasoning. According to Hurley, a deductive argument is '*an argument in which the premises are claimed to support the conclusion in such a way that it is* ***impossible*** *for the premises to be true and the conclusion false*'[653]. By comparison, an inductive argument is *'an argument in which the premises are claimed to support the conclusion in such a way that it is* ***improbable*** *that the premises be true and the conclusion false'*[654].

Peirce offers a simpler definition*; 'deduction proves that something* ***must*** *be; induction*

[653]P. Hurley, *A concise introduction to logic* (7th edn, Wadsworth Pub. 2000) p.33
[654]ibid

*shows that something **actually** is operative'*[655]*.* Peirce also offers that abduction is a third form of logical reasoning that is distinct from deduction and induction; '*abduction merely suggests that something **may** be*'[656] as '*abductive reasoning infers very frequently a fact not capable of direct observation*'[657]. By comparison, Walton explains that '*Deductive inference is abstracted from the data and is independent of them, Inductive inference is based on the data but extrapolates partially beyond them. Abduction extrapolates even further beyond the data*[658]*'.*

Pierce describes abduction as a *process 'where we find some very curious circumstance, which would be explained by the supposition that it was a case of a certain general rule, and thereupon adopt that supposition*'[659]. Indeed, abductive inference has been equated with inference to the best explanation[660]. For example, Walton offers that '*you can accept an abductively derived conclusion as a provisional commitment even if it is subject to retraction in the future'*[661]. Borrowing from Peirce, he states that the expression 'general rule' is significant as '*a general rule may not hold in all cases of a certain kind…it holds only for normal or familiar cases*'[662].

Peirce outlines that abductive argument is a logical inference '*having a perfectly definite logical form*', which is as follows[663]:-

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[655]C. Peirce *et al*, *Collected papers of Charles Sanders Peirce Vol. 5 Pragmatism and Pragmaticism* (Cambridge, Mass. Belknap Press of Harvard University Press 1958) p.106
[656]ibid
[657]C. Peirce *et al*, *Collected papers of Charles Sanders Peirce Vol. 2 Elements of Logic* (Cambridge, Mass. Belknap Press of Harvard University Press 1958) p.386
[658]D. Walton, *Abductive Reasoning* (The University of Alabama Press, 2014) p.12
[659]C. Peirce *et al*, *Collected papers of Charles Sanders Peirce Vol. 5 Pragmatism and Pragmaticism* 375
[660]D. Walton, *Abductive Reasoning,* p.4
[661]ibid
[662]ibid
[663]C. Peirce *et al*, *Collected papers of Charles Sanders Peirce Vol. 5 Pragmatism and Pragmaticism,* p.117

- *C* is a statement or set of statements describing some facts that have been observed.
- *A* is another statement that supposedly accounts for these facts.
- If *A* were true, *C* would be a matter of course.
- Hence, there is reason to suspect that *A* is true.

Josephson and Josephson offer a different form, which is as follows[664]:-

- D is a collection of data.
- H explains D.
- No other hypothesis can explain D as well as H does.
- Therefore H is probably true.

As summarised in Chapter 4, the researcher utilised coding in order to collect data in the form of the frequency of literal codes and thematically grouped codes present relating to the definition of the social licence. As summarised in Chapters 6 and 7, further data was collected when the results of the coding work were used to inform a comparative and doctrinal analysis of Scottish environmental and planning law that culminated in multiple observations. Following Josephson and Josephson's form of abductive reasoning, D is the of the cumulative data obtained as a result of both the coding stage and the subsequent analysis of law that the coding informed. Alternatively, following Piece, the results of Chapters 4 to 7 are a set of statements

[664]J. Josephson *et al*, *Abductive inference : computation, philosophy, technology* (Cambridge University Press 1994) p.14

describing some facts that have been observed by the researcher.

It will be argued below that the Spectrum Model explains the data/the observations of law that have emerged which are set out in Chapters 6 and 7. The Spectrum model is thus H in Josephson and Josephson's expression of abductive reasoning. Importantly, a number of further research exercises are then set out that could be undertaken to test that the Spectrum Model is a legitimate, reliable, and credible basis for expressing and understanding the nature of the relationship between law and the social licence concept.

Walton asks '*how should we evaluate the strength and weakness of a given abductive argument*?' before considering that Peirce would likely have answered that strength and weakness can be evaluated by testing the argument by further observations or experiments[665]. Peirce also argues that the question of abduction is really the question of pragmatism, which Walton takes to mean that '*one has to go beyond the narrow framework of deductive and inductive reasoning to understand abduction*'[666].

8.3 Research observations

Relying on Peirce and Walton's logical forms of abductive argument, the first step is to identify the statements describing some facts that have been observed. In Chapter 7, a number of observations were made following the researcher's analysis of relevant law 'through the lens' of the social licence codes. The observations are summarised below.

[665]D. Walton, *Abductive Reasoning,* p.20
[666]ibid, p.13

Analysis of relevant law through the lens of the **stakeholder code** produced the following observations:-

- Multiple different approaches are taken within the relevant law with regards to (1) defining stakeholders, (2) providing for their participation, and (3) providing them with information.
- Where stakeholders are provided for in the relevant law there is no *direct* ranking of stakeholders provided that any criteria established in the drafting are met by the stakeholders in question. However, where the relevant law contains criteria upon which formal recognition as a stakeholder is based, this will result in an *indirect* ranking.
- Whether the legislation operates at the macro or micro level will further impact upon the level of ranking of stakeholder views, given that a stakeholder utilising macro level provisions will be less able to directly influence a specific activity than a stakeholder who is able to utilise micro level provisions that directly regulate the activity
- The relevant law does not commonly provide rights to coalitions such as 'the community'. However, 'the community' as a concept is used in the context of obligations imposed upon relevant authorities.
- Whilst the myriad of approaches to stakeholder participation demonstrates that law has the flexibility to be drafted such that it can be more or less consistent with the stakeholder code, this could easily appear inconsistent to a hypothetical lay person trying to navigate a complex framework.

Analysis of relevant law through the lens of the **engagement code** produced the

following observations:-

- The relevant law at present appears consistent with the engagement code insofar as it provides for general disclosure of information to stakeholders. However, multiple different approaches are taken within the relevant law with regards to stakeholder participation.
- Whilst different approaches to stakeholder participation rights were observed, across the relevant law it was observed that (1) there is limited use of proactive engagement obligations upon operator/applicant, (2) relevant authorities are regularly given discretion as to the level of stakeholder participation afforded, and (3) there is an absence of stakeholder appeal rights outside of judicial review. This represents a significant diversion with the engagement code and, thus, the social licence concept generally.
- However, there is nothing intrinsic to the character of law that means that the above observations must always apply to law. There is no reason why, if the necessary political will exists, law cannot be altered.

Analysis of relevant law through the lens of the **consent code** produced the following observations:-

- Law has the potential to be drafted such that it is consistent with the consent code insofar as express or explicit consent is concerned.
- The following factors will impact upon the extent to which law can be said to be consistent with the consent code – (1) the extent to which the relevant

law provides for stakeholder involvement via multiple engagement channels that include the right to make representations prior to determination or assessment making by a relevant authority, with no limit imposed regarding the content of representations, (2) the scope of the definition of stakeholder used within the relevant law, (3) the presence of mandatory information sharing by relevant authority and operator/applicant prior to the period for representations.

- The absence of stakeholder representation where such representation was possible in law currently results in a presumption that there is tacit or implied consent amongst stakeholders. Paired with an absence of proactive engagement obligations, the approach taken by the relevant law to tacit or implied consent is inconsistent with the social licence approach to consent generally.

Analysis of relevant law through the lens of the **trust code** produced the following observations:-

- Whilst subjective assessment by stakeholders, operators, and relevant authorities, are central to understanding law through the lens of the trust code, doctrinal analysis can consider law's *potential* for enabling trust.
- Where law provides for wider stakeholder participation, i.e. via broad inclusion of all stakeholders via both participative engagement in decision making and informative engagement in aiding understanding, it has a greater potential of being capable of helping trust to emerge between actors

such that law could be viewed as potentially consistent with the principles of the trust code.

Analysis of relevant law through the lens of the **beyond compliance code** produced the following observations:-

- Whilst law and the beyond compliance code are both concerned with the actions taken by operators, law is incapable of being examined through the lens of the ‘beyond compliance’ code.
- This is on the basis that to attempt to do so would result in the establishment of a paradox wherein the researcher was searching within the law for examples of either (1) legal requirements to go ‘beyond law’, or (2) commonality with the idea that legal compliance is not enough to satisfy legal obligations.
- As a result, the beyond compliance code relies upon law in order to have form and substance, i.e. an operator can only identify steps that would be viewed as ‘beyond compliance’ by understanding what it is obligated to do in law.
- There is no potential for the above paradox to be cured via alternative legal drafting as legislating for operators to be required to adopt beyond compliance actions results in those actions being tied to legal obligations and, as a result, no longer conceptually capable of being described as undertaken in an attempt to go beyond law as a bare minimum.

It is offered that the above observations can be reduced to one consistent observation

that applies across each of the codes; *black letter law is capable of being drafted in a multiplicity of ways such that it can, depending on the underpinning policy intention of the drafter, either provide for or actively restrict stakeholder rights.* Whilst there is nothing ground-breaking about this observation, and the detail of specific observations set out above remain of vital importance, this simplification is important as it emphasises an important temporal dimension to the task of considering the relationship between law and the social licence. There are now two different contexts within which the task must be considered – (1) the practical present, and (2) the theoretical future. In other words, the relationship between the social licence and law *insofar as it is currently drafted* is a different matter to the relationship between the social licence and law *insofar as it is capable of being drafted.*

Whereas the above observations emerge from an attempt to understand law by reference to the social licence, there is one further important observation that emerges from the researcher's attempt to better understand the social licence by reference to law.

It has already been offered that the social licence is dimorphic. Used in its **metaphorical form**, the social licence is most commonly understood as being akin to a legal licence and either something that an operator can claim to have or desire. It is this metaphorical form which the Scottish Government invoked in October 2017[667] and October 2019[668] when it stated to Parliament that there was no social licence for fracking to take place. The second recognised form of the social licence, based on the

[667]P. Wheelhouse MSP, 'Unconventional oil and gas: minister's statement', (Gov.scot, 3 October 2017) <https://www.gov.scot/publications/unconventional-oil-and-gas-statement-2017/> accessed 22 April 2019

[668] P. Wheelhouse, 'Scotland's Unconventional Oil and Gas Policy' *(Theyworkforyou*, *3 October 2019) <https://www.theyworkforyou.com/sp/?id=2019-10-03.25.2>* accessed 4 September 2021

literature review, is **as a tool of measurement,** at least in terms of measuring perceptions.

As evidenced by the current research, whilst the scale of measurement has not yet been established, it is offered that the researcher has demonstrated that it is possible to break the social licence into its key component parts (i.e. the social licence codes) and then make observations based upon the extent to which an external framework (i.e. the relevant law) can be said to be consistent with those component parts. If the social licence can be broken down into its component parts it should, in theory, be capable of being rebuilt from those component parts. In other words, if the observations made of law based on those component parts are grouped, it should reflect the observations that would be made were a universal definition of the social licence stateable with certainty. In other words, the current research has shown that the social licence can be utilised to measure law in the same way it has been utilised by others to measure perceptions.

The current research does not represent the first time that an attempt has been made to demonstrate that the concepts forming the social licence codes can be used as a tool of measurement. For example, the International Association for Public Participation[669] ('IAP2') was founded in 1990 and is an international association of members who '*seek to promote and improve the practice of public participation in relation to individuals, governments, institutions, and other entities that affect the*

[669]"*IAP2 is the preeminent international organization advancing the practice of public participation. Our mission is to advance and extend the practice of public participation through professional development, certification, standards of practice, core values, advocacy and key initiatives with strategic partners around the world."* See International Association for Public Participation, 'About Us' (*IAP2.org*, undated) <https://www.iap2.org/page/about#:~:text=Our%20mission%20is%20to%20advance,international%20volunteer%20Board%20of%20Directors.> accessed 1 October 2020

public interest in nations throughout the world'[670]. In 2003, IAP2 developed the 'IAP2 Core Values for Public Participation' for use in the development and implementation of public participation processes. Their website states that these Core Values were '*developed over a two year period with broad international input to identify those aspects of public participation which cross national, cultural, and religious boundaries*' with the purpose of helping '*make better decisions which reflect the interests and concerns of potentially affected people and entities*'[671].

The IAP2 core values for the practice of public participation are as follows:-

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.

[670]International Association for Public Participation, 'History' (*IAP2.org*, undated) <https://www.iap2.org/page/history> accessed 8 June 2021
[671]International Association for Public Participation, 'Core Values' (*IAP2.org*, 2017*)* <https://www.iap2.org/page/corevalues> accessed 1 October 2020

7. Public participation communicates to participants how their input affected the decision.

From these core values, IAP2 developed a model in 2007 called the '*Spectrum of Public Participation*' [672]. The model, provided below, is '*designed to assist with the selection of the level of participation that defines the public's role in any public participation process*[673]*':-*

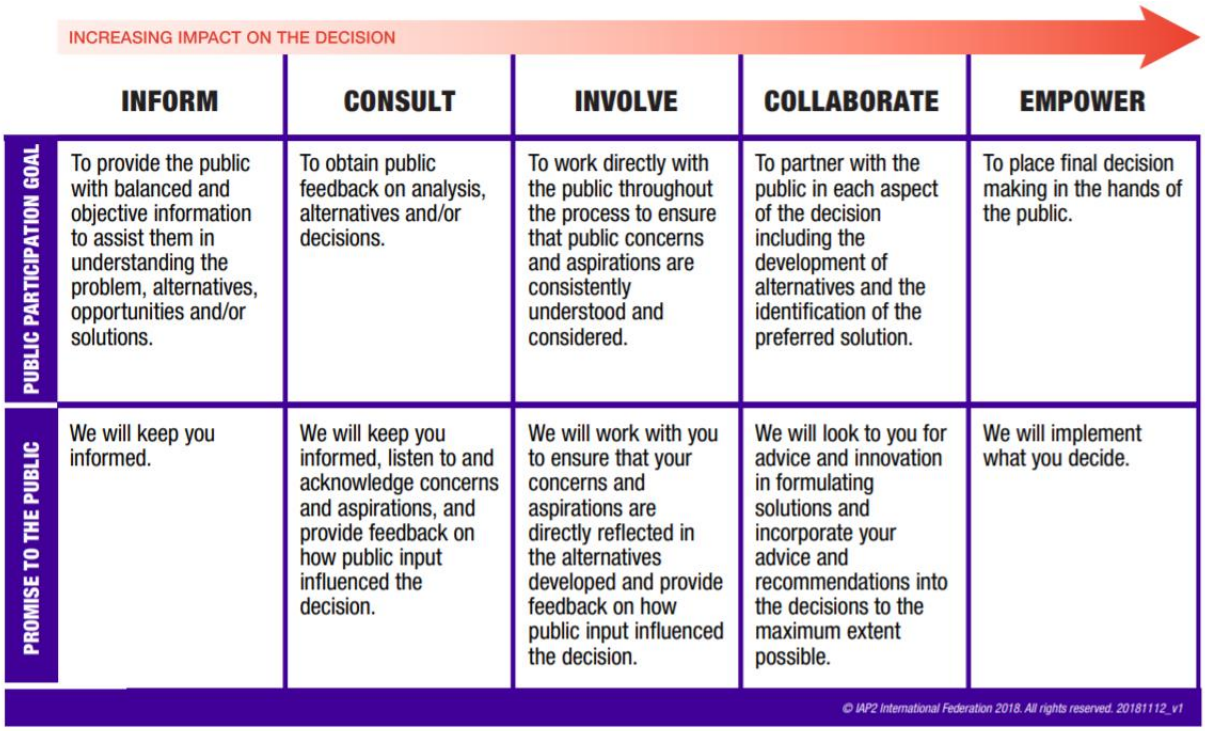

Table 12 - Spectrum of Public Participation (Source: International Association for Public Participation, 'IAP2 Spectrum of Public Participation' (IAP2.org, 2018))

In the above model, it can be seen that public participation is measured by reference

[672]International Association for Public Participation, 'IAP2 Spectrum of Public Participation' (*IAP2.org*, 2018*)* <https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf> accessed 1 October 2020
[673]ibid

to the extent to which the approach taken can be said to have the goal of informing, consulting, involving, collaborating with, or empowering the public.

It is offered that a similar approach can be taken to the social licence codes, i.e. a spectrum can be produced that measures the extent to which the relevant law can be said to be drafted on the basis that stakeholders, engagement, consent, and trust are central. Once established, those spectra should be theoretically capable of combination such that they form the social licence spectrum. This is the measurement format of the social licence, i.e. its second form as a dimorphic concept. Illustrative figures representing the theoretical use of spectra in this way are set out below.

Whilst the above model has emerged from analysis of environmental and planning law insofar as it applies to onshore petroleum extraction, it is offered that the model could equally be applied to other activities. For example, the model could be applied to an alternative analysis of environmental and planning law insofar as it applies to any activity that is currently regulated by law, such as onshore wind development or nuclear power generation. This is on the basis that, unless there is a significant divergence of views across the academic community that would impact upon the frequency documented in Chapter 4, the social licence codes will remain a fixed matter across the different regulatory activities. As it only the relevant legal provisions that change as alternative regulatory approaches are taken to different activities, the relevant law that regulates any activity can be theoretically measured in terms of its commonality with the fixed stakeholder codes, as per the approach taken by the researcher in Chapters 6 and 7. The observations emerging from that analysis would then be used as a basis for measuring the relevant law by reference to its commonality,

or otherwise, with the social licence concept. To the extent that the law relating to one activity differs from another in respect of matters that are central to the social licence as per the coding work conducted by the researcher, e.g. engagement, consent, etc, the relative positions on the spectrum of each distinct legal instrument would also differ.

8.4 The Spectrum Model

Returning again to Peirce and Walton's logical forms of abductive argument, a number of observations have been set out above that must now be accounted for via a statement. Alternatively, as Josephson and Josephson frame abduction as a process, a hypothesis can now be put forward that explains the observations better than any alternative hypothesis could.

