CCLR Special Issue: *"Getting to Zero": Policy Options and Legal Measures for Climate Change Mitigation and Land Use*

When the ship is sinking … everybody bails

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This article provides a case study of the New Zealand experience in climate change mitigation. It examines New Zealand's greenhouse gas emissions profile, and explores the policy response of the courts under the Resource Management Act 1991, the impact of statutory reforms on public participation, judicial review of emissions targets and local authority action, novel torts, and public policy and statutory attempts to get to zero carbon.

I. Introduction

New Zealand legislated for the sustainable management of natural and physical resources by enacting the Resource Management Act 1991 (RMA), a framework statute that restated and reformed the law relating to the use of air, land, and water. In particular, the RMA restricts the use of land by promulgating rules in district and regional plans and by requiring the grant of consent for activities that contravene plan rules or national environmental standards,[1] it restricts the take and use of water unless expressly allowed by regional plan rules (or national environmental standards) or by the grant of consent,[2] and it restricts the discharge of contaminants into the environment unless expressly allowed by regional plan rules (or national environmental standards) or by the grant of consent.[3] For example, restrictions on land use under s 9 of the RMA provide the primary legal measures for regulating agricultural activities, land use change, and enhancing or protecting forest sinks. The potential for the RMA to reduce or avoid greenhouse gas (GHG) emissions was explored through a series of climate change litigation cases during the

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[1] RMA, s 9.

[2] RMA, s 14.

[3] RMA, s 15.

period 2002-2014, but subsequently climate change litigation has focused on the judicial review of statutory decisions and novel tort claims as a result of reforms to the RMA and other statutes. These opportunities for climate action together with the recent declaration of a climate emergency by the New Zealand Government, and the draft advice on future policy directions recently issued by the Climate Change Commission, will be critically examined below.

II. New Zealand's GHG emissions profile and adaptation and mitigation framework

Climate change poses a significant risk for New Zealand both at national and at district level.[4] For example, sea level rise and increased storm surge frequency may increase the risk of coastal erosion and inundation that adversely affect communication networks and buried infrastructure (in particular, storm water and waste services), severe weather events are likely to increase flooding and landslides, salt water intrusion is likely to adversely affect unconfined aquifers and coastal and marine biodiversity, and ocean acidification will adversely affect coastal waters and the increased risk of invasive species will make biosecurity more difficult to control.[5]

1. New Zealand's GHG emissions profile

During the period 1990-2018 New Zealand's gross GHG emissions increased by 24 per cent from 63,590.9 kilotonnes carbon dioxide equivalent (kt CO_2-e) to 78,862.3 kt CO_2-e, caused primarily by methane from livestock digestive systems, nitrous oxide from fertiliser application to agricultural soils, and carbon dioxide from road transport.[6] Notwithstanding this position, New Zealand is likely to meet its 2020 target (namely, to reduce GHG emissions to 5 per cent below 1990 levels) by

[4] Ministry for the Environment, *National Climate Change Risk Assessment for New Zealand* (New Zealand Government, Wellington, 2020), 60-66.

[5] *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [6].

[6] Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018* (April 2020), 2.

using 14.6 million surplus units carried over from the 2008-2012 commitment period (CP1) together with projected forestry removals (sinks) totalling 108 Mt CO_2-equivalent.[7] After meeting its 2020 target New Zealand will retain a balance of 109.1 million surplus units from CP1 that can be offset against future GHG emission reduction obligations.

GHG emissions from the agriculture sector increased by 17.1 per cent during the period 1990-2018, driven mainly by the increase in the size of the national dairy herd (85.6 per cent), and the increase in the application of synthetic nitrogen fertiliser (670 per cent) to improve pasture, during this period.[8]

Similarly, GHG emissions from the energy sector overall increased by 8,167.8kt (34.3 per cent) during the period 1990-2018, and GHG emissions from road transport in particular increased by 7,595.6kt during the same period. The marked increase of GHG emissions from road transport (101.6 per cent) obliterated the gains made by the transition in electricity generation from fossil fuels to 90 per cent generation from renewable sources (hydro, geothermal, and wind) during the period 1990-2018.[9]

Overall, GHG emissions from the agriculture sector contributed 37.7 Mt CO_2-equivalent or 48 per cent of New Zealand's GHG emissions profile in 2018, and GHG emissions from the energy sector (primarily from road transport as noted above) contributed 31.9 Mt CO_2-e during the same year. In contrast, the Land Use, Land-Use Change and Forestry (LULUCF) sector offset New Zealand's gross GHG emissions in 2018 by -23.4 Mt $C0_2$-e or 30 per cent.[10]

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7 Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018: Snapshot April 2020*, 7.

