Imagining a Different Future: Overcoming Barriers to Climate Justice,
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Civil strategies for future generations

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INTRODUCTION

This paper will examine the barriers to implementing climate justice from a New Zealand perspective. In particular, the paper will focus on the governance arrangements for implementing the Paris Agreement, administrative justice and the potential for activist NGO strategies following the majority Supreme Court decision in *Buller Coal*, and the role of the next generation in reconfiguring how we conceive environmental law and institutions in the remainder of this century.

These themes will be interrogated through a critical analysis of deliberate political choice in framing climate change response legislation, the need to guarantee administrative justice through effective judicial remedies, the differing perceptions of the next generation about how to address climate change articulated via the most recent report from the Parliamentary Commissioner for the Environment, emerging new generational ways of holding government and institutions to account advanced by the *Sarah Thomson* judicial review proceedings before the High Court, and the vision for a new political agenda to confront the challenge of climate change imagined by Max Harris.

GOVERNANCE ARRANGEMENTS FOR IMPLEMENTING THE PARIS AGREEMENT

New Zealand is an archipelago of 330 islands in the South Pacific. Its export economy is dominated by agriculture, primarily, dairy products, meat, and wool products. As a result, New Zealand has an unusual greenhouse gas (GHG) emissions profile and the agricultural sector (47.9 per cent) is the largest contributor to the country's gross emissions, driven by methane emissions from livestock. Relative to

1990 levels gross GHG emissions had increased by 24.1 per cent during the period to 15 April 2015. Globally, New Zealand contributes 0.17 per cent to total GHG emissions.

Currently, New Zealand has adopted unconditional targets to reduce GHG emisions to 5 per cent below 1990 levels by 2020 under the United Nations Framework Convention on Climate Change 1992 (FCCC), and to reduce GHG emissions to 30 per cent below 1990 levels by 2030 under the Paris Agreement 2015.

Environmental regulation in New Zealand

New Zealand has a dynamic and innovative legal system and legislated for sustainability under the Resource Management Act 1991 (RMA) based on sustaining the potential for natural and physical resources to meet the reasonably foreseeable needs of future generations, safeguarding the life-supporting capacity of environmental media (air, land, and water), and avoiding, remedying, or mitigating adverse effects on the environment.[1]

Generally, the RMA is founded on an ecological approach to environmental law. For example, Peter Salmon, the inaugural President of the Resource Management Law Association of New Zealand, drew attention to the formative influence of the writings of Joseph Sax and Kenneth Boulding on leading New Zealand environmental lawyers during the period 1989-1992.[2] Boulding focused on the inextricable links between people and communities that bind them together in a common destiny in a world of finite resources, using the metaphor of spaceship Earth to underscore his message. While Sax recognised Boulding's "implicit message" that legal systems need to be revised and recreated to make them "suitable for this new world". He stated:[3]

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1 RMA, s 5(2)(a)-(c).

2 Peter Salmon, "Our place in the world: Hei whakapae ururoa" in Trevor Daya-Winterbottom (ed) *Justice and the Environment* (2nd edn, Thomson Reuters, Wellington, 2012).

3 Joseph L Sax, "The Law of a Liveable Planet" Procedings of the International Conference on Environmental Law, Sydney, 14-18 June 1989, 1.

> At the very heart of the spaceship image is the idea of a community of people endowed with a limited source of sustenance upon which they are mutually depenent. Because the survival of all of them depends upon its continuing ability to sustain them, their relation to it is inevitably one of mutual dependence, common enterprise, joint responsibility. The earth is our spaceship, and it doesn't take much imagination to transfer the spaceship images of a common destiny to problems such as *global warming*, acid precipitation, deforestation or intensifying species extinction. (Emphasis added)

Salmon echoed the need for future legal systems to be creative and observed:[4]

> For lawyers … there can hardly be a more important or responsible task than to ensure that our legal systems, and the philosophies and controls that they enshrine, are adequate to provide for the growing awareness of the interrelatedness between people and the Earth on which we rely for our survival.