In summary, the observations are that (1) black letter law is drafted to reflect the underlying policy intentions of the drafter or those instructing the drafter, (2) as a result, a range of approaches have been observed across the sources of law insofar as their commonality with the social licence codes is considered, and (3) there is temporal aspect to the question of the relationship between law and the social licence given that law is capable of change to reflect new policy. It is offered that the hypothesis which best explains these observations is as follows; the social licence simultaneously acts as both as a metaphor and as a tool of measurement of law. The social licence as a tool of measurement is labelled the Spectrum Model by the researcher.

In the current research, the relevant law has been examined through the lens of various component parts of the social licence, i.e. the social licence codes. A number

of objective and subjective questions were considered by the researcher in relation to each code in order to identify the extent to which the relevant law could be said to share any commonality with the codes. Whilst the researcher does not comment on whether or not commonality with the underlying principles in each code is desirable, in designing the research in this way the codes have each been used as a *standard* for law to be assessed against. The results of that assessment have shown that there are a variety of approaches across the sources of law considered, such that it can be observed that some sources share more in common with the codes than other sources. It follows that it should be theoretically possible to express the commonality observed in a series of spectra, with full commonality with the individual social licence code one pole on the spectrum and zero commonality at the other end of the spectrum.

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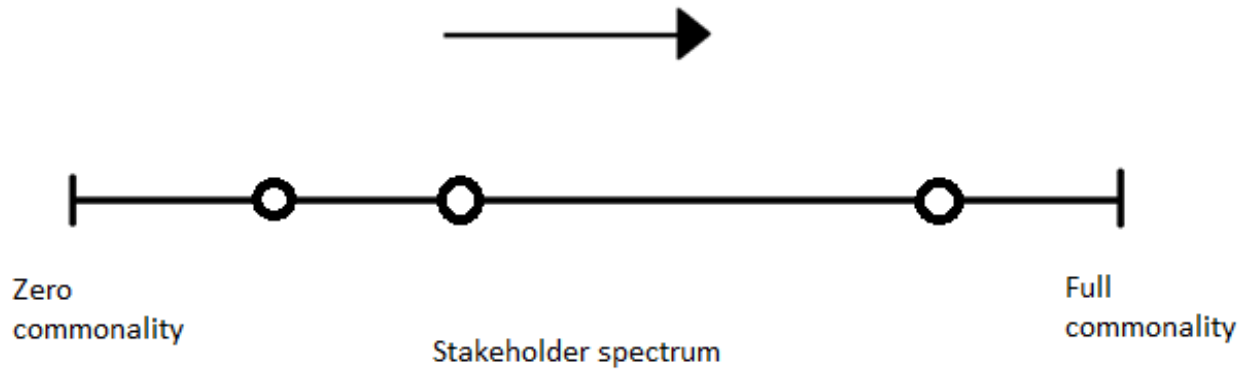

Figure 4 (Source: current research)

Figure 4 above provides a basic visual representation of the use of spectra in this way and is similar in form to IAP2. However, unlike IAP2, there is no labelling of the spectrum beyond the two poles of 'zero commonality' and 'full commonality'. For example, returning to IAP2's *Spectrum of Public Participation*', the labels used therein are 'inform', 'consult', 'involve', 'collaborate', and 'empower'. Further, it is highlighted

that movement across the spectrum from one label to the next is informed by, and essentially measures, the increasing impact on the decision of the public participation approach being taken. Finally, each label is associated with a ‘promise’ to the public’, i.e. to be labelled ‘inform’, the public participation promise to the public must be ‘we will keep you informed’, whilst a promise to ‘implement what you decide’ results in the categorisation of ‘empower’.

Accordingly, where IAP2 delineates its spectrum into components labelled ‘inform’, ‘consult’, ‘involve’, ‘collaborate’, and ‘empower’, the spectrum in Figure 4 only shows a general direction of travel from ‘zero’ to ‘full’ without sub-labelling that direction of travel. This reflects (1) the fact that the current research has not sought to break down the social licence codes into component parts, and (2) the current research does not attempt to ‘place’ any of the sources of relevant law examined onto the spectrum.

Whilst further research is required in order to establish a credible and reliable labelling for each code spectra produced, a hypothetical example is offered at Figure 5 below based upon the definition of the stakeholder code. This example provides a potential approach to determining the place of specific legislation on the stakeholder spectra. However, this is only offered below for illustrative purposes:-

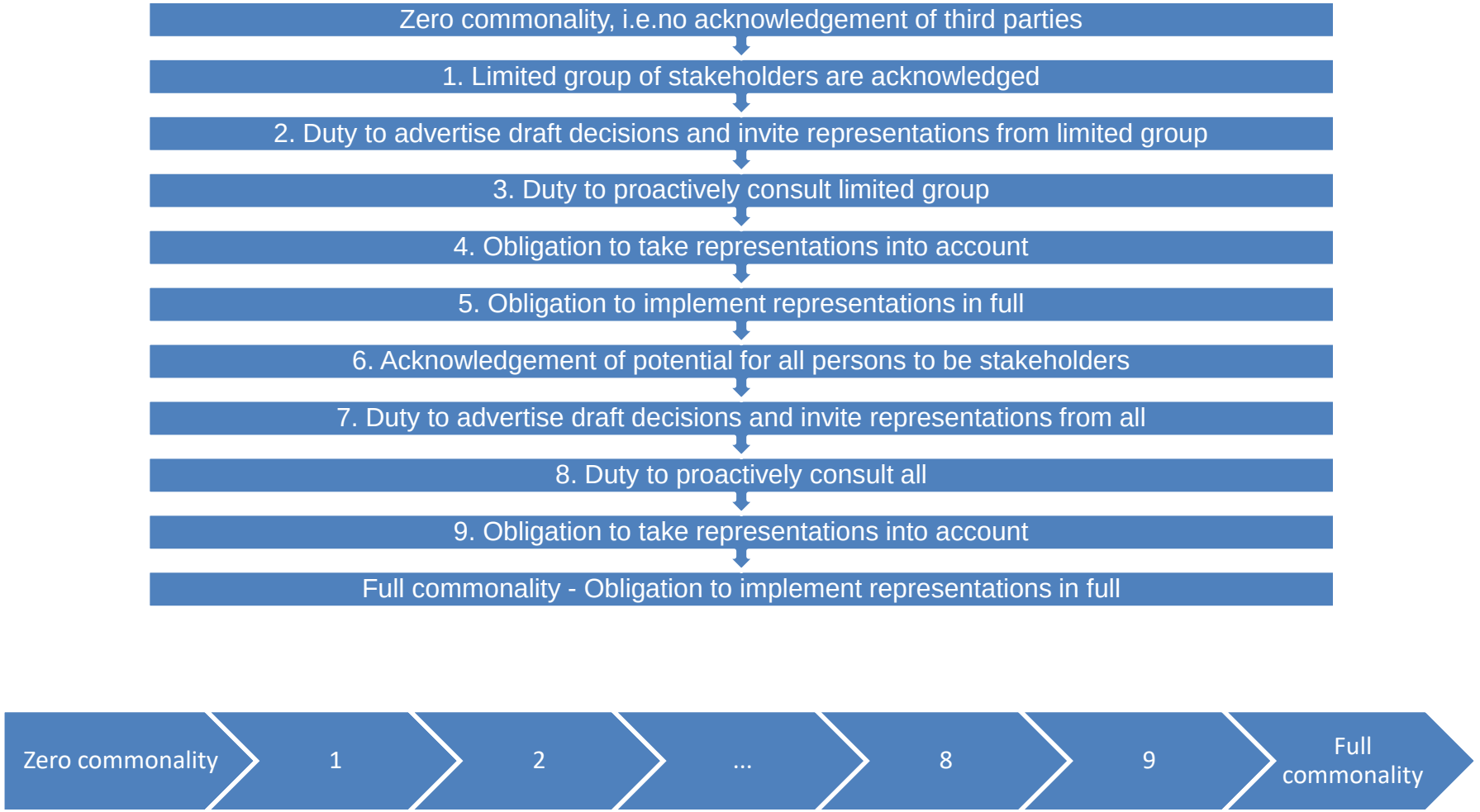

Figure 5 – Stakeholder spectrum with possible labelling (Source: current research)

In the above example, legislation that was found to make no acknowledgement of third parties beyond operator and public authority/regulator would be placed at the ‘zero commonality’ pole. For example, if legislation were analysed and found to contain no information sharing provisions, public participation provisions, or duties to consider environmental or social issues arising from the activity being regulated, it would be placed at this pole. However, legislation that obliges the decision maker to implement the representations of stakeholders in full, were that practical and possible, would share full commonality with the stakeholder code.

Stages 1 to 9 in the above example represent the variety of approaches that theoretically could be taken in law, with a distinction made between legislation that acknowledges a limited group of stakeholders (stage 1) and legislation that acknowledges the potential for all persons to be a stakeholder (stage 6). For example, it is offered that an obligation to implement representations of a limited group of stakeholders would not represent full commonality with the stakeholder code to the extent that stakeholders not acknowledged in law would be ignored. Accordingly, legislation that obliges public authorities to advertise draft decisions and invite representations from a limited group is closer to the ‘zero commonality’ end of the spectrum than legislation that obliges the same authorities to proactively consult all stakeholders and take their representations into account. As explained throughout this Chapter, the later stages in the above example may be beyond the practical confines of law, i.e. it would likely be impossible for law to serve a useful function if decision makers had to proactively consult all stakeholders and somehow implement all of their views on a binary and decisive matter.

It is envisaged that, once labelling is established, it should be possible to ‘map’ the

location of the sources of law from a particular jurisdiction on each spectra in order to visually represent the extent to which each source tends towards one end of the spectrum over the other end. The circles on the spectrum in Figure 4 are a visual representation of the location of three hypothetical sources of law. For example, based on the observations in the previous Chapter, law in the context of DOs would be placed further away from the 'full commonality' pole compared to law in the context of PACs. However, the exact positioning of both on each spectra will not become clear until labelling of each spectra is established. Accordingly, labelling of each spectra is particularly important for sources of law such as CAR, PPC, and EASR given the subtle and nuanced differences between them compared to the more extreme differences noted in other sources.

As already outlined above, if the social licence concept is formed of those component parts (i.e. the social licence codes) which are capable of being visually represented in a spectrum, it follows that it should be possible to create a further, all-encompassing, spectrum by combining the spectra produced by the individual social licence codes. This spectrum would visually demonstrate the measurement of law by reference to commonality with the principles underpinning the social licence and, by extension, the social licence itself. Again, labelling along the spectrum would be an important step towards being able to place sources of law by reference to their commonality with the social licence.

It is helpful to recall at this stage the context within which the social licence has already been conceived of elsewhere as existing in different forms. For example, as outlined in Chapter 3 of the current research, Thompson and Boutilier proposed a cumulative

hierarchy model wherein one's social licence to operate is conceptualised as a pyramid as per Figure 1 below[674,675].

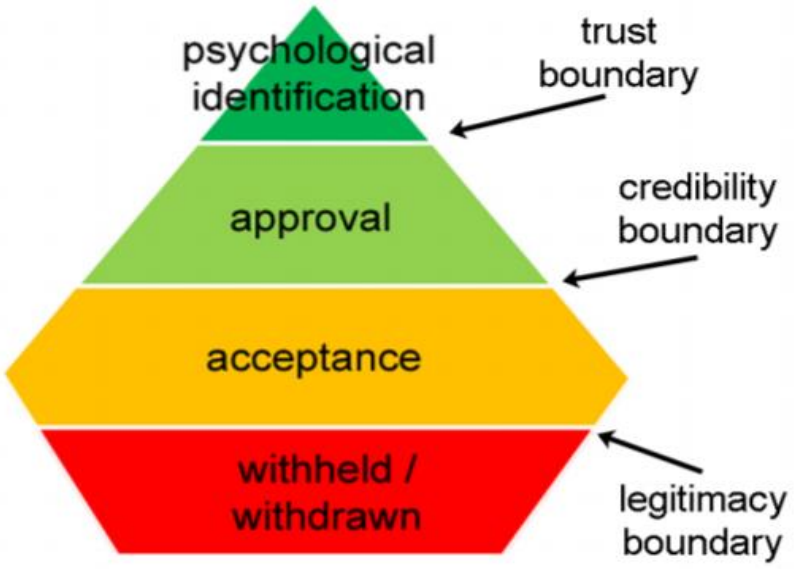

Figure 1: Thomson and Boutilier's Pyramid Model (Source: I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) SME mining engineering handbook)

Thomson and Boutilier define the social licence as a community's perceptions of the acceptability of a company and its local operations. At the lowest level of the hierarchy, the social licence is withdrawn or withheld by the community. The level above this is termed acceptance, which is followed by approval, which is followed by psychological identification. In order to move from one level to the next a project must shape perceptions by demonstrating, respectively, economic legitimacy, socio-political

[674]I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) *SME mining engineering handbook* (SME, 2011) pp.1779–1796
[675]R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business' (2012) International Mine Management Proceedings 227-237, p.233 <https://www.semanticscholar.org/paper/From-Metaphor-to-Management-Tool-How-the-Social-to-Boutilier-Black/c6e7d9985e94abe550563db51952649656b8d14c> accessed 1 October 2020

legitimacy, interactional trust, and, finally, institutionalised trust.

It is offered that Thomson and Boutilier's approach to modelling the social licence insofar as it relates to perception is similar to the approach taken by the researcher to modelling the social licence as it relates to law. The social licence is relied upon in its metaphorical state by Thomson and Boutilier insofar as they frame their research and resulting model around the idea that it is something tangible which stakeholders can withdraw or give to operators, and which operators should seek to have in order 'to operate'. However, the model that emerges in recognising the social licence as non-binary is a system of measurement of perceptions, i.e. the social licence in its measurement state. A similar approach is taken in the current research; the social licence is initially relied upon as a metaphor before it is broken down into its component parts in order to provide tangible criteria to apply to law, with the resulting observations thereafter expressed as a non-binary measurement of that law.

In other words, in the same way that Thomson and Boutilier use the social licence metaphor to measure perceptions, the current research uses the metaphor to evaluate law.

There are, of course, differences between the current research and the model used by Thomson and Boutilier. For example, it can be said that the social licence is effectively composed, in part at least, of perceptions given that it is said to represent the level of societal permission afforded to an activity or industry, with that societal permission based upon stakeholder perceptions. It is not regularly argued that the social licence is composed of law; quite the opposite, the social licence is regularly

framed as being unrelated to or beyond law. Accordingly, it follows that where Thomson and Boutilier measure perceptions it is a matter of simple logic for them to use their observations to form a model that seeks to explain the social licence concept, i.e. the social licence as a tangible thing to obtain is composed of perceptions and Thomson and Boutilier measure those perceptions. As the current research analyses law, it is open to the criticism that it measures something which is not a component part of the social licence and, therefore, any observations obtained are not capable of being compiled into a model that demonstrates anything about the social licence as a concept.

Thomson and Boutilier also have a contested activity to point towards in their research together with direct feedback from interested and impacted stakeholders, whilst the current research does not. This means that Thomson and Boutilier can ask the direct question '*what is the social licence for the contested activity?*'. Whilst the current research relates to fracking insofar as identification of relevant law is concerned, the central focus is not to ask '*what is the social licence for fracking in Scotland?*'. Furthermore, where Thomson and Boutilier's model is informed by direct interaction with research participants, the current research is a desk-based analysis of black letter law.

Accordingly, it would be wrong to suggest that the current research can cite Thomson and Boutilier's model as sharing a common approach in terms of the underpinning methodology that results in the creation of the Spectrum Model put forward in the current Chapter. In particular, Thomson and Boutilier do not appear to rely upon abduction in order to reach their conclusions; it has already been outlined, above, the

extent to which this can impact upon the validity, credibility, and reliability of research findings.

8.5 Beyond compliance

It is important to address the above criticism that the current research measures something which is not a component part of the social licence.

Firstly, it is offered that the social licence is nebulous and malleable enough that it can include within its scope the relevant legal provisions that may impact upon societal perception of contested activities or industries, and that it is right to do so for reasons of informed comparison of operators. For example, whilst it may be the case that the perception of trust is better established by an operator that volunteers to engage with stakeholders compared to one who is compelled to do so by law, it will also be the case that an operator who engages because of law has more of a claim to having a social licence than an operator who does not engage at all. Furthermore, if engagement results in a stronger form of social licence emerging as per Thomson and Boutilier's hierarchy, it is offered that it is not wholly relevant to the existence of a stronger social licence that the engagement was brought upon by law. In other words, it is offered that if the social licence afforded by society can be informed by engagement brought about by law, it follows that the law is a relevant component part of the social licence in that instance.

Secondly, it is offered that law's inclusion as a component part of the social licence concept is mandated by the fact that it may itself be capable of shaping perceptions. In the same way that a hypothetical stakeholder may be against a contested activity

or industry because of associated environmental risks, it is possible that another hypothetical stakeholder may deem the risk sufficiently controlled by law. It is also possible that a hypothetical stakeholder may be against a contested activity or industry not because of associated risk but because of a lack of trust in the way in which law proposes to deal with those risks, or the track record of the relevant regulatory authorities. To be clear, the current research has not established whether or not such hypothetical positions exist across stakeholder networks in Scotland insofar as they perceive fracking. Rather, it is offered that where such viewpoints do exist, it is entirely appropriate for the law to be considered as a relevant component to ascertaining the level of social licence afforded to the contested activity or industry.

Thirdly, and of most importance to the model put forward by the researcher, it must be emphasised that the above discussion has thus far deliberately focussed on only four out of the five social licence codes. It is the researcher's position that law's ability to be measured by reference to the social licence can only be fully understood once 'beyond compliance' as a code is accommodated in the model.

Whilst it is recognised that there is notable complexity in (1) properly labelling the individual social licence code spectra, (2) combining those spectra into a single spectrum, and (3) labelling the single spectrum, it is at least stateable at this stage that law's commonality with four out of five of the component codes is *possible*. For example, it is theoretically possible, albeit practically challenging, for law to be designed such that all the individuals, collectives, and groups that form part of society are given immediate status as 'stakeholders' in all decisions that they themselves believe they have an interest in. Were this to be done, it would be possible in theory

for law to be recognised as having full commonality with the stakeholder code. By comparison, as per the previous Chapter, law is not capable of having any commonality with the beyond compliance code.