8 Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018: Snapshot April 2020*, 4.

9 Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018* (April 2020), 77.

10 Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018: Snapshot April 2020*, 1.

2. New Zealand's adaption and mitigation framework

The Climate Change Response Act 2002 (CCRA) was enacted to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change 1992 (UNFCCC) and the Kyoto Protocol 1997.[11] Under Part 3 of the CCRA, the Inventory agency (the Ministry for the Environment) is responsible for recording New Zealand's GHG emissions profile by compiling and publishing "the official annual report of all anthropogenic (human-induced)" GHG emissions and removals carried out to comply with New Zealand's obligations under the UNFCCC and the Kyoto Protocol.[12]

Subsequently, the CCRA was amended by the Climate Change Response (Emissions Trading) Amendment Act 2008 to establish the New Zealand Emissions Trading Scheme (NZ ETS) and impose obligations on all participants to monitor and report on their GHG emissions and to surrender one unit held under the NZ ETS for each tonne of CO2-equivalent GHG emitted during the relevant reporting year (or to receive similar credits for removals). The NZ ETS as originally designed covered all GHGs and all sectors of the economy and was intended to be fully phased in by 2015. Significant amendments were also made to the CCRA following the 2017 general election, including, providing for New Zealand units (NZU) to be auctioned under the NZ ETS to put a cap on GHG emissions in place, retaining the ability to limit the quantum of approved overseas units transferred into the NZ ETS, phasing out the free allocation of NZU to the industry sector and reduced compliance rates from 2021 onwards, and cancelling units held over from CP1 and replacing them with NZU. These amendments were given effect to by the Climate Change Response (Emissions Trading Reform) Amendment Act 2020.

The New Zealand Registry (established under the Climate Change Response (Emissions Trading) Amendment Act 2008) also plays a vital

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[11] CCRA, s 3.

[12] Ministry for the Environment, *New Zealand's Greenhouse Gas Inventory 1990-2018* (April 2020), 2.

part in the NZ ETS architecture by ensuring the accurate accounting of units under the Kyoto Protocol.[13] The Registry is administered by the Chief Executive of the Environmental Protection Authority (under the direction of the Minister of Finance) and governs the units that may be traded (including the issue and allocation of NZU and the transfer of any approved overseas units into the NZ ETS), provides for the sale of NZU by auction (as noted above), stipulates the requirements for holding accounts to be opened by all participants in the NZ ETS, and regulates the transfer, surrender, and cancellation of units (including provision for verification, monitoring, and enforcement).[14] Participants in the NZ ETS include, persons involved in economic sectors that are obliged under the CCRA to surrender units to cover GHG emissions (mandatory participants phased in over time),[15] persons who are eligible for afforestation credits under the Permanent Forest Sink Initiative (PSFI), and investors who participate voluntarily.[16]

The CCR (as amended by the Climate Change Response (Zero Carbon) Amendment Act 2019) also now provides for the establishment of the Climate Change Commission to provide independent advice to the Government on climate change adaptation and mitigation, and to monitor the Government's progress towards its adaptation and emissions reduction goals.[17] In particular, the CCRA now provides for emissions reduction targets and budgets to be set by the Government for 2050 to assist in meeting New Zealand's international obligations under the Paris Agreement 2015.[18] The Climate Change Commission will play an integral

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[13] Derek Nolan QC (Editor) *Environmental and Resource Management Law* (7th Edition, LexisNexis, Wellington, 2020), 1003.

[14] CCRA, Part 2 Subpart 2, and Part 4.

[15] Mandatory participation in the NZ ETS is governed by CCRA, Schedule 3 and applies to persons carrying out activities with respect to: Forestry, Liquid fossil fuels, Stationary energy, Industrial processes, Agriculture (currently fertiliser processing only, and the from a future date (to be specified by an Order in Council) the application of synthetic nitrogen fertiliser to land), and Waste disposal facility operation.

[16] Derek Nolan QC (Editor) *Environmental and Resource Management Law* (7th Edition, LexisNexis, Wellington, 2020), 1002-1003.

[17] CCRA, s 5B.