The comprehensive, integrated, approach to managing the use of air, land, and water under the RMA provided an opportunity for climate change litigation to implement the broad ecological approach advocated by Salmon.

Administrative justice and the potential for activist NGO strategies

While the preferred climate change policy package was developed during the period following ratification of the Kyoto Protocol on 19 December 2002, a series of climate change cases were brought before the courts by the Environmental Defence Society, testing whether consent conditions could be included on the grant of resource consent to require the planting of forest sinks to mitigate GHG emissions.[5]

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4 Peter Salmon, "Our place in the world: Hei whakapae ururoa" in Trevor Daya-Winterbottom (ed) *Justice and the Environment* (2nd edn, Thomson Reuters, Wellington, 2012), 15.

5 *Environmental Defence Society v Taranaki Regional Council* (A184/2002); *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 492.

While recognizing the scientific basis for climate change, the Environment Court was not ultimately persuaded that it should include such conditions. It stated:[6]

> We accept that the present scientific consensus is that the cumulative anthropogenic emissions of carbon dioxide on a global basis contribute to climate change. While it is not possible to definitively quantify, the prognosis is sufficiently serious for us to find that the proposed emissions … will result, in a cumulative way, in an adverse effect of some consequence … After a careful consideration of the evidence we are left with a considerable disquiet about the efficacy, appropriateness and reasonableness of a condition as proposed.

The Court was persuaded that mitigating climate change should be addressed nationally by a separate statutory regime in line with the Government's preferred policy package.

Subsequently, the RMA was amended in 2004 to preclude local authorities from having regard to the effects of GHG discharges on climate change,[7] when making rules in regional plans to control discharges into air or when considering applications for discharge permits.[8] The scope of these amendments was tested by Greenpeace New Zealand.[9] The *Greenpeace* litigation focused on the ambiguity in the 2004 RMA amendments that on one hand precluded local authorities from having regard to the effects of GHG discharges on climate change, while on the other hand requiring them to have regard to "the effects of climate change" and "the benefits to be derived from the use and development of renewable energy" as mandatory considerations when exercising their powers under the RMA.[10] However, notwithstanding the apparent encouragement of renewable energy in s 7(i) of the RMA, the Supreme Court found that regional

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6 *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 492.

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8 RMA, s 70A and s 104E.

9 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730.

10 RMA, s 7(i) and s 7(j).

councils could not have regard to any adverse effects of discharges on climate when deciding air discharge permit applications for non-renewable energy generation projects.

Notwithstanding this rebuff, climate change litigation continued. In *West Coast ENT v Buller Coal*,[11] an environmental NGO contended that territorial authorities were not precluded by s 104E of the RMA from considering the adverse effects of discharges on climate change when deciding land use consent applications. At issue was whether the down stream effects on climate change of burning coal exports from the proposed mine overseas could be considered by the territorial authority. The majority in the Supreme Court held that any adverse effects on climate change would be too intangible and remote, and that they were not relevant in the context of ancillary land use activities. In particular, the majority found that whatever happened in New Zealand the overseas manufacturers in Brazil and China would continue to emit GHG, and that it would probably be impossible to show that the burning of coal mined on the West Coast could have any perceptible effect on climate change. While the minority (Elias CJ) held that s 104E of the RMA was limited to local authority regulation of GHG discharges into air, and that the land use consent application did not come within this exclusion. In particular, Elias CJ considered that while GHG emissions from burning the coal overseas were likely to be minimal they would nevertheless contribute to a wider global effect, and that they were precisely the type of cumulative effect that should be considered under the RMA.

The combined effect of the Supreme Court decisions in *Greenpeace* and *Buller Coal* confirmed that climate change litigation under the RMA was no longer permissible. Effectively, the view expressed by the Environment Court in the *Environmental Defence Society* decisions, that GHG emissions should be regulated nationally under a different statutory regime, prevailed. Accordingly, the deliberate political choice in framing separate climate change response legislation, coupled with the statutory amendments that inserted s 70A and s 104E into the

[11] *West Coast ENT v Buller Coal* [2013] NZSC 87.

