COUNTRY REPORT: NEW ZEALAND

A year in climate change emergency

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This country report provides an overview of recent case law and legislative amendments regarding climate change mitigation, and the declaration of a climate emergency by the New Zealand Parliament.

Novel torts and climate declarations

Notwithstanding the potential impact of the *Climate Change Response (Zero Carbon) Amendment Act 2019* on the judicial review of greenhouse gas (GHG) emissions targets and emissions reduction budgets and plans (noted below in relation to eroding the rule of law), the Senior Courts remain active in climate change litigation that continues to morph into other permissible avenues for challenge.

Novel torts

In *Smith v Fonterra Co-operative Group Ltd*,[1] the New Zealand High Court (NZHC) was required to consider tort-based claims in public nuisance, negligence, and the breach of a novel duty of care against Fonterra and other New Zealand companies alleging that GHG emissions by them "is human activity that has contributed, and will continue to contribute, to dangerous anthropogenic interference with the climate system and to the adverse effects of climate change".[2] Smith sought declarations that the tortious activities of the defendants are unlawful, together with injunctions requiring the defendants activities to be "net zero" by 2030. The claims in public nuisance and negligence were struck out by the NZHC because Smith failed to establish particular or direct damage beyond that suffered by the public generally, and because any damage caused to natural and physical resources by

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[1] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419.

[2] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [8].

the defendants GHG emissions was considered to be too remote and because allowing negligence claims regarding climate change could compromise the effectiveness of the *Climate Change Response Act 2002* (CCRA).[3]

However, the NZHC refused to strike out the claim based on the novel duty of care that would require the defendants to "cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and the adverse effects of climate change".[4] Without deciding the substantive issue, the NZHC observed:

> It was common ground that the law, on appropriate occasion, evolves, and that the common law is an important source of law. It is capable of creating new principles and causes of action, and from time to time does so – for example, a new tort of intrusion into seclusion has recently been recognised in New Zealand. The common law however proceeds through the methodological consideration of the law that has been applied in the past and the use of analogy. The common law method brings stability, but it can also allow for the injection of new ideas and for the creation of new responses as required.[5]

For example, the NZHC noted that the special damage rule from public nuisance could be adapted to provide a potential remedy for such novel claims, or that modelling techniques may develop to map the adverse effects of particular GHG emissions.[6] The importance of the NZHC strike out application decision in *Smith* is the acceptance of the latest scientific consensus from the Intergovernmental Panel on Climate Change and the recognition (based on the extrajudicial writing of Winkelmann CJ, and Glazebrook and France JJ)[7] that the common law may need to look at existing litigation frameworks "from different angles" because "climate change issues require a rapid response".[8] The substantive judgment in *Smith* has not yet been given by the NZHC at the time of writing.

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3 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [67]-[69], [82], [93]-[96], [98].
4 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15] and [103].
5 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [101].
6 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15], [98], [102]-[103].
7 Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand, "Climate Change and the Law" (paper presented to Asia Pacific Judicial Colloquium, Singapore, May 2019), [131]-[136].
8 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [27]-[31], [55], [103].

Climate declarations

In *Hauraki Coromandel Climate Action v Thames-Coromandel District Council*,[9] the NZHC quashed the decision by the Council not to approve the signing of the Local Government Leader's Climate Change Declaration by the Mayor on the grounds that the decision was inconsistent with the consultation and decision-making requirements in the *Local Government Act 2002*[10] (LGA) and the significance and engagement policy adopted by the Council.

The NZHC decision in *Hauraki Coromandel Climate Action* is significant because (like the NZHC decision in *Thomson v Minister for Climate Change Issues*)[11] it accepted the scientific consensus about climate change generally and the likely impacts on the Thames-Coromandel district in particular, because it confirmed the public interest in local authority decisions pertaining to climate change being amenable to judicial review, and more significantly because it established a link between protecting the lives and welfare of people from the effects of climate change and fundamental human rights.

For example, in relation to the reviewability of the decision, Palmer J stated:

> The evidence, including the Council's own documents, establishes that the potential and likely effects of climate change, and the measures required to mitigate those effects, are of the highest public importance. As the Declaration states, they are likely to implicate a wide range of dimensions of social, economic and environmental well-being in the district. The decision could have legal implications. But even if it did not, the political and policy issues for the Council are of the highest order. The existence of a policy dimension to a decision does not immunise it from judicial review, as *Thomson v Minister for Climate Change Issues* held in relation to climate change. Rather, the reverse. There is a strong public interest in decision-making by the Council on such issues being subject to judicial review. Given the nature, effects and significance of the decision, it is reviewable.[12]

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9 *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228.
10 LGA, s 14, s 76, s 77, s 78, s 79, s 80, s 82.
11 *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160.
12 *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [40].