[18] CCRA, s 5Q (inserted by the Climate Change Response (Zero Carbon) Amendment Act 2019, s 8, on 14 November 2019).

role in this process by providing advice to the Minister for Climate Change on the following matters under s 5ZA(1) of the CCRA (as amended):

a) the recommended quantity of emissions that will be permitted in each emissions budget period; and

b) the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target; and

c) how the emissions budgets, and ultimately, the 2050 target, may realistically be met, including by pricing and policy methods; and

d) the proportions of an emissions budget that will be met by domestic emissions reductions and domestic removals, and the amount by which emissions of each greenhouse should be reduced to meet the relevant emissions budget and the 2050 target; and

e) the appropriate limit on offshore mitigation that may be used to meet an emissions budget, and an explanation of the circumstances that justify the use of offshore mitigation.

In relation to adaptation, the Minister is required to prepare both a national climate change risk assessment every six years and a national adaptation plan (within two years following each risk assessment) to give effect to the risk assessment.[19] The preparation of these documents currently remains a work in progress.

Bringing the agriculture sector into the NZ ETS has been challenging. While the agriculture sector has been required to monitor and report on GHG emissions from 1 January 2012, the Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012 removed the specified NZ ETS entry date for the agriculture sector. As a result, the agriculture sector has not (until recently) been subject to the surrender

[19] CCRA, s 5ZQ and s 5ZS.

obligations under the NZ ETS for biogenic methane emissions. This position changed significantly following the 2017 general election. The Interim Climate Change Committee (ICCC) established in April 2018 as a precursor to the formal establishment of the Climate Change Commission under the Climate Change Response (Zero Carbon) Amendment Act 2019 (noted above) provided recommendations to the Government on "how surrender obligations could be arranged if agricultural methane and nitrous oxide emissions enter into" the NZ ETS.[20] The ICCC recommendations were reflected in the Climate Change Response (Emissions Trading Reform) Amendment Act 2020 that now provides for pricing GHG emissions from animals at farm level and GHG emissions from the application of synthetic nitrogen fertiliser at processor level by regulations (to be promulgated by Order in Council) from 2025. Absent the promulgation of such regulations by Order in Council to establish these specific pricing mechanisms, GHG emissions from the agriculture sector would (as a fallback) become subject to the surrender obligations under the NZ ETS.[21] The free allocation of New Zealand units to NZ ETS participants from the agricultural sector was also increased from 90 per cent to 95 per cent to ease the transition of the sector into the NZ ETS (if required) under the CCRA.[22]

3. Net zero emissions

In response to the decision of the New Zealand High Court (NZHC) in *Thomson v Minister for Climate Change Issues*[23] (noted below) the New Zealand Government set amended 2050 targets under s 5Q of the CCRA[24] (as amended) to address New Zealand's GHG emissions profile to require that:

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[20] ICCC, *Agriculture* (14 August 2018).

[21] Derek Nolan QC (Editor) *Environmental and Resource Management Law* (7th Edition, LexisNexis, Wellington, 2020), 1010.

[22] Derek Nolan QC (Editor) *Environmental and Resource Management Law* (7th Edition, LexisNexis, Wellington, 2020), 1010.

[23] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160.

[24] Inserted into the CCRA by s 8 of the Climate Change Response (Zero Carbon) Amendment Act 2019.

a) net accounting emissions of greenhouse gases in a calendar year, other than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year; and

b) emissions of biogenic methane in a calendar year –

i. are 10% less than 2017 emissions by the calendar year beginning on 1 January 2030; and

ii. are 24% to 47% less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent calendar year.

In relation the definition of "net-zero emissions" used for the purposes of this special journal issue,[25] New Zealand does not currently keep annual GHG emissions from all sources within its national territory in balance with GHGs removed from the atmosphere by sinks within its national territory in the target year. While New Zealand has to date relied on accumulated international transfers for GHG mitigation outcomes (as noted above) it does not specify (in the regulatory framework currently in force) the proportion of domestic GHG mitigation versus international transfers in terms of meeting net-zero emissions targets. These gaps in the legal framework arise because the NZ ETS did not (as enacted in 2008) impose a cap on trading under the ETS:

> Instead, the NZ ETS operates within the cap on emissions from Annex B countries set by the Kyoto Protocol.[26]

However, the Climate Change Response (Emissions Reform) Amendment Act 2020 has now introduced a decision-making framework that will enable a cap to be imposed on allowable GHG emissions in the future by

[25] Fabiano de Andrade Correa and Christina Voigt, "Editorial piece: Net-zero GHG emissions under the Paris Agreement: what does it mean and the role of land-sector legislation in achieving this goal", CCLR Special Issue 2020, 3.