RMA, removed any guarantee of administrative justice through effective judicial remedies.

Climate Change Response Act

Domestically, the Climate Change Response Act 2002 (CCRA) was enacted to meet New Zealand's international obligations under the FCCC. The CCRA established a registry to hold New Zealand's assigned amount units (AAU) and an inventory agency for annual reporting of New Zealand's GHG emissions. Following a protracted policy debate regarding the comparative advantages and disadvantages of introducing either a carbon tax or an emissions trading scheme (ETS), the CCRA was amended in 2008 to provide for the establishment of the New Zealand ETS to meet New Zealand's obligations under the Kyoto Protocol. The ETS was designed to cover all GHG and all sectors of the economy. This has been achieved in part by a staged approach, however, agriculture is not currently covered by the ETS but the Labour Party in the run-up to the September 2017 general election has announced its intention to bring agriculture into the ETS. The timetable for this policy shift remains uncertain. Participants are required to surrender one New Zealand unit (NZU) per tonne of carbon dioxide equivalent GHG emissions per year. Similarly, "removals" as a result of sink activities that result in removal of GHG emissions or via purchase of NZUs or overseas units provide credits that can be offset against the participants obligations or traded.[12] Critically, there is no statutory requirment for the relevant Minister to set a limit on the number of units that can be traded. Likewise there is no requirement that the number of NZUs issued by the Minister should not exceed the number of New Zealand's allocated AAUs. As a result, the New Zealand ETS has been described as "a flexible cap and trade scheme".[13]

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[12] CCRA, s.

[13] Peter Salmon and David Grinlinton, (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2014) 800.

Effectively, the New Zealand ETS embedded in the CCRA is the sole legislative response to the climate change.[14]

THE ROLE OF THE NEXT GENERATION IN RECONFIGURING ENVIRONMENTAL LAW TO MITIGATE CLIMATE CHANGE

This section considers the role of the next generation in reconfiguring how we should conceive environmental law and institutions to mitigate climate change in the remainder of this century.

The Parliamentary Commissioner for the Environment (PCE) has recommended that New Zealand should follow a similar legislative path to that adopted by the United Kingdom in the Climate Change Act 2008 in order to achieve a downward trend in GHG emissions.[15] The impetus for the report and recommendations were the very different views held by young New Zealanders about climate change and what the appropriate government response should be. The PCE found that the youth-led NGO, Generation Zero, strongly supported the introduction of carbon budgets that would "hold the Government to account" in reducing GHG emissions.[16] They also supported the introduction of legislation similar to that enacted in the United Kingdom to achieve these objectives. More importantly, the PCE also noted that the Generation Zero policy stance was also "overwhelmingly" supported by members of the Young National Party, then in government.[17] This led the PCE to investigate the feasibility of introducing similar legislation in New Zealand. In particular, the PCE recommended that legislation should be introduced requiring that GHG emissions targets should be

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[14] [2017] NZHC 733 at [70](a).

[15] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017).

[16] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 4.

[17] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 4.

set and adhered to;[18] that the Minister for Climate Change should be responsible for setting carbon budgets;[19] that an independent Climate Change Commission should be established to provide advice on setting carbon budgets, and to monitor progress and report annually;[20] and that the Minister should be responsible for preparing policies to ensure that carbon budgets are met, and preparing responses to the Commission's monitoring reports.[21] The views expressed by Generation Zero and the members of the Young National Party are typical, and are part of the sea-change in how critical, thoughtful, young New Zealanders engaged in civil society view a range of economic, social, and environmental issues. Their views are radically different from the political establishment, as demonstrated by the action of Max Harris and Sarah Thomson.

Max Harris

Max Harris is an exemplar of the next generation of critical, thoughtful, citizens. Former clerk to Chief Justice Sian Elias at the Supreme Court, Rhodes Scholar, and currently Fellow of All Souls College, Oxford. He was motivated to embark on his "New Zealand project" by the complexity, scale, and unprecedented nature of current issues (such as climate change) that confront New Zealand, the apparent absence of political debate or imagination to confront such issues, the "gulf" between the political establishment and "young New Zealanders" and their vision regarding how such challenging issues should be confronted. His work is representative of a new generation of New Zealanders. The vision for a new political agenda to confront the

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[18] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 30.