When addressing the question of the appropriate level of intensity of review in relation to whether the decision by the Council not to approve the signing of the Declaration by the Mayor was unreasonable, Palmer J established an important link between protecting the lives and welfare of people from the effects of climate change and fundamental human rights based on comparative legal analysis of the decision of The Netherlands Supreme Court in *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*.[13] Palmer J stated:

> There is no doubt that climate change gives rise to vitally important environmental, economic, social, cultural and political issues in 2020. It can also give rise to important legal issues. In *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, the Supreme Court of the Netherlands examined the obligations imposed on states by articles 2 and 8 of the European Convention on Human Rights regarding the right to life and the right to private and family life. It held that climate change threatens human rights. It held those human rights, in conjunction with the United Nations Framework Convention on Climate Change, oblige the Netherlands to reduce greenhouse gas emissions in its territory in proportion to its share of responsibility because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands. Here … the inhabitants and environment in the Thames-Coromandel District, and the cost of Council infrastructure, are likely to be significantly impacted by the effects of anthropogenic climate change.[14]

Palmer J therefore concluded:

> I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here.[15]

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13 *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:HR:2019:2007.
14 *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [50].
15 *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [51].

Legislative amendments and climate change

The *Resource Management Amendment Act 2020* attempted to reform the law relating to climate change by repealing previous amendments to the *Resource Management Act 1991* (RMA) that (inter alia) precluded local authorities from having regard to the effects of GHG discharges on climate change when deciding applications for discharge permits.[16] While these amendments will enable interested members of the public (when consent applications are publicly notified) to make submissions about non-renewable energy developments arguing that such applications should be declined or that GHG discharges should be mitigated by planting forest sinks,[17] climate change mitigation will remain piecemeal as a result of the focus on specific projects. More importantly, these amendments will be unlikely to influence government policy on climate change mitigation because the *Climate Change Response (Zero Carbon) Amendment Act 2019* reversed the High Court decision in *Thomson* (noted above) by providing that any failure to meet GHG emissions reduction targets or budgets is merely a permissive consideration that decision-makers are free to ignore "if they think fit", and by restricting judicial review by limiting public law remedies to the discretion to make declarations only, thereby precluding the Senior Courts from making any of the prerogative orders (e.g. mandamus).[18]

Most recently, the *COVID-19 Recovery (Fast-track Consenting) Act 2020* that is designed to urgently promote employment, support recovery from the economic and social impacts of COVID-19, and support investment certainty across New Zealand, provides for consent applications for nominated projects to be decided by expert consenting panels appointed by the Minister for the Environment and limits appeals by providing for appeals to the High Court and beyond that to the Court of Appeal on questions of law only (bypassing the specialist Environment Court). These appeals are "final" and appeal to the Supreme Court is precluded. While judicial review is preserved, any application for judicial review must be lodged concurrently with any statutory appeal, unless the High Court grants leave for the proceedings to be lodged separately.

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16 RMA, s 104E inserted by the *Resource Management (Energy and Climate Change) Amendment Act 2004*, s 7.

17 *Resource Management Amendment Act 2020*, s 35 in force by Order in Council made between 31 December 2021 and 30 November 2022.

18 CCRA, s 5ZM and s 5ZN inserted by *Climate Change Response (Zero Carbon) Amendment Act 2019*, s 8.

Eroding the rule of law?

The Senior Courts in New Zealand have adopted a consistent approach to privative or ouster clauses following the Court of Appeal decision in *Bulk Gas Users Group v Attorney General*[19] where the Court (when dealing with an exclusive alternative remedy provision) held that ouster clauses only protect decisions on questions of law that the relevant statute allows the decision-maker to decide "conclusively". This approach applies to both inferior courts and tribunals, and has effectively deprived ouster clauses of any practical effect. The approach in *Bulk Gas* is also strengthened by the *New Zealand Bill of Rights Act 1990* (NZBORA) that affirms the right to judicial review, and that requires that statutory provisions should be interpreted in a way that is consistent with the rights and freedoms affirmed by the NZBORA.[20] Effectively, the NZBORA requires ouster clauses to be interpreted as permitting judicial review, unless the only meaning that could be given to the relevant statutory provision is one that excludes judicial review.

Various types of ouster clauses are found in New Zealand statute law, including, limitation of the scope of review clauses (e.g. *Climate Change Response (Zero Carbon) Amendment Act 2019*) and finality clauses (e.g. *Resource Management Amendment Act 2020* and *COVID-19 Recovery (Fast-track Consenting) Act 2020*). Limitations on the scope of review appear to be justified on the basis that an effective public law remedy is available, but it is unclear how the restrictions on relevant considerations and remedies in the *Climate Change Response (Zero Carbon) Amendment Act 2019* could be "demonstrably justified in a free and democratic society".[21] It is also for note that, following *Bulk Gas*, finality clauses do not prevent judicial review for any error of law, within or without jurisdiction.