[26] Derek Nolan QC (Editor) *Environmental and Resource Management Law* (7th Edition, LexisNexis, Wellington, 2020), 1002.

promulgating regulations to prescribe limits on the quantum of units that can be used in any calendar year (including any new international transfers).[27] Although international transfers have not been accepted since 2015 as a result of the New Zealand Government decision to take GHG emissions reductions under the UNFCCC for the commitment period 2013-2020 (CP2), accumulated surplus units from international transfers during CP1 will continue to exert a disincentive to generate real GHG emissions reductions from all sources within New Zealand. The statutory amendments made to the ETS by the Climate Change Response (Zero Carbon) Amendment Act 2019 take the first real steps to regulate GHG emissions from the agricultural sector.

III. Enhancing and protecting forest sinks

The New Zealand Environment Court (NZEnvC) in *Environmental Defence Society v Auckland Regional Council*[28] considered whether planting forest sinks should be required to offset GHG emissions from a proposed gas-fired combined cycle power station at Otahuhu, in the Auckland region, in the context of a discharge permit application under the RMA. The Environmental Defence Society (EDS) relying on the UNFCCC and the Kyoto Protocol contended that a consent condition was required to offset the adverse effect of GHG emissions, whereas the Council and Contact Energy (the applicant) argued that local authorities should not be required to consider the effects of GHG emissions beyond their administrative boundaries.

The NZEnvC noted the scientific evidence regarding climate change, and the UNFCCC requirements for the parties to stabilise GHG emissions to prevent dangerous anthropogenic interference with the climate system,[29] and the need for developed countries to undertake specific commitments

[27] Climate Change Response (Emissions Reform) Amendment Act 2020, s 50 (inserting a new s 30GB into the Climate Change Response Act 2002).

[28] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493.

[29] UNFCCC, Article 2.

to mitigate climate change[30] and to return GHG emissions to their 1990 levels.[31] In particular, the NZEnvC stated:

> On the evidence presented to us, we find that the greenhouse effect and the possibility of climate change are a matter of serious concern. It is difficult to assess the degree of concern because there are widely differing opinions as to the likely environmental consequences. However, the weight of scientific opinion is such, that on balance, the threat posed by the enhanced greenhouse gas effect is sufficiently significant for us to conclude that the green house effect is likely to result in significant changes to the global environment, including New Zealand and the Auckland region.[32]

Put simply, the NZEnvC was not persuaded by the Council's argument that New Zealand's contribution to global GHG emissions was "very small" and that any saving from not building the proposed Otahuhu power station (0.005 per cent of total global GHG emissions) would be "equivalent to less than one day of growth in … developing nations" GHG emissions.[33] Accordingly, it held that the definition of "effects" in s 3 of the RMA "should not be interpreted narrowly" and found that it includes cumulative effects that arise "over time or in combination with other effects",[34] and observed:

> We can find nothing in the wording of the relevant provisions of the Act, particularly in s 5, Part II and in the definitions of "environment and effects" in s 2 which could limit the application of consideration of effects to within the boundaries of a regional council.[35]

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30 UNFCCC, Article 4(2).

31 UNFCCC, Article 17.

32 *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [65].

33 *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [58].

34 *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [59]; RMA, s 3(d).

35 *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [63].

Likewise, the NZEnvC held that the UNFCCC and the Kyoto Protocol were "relevant considerations to be taken into account pursuant to s 104(1)(i)" of the RMA based on the established common law position, although New Zealand had not (at that time) transposed the UNFCCC requirements into domestic legislation and had not ratified the Kyoto Protocol, because:

> It has been increasingly recognised in recent years that, even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international obligations.[36]

The NZEnvC therefore held that "New Zealand is required by Article 18 of the Vienna Convention on the Law of Treaties to refrain from Acts which would defeat the object and purpose of the Kyoto Protocol, even before it has ratified that instrument".[37]

However, the NZEnvC exercising its "broad" discretion under the RMA decided against including the offsetting condition requested by EDS due to concerns regarding its ability to assess both "the national and international consequences" and "the social and economic consequences" of the condition, the preferred New Zealand Government policy to address GHG emissions in an international and national context (a proposed carbon tax that was later abandoned in 2005),[38] the endorsement of the Government's preferred policy approach in the regional planning documents, and the residual doubt regarding the "efficacy of such a condition in the global context".[39] Notwithstanding this result, the

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[36] *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229 per Richardson J; *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [25].