[19] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 31.

[20] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 33.

[21] Parliamentary Commissioner for the Environment, *Stepping stones to Paris and beyond: Climate change, progress, and predictability* (Parliamentary Commissioner for the Environment, Wellington, 2017) 32.

challenge of climate change imagined by Harris, *The New Zealand Project*, articulates three interconnected themes that underpin an agenda for achieving a clean environment, namely, pursuing an ethical and independent foreign policy, decolonisation, and constitutional transformation.[22]

Justifying foreign policy in ethical terms

Harris noted the historical trend of justifying New Zealand's foreign policy in ethical terms.[23] Perhaps, the best illustration of this approach to crafting an independent foreign policy is the participation by David Lange (then Prime Minister) in the Oxford Union debate on 1 March 1985 regarding nuclear disarmament. Lange focused on the absence of any moral justification for nuclear weapons, and their propensity to corrupt the political intentions of the countries who possess them. Harris noted that:[24]

> What is notable is Lange's reliance on ethical language and argumentation. He speaks not of the place of nuclear weapons in the power politics of the world, but of the rightness and wrongness of nuclear weapons and those who use them.

Critically, Harris observed that New Zealand's position could be rationalized on the basis of its relative size in the international world order, and the possibility that it can therefore "afford" the relative comfort of avoiding "realpolitik reasoning" by retreating to "ethical language".[25] However, in practice the moral justification for failing to address climate change mitigation may require an ethical counterfactual as the catalyst for moving political action forward both nationally and internationally. In this sense, the relative comfort

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[22] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), ch 1.

[23] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 36.

[24] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 36.

[25] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 36.

derived from New Zealand's perceived weight in international debates could provide the basis for challenging complacency through its newfound willingness to describe climate change as this "generation's nuclear-free moment".[26]

In particular, Harris noted the case of Ioane Teitiota who sought to remain in New Zealand "because he was unable to return to Kiribati due to fears about the impact of climate change".[27] Teitiota's claim to be the world's first climate change refugee failed before the Immigration and Protection Tribunal, the High Court, and the Court of Appeal on the grounds that:[28]

> The IPT's findings reflected mainstream views on the status of so-called 'climate refugees' at international law. The 1951 Refugee Convention, originally designed to address the legal status of millions of displaced people after the Second World War was crafted with quite different purposes in mind, and certainly well before the spectre of climate-displaced persons had entered public consciousness. Despite the creative attempts of some lawyers and academics to argue otherwise, the Refugee Convention doesn't cover environmentally displaced people.

Ultimately, the Supreme Court refused to give leave for a further appeal. The Court stated:[29]

> [12] … In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face "serious harm" and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation *to the extent that it can* …
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> [13] That said, we note that both the Tribunal and the High Court, emphasized their decisions did not mean that environmental

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[26] Jacinda Ardern, Campaign Launch, 19 August 2017.

[27] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 42.

[28] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125; [2014] NZCA 173.

[29] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

> degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an *appropriate* case. (Emphasis added)

The Supreme Court decision is suitably vague as to the circumstances when, in its view, it would be "appropriate" to be creative and allow a climate change refugee to remain in New Zealand. Teitiota was deported in September 2015. This led Harris to question whether New Zealand could do more internationally to raise the issue of displaced people by speaking at Conferences of the Parties to relevant treaties, by taking a lead role in processes such as the Nansen Initiative/Platform on Disaster Displacement, or by allowing displaced people to take refuge in New Zealand. In particular, he observed that taking the lead in providing a home for people displaced by climate change would be true to New Zealand's heritage of ethical foreign policy, and that it could capture the international imagination and provide the catalyst for other countries to follow. Overall, Harris considered that New Zealand could do more. He stated:[30]

> New Zealand could do so much more on the specific issue of climate change refugees and climate advocacy. New Zealand is close to Pacific countries that are affected by climate change, and New Zealand has skills and ties with other countries that – if harnessed in the right way – could be useful for climate advocacy.