However, it is offered that the impossibility of commonality between law and beyond compliance can be reflected within the Spectrum Model. This is done by adopting an *infinite* spectrum as the model of measurement, i.e. where the pole representing full commonality with the social licence concept is an infinite distance away from any position that may be plotted on the line between the poles. This use of infinite distance represents the reality that complete commonality of law with the social licence concept is impossible, as represented below by a broken line at the full commonality pole of the spectrum in Figure 6 below.

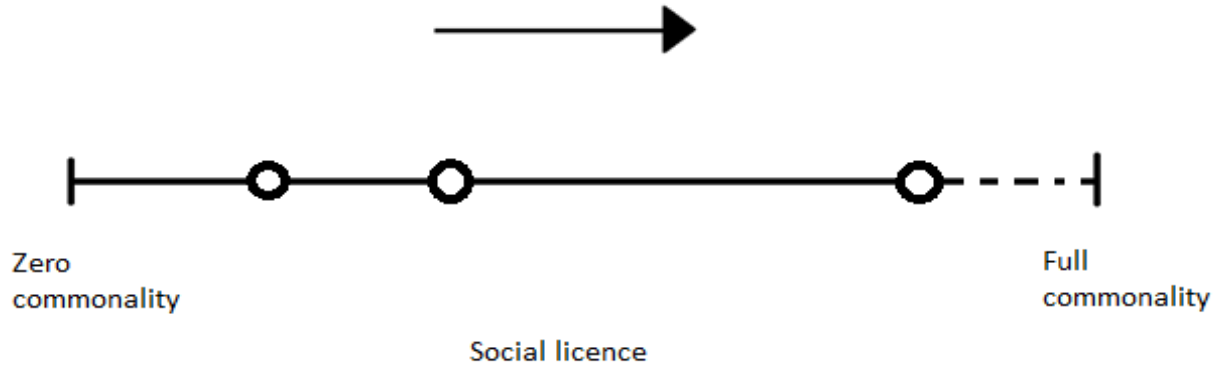

Figure 6 (source: current research)

In order to explain how this impacts upon the utility of the spectrum, consider the situation where three different jurisdictions are analysed by reference to the social licence codes and subsequently 'placed' on the social licence spectrum. As per Figure 7 below, it can be said that jurisdiction C is *closer* to one end of the spectrum than

jurisdiction B, with jurisdiction A placed in the middle. As jurisdiction B tends towards the left pole, it must be inferred that it has less in common with the social licence than jurisdiction C. However, as the spectrum is infinite it is not possible for any jurisdiction to be placed directly on the 'full compliance' social licence pole.

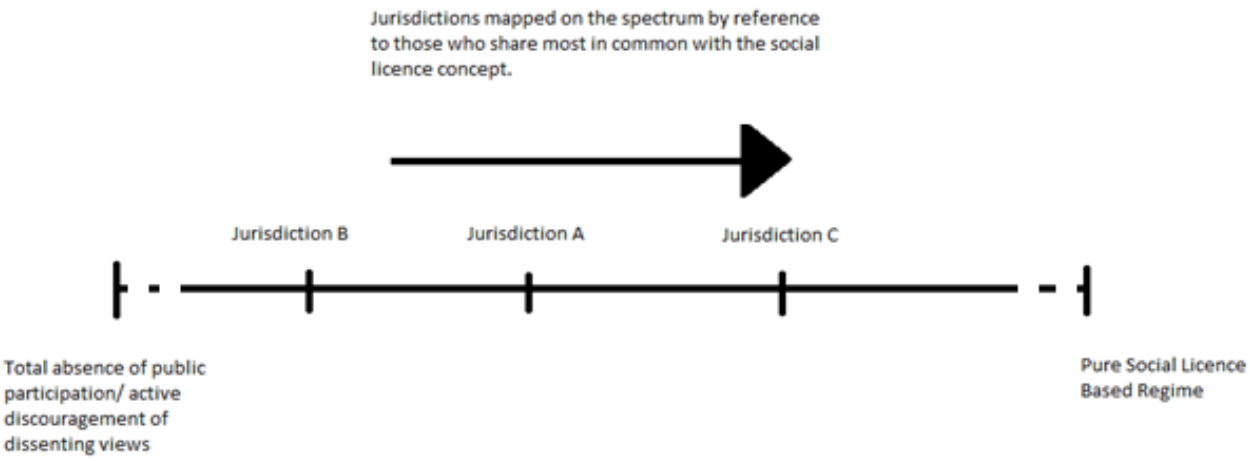

Figure 7 (source: current research)

There are a number of practical reasons why law will struggle to share complete commonality with the social licence concept. For example, throughout the current research the following examples have been noted:-

- the difficulty in ascertaining who should properly be labelled a stakeholder and who should not in relation to a contested activity or industry, e.g. should all of Scotland be consulted where the direct impact of such activities or industry will only be felt within a specific local authority area?;
- the administrative burden that could be placed upon operators/applicants if they are required to actively seek consent of stakeholders, as opposed to law being drafted such that it will infer tacit consent if objections are not lodged by the

stakeholder upon notification that activities are being considered in their local area; and

- the reality that stakeholders in any one stakeholder network will likely have a mixture of different views, such that there is no clear 'community' view that can be expressed.

These practical issues impact upon the drafting of law insofar as they impact upon the policy intentions of those instructing the drafter. For example, in theory, there is no reason why law could not be drafted such that, practical concerns aside, all operators/applicants must proactively obtain stakeholder consent for all identifiable stakeholders. However, in practice, the policy intention will be informed by other factors alongside stakeholder engagement. The relevance of this is to make clear that the use of an infinite spectrum is helpful insofar as it recognises the incompatibility of law with beyond compliance, and also the practical difficulty of designing a system of law with the intention of establishing full commonality with those social licence codes which are compatible with law.

Returning to the criticism that the current research measures something which is not a component part of the social licence, it is offered that this is (1) not accurate, and (2) irrelevant. Rather, the current research measures something which is *capable* of being a component part of the social licence. However, in any event, the issue is not law's compatibility with the social licence as a whole, but with the 'beyond compliance' component that underpins many of its principles. This is accommodated in the infinite Spectrum Model and the acceptance that law cannot share complete commonality with the social licence, but can still be measured against the social licence as a

standard.

A consequence of the above conceptualisation of the social licence spectrum as infinite is a requirement to consider what would happen if law was to be ‘absolute’, i.e. if all steps currently viewed as ‘beyond compliance’ and not mandated by law were to become a part of law and placed upon operators as obligations.

It is accepted by the researcher that if it is possible to delineate the border between law and the social licence by reference to what is compliance with obligations versus what is ‘beyond compliance’, it should be theoretically possible for law to slowly encroach upon the space occupied by the social licence by reforms which bring those beyond compliance obligations within the scope of the law. Leaving aside the practical reality, it follows that it should theoretically be possible for all possible actions to be identified and then mandated such that there no longer is the possibility of an action to be taken ‘beyond compliance’ with law. It could be suggested that the consequence of this in terms of the model, assuming that there is full commonality between law and every other social licence component, is that law would share full commonality with the social licence, and demonstrate the use of an infinite spectrum as fundamentally flawed and incorrect. However, it is offered that such a suggestion misunderstands the nature of the social licence.

It has already been observed in the current research that the social licence emerged from the idea that law alone was not capable of providing communities, stakeholder networks, society etc. what they wanted in terms of consenting to contested activities or industries. In that sense, the potency of the social licence concept depends upon

the extent to which law is lacking with regards to providing stakeholders with meaningful engagement and participation in decision making. If there is little to no provision in law for these concepts, it follows that those stakeholders who feel unempowered will view the social licence concept as offering them an alternative route to achieving status and having impact. It follows that, if the law provides stakeholders with multiple meaningful rights regarding engagement and participation, the social licence as a concept will be less useful to the extent that a stakeholder network can observe that the law appears to be providing them with suitable methods of being involved and challenging contested activities or industries. In this way, the relationship between law and the social licence as stakeholder routes toward influence is one of mutual and bilateral impact.

This means that, if it were possible to identify all potential actions that an operator could take to secure a strong social licence and then mandate them in law, law would have effectively removed the need for the social licence as a concept, rendering comparison between law and the social licence as obsolete. In other words, the infinite Spectrum Model would not itself be shown to be incorrectly conceived. Rather, there would no longer be a pole to mark ‘100% commonality with the social licence’ as the social licence as a concept would no longer exist.

Whilst it is important to address the above in order to defend the model, it must be reiterated that the researcher does not take the view that it is possible for all of ‘beyond compliance’ to be accommodated within law such that the law remains meaningful, practical, useful, or enforceable.

8.6 Practical usage of the Spectrum Model

The discussion thus far has focussed on the theory underpinning the Spectrum Model without addressing its practical use. This is dealt with below.

As the model used relies on an infinite spectrum, considering Scotland in isolation allows for no conclusions to be drawn when attempts are made to find its location on the spectrum by reference to the full commonality pole on the social licence spectrum, even after labelling is completed. As already outlined above, it is offered that it may be theoretically possible for law to be drafted such that it shares full commonality with many of the underpinning principles of the social licence. However, it is when the principles are combined to provide for a social licence spectrum that infinite distance from the regime to the full commonality pole is established, i.e. via the inclusion on the spectrum of the 'beyond compliance' element.

If an assessment of Scotland in isolation can only produce the basic conclusion that Scotland is an infinite distance away from having a legal regime that shares full commonality with the principles of the social licence, it could be argued that the current research has no value insofar as it seeks to establish the Spectrum Model as credible and useful. However, upon establishing a system of labelling for the spectrum, it is offered that a comparative law exercise could be undertaken in order to unlock the utility of the Spectrum Model.

8.6.1. The comparative exercise

The comparative law exercise would follow the following basic outline:-

- at least three alternative jurisdictions suitable for the purposes of comparison are identified;
- social licence codes are identified for the purposes of examining relevant sources of law within each alternative jurisdiction, as per the current research;
- each alternative jurisdiction is subjected to doctrinal assessment in order to identify relevant law for the purposes of comparison, in line with the approach taken in Chapter 5 of the current research;
- once relevant law is established, the sources of law in each jurisdiction are considered through the lens of each social licence code, again as per Chapter 7 of the current research; and
- assuming that labelling of the Spectrum Model has been achieved, the observations that emerge enable the research to plot the respective positions of each jurisdiction on each individual social licence code spectra and, ultimately, the combined social licence spectrum.

In Figure 8 below, the presence of three hypothetical jurisdictions mapped on the spectrum allow for comments to be made as to the differences between each jurisdiction in terms of their tendency towards full commonality *compared with one another*. Once the jurisdictions have been mapped, it is possible to remove the unobtainable poles of the infinite spectrum and produce the following *finite* spectrum:-

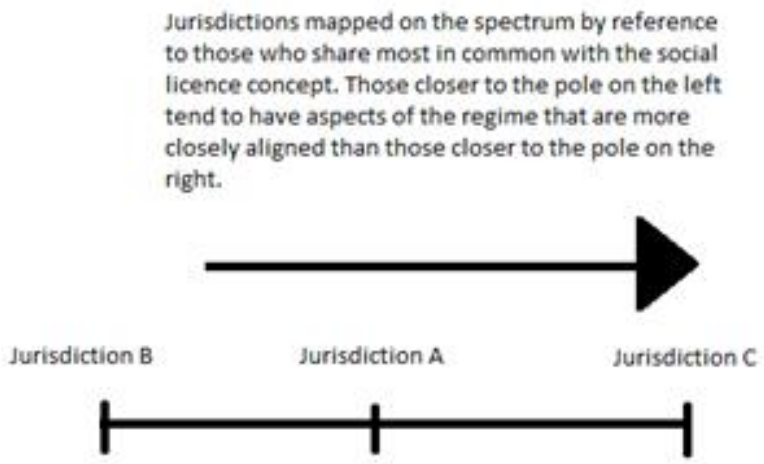

Figure 8 (source: current research)

In the above finite spectrum, jurisdiction C does ***not*** share full commonality with the social licence, nor is jurisdiction B necessarily lacking any commonality. Rather, the purpose of the finite spectrum is to visually represent the practical utility of measuring law against an unobtainable standard. Those in jurisdiction A who may be tasked with considering what reforms could be made to increase commonality with the unobtainable standard may instead now aim at what may practically be achieved in pursuit of the standard in jurisdiction C. The unobtainable standard of the social licence still exists; it is only removed for the purposes of focussing on that which may be practically achieved.

To be clear, the finite spectrum above still does not answer the question of the relative commonality of an *entire* legal system with the social licence concept when that legal system is considered in isolation. However, as per the approach undertaken in Chapters 6 and 7, it is possible to examine the distinct legislation within a legal system for the purposes of internal comparison against the social licence as a standard. Returning to Figure 8 above, instead of entire jurisdictions being mapped on the

spectrum, distinct pieces of legislation or processes would be mapped as a result of this process. For example, in the current research, DOs would be at the position of jurisdiction B in Figure 8, whilst PACs would be at the position of jurisdiction C; given that they represent the clearest examples of the extremes of commonality observed by the researcher.

The ultimate utility of this is as follows; ***where the policy intention behind legal drafting relates to the social licence, either in terms of a desire to increase or decrease commonality between law and the social licence, a comparative exercise that incorporates the above approach may provide evidence of alternative approaches already existing in law that, in theory, could be adopted to meet the policy intention.*** With this in mind, it is helpful to return briefly to the Scottish Government's position in relation to fracking in Scotland, i.e. that there is no social licence for such activities to take place.

Again, the researcher does not offer an opinion on whether or not (1) the Scottish Government is correct, or (2) fracking should be allowed in Scotland. However, on the basis that the Scottish Government have deemed the social licence relevant to its decision making in this instance, the question of commonality between Scots law and the social licence is a relevant consideration. For example, if it can be evidenced that Scots law shares little commonality with the principles of the social licence it could be argued that legal reforms should be considered with the aim of creating a system that has improved commonality.

From the perspective of those who are in favour of fracking, the argument may be that

if the social licence is important to the Scottish Government they should use their legislative powers to create a regime that better allows for conditions akin to a strong social licence to emerge. From the perspective of those who are against fracking, the argument may be that the Scottish Government has adopted a position they support by citing something that is 'non-legal' in the sense that the social licence does not appear anywhere within current legislation wherein stakeholder rights to object are contained. It may follow that those who are against fracking would see value in reforms designed to increase commonality between law and the social licence.

The researcher does not offer an opinion on the above hypothetical positions. They are offered only to highlight the potential utility of the Spectrum Model on the basis of the Scottish Government's decision to effectively ban fracking by reference to the social licence concept.

Taking the law of an alternative jurisdiction, or alternative legislation from within the same jurisdiction, and comparing it with another is not straightforward. Whilst the current research does not expressly seek to propose the transplant of a specific rule or approach from alternative jurisdictions or legislation, it is clear from the above that the utility of the research is based upon a certain level of acceptance that one may consider alternative approaches in law and then consider whether a transplant of the alternative would be feasible.

8.6.3. The Spectrum Model and the Integrated Authorisation Framework

A simple, and timely, example of the potential practical application of the Spectrum Model can be offered by reference to the Scottish Government and SEPA's ongoing

work on an integrated authorisation framework. This example does not have to contend with the debate on legal transplants summarised above on the basis that it involves only the consideration and comparison of existing Scottish law.

It is presently intended that the EASR will deliver '*an integrated authorisation framework, which will integrate, as far as possible, the authorisation, procedural and enforcement arrangements relating to: water; waste management; radioactive substances; pollution prevention and control*'[676]. In other words, the environmental permitting legislation summarised above, in a phased approach, will eventually be integrated into a single piece of the legislation, resulted in a more uniform approach to environmental regulation in Scotland.

It will be recalled that the Scottish Government's October 2017 and October 2019 statements on fracking implied the social licence was something of a pre-requisite. At the very least, it is clear from the decision that the ideals of the social licence were at least offered as the public explanation for the Scottish Government's policy on fracking. On the basis that the Integrated Authorisation Framework represents an attempt to standardise environmental permitting across environmental media, it is conceivable that, if the Scottish Government believed the social licence was relevant to fracking, it may believe that the social licence, or its component principles, is relevant to environmental permitting generally. In other words, from a policy perspective, it is conceivable that the Scottish Government could attempt to consider the extent to which the reforms of the Integrated Authorisation Framework provide an

[676]SEPA, 'Environmental Authorisations (Scotland) Regulations 2018' (*sepa.org.uk*, undated) <https://www.sepa.org.uk/regulations/how-we-regulate/environmental-authorisations-scotland-regulations-2018/> accessed 27 November 2021

opportunity to reform environmental regulation in order that it more closely mirrors the principles of the social licence.

The current thesis has considered in detail three separate pieces of environmental permitting legislation that will eventually be amalgamated within EASR. Viewed through the lens of the social licence code, it was noted that there were enough differences in approach between the legislation such that it could be stated that one was closer in spirit to the others in terms of its commonality with the social licence. Accordingly, if some of the policies underpinning the Integrated Authorisation Framework were to harmonise environmental permitting *and* utilise provisions that were closer to the ideals of the social licence, the Spectrum Model would provide a basis for identification of the relevant provisions to adopt.

For example, it was observed that the participatory rights afforded to the public are nuanced across the relevant legislation:-

- In PPC, any person may make written representations to SEPA in a 28 day period beginning with the date of the advertisement of a draft determination;
- In CAR, where a licence application has the potential of resulting in a significant adverse impact to the water environment, any person affected or likely to be affected by, or having an interest in, the application may make representations to SEPA; and
- In EASR, public consultees are persons whom SEPA considers are affected by, is likely to be affected by, the application

Viewed through the lens of the social licence codes, the above observations would result in PPC being mapped on the Spectrum Model as tending to be closer to the full commonality pole than CAR or EASR. It would follow that, of the above three approaches, where the policy intent is to draft provisions that are consistent with the ideals of the social licence, the participatory rights within PPC would be adopted or at least relied upon as a starting point to build from.

The above example has focussed solely on the provisions in PPC, CAR, and EASR given that the intention behind the Integrated Authorisation Framework is to harmonise the existing environmental permitting regimes. However, it will also be recalled that planning law was found to contain more proactive obligations to seek consent, as opposed to the tacit inference of consent based on a lack of representation that was found to be adopted in the environmental permitting legislation. Accordingly, viewed through the lens of the social licence codes, certain planning law provisions would be placed closer still than PPC to the full commonality pole on the Spectrum Model.