[37] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [27].

[38] Cabinet Minute of Decision "Climate Change: Review of Policy and Next Steps" (19 December 2005) CBC Min (05) 20/10.

[39] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [88].

significance of the NZEnvC decision lies in its finding that while it was "not possible to definitively quantify, the prognosis is sufficiently serious for us to find that the emissions from Otahuhu C will result, in a cumulative way, in an adverse effect of some consequence".[40] While the NZEnvC declined to decide the submission that it was not within the Council's functions under s 30 of the RMA to require forest sinks to be planted outside the region, the NZEnvC observed that it "would be confronted with considerable practicable difficulties in monitoring and enforcing it".[41]

Subsequently the New Zealand Government finally arrived at a preferred policy package to reduce GHG emissions in an international and national context by amending the Climate Change Response Act 2002 (CCRA) to introduce the NZ ETS in 2008.[42]

IV. RMA reform and public participation

1. RMA reforms

In the interim, the New Zealand Government response to the EDS climate change litigation[43] emphasised the preferred policy to address GHG emissions in an international and national context by:

- Amending s 7 of the RMA to insert references to "the efficiency of the end use of energy", "the effects of climate change", and "the benefits derived from the use and development of renewable energy" in the list of matters that decision-makers are required to have particular regard to.[44]
- Inserting s 70A into the RMA that currently precludes regional councils (when making rules to control the discharge of GHG

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[40] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [88].

[41] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493 at [92].

[42] Climate Change Response (Emissions Trading) Amendment Act 2008.

[43] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 493; *Environmental Defence Society v Taranaki Regional Council* (A184/2002).

[44] Resource Management (Energy and Climate Change) Amendment Act 2004, s 5.

emissions into air) from having "regard to the effects of such discharges on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either – (a) in absolute terms; or (b) relative to the use and development of non-renewable energy".[45]

- Inserting s 104E into the RMA that currently precludes regional councils (when considering discharge permit applications relating to the discharge of GHG emissions into air) from having "regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either – (a) in absolute terms; or (b) relative to the use and development of non-renewable energy".[46]

2. Decisions from the Senior Courts

These statutory amendments gave rise to further climate change litigation. For example, in *Genesis Power Ltd v Greenpeace New Zealand*,[47] the New Zealand Supreme Court (NZSC) considered a declaratory application on further appeal. Genesis proposed to develop a gas-fired power station at Rodney, in the Auckland region. In particular, the proceedings focused on s 104E of the RMA that precludes regional councils from considering the effects of GHG emissions on climate change when deciding discharge permit applications. The declaratory proceedings in *Genesis Power* arose because the NZHC had previously held in *Greenpeace New Zealand v Northland Regional Council* (regarding a separate proposal for the development of coal-fired power station at Marsden Point, in the Northland region, by Mighty River Power) that whether a proposed activity would enable the reduction of GHG emissions into air was a relevant consideration in relation to both

[45] Resource Management (Energy and Climate Change) Amendment Act 2004, s 6.

[46] Resource Management (Energy and Climate Change) Amendment Act 2004, s 7.

[47] *Genesis Power Ltd v Greenpeace New Zealand* [2009] 1 NZLR 730.

renewable and non-renewable energy projects.[48] This approach was, however, rejected by the New Zealand Court of Appeal (NZCA) in *Genesis Power* where the NZCA declared that:

> In considering the application by Genesis Power of a discharge permit relating to the discharge into the air of greenhouse gases associated with the proposed Rodney power station, the Auckland Regional Council must not have regard to the effects of that discharge on climate change.[49]

Genesis therefore maintained before the NZSC that s 104E of the RMA was only relevant (as a mandatory consideration) in the context of discharge permit applications pertaining to renewable energy development, and that there was "no corresponding disadvantage to an application which chooses to use only non-renewable energy".[50] The majority in the NZSC was persuaded by this argument and upheld the NZCA decision to grant the declaration (noted above) because only renewable energy applications were capable of enabling a reduction in GHG emissions.[51]

Subsequently, in *West Coast ENT v Buller Coal Ltd*,[52] the NZSC was required to consider s 104E of the RMA in the context of a land use consent application for the construction of roads and the handling of hazardous substances in relation to a proposed open-cast coal mine on the Denniston Plateau, in the West Coast region. The majority in the NZSC held that the legislative scheme in the RMA (as amended by the Resource Management (Energy and Climate Change) Amendment Act

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48 *Greenpeace New Zealand v Northland Regional Council* [2007] NZRMA 87 at [50].