Following the 17 September 2017 general election, the Minister for Climate Change has announced the intention to introduce legislation providing for "an experimental humanitarian visa category" to assist displaced people from the Pacific as a result of climate change effects, including, sea level rise, to remain in New Zealand.[31] The Minister has indicated that up to 100 humanitarian visas could be granted per year. To put this number into context, New Zealand currently grants refugee status to 750 people per year. Commentary on the proposal has been

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[30] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 43.

[31] Charles Anderson, "New Zealand considers creating climate change refugee visas" *The Guardian*, 31 October 2017.

mixed. For example, *The Guardian* noted that there would need to be clear guidelines to determine how people would qualify, while Atle Solberg stated:[32]

> … we welcome this proposal by New Zealand and hope that it will encourage other countries to account for similar gaps in their humanitarian visa catergories. While it is *largely symbolic*, it reflects a growing global understanding there need to be better protections not only for victims of climate change, but victims of all kinds of natural disasters. (Emphasis added)

Whether the move is merely symbolic or has a catalytic effect on the international community currently remains in the balance. But it provides hope for authors such as Harris that their civil strategies could be taken up by the government and given practical reality.

Decolonisation: integrating Maori world views into environmental policy

Harris argued for the need to decolonise the New Zealand legal system by integrating "Maori world views into policy solutions".[33] This is important because Maori tikanga is focused on "the interconnectedness of all things". For example, Harris noted that:[34]

> … Maori values – such as mauri, wairua, kaitiakitanga and utu – offer a powerful way to ensure that there is balance, collective custodianship or guardianship and respect for the spirit or force of the natural world.

As a result, he observed that integrating Maori world views into environmental policy would provide a promising start to developing solutions to address climate change and other environmental crises. This approach reflects the ecological foundations of New Zealand environmental law and Boulding's image of the incoming spaceship Earth noted above. It also reflects a substantial body of New Zealand

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[32] "Changing climate" *Geographical* January 2018 Volume 90 Issue 1, 15.

[33] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 200.

[34] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 200.

extra-judicial writing. For example, Justice Joe Williams from the Court of Appeal observed the "fusion" or "collision" of English common law and Maori tikanga to create a distinctive New Zealand jurispridence.[35] While Justice Christian Whata from the High Court noted the emergence of "tikanga Maori-based assessment".[36]

In particular, Whata traced the development from reasoned approaches to determing the Maori world view from an "anglicised" perspective based on the objective view of the general community, to the analytical approach that identifies differing world views, develops methods to accommodate the Maori world view, and "provides a frame for recognition of tikanga as positive rules" rather than merely as a set of underpinning values.[37] Based on this trend, he observed that the resolution of indigenous grievances under the Treaty of Waitangi Act 1975 could be "transformative" where Maori tikanga is given recognition as normative legal rules. As a result, Whata stated:[38]

> … the significance here lies in ratifying or making cognisable both the cultural processes that underpin tikanga, and the tikanga itself, so that the assessment of Maori environmental issues is not so much an assessment of effects on proven physical or metaphysical entities, or even a weighing of competing kaumatua evidence, but a question of weighing significance of non-compliance with tikanga per se against the other matters identified … as relevant considerations.

This conclusion adds considerable weight to Harris's argument that integrating Maori world views into all spheres of public policy, including climate change policy, could be transformative in a constitutional sense and result in the creation of a distinctively New Zealand jurisprudence.

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36 Christian Whata ""Matauranga Maori" knowledge, comprehension and understanding: Reflection on lessons learnt and contemplation of the future" [2016] Resource Management Theory & Practice 21, 22.

37 Christian Whata ""Matauranga Maori" knowledge, comprehension and understanding: Reflection on lessons learnt and contemplation of the future" [2016] Resource Management Theory & Practice 21, 26.