8.7. What is the relationship between the social licence and law?

On the basis that (1) the social licence can be objectively stated to consist of the component parts represented by the social licence codes, and (2) law in this context refers to black letter primary legislation, the relationship appears to be one of mutual and bilateral impact. It has been observed throughout this research that the social licence relies upon law for its metaphorical underpinning. However, in addition to this, it is also offered that the social licence relies upon law for its potency.

Where a stakeholder or stakeholder network feels that it either has no avenue through

law to participate in decision making, or that law has resulted in the wrong decision being taken, the social licence as a concept offers an alternative. By requiring operators to have a social licence, stakeholder networks assert themselves as influential regardless of the relevant operator's compliance with legal requirements. Accordingly, it follows that to the extent that law is capable of providing for stakeholder participation and influence, the potency and attractiveness of the social licence must diminish as an alternative avenue to find that same participation and influence.

However, as already explained in this research, it is by no means a simple task for law to provide for the same level of participation and influence that is offered by the social licence concept. For many practical reasons, law is not drafted to entirely mirror the approach to participation and influence that the social licence offers. Further, from the purely theoretical perspective discussed in the preceding Chapter, law cannot match the social licence in terms of the requirement it may place on operators to go beyond compliance.

The above observations are a natural extension of the finding that the social licence may be used to measure law. Whilst law may change over time, the social licence as an ideal is relatively fixed by comparison. Given that law can be drafted to attempt to provide for many of the same things as the social licence, i.e. stakeholders, trust, engagement, and consent, it follows that various different approaches to law can be mapped against the fixed, yet infinitely unobtainable, standard that the social licence concept represents. To the extent that law gets closer to the social licence on the Spectrum Model, the less there is for the social licence to offer by way of alternative avenue for stakeholders to achieve influence.

In terms of the impact of the social licence *upon* law, given the above statement that the relationship is one of mutual and bilateral impact, it should be clear that if the social licence is deemed a pre-requisite or an ideal it must naturally have a direct impact on law in two related ways.

Firstly, as was the case in the Scottish Government's decision on fracking, where the social licence is a pre-requisite lawful operations cannot take place until a social licence is obtained. Accordingly, in the case of fracking, none of the public participation or information sharing provisions in PPC, CAR, EASR etc were ever used. Neither were the opportunities for public consultation afforded in Scottish planning law. The actual ability of law to provide for a decision making process that accommodates the social consensus in the context of fracking remains untested. This is a clear impact upon law by the social licence concept – to the extent that policy makers deemed the social licence of prior value, legal provisions on public participation in decision making arguably became irrelevant.

Secondly, where the social licence is deemed an ideal, it follows that reform of law could be undertaken with the component parts of 'what gives you a social licence' used to underpin legislative provisions on public participation and information sharing. Again, this is a clear impact upon law by the social licence concept. Examples of utilising the Spectrum Model for this purpose have already been outlined above,

8.8. Conclusions

Again, the researcher does not offer an opinion on whether or not (1) the Scottish Government is correct, or (2) fracking should be allowed in Scotland. However, on the

basis that the Scottish Government have deemed the social licence relevant to its decision making in this instance, the question of commonality between Scots law and the social licence is a relevant consideration. For example, if it can be evidenced that Scots law shares little commonality with the principles of the social licence it could be argued that legal reforms should be considered with the aim of creating a system that has improved commonality.

From the perspective of those who are in favour of fracking, the argument may be that if the social licence is important to the Scottish Government they should use their legislative powers to create a regime that better allows for conditions akin to a strong social licence to emerge. From the perspective of those who are against fracking, the argument may be that the Scottish Government has adopted a position they support by citing something that is 'non-legal' in the sense that the social licence does not appear anywhere within current legislation wherein stakeholder rights to object are contained. It may follow that those who are against fracking would see value in reforms designed to increase commonality between law and the social licence.

The researcher does not offer an opinion on the above hypothetical positions. They are offered only to highlight the potential utility of the Spectrum Model on the basis of the Scottish Government's decision to effectively ban fracking by reference to the social licence concept.

In summary, the following conclusions are set out above:-

- as black letter law is drafted to reflect underlying policy intentions, a range of approaches have been observed across the sources of law in the current research insofar as their commonality with the social licence codes is considered;
- there is a temporal aspect to the question of the relationship between law and the social licence given that law is capable of change to reflect new policy, meaning that the relationship between the social licence and law insofar as it is *currently drafted* is a different matter to the relationship between the social licence and law insofar as it is *capable* of being drafted.
- the social licence is dimorphic, existing both as a metaphor and a tool of measurement;
- as a tool of measurement, analysing law through the lens of the social licence allows for spectra to be produced that measure the extent to which the relevant law can be said to be drafted on the basis that stakeholders, engagement, consent, trust etc are central;
- once established, those spectra should be capable of combination such that they form the social licence spectrum, i.e. if the social licence concept is formed of those component parts (i.e. the social licence codes) which are capable of being visually represented in a spectrum, it follows that it should be possible to create a further spectrum by combining the spectra produced by the individual social licence codes;
- the social licence spectrum would visually demonstrate the measurement of law by reference to commonality with the principles underpinning the social licence and, by extension, the social licence itself;

- the impossibility of commonality between law and beyond compliance can be reflected within the Spectrum Model by adopting an infinite spectrum as the model of measurement, i.e. where the pole representing full commonality with the social licence concept is an infinite distance away from any position that may be plotted on the line between the poles;
- upon establishing a system of labelling for the spectrum, further research in the form of a comparative law exercise must be undertaken in order to unlock the utility of the Spectrum Model and create a finite spectrum that allows for meaningful observations to be made regarding a legal system's position relative to other legal systems when each system is considered through the lens of the social licence;
- where the policy intention behind legal drafting relates to the social licence, either in terms of a desire to increase or decrease commonality between law and the social licence, a comparative exercise that incorporates the above approach may provide evidence of alternative approaches already existing in law that, in theory, could be adopted to meet the policy intention; and
- further research is required in order to establish a (1) credible and reliable labelling for each of social licence code spectra produced, (2) the process of combining individual code spectra into a single spectrum outlining commonality with the social licence as a concept, and (3) credible and reliable labelling for the social licence spectrum.

Chapter 9 – Conclusion

In Chapters 1 and 2, the following research questions were set out:-

- what is the social licence?;
- can the social licence inform doctrinal analysis of black letter law?;
- can the social licence be used to analyse Scottish law insofar as it relates to environmental law or planning law governing the permissioning stage for onshore petroleum projects in Scotland?;
- what relationship, if any, exists between the social licence and law?;
- if a relationship exists, can it be expressed and understood in a model?; and
- what utility, if any, emerges from the answers to the above?

In order to address these research questions, the researcher undertook the following steps:-

- as summarised in Chapter 3 a literature review of the social licence concept was completed;
- as summarised in Chapter 4, textual and thematic comparative content analysis was undertaken of academic discourse on the social licence in order to provide objective and empirical evidence of the common themes and language across the multiple definitions and approaches to the concept that exist; this produced codes of ‘Stakeholder’, ‘Engagement’, ‘Consent’, ‘Trust’, and ‘Beyond Compliance’;
- as summarised in Chapter 5, a doctrinal analysis of Scottish environmental and planning law was completed to (1) synthesise the relevant law for the purposes

of the research, and (2) evidence the rationale for the researcher's chosen approach to identifying the relevant law;

- as summarised in Chapters 6 and 7, further comparative and doctrinal analysis of the relevant law was undertaken in order to explore, understand, and evidence the relationship between the relevant law and the social licence codes;
- as summarised in Chapter 8, via a process of abduction, a new model for understanding the relationship between the social licence and law was put forward, termed the Spectrum Model by the researcher; and
- as also summarised in Chapter 8, potential further research was identified to build upon on the foundations developed from the above.

9.1. **Literature review**

The literature review in Chapter 3 identified that the social licence as a concept has gathered momentum in the years following James Cooney's first usage of the term in 1997[677]. In particular, it was noted that multiple different approaches to defining and measuring the concept have emerged. Explanations for these divergent approaches to the concept could be attributed, in part at least, to the variety of different contexts the concept has been deployed within.

For example, the work of Joyce and Thomson was noted for identifying problem areas posing significant social risk to Latin American companies as including conflict legacies

[677] R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32(4) Impact Assessment and Project Appraisal 263-272, p.263 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.941141> accessed 19 March 2015

and a public perception that foreign companies are treated differently[678]. By comparison, Bice's exploration of the social licence was rooted in the analysis of corporate entities operating in the Australian Mining Industry[679]. As a further example, Ruckstuhl et al considered the use of the social licence as a legal tool in New Zealand in relation to the aquaculture, dairy and mining industries, contextualising the concept in *Te Tiriti o Waitangi*, an agreement signed with the Māori population in order to enshrine Māori community rights to articulate planning and permitting concerns[680].

Whilst a number of common themes were identified across the different definitions identified by the researcher, it became clear from the literature review that the concept was malleable and, arguably, nebulous. Further, it also became clear that there was no universal consensus on whether the concept was of meaningful practical application, with a number of academics identified as critics of the social licence as too ambiguous, biased, a tool of PR, and of negative impact on legal licences.

The researcher considered that the above observations created some difficulty with regards to the aim of considering whether a relationship exists between the social licence and law. Traditional legal approaches to regulation are based upon statutory provisions that are intended to be objective and enforceable black letter statements of process, standards, and roles. Accordingly, whilst an objective statement can be

[678] S. Joyce and I. Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America' (2000) The Canadian Mining and Metallurgical Bulletin 93(1037) <http://oncommonground.ca/wp-content/downloads/license.htm> accessed 6 April 2016

[679] S. Bice, 'What gives you a social licence? An exploration of the social licence to operate in the Australian mining industry' (2014) 3(1) Resources 62–80, p.62 <http://www.mdpi.com/2079-9276/3/1/62> accessed 3 June 2016

[680] K. Ruckstuhl *et al*, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', 32(4) Impact Assessment and Project Appraisal 304-314 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.929782?journalCode=tiap20> accessed 6 April 2016

provided in response to the question ‘what does the law provide?’, it is difficult to provide an objective statement in response to the question ‘what is a social licence’. It was the researcher’s view that, in order to properly consider the relationship between law and the social licence, objective statements as to the content of both were necessary. The alternative approach, i.e. adopting a preferred definition of the social licence for the purposes of the research, risked the criticism that any observations made would be highly subjective and fail to accommodate the breadth and variety of approaches to the social licence that exist.

9.2. Coding the literature

On the basis that the researcher was able to identify a number of shared themes and concepts across the literature review, it was determined that a level of objectivity could be established for the purposes of examining the concept in relation to traditional legal approaches to regulation. Building upon the general examination contained within the literature review, the researcher completed a textual and thematic content analysis of relevant literature on the social licence using the NVivo software package and an open coded approach. This method, and the results it produced, were summarised in Chapter 4.

Using various online resources that provided access to a wide variety of academic journals, a body of literature emerged that was subsequently widened via an iterative process and which provided the content subsequently analysed. Coding was performed in NVivo 12 by a single coder; the researcher. Multiple coding runs were completed to allow for certainty that the material had been fully coded and understood.

An open coding approach was initially used by the researcher, with the codes being taken from the actual language used within the text of the academic articles as opposed to being generated by the researcher's attempts to simplify or condense language. The researcher coded each text solely insofar as that text dealt with the question of defining a social licence. This meant that the texts were coded both where they sought to summarise the state of academic writing to date, and where they sought to differentiate from, or add to, academia on the concept. As a result, concepts from those texts which were most regularly cited across the literature coded by the researcher appeared more regularly in the data.

Upon completion of literal coding, 546 codes were listed in NVivo 12 as the cumulative total of all codes created from each source. Once repeat codes were removed, this resulted in 349 unique codes being listed before any attempt was made to further reduce the number by grouping codes thematically or by objective synonyms. To reduce this number further, the research undertook thematic grouping and grouping by synonym. A table of results is provided in Annex 4 that contains the 51 codes produced by the process of thematic grouping and grouping by synonym referred to above. Each code is listed with its corresponding frequency in terms of (1) sources found to include the code, and (2) the aggregate number of instances each code was found across the sources.

Via the above process of objective literal coding and thematic grouping, five codes were identified and selected to provide an objective answer to the question 'what is a social licence?'. Four of the five codes selected represented the most commonly cited

components of the social licence across the source material considered and, as such, were considered to be the most appropriate basis for a considering the relationship between law and the social licence via the doctrinal and comparative methods set out in the preceding methodology. The fifth code, 'beyond compliance', was selected not on the basis of common frequency across the source material but on the basis that it represented a significant challenge to the research, i.e. that the social licence in some way exists *beyond law*.

As outlined above, the codes selected, and their associated definitions (created by the researcher from the coding of academic literature detailed in Chapter 4) , were as follows:-

- **Consent** - *the broad conceptual heading which conveys the principle that a stakeholder may give, both explicitly and tacitly, permission for something to happen, through both action and inaction on their part, and also withdraw permission. The type, form, and level of consent given will vary depending upon context, which can be influenced by various factors including the risk and reward of the action occurring and the type of interaction between the stakeholder and the individual or group seeking permission. Although not an exhaustive list, examples of this concept that emerge most frequently across the reviewed literature are acceptance, approval, and psychological identification*.
- **Stakeholders** - *a person and/or group with an interest in the contested business, activity, project, or industry. Interest is broadly deemed to be related*

to impact upon the person and/or group. Whilst there is no process for ranking impacts or importance of stakeholders, references to the concept of the community and local interests outnumber references to macro-level stakeholders. References to the concept of stakeholder in tandem with the environment as special in the context of the social licence outnumber references to the concept of the stakeholder in tandem with economic interests. Stakeholders have the power and influence, either alone or in coalitions, to either stop projects or impose severe costs upon them.

- **Trust** - *the reliance of one actor on the truth, honesty and integrity of another, evidenced, obtained and maintained via transparent and procedurally fair processes wherein environmental protection is central, both in terms of the perceived impacts from the activity being considered and the governance processes in place for mitigation and/or removal of such impacts.'*
- **Engagement** - *the fact of being involved and the process of encouraging people to be interested and/or involved, with multiple process and vehicles for engagement available that, depending upon the perspective of the actors involved, will impact on the extent to which the engagement is deemed acceptable, meaningful, and appropriate.*
- **Beyond Compliance** - *conveys the idea that social licence stakeholders are no longer satisfied by what is provided for in law in order to obtain a formal licence, contract, or legal right to operate. Instead, to get stakeholder buy in, those seeking a social licence must be seen to do more, go further, and volunteer to take on additional obligations, i.e. they must go beyond compliance.*

9.3. Doctrinal analysis and identification of relevant law

In order to move to comparative analysis of the social licence and law, an objective basis was required for the purposes of establishing the relevant law . In order to identify the relevant law, the following was noted:-

- the purpose of the research was to consider the relationship between the social licence and law in the context of onshore petroleum extraction and a company seeking to utilise hydraulic fracturing;
- such a company, were fracking to be allowed in Scotland, would require to interact with a complex legal framework consisting of multiple different permits, stakeholders, and public bodies;
- the primary sources of law in that context are the specific legislative provisions within Scots law that correspond to the risks associated with fracking that were identified in the introduction;
- as the social licence is concerned with giving form to the concept of societal permission being expressed through means that are outside traditional legal approaches to state permission, the research should focus on law where it also acts to confer permission;
- whilst there may be a relationship between the social licence and that law which sits outside of permissioning, focusing on permissioning provisions was justified by the direct comparisons that exist between legal and non-legal ‘permissions’; and
- it was desirable to limit what is considered relevant law in order that the research is sufficiently focussed and precise.

Consideration of the above resulted in the researcher approaching the task of identifying the relevant law with the following two questions in mind:-

(1) what legal permissions would a company seeking to frack for shale gas in Scotland be required to obtain in order to lawfully begin to operate?; and
(2) what provision is there in law for third party stakeholders to participate in, and/or influence, any decision to grant such permissions in law?

As a result, legislation that may traditionally be termed ‘environmental law’ and ‘planning law’ by Scots law practitioners was identified as being of central relevance. Further, alongside identification of legislation wherein specific legal permissions to operate are granted, legislation dealing more generally with environmental and planning matters was also deemed relevant on the basis that it could provide stakeholders with an indirect method to participate and influence decision making. For example, it was identified that a hypothetical onshore operator would require a permit under the Pollution Prevention and Control (Scotland) Regulations 2012. However, it was also identified that the Climate Change (Scotland) Act 2009 allowed for stakeholder representations to be made at a broader level that could indirectly impact on fracking as an activity.

Multiple legislative sources of environmental law and planning law in Scotland were taken forward for consideration. Each of the legal instruments were noted to represent a black letter expression of how the law should operate in theory. Whilst there may be a gap between theory and practice due to a number of factors that are external to the

black letter design of law, it was beyond the scope of this research to consider the impact of such a gap on the relationship that may exist between law and the social licence.

9.4. Analysing the relevant law

A close textual reading of the black letter law was conducted by the researcher with the specific purpose of identifying the extent to which each of the five codes taken forward from the coding work could be said to be present or absent within the provisions analysed. As these five codes were found to be the most frequently recurring across the literature on the social licence, it was determined that the relationship between law and the social licence would become clearer by searching for provisions in the relevant legislation that either (1) share the same purpose or underpinning as the codes, or (2) appear to either contrast with, or actively work against, the same.

The researcher approached the law being analysed by asking both objective questions that are capable of being repeated by others, and several subjective questions which arose naturally from the nature of the task at hand. The observations emerging from this approach were summarised in Chapter 7. In summary:-

- the provisions which had most in common with the social licence concept were those which related to public participation in decision making, information sharing, and the imposition of obligations on third parties;
- there were multiple subtle differences in drafting across the legislation which resulted in notable differences in effect from the stakeholder perspective;

- the participatory rights afforded to the public were nuanced across the legislation, such that a wide spectrum of approaches was observed and meaningful differences were seen to exist;
- there were examples of law being designed in a manner that is diametrically opposed to the social licence concept, and notable examples of proactive engagement obligations placed upon operators to ensure stakeholder participation; and
- wide discretion was regularly conferred upon the relevant authorities in the context of public participation in decision making, both in terms of provisions setting out (1) when public participation is required, and (2) what steps must be taken when public participation is required.

In short, a large number of specific provisions were identified as directly relevant for the purposes of comparing law with the social licence codes.