49 *Genesis Power Ltd v Greenpeace New Zealand* [2008] 1 NZLR 803 at [44].

50 *Genesis Power Ltd v Greenpeace New Zealand* [2009] 1 NZLR 730 at [8].

51 *Genesis Power Ltd v Greenpeace New Zealand* [2009] 1 NZLR 730 at [11], [20], [26], [36], [54], [56], [62], and [65].

52 *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32.

2004) would be subverted if the reduction of GHG emissions could be considered in relation to ancillary land use consent applications.[53]

The NZCA decision in *Genesis Power* and the NZSC decision in *Buller Coal* are, however, remarkable for the way that they addressed the relative scale of GHG emissions and their global impact. For example, in *Genesis Power* the NZCA noted "New Zealand's comparatively low contributions to worldwide GHG emissions and infinitesimal contribution which any particular project could make", and stated "there could be no demonstrable linkage between GHG emissions associated with any particular project and climate change in general".[54] Similarly, in *Buller Coal* the NZSC considered that overseas steel manufacturers would regardless of "whatever happens in New Zealand, burn whatever coal is required for their purposes" and that the GHG emissions "which result from their operations is not properly to be seen as a consequence or effect of the mining of coal in New Zealand".[55] Accordingly, the NZSC majority in *Buller Coal* considered that "it would be difficult, and probably impossible, to show that the burning of coal would have any perceptible effect on climate change".[56]

3. Regression and public participation

Overall, the Resource Management (Energy and Climate Change) Amendment Act 2004 reforms have had a radical effect in shutting out public participation under the RMA in decisions that are likely to increase GHG emissions either directly from activities in New Zealand or indirectly from activities overseas. These regressive reforms were predicated on the hypothesis that GHG emissions could be regulated and reduced more efficiently and effectively via national direction (e.g. under the NZ ETS).

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53 *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32 at [170], [171], [172], [174], and [175].

54 *Genesis Power Ltd v Greenpeace New Zealand* [2008] 1 NZLR 803 at [17].

55 *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32 at [122](a).

56 *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32 at [122](b).

Arguably, the minority judgment of Elias CJ in *Buller Coal* provides a more coherent and logical approach to statutory interpretation based on the legislative history of the reforms. This analysis led her to conclude:

> The fact that climate change consideration was removed only in relation to consents for permits to discharge greenhouse gases into air (as the terms of the amendments made clear) left regional councils and consent authorities able to take into account climate change effects in all other resource management planning and consent processes.[57]

Similarly, Elias CJ was not persuaded by the remoteness or tangibility arguments and cited with approval the conclusions of the NZEnvC in the EDS climate change litigation, and found that the relative scale of GHG emissions should not be ignored as de minimis and that cumulatively the combined effect of GHG emissions is global.[58]

4. Full circle

The restrictions imposed on regional councils against having "regard to the effects of such discharges on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either – (a) in absolute terms; or (b) relative to the use and development of non-renewable energy" under s 70A and s 104E of the RMA when preparing regional plan rules and deciding discharge permit applications will now be repealed by 30 November 2022 (at latest)[59] by s 19 and s 35 of the Resource Management Amendment Act 2020. It is however unclear at the time of writing whether these statutory amendments will (in practice) result in a resurgence of climate change litigation under the RMA or any replacement legislation that may in future be in force.

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[57] *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32 at [85].

[58] *Environmental Defence Society v Taranaki Regional Council* (A184/2002) at [24]; *West Coast ENT v Buller Coal Ltd* [2014] 1 NZLR 32 at [87]-[91].

[59] Resource Management Amendment Act 2020, s 2(3) and s 2(4).

V. Turning the tide?

1. Climate change targets

As a result of the majority NZSC decision in *Buller Coal* climate change litigation in New Zealand refocused on national direction. For example, the decision of the NZHC in *Thomson v Minister for Climate Change Issues* [60] focused on the 2030 and 2050 targets set under the CCRA.