38 Christian Whata ""Matauranga Maori" knowledge, comprehension and understanding: Reflection on lessons learnt and contemplation of the future" [2016] Resource Management Theory & Practice 21, 28.

For example, Sax (as noted above) considered that mutual dependence based on the inextricable links between people and communities and their environment provide the keys to resolving problems such as agreement on what is required to achieve climate change mitigation.

Redistribution of public power through constitutional change

Following on from this conclusion about the transformative nature of constitutional change, Harris relied substantially on the work of Palmer and Butler who noted the international trend to link human rights with the response to "the magnitude of the global environmental crisis".[39] This led them to propose that any written constitution for New Zealand should include environmental rights. They noted that over 80 states now have written constitutions that provide for environmental rights. In particular, they observed that the "aim" of such a provision:[40]

> … is to ensure that people can enjoy an environment that is not harmful to their health or wellbeing and to protect the environment for the benefit of present and future generations by ensuring that economic development is sustainable. This is an important principle reflected in the New Zealand Resource Management Act 1991. The provision in the Constitution gives constitutional status to that principle.

Clause 105 in their proposed written constitution was based on the South African Constitution and provides:[41]

> Everyone has the right –
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> (a) to an environment that is not harmful to his or her health or wellbeing; and

[39] Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) 169.

[40] Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) 171.

[41] Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) 69-70.

> (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that –
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> (i) reduce pollution and ecological degradation;
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> (ii) promote conservation;
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> (iii) pursue ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

As a result, Harris observed:[42]

> Written constitutions matter. They provide backstop protections when things go wrong. They help to provide clarity on values and the protections that do exist in our laws.

This led him to conclude that adopting a written constitution could "structure and harness" transformative change regarding (inter alia) climate change and environmental policy.[43]

Murky and green?

Harris applied these three overarching themes to climate change policy. For example, he noted that New Zealand's relative size in the international world order was not decisive in terms of its decision to pursue a nuclear-free policy. Likewise, it should not be decisive in terms of determining New Zealand's commitment to reducing GHG emissions. He found that New Zealand's total contribution to global GHG emissions (0.3 per cent) was "not insignificant", and that New Zealand should not "shirk" its responsibilities because it could "make genuinely global action more likely by contributing to global reductions

[42] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 98.

[43] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 98.

in emissions".[44] In particular, Harris found judicial comments regarding relative size unhelpful.[45] He considered that the New Zealand ETS was overly complex and that replacing it with a carbon tax would be more transparent and obtain greater public understanding and support. Harris criticised the reliance on overseas units to achieve past GHG reductions.[46] For example, during the period to December 2015 out of 136 million units surrendered, 121 million had been purchased from China, Russia, and the Ukraine.[47] Harris labelled these units as "fraudulent" due to the possibility that these credits had not been generated by actual GHG emissions in their home jurisdictions.[48] Overall, the major issue ("the sheep in the room") was the fact that the ETS does not currently apply to the agricultural sector.[49] He considered this to be a serious credibility and business risk for the export dependent New Zealand economy.

While the Labour party announced its intention, in the run up to the September 2017 general election, to bring the agricultural sector into the ETS by 2020, no decisions regarding this have yet been announced by the new government.

Sarah Thomson

Sarah Thomson, like Max Harris, is an exemplar of the next generation of critical, thoughtful, yound New Zealanders. A graduate of the Faculty of Law at the University of Waikato, her passion for the environment led her (while still a law student) to commence judicial

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[44] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 203.

[45] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 203; *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 at [16].

[46] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 204-207.

[47] Eric Frykberg, Radio NZ, 21 December 2015.

[48] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 204.

[49] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017), 207-211.

review proceedings against the Minister for Climate Change.[50] She is currently in practice in Auckland, specialising in insurance law.

Thomson conteneded, first, that publication of the IPCC Fifth Assessment Report (AR5) should have triggered a review of New Zealand's 2050 target either because this was required either under s 225 of the CCRA, or alternatively because the Minister was "required to exercise her discretion … on administrative law grounds".[51] Second, she contended that the Minister had failed to have regard to relevant considerations when putting forward New Zealand's nationally determined commitment (NDC) under the Paris Agreement.