9.5. Comparing the law with the social licence codes

Building upon the above analysis, the researcher compared the relevant law with each separate code taken forward from the coding work summarised at Chapter 4. Again, both objective and subjective questions were asked of the legislation and a number of observations were made.

For example, the relevant law analysed through the lens of the stakeholder code produced the following observations:-

- law was inconsistent in terms of its approach to defining ‘stakeholders’, often resulting in an ‘indirect’ ranking of stakeholders;
- some of the relevant legislation operated to restrict public participation whilst others provided for a level of public participation;
- the concept of ‘community’, both in a literal and interpretive sense (i.e. the use of concepts akin to the broad idea of ‘a community’) did not appear in a majority of the sources reviewed;
- whilst ‘interest’ and ‘impact’ were regularly used as criteria that must be met before participatory rights are afforded to stakeholders, it was normally a matter for the relevant authorities to decide whether a stakeholder had a legitimate ‘interest’ or claim to ‘impact’; and
- given that the social licence concept is malleable enough to allow for anyone to potentially self-define as a stakeholder and become involved, the above represents a clear divergence between the social licence and law.

All observations emerging from this analysis were summarised in Chapter 7. In general, the variety of legislative approaches observed demonstrated that law can ultimately be drafted in a way which is closer to the social licence in terms of its practical effect. On the basis that law is a formal expression of policy intent, where the policy intent is to increase public participation or information sharing there were examples within the relevant law of provisions that could be adopted to achieve these aims. Where the policy intent is the opposite, there were examples within the relevant law of alternative provisions. This suggested that, viewed through the lens of the social licence, the various approaches observed in the relevant legislation could be viewed as existing on a spectrum.

9.6. Abductive reasoning and the Spectrum Model

From the work undertaken by the researcher in (1) reviewing the social licence literature, (2) coding the same sources, (3) synthesising the relevant law, (4) analysing the law, and (5) comparing the law to the codes, a model was formulated for expressing and understanding the relationship between law and the social licence concept. This has been termed the Spectrum Model by the researcher. The development of this model was influenced by, and expands on the IAP2.org model, referred to in Chapter 8.

As per Chapter 8, it was determined that the observations summarised in Chapter 7 could be reduced to a broad consistent observation that applied across each of the codes; black letter law is capable of being drafted in a multiplicity of ways such that it can, depending on the underpinning policy intention of the drafter, either provide for or actively restrict stakeholder rights. Whilst the detail of the specific observations made in Chapter 7 remains important, this simplification enabled the research to emphasise an important temporal dimension to the task of considering the relationship between law and the social licence. From this observation, there emerged two different contexts to the task of considering the relationship between law and the social licence: (1) the practical present, and (2) the theoretical future. In other words, the relationship between the social licence and law insofar as it is currently drafted is a different matter to the relationship between the social licence and law insofar as it is capable of being drafted.

It was further outlined that, through the research, the researcher had demonstrated that the social licence is dimorphic, existing in both a metaphorical form and in as a tool of measurement. This observation was based on the variety of approaches observed within the relevant law that emerged from comparing the law to the social licence codes, i.e. via using the social licence codes as a yardstick against which to assess the legislation. Alternative examples of the social licence existing as a dimorphic concept were cited, such as Boutilier and Thompson's representation of the social licence via a hierarchical model wherein society perceptions are measured[681]. Further, the work of IAP2 in establishing the 'Spectrum of Public Participation' in 2007 was also cited as an example of using spectra to visually represent the relationship between any objective approach to implementing public participation and the intangible standard of achieving 'impact'[682]. It has been offered that in measuring legislative provisions by reference to the social licence and representing the outcome via a spectrum, the researcher is advocating for a similar conceptualisation of the relationship between law and the social licence.

In the current research, the relevant law has been examined through the lens of various component parts of the social licence, i.e. the social licence codes. A number of objective and subjective questions were considered by the researcher in relation to each code in order to identify the extent to which the relevant law could be said to share any commonality with the codes. Whilst the researcher does not comment on

[681] R. Boutilier *et al*, 'From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business' (2012) International Mine Management Proceedings 227-237, p.233 <https://www.semanticscholar.org/paper/From-Metaphor-to-Management-Tool-How-the-Social-to-Boutilier-Black/c6e7d9985e94abe550563db51952649656b8d14c> accessed 1 October 2020

[682] International Association for Public Participation, 'IAP2 Spectrum of Public Participation' (*IAP2.org*, 2018*)* <https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf> accessed 1 October 2020

whether or not commonality with the underlying principles in each code is desirable, in designing the research in this way the codes have each been used as a standard for law to be assessed against. The results of that assessment have shown that there are a variety of approaches across the sources of law considered, such that it can be observed that some sources share more in common with the codes than other sources. It follows that it should be theoretically possible to express the commonality observed in a series of spectra, with full commonality with the individual social licence code one pole on the spectrum and zero commonality at the other end of the spectrum. Visual representations of this approach were provided in Chapter 8.

It was further determined that an infinite spectrum must be used in order to accurately represent the relationship between the social licence and law for two reasons:-

(1) to reflect the impossibility of commonality between law and beyond compliance for the reasons previously outlined; and
(2) to reflect the variety of practical reasons why law will struggle to share complete commonality with the social licence concept.

Visually representing the relationship between law and the social licence as an infinite spectrum essentially implies that the social licence is an ‘ideal’ that a policy-maker may determine that law should strive to meet through its drafting. Accordingly, practical usages emerged in Chapter 8 that utilised the Spectrum Model for this purpose. In particular, it was noted a comparative law exercise could be undertaken in order to unlock the utility of the Spectrum Model. The basic parameters of this exercise were set out in Chapter 8.

The ultimate utility of the Spectrum Model as a visual representation of the relationship between law and the social licence, when the social licence is used in its measurement form, is as follows: *where the policy intention behind legal drafting relates to the social licence, either in terms of a desire to increase or decrease commonality between law and the social licence, a comparative exercise that incorporates the above approach may provide evidence of alternative approaches already existing in law that, in theory, could be adopted to meet the policy intention.*

Returning to the question 'what is the relationship between the social licence and law?', the following answer is provided as a result of the research summarised in this thesis:-

- depending upon the policy intent underpinning the legal drafting, legislation can be designed so as to be composed of, and/or focused on providing for, the same component concepts of which the social licence is composed;
- as law is capable of being reformed, to the extent that the social licence is capable of objective definition it may serve as a measurement of the extent to which the *current* legal framework shares any commonality with the principles of the social licence;
- this can be visually represented in the Spectrum Model, where law is measured on an infinite spectrum against the unobtainable 'ideal' of full commonality with the social licence, with the spectrum representing the scope for law to be amended such that it is closer to the social licence in terms of how it provides for societal involvement in decision making; and

- understanding the relationship between law and the social licence in this way would enable policy makers to rely upon the principles of the social licence as a basis for designing law, wherein the Spectrum Model was utilised as the basis for comparisons between competing approaches in law to providing for public participation.

9.7. Research utility

Returning briefly to the Scottish Government statements of October 2017 and October 2019 that opened this thesis, it will be recalled that the decision to effectively ban fracking was based on there being no social licence for the activity in Scotland. Invocation of this concept by the Scottish Government as part of its decision making heavily implies that the social licence was viewed as a pre-requisite to lawful operations, i.e. before the existing legal framework would be allowed to determine its various permissions to operate. In other words, one could view the Scottish Government to be inadvertently critiquing its own legislative framework by effectively pre-empting various processes by concluding that there was no social licence for fracking.

For example, as identified in this thesis, there already exist multiple public participation provisions across the legislation dealing with the various legal permissions that a hypothetical fracking operator would need to obtain. It could be argued that, if there were no social licence for fracking, this would become apparent if legal permission to operate were applied for by a prospective operator and concerns were raised via representation to the environmental regulator or the planning authority. That the

Scottish Government felt compelled to pre-empt any regulatory decision making in this respect could suggest a tacit critique by them that the current legislative framework is not suitable for regulating activities such that societal concerns are accommodated in decision making.

The utility of the current research should be viewed with the above in mind. The researcher makes no criticism of the Scottish Government for invoking the social licence concept. However, to the extent that its usage implies that traditional legal regulation is lacking, the current research has demonstrated that it is theoretically possible to design law such that it has more in common with the component parts of the social licence in terms of what the concept purports to offer stakeholder networks. To the extent that the Scottish Government's reference to the social licence has resulted in it being deemed an 'ideal' or a prerequisite for socially contested activities in Scotland, a methodical basis has now been established to (1) understand the relationship between law and the social licence, and (2) meaningfully consider how Scottish law could be amended to incorporate elements of the social licence concept.

Bibliography

Statutes and statutory instruments

1. Climate Change (Scotland) Act 2009
2. Community Empowerment (Scotland) Act 2015
3. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1
4. Environment Act 1995
5. Environmental Assessment (Scotland) Act 2005
6. The Environmental Authorisations (Scotland) Regulations 2018
7. Local Government in Scotland Act 2003
8. Planning etc. (Scotland) Act 2006
9. The Pollution Prevention and Control (Scotland) Regulations 2012
10. Scotland Act 1998
11. The Conservation (Natural Habitats, &c.) Regulations 1994
12. The Control of Major Accident Hazards Regulations 2015
13. The Environmental Authorisations (Scotland) Regulations 2018
14. The European Union (Continuity) (Scotland) Act 2021
15. The Management of Extractive Waste (Scotland) Regulations 2010
16. The Petroleum Act 1998

17. The Pollution Prevention and Control (Scotland) Regulations 2012

18. The Town and Country (General Permitted Development) (Scotland) Order 1992

19. The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013

20. The Town and Country Planning (Development Planning) (Scotland) Regulations 2008

21. The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017

22. The Town and Country Planning (Scotland) Act 1997

23. The Water Environment (Controlled Activities) (Scotland) Regulations 2011

EU legislation and international treaties and conventions

24. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1

25. The UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice, The Aarhus Convention (Aarhus, 1998)

26. United Nations Conference of the Parties, The Paris Agreement, (December 2015) <https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf> accessed 10 September 2020

27. United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I) 1992) <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> accessed 10 September 2020

28. United Nations, United Nations Convention On Biological Diversity, (1992) <https://www.cbd.int/doc/legal/cbd-en.pdf> accessed 10 September 2020

29. Te Tiriti o Waitangi, 1840

30. Waitangi Tribunal, 'The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal' (undated) <https://waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf ->

Books

31. A. Brymen, Social Research Methods (Oxford University Press, 2008)

32. C. Peirce et al, Collected papers of Charles Sanders Peirce Vol. 5 Pragmatism and Pragmaticism (Cambridge, Mass. Belknap Press of Harvard University Press 1958)

33. D. Walton, Abductive Reasoning (The University of Alabama Press, 2014)

34. G. Curran, 'Unconventional Gas and Social Licence: Locking the Gate?' in, G. Curran, Sustainability and Energy Politics (Palgrave, 2015)

35. J. Josephson et al, Abductive inference : computation, philosophy, technology (Cambridge University Press 1994)

36. J. Morrison, The Social Licence: How to Keep Your Organization Legitimate (Palgrave Macmillan, 2014)

37. J. Saldaña, The Coding Manual for Qualitative Researchers (SAGE Publications, 2013)

38. M. Alramahi, Oil and gas law in the UK (Bloomsbury Professional 2013)

39. N. Simmonds, The Decline of Juridical Reason: Doctrine and Theory in the Legal Order (Manchester University Press, 1984)

40. P. Hurley, A concise introduction to logic (7th edn, Wadsworth Pub. 2000)

Contributions to edited books

41. A. Mills et al (eds), Encyclopedia of Case Study Research (SAGE Publications, 2010)

42. G. Gordon, 'Petroleum Licensing', in Greg Gordon, John Paterson and Emre Üşsenmez (eds), Oil and gas law : current practice and emerging trends (2nd edn, Dundee University Press 2011)

43. G. Little, 'Principles, sources and institutions of environmental law in Scotland' in: F McManus (ed), Environmental Law in Scotland (Thomsons/W Green, 2007)

44. I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) SME mining engineering handbook (SME, 2011) pp.1779–1796

45. S. Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M. Reimen et al (eds), The Oxford Handbook of Comparative Law (Oxford University Press, 2008)

46. T Hutchinson, ‘Doctrinal Research: Researching the Jury’ in D. Watkins and M. Burton (eds), Research Methods in Law (Routledge, 2013)

Journal articles

47. A. Baumber, 'Energy cropping and social licence: What's trust got to do with it?' (2018) 108 Biomass and Bioenergy

48. A. Warhurst, ‘Corporate citizenship and corporate social investment: drivers of tri-sector partnerships’ (2001) 1 Journal of Corporate Citizenship 57

49. A. Watterson and W. Dinan, ‘Public Health and Unconventional Oil and Gas Extraction Including Fracking: Global Lessons from a Scottish Government Review’ (2018) 15(4) Int J Environ Res Public Health 675

50. B. Collins and M. Kumral, ‘A critical perspective on social license to operate terminology for Canada’s most vulnerable mining communities’ (2021) 8 The Extractive Industries and Society

51. B. Harvey and S. Bice, ‘Social impact assessment, social development programmes and social licence to operate: tensions and contradictions in intent and practice in the extractive sector’ (2014) 32(4) Impact Assessment and Project Appraisal 327-335

52. C. Cullen-Knox et al, 'Contemporary Challenges in Environmental Governance: Technology, governance and the social licence' (2017) 27 Environmental Policy and Governance 3

53. C. Gallois et al, 'The Language of Science and Social Licence to Operate' (2016) 36 Journal of Language and Social Psychology 45

54. C. Gough, ‘Understanding key elements in establishing a social license for CCS: An empirical approach’ (2018) 68 International Journal of Greenhouse Gas Control 16-25

55. D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model' (2018) 73 Environmental Impact Assessment Review 31

56. H. Heikkinen et al, 'Challenges in acquiring a social licence to mine in the globalising Arctic' (2013) 52 Polar Record 399

57. H. Murphy-Gregory, ‘Governance via persuasion: environmental NGOs and the social licence to operate (2018) 27(2) Environmental Politics 320–340

58. H. Luke et al, ‘Unconventional gas development in Australia: A critical review of its social license’ (2018) 5 The Extractive Industries and Society 648-662

59. J. Colton et al, ‘Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper’ (May 2016) 9 (20) SPP Research Papers

60. J. Everingham, ‘Towards social sustainability of mining: The contribution of new directions in impact assessment and local governance’ (2007) 57 Greener Management International 2007 91-103

61. J. Gehman et al, 'Comparative Analysis of Hydraulic Fracturing Wastewater Practices in Unconventional Shale Development: Newspaper Coverage of Stakeholder Concerns and Social License to Operate' (2016) 8 Sustainability

62. J. Górski, ‘Social Licence to operate (SLO) in the Extractive and Energy Sectors – Introduction’ (2020) 1 OGEL

63. J. Owen and D. Kemp, 'Social licence and mining: A critical perspective' (2013) 38 Resources Policy 29

64. J. Prno and D. Scott Slocombe, 'Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 Resources Policy 346

65. J. Syn, ‘The Social License: Empowering Communities and a Better Way Forward’ (2014) 28 Social Epistemology 3-4

66. J. Whitton et al, 'Shale gas governance in the United Kingdom and the United States: Opportunities for public participation and the implications for social justice' (2017) 26 Energy Research & Social Science 11

67. K. Moffat and A. Zhang, ‘The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining’ (2013) Resources Policy 39(1) 61–70

68. K. Moffat et al, 'The social licence to operate: a critical review' (2016) 89 Forestry 477

69. K. Yongvanich, and J. Guthrie, ‘Legitimation strategies in Australian mining extended performance reporting’ (2007) 11(3) Journal of Human Resource Costing & Accounting 156-177

70. L. Mercer-Mapstone et al, ‘What makes stakeholder engagement in social licence ‘meaningful’? Practitioners’ conceptualisations of dialogue’ (2018) 27 Rural Society 1-17

71. L. Mercer-Mapstone et al, 'Conceptualising the role of dialogue in social licence to operate' (2017) 54 Resources Policy 137

72. L. Poppo et al, ‘Repairing public trust in organisations’ (2010) 13 Corporate Reputation. Review 124–141

73. M. Brueckner and M. Eabrasu, ‘Pinning down the social license to operate (SLO): The problem of normative Complexity’ (2018) 59 Resources Policy 217-226

74. N. Hall and T. Jeanneret, ‘Social licence to operate: an opportunity to enhance CSR for deeper communication and engagement’ (2015) 20 Corporate 213–227

75. N. Mason, ‘Environmental governance in Sierra Leone's mining sector: A critical analysis’ (2014) 41 Resources Policy 152–159

76. R. Parsons et al, ‘Integrating impact and relational dimensions of social licence and social impact assessment’ (2014) 32 Impact Assessment and Project Appraisal 273

77. R. Ford and K. Williams, 'How can social acceptability research in Australian forests inform social licence to operate?' (2016) 89 Forestry 512

78. S. Billing, ‘Using public comments to gauge social licence to operate for finfish aquaculture: Lessons from Scotland’ (2018) 165 Ocean and Coastal Management 401-415

79. S. Gunster and R. Neubauer, '(De)legitimating extractivism: the shifting politics of social licence' (2019) 28 Environmental Politics 707

80. S. Stephens et al, ‘The social license to operate in the onshore wind energy industry: A comparative case study of Scotland and South Africa’ (2021) 148 Energy Policy

81. S. Wheeler, 'Global production, CSR and human rights: the courts of public opinion and the social licence to operate' (2015) 19 The International Journal of Human Rights 757

82. W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru' (2016) 89 Forestry 552

Online journals

83. B. Crowley, ‘Crowley in the Globe: where does one apply for a ‘social licence’?’ (2014) The MacDonald Laurier Institute <http://www.macdonaldlaurier.ca/crowley-in-the-globewhere-does-one-apply-for-a-social-licence/> accessed 3 June 2016

84. D. Bursey, ‘Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries’ (2014) 7(2) British Council of British Columbia Environment and Energy Bulletin 1-10 <http://www.bcbc.com/content/1708/EEBv7n2.pdf> accessed 3 June 2016

85. D. Vogel, ‘Private global business regulation’ (2008) 11 Annual Review of Political Science 261-282 <http://faculty.haas.berkeley.edu/Vogel/private_global_bus_reg.pdf> accessed 3 June 2016