First, Thomson argued that the Minister was required to review the 2050 target (set in 2011) for 50 per cent reduction from 1990 GHG emission levels by 2050 following the staged publication of the Fifth Assessment Report (AR5) by the Intergovernmental Panel on Climate Change (IPCC) in 2013-2014 that indicated that global temperature increases should be limited to no more than 2^{o}C above pre-industrial levels to address climate change mitigation. The New Zealand Government accepted that AR5 provided the most up to date scientific consensus (at that time) about climate change. Accordingly, the NZHC held that the Minister was required to consider whether the target set under s 224 of the CCRA should be reviewed to comply both with the requirements of the CCRA and New Zealand's international obligations under the UNFCCC. The NZHC found that this was a mandatory relevant consideration. Mallon J stated:

> … The IPCC reports provide the most up to date scientific consensus on climate change. New Zealand accepts this. To give effect to the Act and what New Zealand has accepted, recognised and committed to under the international instruments, and in light of the threat that climate change presents to humankind and the environment, I consider the publishing of a new IPCC report requires the Minister to consider whether a target set under s 224 should be reviewed. That is, it is a mandatory relevant consideration in whether an existing target should be reviewed under s 224(2). The Minister must therefore consider whether

[60] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160.

> information in an IPCC report materially alters the information against which an existing target was set. If it does, a review of the target must be undertaken. That review may or may not lead to a decision to amend an existing target or to set additional targets, depending on the outcome of the process undertaken.[61]

Second, Thomson contended that the Minister had failed to take account of relevant considerations when setting New Zealand's Nationally Determined Contribution (NDC) under the Paris Agreement, including, the cost of climate change mitigation absent any real action, the adverse effects on Tokelau and other developing countries, and the scientific consensus that cumulatively NDCs (generally) fell short of the reductions required to stabilize GHG emission levels.[62] In response, the Minister argued that these matters were not amenable to review because the Paris Agreement had not been incorporated into domestic New Zealand law and because setting the 2030 target required the balancing of economic and social factors.[63] Put simply, these were political matters. The NZHC was not persuaded by these arguments. After considering comparative case law from Canada, The Netherlands, the United Kingdom, and the United States, Mallon J stated:

> … The courts have not considered the entire subject matter is a "no go" area, whether because the state has 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

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61 *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [94].

62 *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [99].

63 *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [102].

> 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. …[64]

This led Mallon J to conclude:

> … 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. …[65]

The NZHC held that climate change effects on the Pacific island group of Tokelau (that forms part of the realm of New Zealand) was a mandatory relevant consideration when setting the NDC, but the NZHC found that this did not require the Minister to suggest that global temperature increases should be limited to no more than 1.5°C.[66] Overall, the NZHC found that compliance with the requirements of the Paris Agreement was not a "no go" area and that it was susceptible to judicial review.

Third, Thomson argued that the Minister's decision in setting the NDC was irrational or unreasonable either because it was not based on a rational belief that the NDC would respond to global climate change in a meaningful way, or because the NDC fell short of what was required (when compared with the global scientific consensus) to stabilize global GHG emissions. While the NZHC observed that a differently constituted Government may have balanced competing economic and social factors in a different way, the NZHC nevertheless held that the NDC (although unambitious) was within the legitimate ambit of the Minister's discretion.[67]

Overall, the NZHC found that the Minister had failed to review the 2050 target under the CCRA following the publication of AR5, but the NZHC declined to exercise its discretion to grant a public law remedy because

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[64] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [133].

[65] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [134].

[66] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [157].

[67] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [160] and [176].

this ground of review had been overtaken by the General Election 2017 results and the announcement by the incoming Government that it intended to set a new 2050 target. Arguably, based on the persuasive precedent of the United Kingdom Supreme Court decision in *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*,[68] the NZHC should have made a declaration to hold the incoming Government to its word. The second and third grounds of review were not upheld by the NZHC because it was "not persuaded the Minister made any reviewable error" of law.

The importance of the NZHC decision in *Thomson*, however, lies in the acceptance of the scientific consensus about climate change and the definitive nature of the IPCC's assessment reports, the finding that publication of AR5 triggered a mandatory relevant consideration to review the 2050 target, the boldness of the NZHC in concluding that compliance with the Paris Agreement was amenable to judicial review at common law, and the finding that climate change effects on Pacific islands (such as Tokelau) and developing countries was a mandatory relevant consideration in setting New Zealand's NDC.

2. Zero Carbon

Subsequently, the key finding in *Thomson* that publication of AR5 triggered a mandatory relevant consideration to review the 2050 target, and the potential for the Senior Courts to make any one of the prerogative orders (e.g. certiorari, mandamus, or prohibition) in response as an exercise of remedial discretion, have been overturned by the Climate Change Response (Zero Carbon) Amendment Act 2019. For example:

- Section 5ZM(2) restricts the remedial discretion of the Senior Courts to making a declaration for any failure by the New Zealand Government to meet the 2050 target or any emissions budget, and

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

- Section 5ZN reduces the duty to take into account the 2050 target or any emissions budget or any emissions reduction plan from being a mandatory relevant consideration under *Thomson* to now being merely a permissive consideration that decision-makers may either take into account if "they think fit" or ignore.