Restricted appeal rights are, however, problematic because an appeal against a decision of the High Court is necessary before an application for judicial review can be heard by the Supreme Court, and because it remains unclear whether the provisions in the *COVID-19 Recovery (Fast-track Consenting) Act 2020* are intended to oust the jurisdiction of the Supreme Court completely. It is therefore likely that these provisions will be tested before the Senior Courts, and that such litigation

19 *Bulk Gas Users Group v Attorney General* [1983] NZLR 129.
20 NZBORA, s 6.
21 NZBORA, s 5.

could expose political fault lines between the government and the courts (similar to *R (Miller) v Prime Minister*)[22] that should preferably be avoided.

Putting aside the need to justify prohibiting a statutory right of appeal to the Supreme Court, it is unclear whether the right to judicial review could be constrained in the same way. For example, the majority of the United Kingdom Supreme Court (UKSC) in *R (Privacy International) v Investigatory Powers Tribunal*[23] expressed doubt as to whether Parliament could oust the judicial review jurisdiction of apex courts. Beyond that, the UKSC majority in *Privacy International* also drew attention to the practical difficulty inherent in any attempt to craft an ouster clause that could effectively prohibit an apex court from exercising inherent judicial review jurisdiction. Viewed in this way, prohibiting statutory rights of appeal to the Supreme Court would likely be pyrrhic, because the Court's inherent judicial review jurisdiction would remain intact.

RMA review

The report of the Resource Management Review Panel, *New Directions for Resource Management in New Zealand*[24] also noted that New Zealand is already experiencing the impact of climate change but found that the current legislative framework under the RMA and the CCRA does not in reality focus on reducing GHG emissions or addressing increased natural hazard risks resulting from climate in a coherent or consistent way. The report therefore recommended that regional planning under the RMA should play a part in reducing GHG emissions and managed coastal retreat.[25] These recommendations are consistent with the reforms under the *Resource Management Amendment Act 2020* (noted above).

Climate change emergency

Most recently, the New Zealand Parliament declared a climate change emergency on 2 December 2020 that emphasises the steps taken to date by the New Zealand Government to address climate change mitigation and reduce GHG emissions across all sectors of the economy, and introduces a

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22 *R (Miller) v Prime Minister* [2019] UKSC 41.
23 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
24 Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (Wellington, 2020).
25 Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (Wellington, 2020), 191.

new commitment to "show leadership and demonstrate what is possible to other sectors of the New Zealand economy by reducing the Government's own emissions and becoming a carbon-neutral Government by 2025".[26] This will be achieved through building management and public procurement by applying the NABERSNZ scheme adapted by the Energy Efficiency and Conservation Authority (EECA) and the New Zealand Green Building Council (NZGBC) from the National Australian Building Environmental Rating System (NABERS) in 2013 to all buildings over 2,000 square metres in floor area owned or leased by New Zealand Government Departments and Departmental Agencies, the New Zealand Defence Force, the New Zealand Police, and 25 Crown Entities. This will include minimum requirements to meet a 4-star rating when entering into new building leases and a 5-star rating when commissioning new buildings. These organisations will also be required to phase out coal boilers, purchase electric vehicles where practicable, and reduce their vehicle fleet size. Additionally, these organisations together with 16 Crown Entity subsidiaries, 2,416 School Boards of Trustees, and 8 Universities will be required to measure, verify and report on their GHG emissions. In particular, this will entail setting gross GHG emissions reduction targets, introducing work plans to reduce their emissions, and offsetting their emissions to achieve carbon neutrality.[27]

While these are real commitments for the public sector, they will only have a persuasive effect on other sectors of the New Zealand economy. But the lessons from COVID-19 lockdowns have demonstrated (as noted by Gerd Winter) that "in urgent situations society is much more prepared than assumed to accept strict regulation entailing deep interferences with basic personal and economic rights".[28] This observation is important in light of the findings by the Oxford Smith School of Enterprise and the Environment on the effect of COVID-19 economic recovery packages on climate change, that annual GHG emissions reductions (7.6 per cent per year) similar to those experienced

[26]Notice of motion, House of Representatives, Order Paper, 2 December 2020, 9.

[27] Media Release by Rt Hon Jacinda Ardern, Prime Minister; Hon James Shaw, Minister for Climate Change; and Hon Stuart Nash, Minister for Economic and Regional Development, 2 December 2020; Table of Organisations included in the Carbon Neutral Government Programme <Beehive.govt.nz>

[28] Gerd Winter, "Lessons of the Corona pandemic learning for environmental policy" (The 2020 Journal of Environmental Law Workshop, Environmental Law in the Time of COVID, Webinar, 25 November 2020).

during lockdowns will be required each year during 2021-2030 to prevent global temperature rise above 1.5^0C.[29]

[29] Cameron Hepburn, Brian O'Callaghan, Nicholas Stern, Joseph Stiglitz and Dimitri Zenghelis, *Will Covid-19 fiscal recovery packages accelerate or retard progress on climate change?* (Oxford Smith School of Enterprise and the Environment, Working Paper No 20-02, 8 May 2020), 5-6.