86. G. Lynch-Wood and D. Williamson, ‘The Social Licence as a Form of Regulation for Small and Medium Enterprises’ (2007) Journal of Law and Society 34(3) 321-341 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6478.2007.00395.x/abstract> accessed 3 June 2016

87. I. de Melo-Martin, ‘The role of ethics in shale gas policies’ (2014) 470-471 Science of The Total Environment 1114–1119 <http://www.sciencedirect.com/science/article/pii/S0048969713012321> accessed 22 April 2019

88. I. van Putten et al, 'The emergence of social licence necessitates reforms in environmental regulation' (2018) 23(3) Ecology and Society <https://www.ecologyandsociety.org/vol23/iss3/art24/> accessed 21 November 2021

89. J. Nelsen, ‘Social licence to operate’ (2006) International Journal Mining, Reclamation and Environment 20(3) 161–162 <http://www.tandfonline.com/doi/abs/10.1080/17480930600804182> accessed 6 April 2016

90. J. Owen and D. Kemp, ‘Social licence and mining: A critical perspective’ (2013) Resources Policy 38(1) 29-35 <http://www.sciencedirect.com/science/article/pii/S0301420712000529> accessed 3 June 2016

91. J. Prno, ‘An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry’ (2013) 38(4) Resources Policy 577–590 <http://www.sciencedirect.com/science/article/pii/S0301420713000810> accessed 3 June 2016

92. K. Ruckstuhl et al, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', 32(4) Impact Assessment and Project Appraisal 304-314 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.929782?journalCode=tiap20> accessed 6 April 2016

93. O. Salzmann et al, ‘Corporate License to Operate (LTO) – Review of the Literature and Research Options’ (2006) CSM Project Forum for Corporate Sustainability Management Forum for Corporate Sustainability Management IMD International Institute for Management Development IMD <https://studylib.net/doc/8811124/corporate-license-to-operate--lto--%E2%80%93-review-of-the-litera...> accessed 10 June 2020

94. R. Boutilier and I. Thomson, ‘Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue between Theory and Practice’ (2011) International Mine Management, p.4 <http://socialicense.com/publications.html> accessed 3 June 2016

95. R. Boutilier et al, ‘From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business’ (2012) International Mine Management Proceedings 227-237<http://www.stakeholder360.com/Boutilier_Black_Thomson_From_metapho r_to_mgmt_tool_w_AUSIMM_permission.pdf> accessed 6 April 2016

96. R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32(4) Impact Assessment and Project Appraisal 263-272 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.941141> accessed 19 March 2015

97. R. Heffron et al, 'The emergence of the ‘social licence to operate’ in the extractive industries?' (2018) Resources Policy <https://www.sciencedirect.com/science/article/pii/S0301420717304786> accessed 10 Jun 2020

98. R. Parsons & K. Moffat, ‘Constructing the Meaning of Social Licence’ (2014) 28(3-4) Social Epistemology 340-363 <http://www.tandfonline.com/doi/abs/10.1080/02691728.2014.922645> accessed 3 June 2016

99. R. Parsons et al, 'Maintaining legitimacy of a contested practice: how the minerals industry understands its ‘social licence to operate’' (2014) 41 Resources Policy 83–90 <http://www.sciencedirect.com/science/article/pii/S0301420714000336> accessed 6 April 2016

100. R. W. Howarth et al, 'Natural gas: Should fracking stop?' (2011) 477 Nature 271-275 <https://www.nature.com/nature/journal/v477/n7364/full/477271a.html> accessed 17 September 2015

101. S. Bice, 'What gives you a social licence? An exploration of the social licence to operate in the Australian mining industry' (2014) 3(1) Resources 62–80 <http://www.mdpi.com/2079-9276/3/1/62> accessed 3 June 2016

102. S. Gunningham et al, 'Social licence and environmental protection: why businesses go beyond compliance' (2004) 29 Law and Social Inquiry 307–341 <http://scholarship.law.berkeley.edu/facpubs/675/> accessed 27 May 2016

103. S. Joyce and I. Thomson, ‘Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America’ (2000) The Canadian Mining and Metallurgical Bulletin 93(1037) <http://oncommonground.ca/wp-content/downloads/license.htm> accessed 6 April 2016

104. S. Osborn et al, 'Methane contamination of drinking water accompanying gas-well drilling and hydraulic fracturing' (2008) 108(20) PNAS 8172-8176 <http://www.pnas.org/content/108/20/8172.full.pdf> accessed 17 September 2015

105. W. Beckerman, ‘Sustainable development: Is it a useful concept?’ (1994) 3 Environmental Values 191–209 <http://discovery.ucl.ac.uk/17881/> accessed 3 June 2016

106. W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru' (2016) 89 Forestry 552

Scottish and UK Government publications and statements

107. A. Kibble et al, Review of the Potential Public Health Impacts of Exposures to Chemical and Radioactive Pollutants as a Result of the Shale Gas Extraction Process (Crown/Public Health England, 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332837/PHE-CRCE-009_3-7-14.pdf> accessed 17 September 2015

108. D Griesbach et al, Talking 'Fracking': A Consultation on Unconventional Oil and Gas – Analysis of Responses (Scottish Government, October 2017) <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2017/10/talking-fracking-consultation-unconventional-oil-gas-analysis-responses/documents/00525464-pdf/00525464-pdf/govscot%3Adocument> accessed 22 April 2019

109. House of Commons Environmental Audit Committee, Environmental Risks of Fracking: Eighth Report of Session 2014–15 (Hansard, 2015) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/856/856.pdf> accessed 22 April 2019

110. P. Wheelhouse MSP, 'Unconventional oil and gas: minister's statement', (Gov.scot, 3 October 2017) <https://www.gov.scot/publications/unconventional-oil-and-gas-statement-2017/> accessed 22 April 2019

111. P. Wheelhouse MSP, 'Unconventional oil and gas: minister's statement', (Gov.scot, 3 October 2019) <https://www.gov.scot/publications/unconventional-oil-gas/> accessed 22 November 2021

112. P. Wheelhouse, 'Scotland's Unconventional Oil and Gas Policy' (Theyworkforyou, 3 October 2019) <https://www.theyworkforyou.com/sp/?id=2019-10-03.25.2> accessed 4 September 2021

113. The Scottish Government, A Guide to the Planning System in Scotland (The Scottish Government, 2009) p.2 <https://www.gov.scot/publications/guide-planning-system-scotland/> accessed 15 September 2020#

114. The Scottish Government, Ambition.Opportunity.Place: Scotland's Third National Planning Framework (The Scottish Government, 23 June 2014) <https://www.gov.scot/publications/national-planning-framework-3/> accessed 15 September 2020

115. The Scottish Government, Consultation On Environmental Principles and Governance In Scotland (February, 2019) <https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/pages/3/> accessed 10 September 2020

116. The Scottish Government, National Planning Framework 3: Participation Statement (The Scottish Government, January 2014) <https://www2.gov.scot/Resource/0044/00441807.pdf> accessed 29 September 2020

117. The Scottish Government, Participation Requests under the Community Empowerment (Scotland) Act 2015 Guidance (The Scottish Government, April 2017) <https://www.gov.scot/publications/community-empowerment-participation-request-guidance/> accessed 18 September 2020

118. The Scottish Government, 'Places, People and Planning consultation: Scottish Ministers' position statement' (gov.scot, 29 June 2017) <https://www.gov.scot/publications/places-people-planning-position-statement/> accessed 15 September 2020

119. The Scottish Government, 'Planning and architecture: Development plans' (gov.scot, undated) <https://www.gov.scot/policies/planning-architecture/development-plans/> accessed 15 September 2020

120. The Scottish Government, Planning Circular: The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (Scottish Planning Series Planning Circular 1/2017, 16 May 2017) <https://www.gov.scot/publications/planning-circular-1-2017-environmental-impact-assessment-regulations-2017/pages/3/> accessed 18 September 2020

121. The Scottish Government, 'Policy: Oil and Gas – Unconventional Oil and Gas' (Gov.scot, undated) <https://www.gov.scot/policies/oil-and-gas/unconventional-oil-and-gas/#:~:text=On%2028%20January%202015%2C%20we,far%2Dreaching%20investigation%20into%20UOG.> accessed 21 September 2020

122. The Scottish Government, Review of the Scottish Planning System – Planning Bill (The Scottish Government, June 2017) <https://www.gov.scot/publications/places-people-planning-position-statement/> accessed 15 September 2020

123. The Scottish Government, Scotland's Fourth National Planning Framework Position Statement (The Scottish Government, 26 November 2020) <https://www.gov.scot/publications/scotlands-fourth-national-planning-framework-position-statement/documents/> accessed 13 September 2021

124. The Scottish Government, 'Scottish Planning Policy - Legal' (The Scottish Government, December 2014) <https://www.gov.scot/publications/scottish-planning-policy/> accessed 13 September 2021

125. The Scottish Government, 'Scottish Planning Policy' (The Scottish Government, December 2020) <https://www.gov.scot/publications/scottish-planning-policy/documents/> accessed 13 September 2021

126. The Scottish Government, Strategic Development Plan Areas (The Scottish Government, 2013) para 4 <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2013/03/circular-1-2013-strategic-development-plan-areas/documents/00416936-pdf/00416936-pdf/govscot%3Adocument/00416936.pdf> accessed 15 September 2020

127. The Scottish Government, Talking 'Fracking' A Consultation on Unconventional Oil and Gas (The Scottish Government, January 2017) <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2017/01/talking-fracking-consultation-unconventional-oil-gas/documents/00513575-pdf/00513575-pdf/govscot%3Adocument/00513575.pdf> accessed 4 September 2021

128. The Scottish Government, Unconventional Oil And Gas: Regulatory Workshop, Overview Of The Current Regulatory Framework (November, 2016) <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2018/09/unconventional-oil-and-gas-regulation-workshop/documents/unconventional-oil-and-gas-regulation-workshop---overview-of-the-current-regulatory-framework/unconventional-oil-and-gas-regulation-workshop---overview-of-the-current-regulatory-framework/govscot:document/?forceDownload=true> accessed 11 September 2020

Websites and articles

129. B. Walsh, 'The Seismic Link Between Fracking and Earthquakes', TIME (New York City, 1 May 2014) <www.time.com/84225/fracking-and-earthquake-link/> accessed 17 September 2015

130. BEIS, Government ends support for fracking (BEIS, 2 November 2019) <https://www.gov.uk/government/news/government-ends-support-for-fracking> accessed 13 September 2021

131. C. Mooney, 'The Truth about Fracking', (Scientific American, November 2011) <www.nature.com/scientificamerican/journal/v305/n5/full/scientificamerican1111-80.html> accessed 17 September 2015

132. Cambridge Core, ‘About’ (Cambridge University Press) <https://www.cambridge.org/core/about> accessed 13 June 2021

133. Concerned Health Professionals of NY, Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking, (2nd edition, 10 July 2014) <www.concernedhealthny.org/wp-content/uploads/2014/07/CHPNY-Fracking-Compendium.pdf> accessed 22 April 2019

134. DECC, About shale gas and hydraulic fracturing (fracking) (DECC, 19 December 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/268017/About_shale_gas_and_hydraulic_fracturing_Dec_2013.pdf> accessed 12 September 2020>

135. DECC, About shale gas and hydraulic fracturing (fracking) (DECC, 19 December 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/268017/About_shale_gas_and_hydraulic_fracturing_Dec_2013.pdf> accessed 12 September 2020 DECC, Onshore oil and gas exploration in the UK: regulation and best practice (Scotland) (DECC, 2013)

136. DECC, Onshore oil and gas exploration in the UK: regulation and best practice (Scotland) (DECC, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265984/Onshore_UK_oil_and_gas_exploration_Scotland_Dec13_contents.pdf> accessed 11 September 2020

137. E. Cantarow, ‘Meet Anthony Ingraffea—From Industry Insider to Implacable Fracking Opponent’ (Ecowatch, 2 January 2013)

<http://ecowatch.com/2013/01/02/industry-insider-to-fracking-opponent/> accessed 17 September 2015

138. Elsevier, ‘Science Direct’ (Elsevier.com, 2021) <https://www.elsevier.com/solutions/sciencedirect> accessed 13 June 2021

139. Emerald Insight, ‘Who we are’ (Emerald Publishing, 2021) <http://www.emeraldgrouppublishing.com/about/index.htm> accessed 13 June 2021

140. Energy and Climate Change Directorate, ‘Parliamentary statement by former Minister for Energy, Connectivity and Islands: EIR release’ (Gov.scot, 20 October 2021) <https://www.gov.scot/publications/foi-202100236426/> accessed 22 November 2021

141. Freight Transport Association, The Logistics Report 2014, (PWC, 2014) <https://www.pwc.co.uk/transport-logistics/assets/lr14-report-web-060514.pdf> accessed 17 September 2015

142. Google, ‘Google Scholar’ (Google, 2021) <https://scholar.google.com/> accessed 13 June 2021

143. Health Protection Scotland, ‘Unconventional Oil and Gas’ (HPS.scot, 8 December 2016) <https://www.hps.scot.nhs.uk/a-to-z-of-topics/unconventional-oil-and-gas/> accessed 4 September 2021

144. IEA, The Golden Rules for a Golden Age of Gas: World Energy Outlook: Special Report on Unconventional Gas, (OECD/ IEA, Paris 2012) <http://www.worldenergyoutlook.org/goldenrules/> accessed 3 June 2016

145. International Association for Public Participation, ‘About Us’ (IAP2.org, undated) <https://www.iap2.org/page/about#:~:text=Our%20mission%20is%20to%20advance,international%20volunteer%20Board%20of%20Directors.>

146. International Association for Public Participation, ‘Core Values’ (IAP2.org, 2017) <https://www.iap2.org/page/corevalues> accessed 1 October 2020

147. International Association for Public Participation, ‘History’ (IAP2.org, undated) <https://www.iap2.org/page/history> accessed 8 June 2021

148. International Association for Public Participation, ‘IAP2 Spectrum of Public Participation’ (IAP2.org, 2018) <https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf> accessed 1 October 2020

149. JSTOR, ‘About JSTOR’ (JSTOR, 2021) <https://about.jstor.org/> accessed 13 June 2021

150. Land Use Consultants Ltd, Environmental Report for the SEA of the Scottish Government's Preferred Policy Position on Unconventional Oil and Gas in Scotland (Final Report, October 2018) <https://www.gov.scot/publications/partial-business-regulatory-impact-assessment-unconventional-oil-gas-policy/> accessed 18 September 2020

151. L. Brooks, ‘Scotland announces moratorium on fracking for shale gas’ (The Guardian, 28 January 2015) <http://www.theguardian.com/environment/2015/jan/28/scotland-announces-moratorium-on-fracking-for-shale-gas> accessed 22 April 2019

152. MDPI, ‘About’ (mdpi.com, 2021) <https://www.mdpi.com/about> accessed 13 June 2021

153. Ministry of Defence (MoD) sites in Scotland are exempt from the provisions of Environmental Authorisations (Scotland) Regulations – see Scottish Environment Protection Agency, ‘Nuclear industry’ (SEPA) <https://www.sepa.org.uk/regulations/radioactive-substances/nuclear-industry/> accessed 12 September 2020

154. Oxford Academic, ‘About us’ (Oxford University Press, 2021) <https://academic.oup.com/journals/pages/about_us?> accessed 13 June 2021

155. ResearchGate, ‘About’ (ResearchGate, 2021) <https://www.researchgate.net/about> accessed 13 June 2021

156. SEPA, ‘Environmental Authorisations (Scotland) Regulations 2018’ (sepa.org.uk, undated) <https://www.sepa.org.uk/regulations/how-we-regulate/environmental-authorisations-scotland-regulations-2018/> accessed 27 November 2021

157. Springer Link, ‘Springer Link’ (Springer Link, 2021) <https://link.springer.com/> accessed 13 June 2021

158. Taylor & Francis, ‘About Taylor & Francis’ (Taylorandfrancis.com, 2021) <https://taylorandfrancis.com/about/> accessed 13 June 2021

159. The Health and Safety Executive for Northern Ireland, ‘About HSENI’ HSENI <https://www.hseni.gov.uk/about-hseni> accessed 11 September 2020

160. The Health and Safety Executive, ‘Our Role as a Regulator’ HSE <https://www.hse.gov.uk/enforce/our-role-as-regulator.htm> accessed 11 September 2020

161. United Kingdom Onshore Oil and Gas, ‘Drilling and the Hydraulic Fracturing (Fracking) Process’ (UKOOG, 2013) <http://www.ukoog.org.uk/onshore-extraction/drilling-process> accessed 17 September 2015Wiley Online Library, ‘About Wiley Online Library’ (onlinelibrary.wiley.com, 2021) <https://onlinelibrary.wiley.com/> accessed 13 June 2021

162. Metgasco, ‘Megasco update’ (*Metgasco.com.au*, 20 May 2014) <https://www.metgasco.com.au/asx-announcements/metgasco-update> accessed 25 May 2022

Annex 1 – Information request and response

The researcher submitted a request for information to the Scottish Government under both the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 on 6 September 2021. The Scottish Government responded on 1 October 2021. Both the request and response were published online on 20 October 2021 at https://www.gov.scot/publications/foi-202100236426/. The text below reproduces the content of the request and response as displayed online.

FOI reference: FOI/202100236426

Date received: 6 Sep 2021

Date responded: 1 Oct 2021

Information requested

In reference to matters detailed in the 2019 Parliamentary statement made by Mr Paul Wheelhouse MSP, wherein he stated the Scottish Government's final policy position was not to support development of unconventional oil and gas. Can you provide the following information?

1. What was the basis of the Scottish Government's conclusion that there was no social licence for fracking in Scotland?
2. Which theoretical approach to the social licence concept, e.g. in terms of its definition or measurement, if any, did the Scottish Government adopt or have in mind when reaching this conclusion?