Reviewing New Zealand's 2050 target

In addition to the ETS, the CCRA also provides for emissions reduction targets to be set under s 224 and s 225. In particular, s 224(2) of the CCRA provides the Minister for Climate Change with a discretion to set targets by notice publised in the New Zealand Gazette, and to "amend or revoke an existing target, at any time". This mechanism was used by the Minister to set New Zealand's 2050 target of achieving a "50 per cent reduction in greenhouse gas emissions by 2050 (using 1990 as a baseline year)" based on the AR4 scenarios for stabilizing GHG emissions.[52]

The Court found that s 225 of the CCRA provides an alternative mechanism for setting targets by regulations made by the Governor-General on the advice of the Minister. It was inserted into the CCRA by the Climate Change Response (Moderated Emissions Trading) Amendment Act 2009. In particular, the Court noted from the explanatory note to the Bill that Parliament "perceived" that setting a target by regulation would have a "higher status" than a target set under the Gazette notice procedure. The point of difference between the two provisions is that s 225(3)(a) of the CCRA imposes a

50 *Sarah Thomson v Minister for Climate Change* [2017] NZHC 733.

51 [2017] NZHC 733 at [74].

52 [2017] NZHC 733 at [48].

mandatory obligation on the Minister to review the target following the publication of the latest IPCC assessment report. Based on the explanatory note, the Court held that s 224 and s 225 were not designed to be read together

The Court found that setting emissions reduction targets under s 224 of the CCRA by Gazette notice provided the Minister with a discretion to amend or revoke the targets "at any [subsequent] time" by following the same process. While the previous Government had reviewed AR5, the affidavit evidence indicated that the Minister had not considered whether this discretion should be exercised. Although the Court noted that the 2050 target was consistent with AR5 and that this counted "against any remedy", it went on to state:[53]

> But for the change in Government … this may not have been decisive. That is because the Minister did not in fact consider whether to adjust the 2050 target *and there may be other matters in AR5 that would cause the Minister to consider a more ambitious 2050 target*. (Emphasis added)

Put simply, the Minister had failed to exercise the discretion in s 224 of the CCRA, and had he done so this could have resulted in an amended and more ambitious 2050 target being set.

Based on the new Government's intention to amend the 2050 target, the Court declined to grant a remedy or make a declaration, notwithstanding the fact that no timetable was in place for amending the target and the Gazette notice procedure under s 224 of the CCRA had not been commenced. The position adopted by the High Court contrasts with the decision of the United Kingdom Supreme Court in *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* where in similar circumstances the Supreme Court made "a mandatory order requiring new plans … to be prepared within a defined timetable" while reserving leave for the relevant minister to apply to vary the timetable if required.[54] This approach would have been appropriate in *Thomson* for two reasons.

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[53] [2017] NZHC 733 at [97].

[54] *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 at [31].

First, given the acknowledged need for "action" regarding climate change recorded by the courts. Second, based on the constitutional principle that ministerial or political statements do not have the force of law.[55] What is however clear is that the Court in *Thomson* would have sought further submissions on the question as to whether anything more could reasonably be done to secure compliance with the "2050 target in light of the AR5" report, but for the turn of political events following the 23 September 2017 general election.[56]

Beyond that, the Court's logic in concluding that a target set against the background of AR4 could also be consistent with AR5, appears to be questionable because the scientific evidence and findings in AR5 point to an increasingly more serious situation that arguably requires more urgent action.

Paris Agreement

More dramatic than the Court's findings regarding the question of compliance with the discretionary power in s 224 of the CCRA is the Court's conclusion regarding compliance with the Paris Agreement, namely, that the previous Government failed to have regard to relevant considerations when putting forward New Zealand's NDC under the agreement. In reply, the Minister contended that this claim was not justiciable because the Paris Agreement had not been transposed into New Zealand law by statute and that compliance with the agreement was therefore merely "a political matter which is not reviewable", and because the decision regarding the 2030 target set by the NDC was polycentric and required the balancing of a number of matters that were not susceptible to legal review.[57]

The Court was not persuaded by these submissions on behalf of the Minister and embarked on a detailed review of climate change cases (including *ClientEarth*) from a variety of civil and common law

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55 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC) at 622.