3. Did the Scottish Government consider any of the criticisms of the social licence concept that have been raised in recent years? If so, how were these accommodated?
4. To what extent did the Scottish Government consider whether the absence of a response from a member of the public could be considered an indication of either tacit acceptance or indifference to fracking? If yes, what approach was taken?
5. Did the Scottish Government attempt to model or measure the level of social licence afforded by members of the public? If yes, what findings were produced? If no, was this a conscious choice?
6. To what extent did the Scottish Government consider whether the lack of a social licence, however defined and modelled, could be attributable to reasons beyond the public perception of the activity? For example, did the Scottish Government consider whether a link could exist between the absence of a social licence and the design of the prevailing legal regime isolated from the risks of the activity?
7. Did the Scottish Government adopt a process of ranking stakeholders by reference to the impact or effect of fracking upon them, or by their direct interest in the activity? If so, what process was undertaken and what ranking was employed? For example, did the Scottish Government seek to attach weight depending on the proximity of the stakeholder to potential fracking sites?
8. To what extent did the Scottish Government consider the level of social licence already afforded to distinct operators, as opposed to fracking as an activity, as part of its decision making? For example, did the Scottish Government ever consider that a specific operator with an existing social licence should be afforded an opportunity to apply for necessary legal permissions to operate?

9. Does it follow from the Scottish Government's position on fracking that if the activity can gain and evidence a social licence, it will be supported by the Government and/or have its effective ban removed?
10. Does the Scottish Government have a position on what would need to be done by industry parties to gain a social licence for fracking as an activity? What evidence would the Scottish Government accept as proof of such a social licence?
11. If comparisons with a conventional licence are followed, who awards or grants a social licence? Similarly, by what procedure and standards of engagement are a 'social licensee' judged?

Response

Question 1 – As the former Minister for Energy, Connectivity and Islands stated in the Scottish Parliament on 3 October 2019 (the statement to which you referred in your request) the Scottish Government undertook one of the most far-reaching investigations of any government, anywhere, into unconventional oil and gas (which includes hydraulic fracturing, or 'fracking', and coalbed methane dewatering).

These investigations included commissioning research studies, undertaking public consultations and statutory assessments (information about these activities is available on the Scottish Government website here). The evidence collected over the course of these activities assisted Scottish Ministers make their decision in respect of the finalised policy position on unconventional oil and gas, as set out in the statement.

Questions 2, 3, 5, 6, 8, 9, 10 and 11 - The concept of social licensing was not considered by the Scottish Government in the course of the unconventional oil and gas policy decision making process.

However, it did feature in some responses to the 2017 Talking Fracking consultation. Over 60,000 responses to the consultation were received, including 21,077 standard campaign responses, 31,033 petition signatories and 8,425 substantive responses (drafted by respondents using their own words, and non-standard campaign responses).

Annex 1 of the consultation analysis report includes information about the various campaign responses received. The Broad Alliance - Communities Against Unconventional Oil and Gas Extraction promoted the use of model answers by respondents to the consultation questions, including use of the sentence 'It is already clear that there is no social licence for fracking in the currently licensed areas'.

In addition to references to 'social licences' in some campaign responses, of the 8,425 substantive responses received, 3,405 were published with the permission of the respondents. Of these, 66 included references to either 'social licence' or 'social license'.

The single reference to 'social licence' in the Ministerial statement to the Scottish Parliament on 3 October 2019, was in acknowledgement of the use of this term by a number of respondents to the Talking Fracking consultation in 2017.

Question 4 – An extensive campaign was conducted to raise awareness of the Talking Fracking public consultation. In 2016, a series of meetings was held with stakeholders

to give them an opportunity to discuss participation and engagement in the planned consultation on unconventional oil and gas. The meetings resulted in a participation commitment report which informed the development of materials for the 2017 Talking Fracking consultation. This included setting up a website dedicated to the consultation, featuring links to reports of research commissioned by the Scottish Government and inclusion of discussion tool-kits to help communities and other groups participate in the consultation. Over 60,000 responses were received which was the second highest response rate to a Scottish Government held public consultation, at that time.

Question 7 – The questions in the consultation paper were developed in line with the Scottish Government's quality assurance process (with a key role played by the Office of the Chief Social Researcher) to ensure that the consultation process was:

Transparent – provided access to clear, up-to-date and factual information at each stage of the consultation process.
Impartial – took all appropriate steps to avoid conflicts of interest and promote the preparation and presentation of unbiased information.
Participative – created opportunities for our stakeholders to actively participate in the consultation and its preparation.

Responding to the consultation suggested a direct interest, on the part of respondents, in potential 'fracking' activity in Scotland. In responding to the consultation, respondents were free to indicate their thoughts on the potential impact of unconventional oil and gas development on their local communities. However, no

additional weightings were applied to responses which included information specific to individual circumstances or location.

Annex 2 – Tables and figures

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Acceptance	25	69
Trust	21	53
Communities	20	41
Legitimacy	18	60
Criticisms	18	59
Environment as special	18	46
Stakeholders	18	30
Approval	18	22

Table 1 – Literal coding results (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Consent (Parent Code)	27	145
Stakeholders (Parent Code)	26	114
Engagement (Parent Code)	21	77
Relation to Law	24	71
Trust	21	53

Table 2 – Thematic results (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Consent (Parent code)	27	145
	Consisting of	
Consent (Child code)	5	41
Acceptance	25	69
Approval	18	22
Social Licence as tacit	6	7
Withheld	3	3
Psychological Identification	3	3

Table 3 – Consent parent code (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Stakeholder (parent code)	26	114
	Consisting of	
Stakeholders (child code)	18	30
Communities	20	41
Society	9	16
Public	6	11
Stakeholder network	6	9
Civil society	5	5
Affected Groups	2	2

Table 4 – Stakeholder parent code (Source: current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Relation to Law	24	71
	Consisting of	
Connected to Law	12	34
Separate to Law	12	20
Beyond Compliance	11	17

Table 5 – Relation to Law parent code (Source: Current research)

Code	Number of sources that included code (x/30)	Cumulative frequency across all sources
Engagement (Parent code)	21	77
	Consisting of	
Engagement (Child code)	11	16
Relationships	9	15
Communication	6	25
Consultation	5	6
Informed	5	7
Partnerships	4	4
Shared Values	2	2
Collaboration	1	2

Table 6 – Engagement parent code (Source: current research)

Public Body	Relevant responsibilities
Scottish Government/ Scottish Ministers	Legislate for the granting and regulation of onshore licences, determine their terms and conditions, and regulate the licensing process, including administration of existing licences.
Scottish Environment Protection Agency (SEPA)	Responsible for pollution prevention and control, protection of the water environment, and control of major accident hazards (with the Health and Safety Executive). Also a statutory consultee for major planning applications, Environmental Impact Assessments (EIAs), Strategic Environmental Assessments (SEAs), and minerals applications.
NatureScot	Licensing authority for wildlife and provides advisory role with regard to natural habitats. Also a statutory consultee for SEAs, EIAs, proposals that could affect Sites of Special Scientific Interest, National Scenic Areas, Special Protection Areas, and Special Areas of Conservation.
Planning Authorities/ Local Authorities	Planning Authorities are responsible for determining applications for planning permission. Local Authorities are responsible for air quality, waste management, and investigating and taking appropriate action where an activity is causing a statutory nuisance.

Table 7 – Relevant public bodies (source: current research)

Key	Environmental permitting			Other relevant environmental legislation						Planning law						
Yes / No / N/A	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
Is stakeholder defined?	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
Is it used in the legislation?	No	No	No	No	No	No	No	Yes	No	No	No	No	No	No	No	No
Is interest a defined term?	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
Is it used in the legislation?	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes	No	No	Yes	Yes
Is impact a defined term?	No	Yes	No	No	No	No	No	No	No	No	No	No	No	No	No	Yes
Is it used in the legislation?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	No	Yes	Yes
Are stakeholders ranked?	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No

Table 8 – Stakeholder questions objective (source: current research)

Key	Environmental permitting			Other relevant environmental legislation						Planning law						
Yes / No / N/A	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
Use of stakeholder synonyms?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Use of interest synonyms?	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	No	No
Use of impact synonyms?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Indirect ranking of stakeholders?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Use of ‘community’ or synonyms thereof?	No	No	No	No	No	No	Yes	Yes	No	No	No	Yes	No	Yes	Yes	No

Table 9 – Stakeholder questions subjective (source: current research)

Key Yes / No / N/A	Environmental permitting			Other relevant environmental legislation						Planning law						
	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
1. Mandatory public disclosure of info obtained via legislation?																
2. Exemptions from or exceptions to the above?																
3. Pre-decision, operator to stakeholder info sharing is always mandatory?																
4. If not, operator to stakeholder info sharing is sometimes mandatory?																
5. Pre-decision, authority to stakeholder info sharing is always mandatory?																
6. If not, operator to stakeholder info sharing is sometimes mandatory?																

Table 10 – Information sharing questions (Source: current research)

Key Yes / No / N/A	Environmental permitting			Other relevant environmental legislation						Planning law						
	PPC	CAR	EASR	CNHR	COMAH	MEWS	EA95	CC	EASA	NPF	DP	CE	DO	PAC	PP	EIA
7. Full stakeholder participation in decisions?																
8. Some stakeholders participate in all decisions?																
9. Some stakeholders participate in some decisions?																
10. Do authorities have discretion to allow stakeholder participation?																
11. Must authorities always consider stakeholder representations?																
12. Authorities sometimes required to consider representations?																
13. Authorities must explain their public participation processes?																
14. Authorities must explain their decisions to stakeholders?																
15. Stakeholders have the right to appeal decisions?																

Table 11 – Stakeholder participation questions (Source: current research)

INCREASING IMPACT ON THE DECISION

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

Table 12 - Spectrum of Public Participation (Source: International Association for Public Participation, 'IAP2 Spectrum of Public Participation' (IAP2.org, 2018))

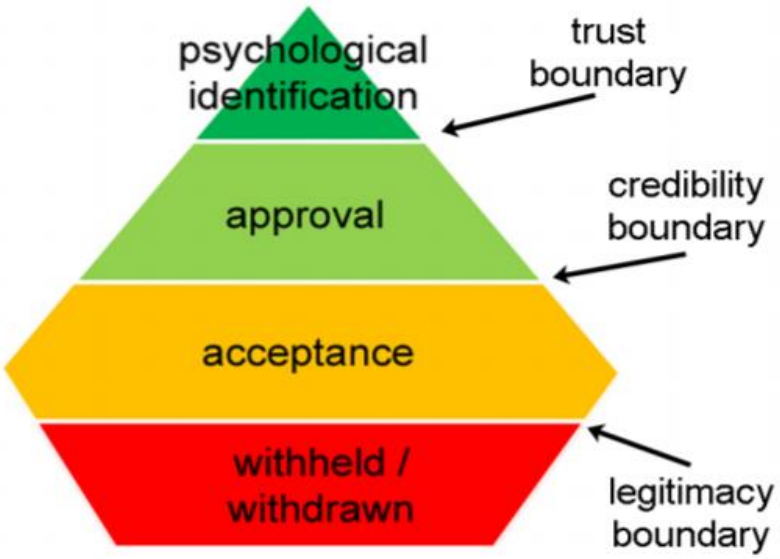

Figure 1: Thomson and Boutilier's Pyramid Model (Source: I. Thomson and R. Boutilier, 'Social licence to operate' in: P. Darling (ed) SME mining engineering handbook)

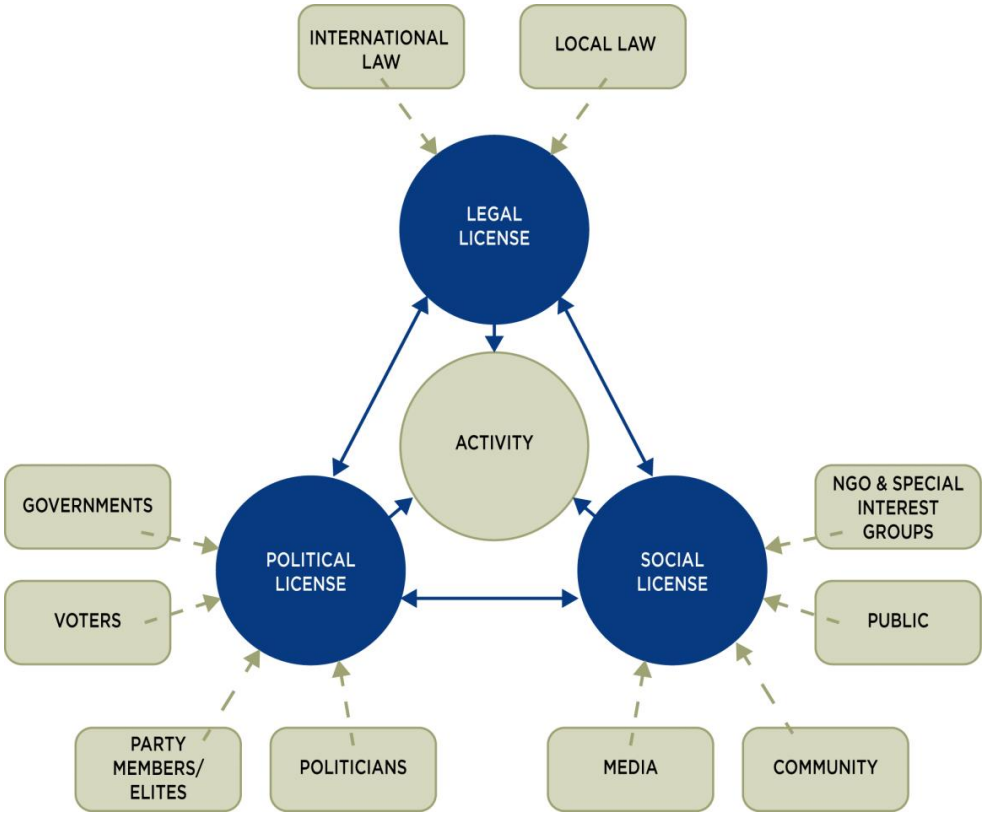

Figure 2: Gunningham et al's Three-Strand Model (Source: J. Colton et al, 'Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper')

Figure 3: Wustenhagen et al's Triangle Model (Source: J. Colton et al, 'Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper)

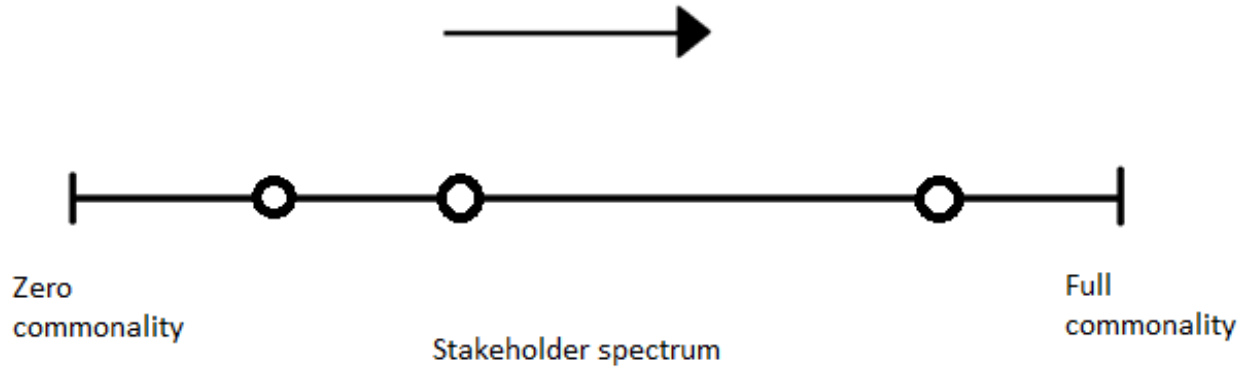

Figure 4 (Source: current research)

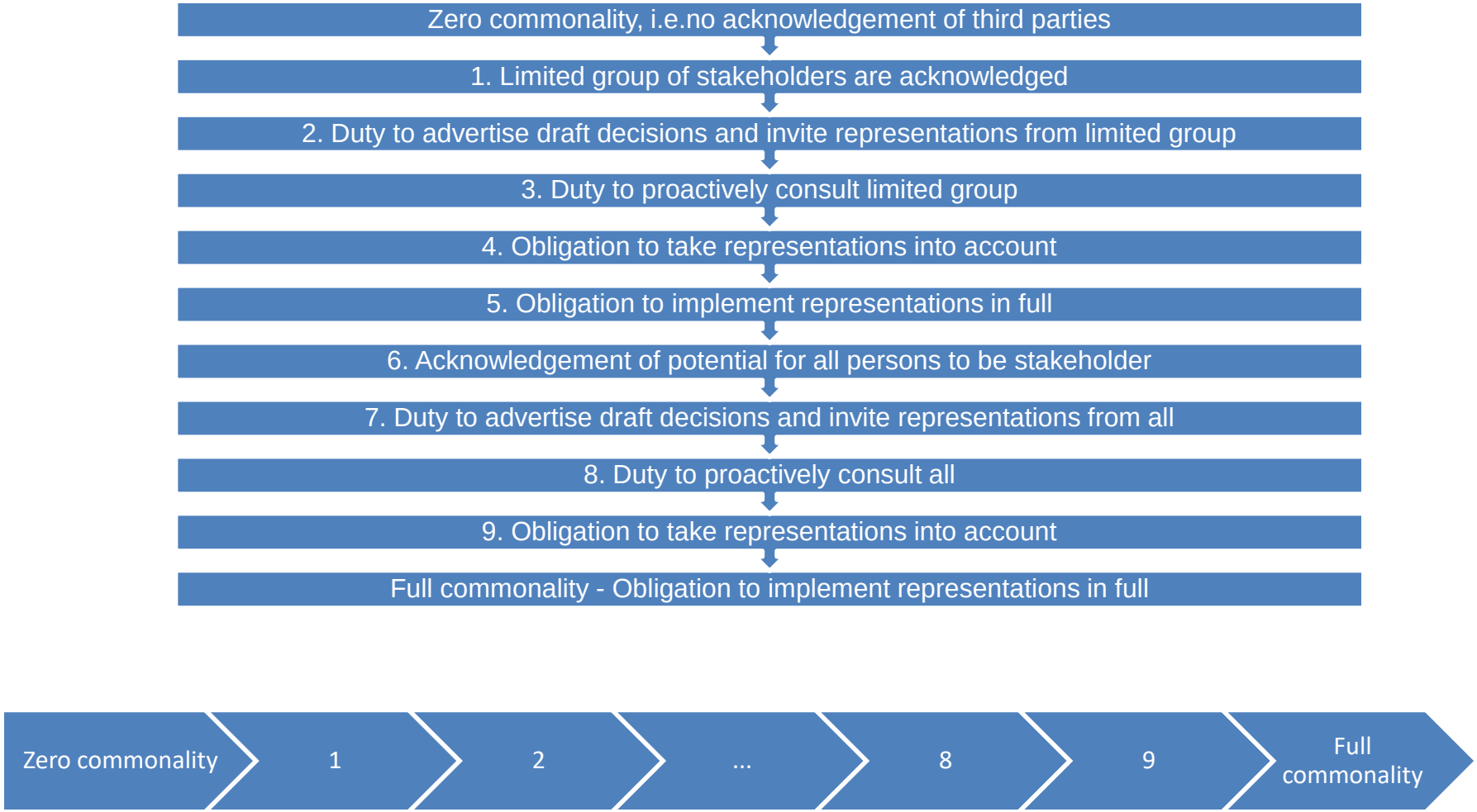

Figure 5 – Stakeholder spectrum with possible labelling (Source: current research) (Source: current research)

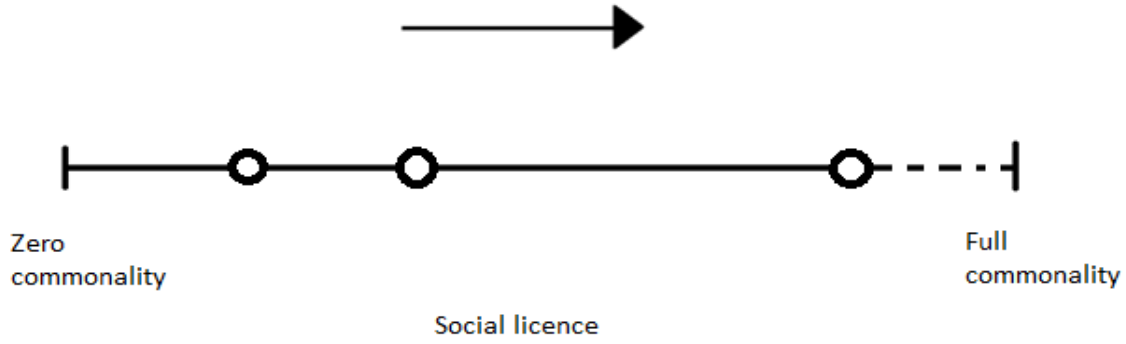

Figure 6 (source: current research)

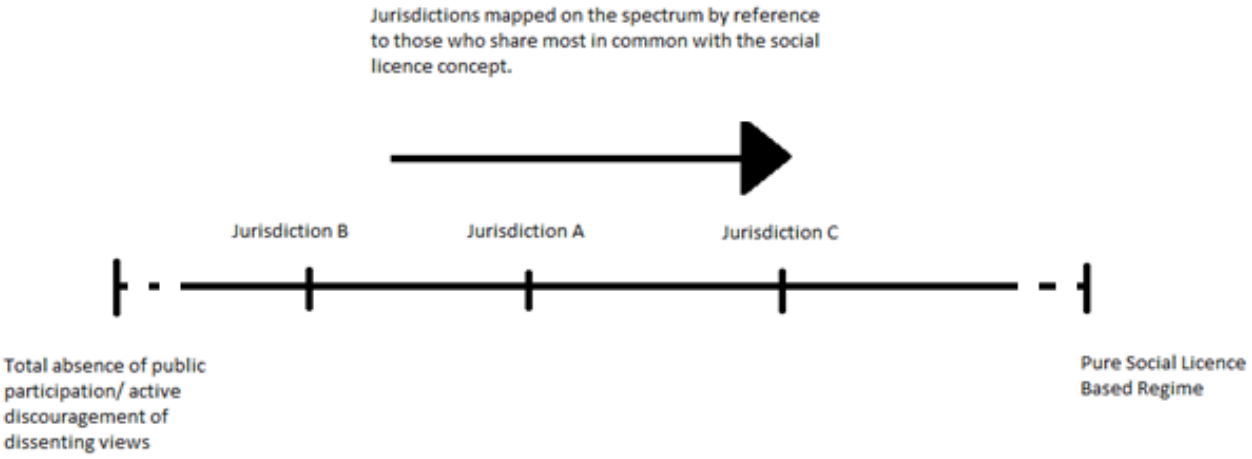

Figure 7 (source: current research)

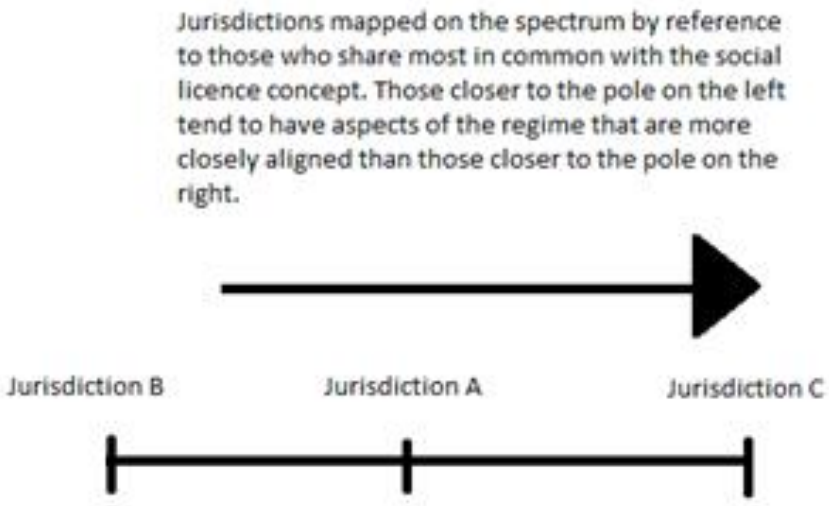

Figure 7 (source: current research)

Annex 3 – Sources used for Nvivo exercise

1. A. Baumber, 'Energy cropping and social licence: What's trust got to do with it?' (2018) 108 Biomass and Bioenergy

2. A. Warhurst, ‘Corporate citizenship and corporate social investment: drivers of tri-sector partnerships’ (2001) 1 Journal of Corporate Citizenship 57A.

3. Watterson and W. Dinan, ‘Public Health and Unconventional Oil and Gas Extraction Including Fracking: Global Lessons from a Scottish Government Review’ (2018) 15(4) Int J Environ Res Public Health 675

4. B. Collins and M. Kumral, ‘A critical perspective on social license to operate terminology for Canada’s most vulnerable mining communities’ (2021) 8 The Extractive Industries and Society

5. B. Crowley, ‘Crowley in the Globe: where does one apply for a ‘social licence’?’ (2014) The MacDonald Laurier Institute < http://www.macdonaldlaurier.ca/crowley-in-the-globewhere-does-one-apply-for-a-social-licence/> accessed 3 June 2016

6. B. Harvey and S. Bice, ‘Social impact assessment, social development programmes and social licence to operate: tensions and contradictions in intent and practice in the extractive sector’ (2014) 32(4) Impact Assessment and Project Appraisal 327-335

7. C. Cullen-Knox et al, 'Contemporary Challenges in Environmental Governance: Technology, governance and the social licence' (2017) 27 Environmental Policy and Governance 3

8. C. Gallois et al, 'The Language of Science and Social Licence to Operate' (2016) 36 Journal of Language and Social Psychology 45

9. C. Gough, ‘Understanding key elements in establishing a social license for CCS: An empirical approach’ (2018) 68 International Journal of Greenhouse Gas Control 16-25

10. D. Bursey, ‘Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries’ (2014) 7(2) British Council of British Columbia Environment and Energy Bulletin 1-10 <http://www.bcbc.com/content/1708/EEBv7n2.pdf> accessed 3 June 2016

11. D. Jijelava and F. Vanclay, 'How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model' (2018) 73 Environmental Impact Assessment Review 31

12. D. Vogel, ‘Private global business regulation’ (2008) 11 Annual Review of Political Science 261-282 <http://faculty.haas.berkeley.edu/Vogel/private_global_bus_reg.pdf> accessed 3 June 2016

13. G. Curran, ‘Unconventional Gas and Social Licence: Locking the Gate?’ in, G. Curran, Sustainability and Energy Politics (Palgrave, 2015)

14. G. Lynch-Wood and D. Williamson, ‘The Social Licence as a Form of Regulation for Small and Medium Enterprises’ (2007) Journal of Law and Society 34(3) 321-341 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6478.2007.00395.x/abstract> accessed 3 June 2016

15. H. Heikkinen et al, 'Challenges in acquiring a social licence to mine in the globalising Arctic' (2013) 52 Polar Record 399

16. H. Luke et al, ‘Unconventional gas development in Australia: A critical review of its social license’ (2018) 5 The Extractive Industries and Society 648-662

17. H. Murphy-Gregory, ‘Governance via persuasion: environmental NGOs and the social licence to operate (2018) 27(2) Environmental Politics 320–340

18. I. de Melo-Martin, ‘The role of ethics in shale gas policies’ (2014) 470-471 Science of The Total Environment 1114–1119 <http://www.sciencedirect.com/science/article/pii/S0048969713012321> accessed 22 April 2019

19. I. Thomson and R. Boutilier, ‘Social licence to operate’ in: P. Darling (ed) SME mining engineering handbook (SME, 2011) pp.1779–1796

20. I. van Putten et al, 'The emergence of social licence necessitates reforms in environmental regulation' (2018) 23(3) Ecology and Society <https://www.ecologyandsociety.org/vol23/iss3/art24/> accessed 21 November 2021

21. J. Colton et al, ‘Energy projects, social licence, public acceptance and regulatory systems in Canada: a white paper’ (May 2016) 9 (20) SPP Research Papers

22. J. Everingham, ‘Towards social sustainability of mining: The contribution of new directions in impact assessment and local governance’ (2007) 57 Greener Management International 2007 91-103

23. J. Gehman et al, 'Comparative Analysis of Hydraulic Fracturing Wastewater Practices in Unconventional Shale Development: Newspaper Coverage of Stakeholder Concerns and Social License to Operate' (2016) 8 Sustainability

24. J. Górski, ‘Social Licence to operate (SLO) in the Extractive and Energy Sectors – Introduction’ (2020) 1 OGEL

25. J. Morrison, The Social Licence: How to Keep Your Organization Legitimate (Palgrave Macmillan, 2014)

26. J. Nelsen, ‘Social licence to operate’ (2006) International Journal Mining, Reclamation and Environment 20(3) 161–162 <http://www.tandfonline.com/doi/abs/10.1080/17480930600804182> accessed 6 April 2016

27. J. Owen and D. Kemp, ‘Social licence and mining: A critical perspective’ (2013) Resources Policy 38(1) 29-35 <http://www.sciencedirect.com/science/article/pii/S0301420712000529> accessed 3 June 2016

28. J. Owen and D. Kemp, 'Social licence and mining: A critical perspective' (2013) 38 Resources Policy 29

29. J. Prno and D. Scott Slocombe, 'Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 Resources Policy 346

30. J. Prno, ‘An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry’ (2013) 38(4) Resources Policy 577–90 <http://www.sciencedirect.com/science/article/pii/S0301420713000810> accessed 3 June 2016

31. J. Syn, ‘The Social License: Empowering Communities and a Better Way Forward’ (2014) 28 Social Epistemology 3-4

32. J. Whitton et al, 'Shale gas governance in the United Kingdom and the United States: Opportunities for public participation and the implications for social justice' (2017) 26 Energy Research & Social Science 11

33. K. Moffat and A. Zhang, ‘The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining’ (2013) Resources Policy 39(1) 61–70

34. K. Moffat et al, 'The social licence to operate: a critical review' (2016) 89 Forestry 477

35. K. Ruckstuhl et al, 'Māori and mining: Indigenous perspectives on reconceptualising and contextualising the social licence to operate', 32(4) Impact Assessment and Project Appraisal 304-314 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.929782?journalCode=tiap20> accessed 6 April 2016

36. K. Yongvanich, and J. Guthrie, ‘Legitimation strategies in Australian mining extended performance reporting’ (2007) 11(3) Journal of Human Resource Costing & Accounting 156-177

37. L. Mercer-Mapstone et al, ‘What makes stakeholder engagement in social licence ‘meaningful’? Practitioners’ conceptualisations of dialogue’ (2018) 27 Rural Society 1-17

38. L. Mercer-Mapstone et al, 'Conceptualising the role of dialogue in social licence to operate' (2017) 54 Resources Policy 137

39. L. Poppo et al, ‘Repairing public trust in organisations’ (2010) 13 Corporate Reputation. Review 124–141

40. M. Brueckner and M. Eabrasu, ‘Pinning down the social license to operate (SLO): The problem of normative Complexity’ (2018) 59 Resources Policy 217-226

41. N. Hall and T. Jeanneret, ‘Social licence to operate: an opportunity to enhance CSR for deeper communication and engagement’ (2015) 20 Corporate 213–227

42. N. Mason, ‘Environmental governance in Sierra Leone's mining sector: A critical analysis’ (2014) 41 Resources Policy 152–159

43. O. Salzmann et al, ‘Corporate License to Operate (LTO) – Review of the Literature and Research Options’ (2006) CSM Project Forum for Corporate Sustainability Management Forum for Corporate Sustainability Management IMD International Institute for Management Development IMD <https://studylib.net/doc/8811124/corporate-license-to-operate--lto--%E2%80%93-review-of-the-litera...> accessed 10 June 2020

44. R. Boutilier and I. Thomson, ‘Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue between Theory and Practice’ (2011) International Mine Management, p.4 <http://socialicense.com/publications.html> accessed 3 June 2016

45. R. Boutilier et al, ‘From metaphor to management tool: How the social license to operate can stabilise the socio-political environment for business’ (2012) International Mine Management Proceedings 227-237<http://www.stakeholder360.com/Boutilier_Black_Thomson_From_metapho r_to_mgmt_tool_w_AUSIMM_permission.pdf> accessed 6 April 2016

46. R. Boutilier, 'Frequently asked questions about the social licence to operate' (2014) 32(4) Impact Assessment and Project Appraisal 263-272 <http://www.tandfonline.com/doi/abs/10.1080/14615517.2014.941141> accessed 19 March 2015

47. R. Ford and K. Williams, 'How can social acceptability research in Australian forests inform social licence to operate?' (2016) 89 Forestry 512

48. R. Heffron et al, 'The emergence of the ‘social licence to operate’ in the extractive industries?' (2018) Resources Policy <https://www.sciencedirect.com/science/article/pii/S0301420717304786> accessed 10 Jun 2020

49. R. Parsons & K. Moffat, ‘Constructing the Meaning of Social Licence’ (2014) 28(3-4) Social Epistemology 340-363 <http://www.tandfonline.com/doi/abs/10.1080/02691728.2014.922645> accessed 3 June 2016

50. R. Parsons et al, ‘Integrating impact and relational dimensions of social licence and social impact assessment’ (2014) 32 Impact Assessment and Project Appraisal 273

51. R. Parsons et al, 'Maintaining legitimacy of a contested practice: how the minerals industry understands its ‘social licence to operate’' (2014) 41 Resources Policy 83–90 <http://www.sciencedirect.com/science/article/pii/S0301420714000336> accessed 6 April 2016

52. R. W. Howarth et al, 'Natural gas: Should fracking stop?' (2011) 477 Nature 271-275 <https://www.nature.com/nature/journal/v477/n7364/full/477271a.html> accessed 17 September 2015

53. S. Bice, 'What gives you a social licence? An exploration of the social licence to operate in the Australian mining industry' (2014) 3(1) Resources 62–80 <http://www.mdpi.com/2079-9276/3/1/62> accessed 3 June 2016

54. S. Billing, ‘Using public comments to gauge social licence to operate for finfish aquaculture: Lessons from Scotland’ (2018) 165 Ocean and Coastal Management 401-415

55. S. Gunningham et al, 'Social licence and environmental protection: why businesses go beyond compliance' (2004) 29 Law and Social Inquiry 307–341 <http://scholarship.law.berkeley.edu/facpubs/675/> accessed 27 May 2016

56. S. Gunster and R. Neubauer, '(De)legitimating extractivism: the shifting politics of social licence' (2019) 28 Environmental Politics 707

57. S. Joyce and I. Thomson, ‘Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America’ (2000) The Canadian Mining and Metallurgical Bulletin 93(1037) <http://oncommonground.ca/wp-content/downloads/license.htm> accessed 6 April 2016

58. S. Stephens et al, ‘The social license to operate in the onshore wind energy industry: A comparative case study of Scotland and South Africa’ (2021) 148 Energy Policy

59. S. Wheeler, 'Global production, CSR and human rights: the courts of public opinion and the social licence to operate' (2015) 19 The International Journal of Human Rights 757

60. W. Beckerman, ‘Sustainable development: Is it a useful concept?’ (1994) 3 Environmental Values 191–209 <http://discovery.ucl.ac.uk/17881/> accessed 3 June 2016

61. W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru' (2016) 89 Forestry 552

62. W. de Jong and D. Humphreys, 'A failed Social Licence to Operate for the neoliberal modernization of Amazonian resource use: the underlying causes of the Bagua tragedy of Peru' (2016) 89 Forestry 552

Annex 4 – Full table of Nvivo results

The table below is sorted by “Number of sources that included code” then by “Frequency across all codes”.

Code	Number of sources that included code (x/30)	Frequency across all sources
Consent (parent code)	27	145
Stakeholder (parent code)	26	114
Acceptance	25	69
Relation to law (parent code)	24	71
Engagement (parent code)	21	77
Trust	21	53
Communities	20	41
Legitimacy	18	60
Criticisms	18	59
Environment as special	18	46
Stakeholders (child code)	18	30
Approval	18	22
Intangible/malleable/nebulous	17	26
Perception	16	49
Changeable	13	20
Connected to law	12	34
Levels & continuum	12	24
Metaphor and symbol	12	23
Separate to law	12	20
Ongoing	12	16
Beyond compliance	11	17
Engagement (child code)	11	16
Credibility	10	25
Reputational	10	16
Relation to other concepts	9	16
Society	9	16
Relationships	9	15

Code	Number of sources that included code (x/30)	Frequency across all sources
Expectations	7	8
Communication	6	25
Public	6	11
Stakeholder network	6	9
Social licence as tacit	6	7
Consent (child code)	5	41
Benefits	5	16
Transparency	5	8
Informal	5	7
Informed	5	7
Maintained	5	7
Consultation	5	6
Management tool	5	6
Procedural fairness	5	6
Civil society	5	5
Contextual	4	6
Impacts	4	5
Accountability	4	4
Partnerships	4	4
Psychological identification	3	3
Withheld	3	3
Affected groups	2	2
Justice	2	2
Shared Values	2	2
Collaboration	1	2