56 [2017] NZHC 733 at [97].

57 [2017] NZHC 733 at [102].

jurisdictions which led the Court to find conclusively that it had jurisdiction to consider the claim regarding the adequacy of New Zealand's NDC. The Court stated:[58]

> … The courts have not considered the entire subject matter is a "no go" area, whether because the state had entered into international obligations, or because the problem is a global one and one country's efforts alone cannot prevent harm to that country's people and their environment, or because the Government's response involves the weighing of social, economic and political factors, or because of the complexity of the science. The courts have recognised the significance of the issue for the planet and its inhabitants and that those within the court's jurisdiction are necessarily amongst all who are affected by *inadequate efforts to respond to climate change*. The various domestic courts have held they have a proper role to play in Government decision making on this topic, while emphasising that there are constitutional limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body. (Emphasis added)

The Court then went on to hold that:[59]

> This approach is consistent with the view that justiciability concerns depend on the ground for review rather that its subject matter. The subject matter may make a review ground more difficult to establish, but it should not rule out any review by the Court. *The importance of the matter for all and each of us warrants some scrutiny of the public power* in addition to accountability through Parliament and the General Elections. If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing. (Emphasis added)

Effectively, the Court applied a reasonableness or proportionality test for scrutinizing the adequacy and appropriateness of the Minister's decision.

While the Court found that vulnerable low-lying small island states are generally a matter of concern under the Paris Agreement,[60] and (in particular) that "the impact on Tokelauans is a mandatory relevant consideration when New Zealand is considering its responses to climate

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58 [2017] NZHC 733 at [133].

59 [2017] NZHC 733 at [134].

60 [2017] NZHC 733 at [33].

change",[61] the Court was not ultimately persuaded that the NDC put forward by New Zealand "was outside the proper bounds of the Minister's power".[62] Arguably, a more robust conclusion on this point would have been less deferential, and would have seen the Court interrogate whether the Minister's judgment on where to set the NDC was objectively reasonable based on the argument and reasoning from *Whaling in the Antarctic*.[63]

Accordingly, the ground for review based on the Paris Agreement failed in this case.

Turning the tide

Overall, the Court's approach to the Paris Agreement was consistent with the general approach of New Zealand courts regarding the "implicit relevance" of international obligations and the role they can play in "informing the exercise of discretion".[64] The real impact of the decision, however, derives from the Court's clear findings that the Minister's decision under the CCRA was reviewable and that a remedy may have been granted absent the change to the political landscape following the 23 September 2017 general election; and that climate change litigation is firmly justiciable before the New Zealand courts notwithstanding questions about dualism or polycentricity.

While the decision in *Thomson* has not "turned the tide",[65] it has arguably galvanized the political will to focus on New Zealand's international responsibilities to its Pacific island neighbours. In addition to the possible introduction of humanitarian visas for people displaced by climate change, noted above, the Minister has expressly welcomed the decision in *Thomson* as "an important judicial contribution to the

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61 [2017] NZHC 733 at [137].

62 [2017] NZHC 733 at [160].

63 ICJ.

64 Matthew Smith, *New Zealand Judicial Review Handbook* (2nd edn Thomson Reuters, Wellington, 2016) 198.

65 Josephine van Zeben, "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?" Transnational Environmental Law 4:2 (2015) 339.

critical issue of how the Government should respond to climate change",[66] extended the application of the FCCC to include Tokelau from 14 November 2017,[67] and committed New Zealand to be a "net-zero" GHG emissions economy by 2050.[68]

CONCLUSION

Based on this analysis, the paper will likely conclude that dynamic and innovative legal systems can (in practice) put place significant barriers for implementing climate justice. But despite these failures there is real hope that future generations will reconfigure public policy and litigation to overcome these barriers via the catalytic activism of the next generation.

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