While the Climate Change Response (Zero Carbon) Amendment Act 2019 has established the Climate Change Commission that will play an important role in providing advice to the Government (as an advisory monitoring body) regarding the review and amendment of the 2050 target, effectively this is a political remedy that will only be subject to scrutiny in the "court of public opinion"[69] and via general elections in the case of any departure by the Government from the Commission's recommendations.[70] Arguably, these statutory amendments remove the important constitutional role (identified by Mallon J in *Thomson*) that the Senior Courts could "play in Government decision making" on climate change.[71]

VI. Novel torts and climate change emergencies

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

1. Novel torts

In *Smith v Fonterra Co-operative Group Ltd*,[72] the 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

[69] *Taylor v Attorney-General* [2015] NZHC 1706 at [70] per Heath J.

[70] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5J and s 5U.

[71] *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 at [133].

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

anthropogenic interference with the climate system and to the adverse effects of climate change".[73] 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 the defendants GHG emissions was considered to be too remote and because allowing negligence claims regarding climate change could compromise the effectiveness of the CCRA.[74]

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".[75] 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.[76]

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

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

[74] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [67]-[69], [82], [93]-[96], [98].

[75] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15] and [103].

[76] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [101].

effects of particular GHG emissions.[77] The importance of the NZHC strike out application decision in *Smith* is the acceptance of the latest scientific consensus from the IPCC and the recognition (based on the extrajudicial writing of Winkelmann CJ, and Glazebrook and France JJ)[78] that the common law may need to look at existing litigation frameworks "from different angles" because "climate change issues require a rapid response".[79] The substantive judgment in *Smith* has not yet been given by the NZHC at the time of writing.

2. Climate declarations

In *Hauraki Coromandel Climate Action v Thames-Coromandel District Council*,[80] 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[81] (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*) it accepted the scientific consensus about climate change generally and the likely impacts on the Thames-Coromandel district in particular (as noted above), 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.

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77 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15], [98], [102]-[103].

78 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].

79 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [27]-[31], [55], [103].

80 *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228.

81 LGA, s 14, s 76, s 77, s 78, s 79, s 80, s 82.

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.[82]

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*.[83] 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

[82] *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [40].

[83] *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:HR:2019:2007.

> 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.[84]

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.[85]

3. Climate change emergency

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 (including the One Billion Trees Programme), and introduces a 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".[86] This will be achieved through building management and public procurement by applying the

[84] *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [50].

[85] *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [51].

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

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 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 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.[87]

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".[88] 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 similar annual GHG emissions reductions (7.6 per cent per year) will be required each year during 2021-2030 to prevent global temperature rise above 1.5^0C.[89]

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[87] 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>

[88] 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).

[89] Cameron Hepburn, Brian O'Callaghan, Nicholas Stern, Joseph Stiglitz and Dimitri Zenghelis, *Will Covid-19 fiscal recovery packages accelerate or retard progress on*

4. Climate Change Commission advice on future policy direction

Most recently, the Climate Change Commission issued its draft advice on future policy direction to reduce GHG emissions for consultation on 31 January 2021.[90] The advice concluded that current Government policies are unlikely to achieve the 2050 target for GHG emissions reductions.[91] Not unsurprisingly, the advice noted that the agricultural sector will need to play a key role in achieving GHG emissions reductions by reducing both biogenic methane emissions from pastoral farming (deer, sheep, beef, and diary cows) and synthetic nitrogen fertiliser application.[92] While Government investment has been made in reducing biogenic methane emissions by "on-farm efficiencies and technologies" the advice notes that there is currently no long-term investment plan beyond 2025, and that a voluntary approach is being taken "to develop a farm level pricing system" for biogenic methane emissions via the He Waka Eke Noa Partnership.[93] The Commission therefore recommended that adjustments should be made to farming practices by reducing animal stocking rates (by 15% compared with 2018 numbers), and through land use change to exotic pine forestry and horticulture.[94] In particular, the advice noted that reductions in animal stocking rates (primarily dairy cows) is being driven by ongoing freshwater policy reforms.[95]

However, the pace of agricultural land use change from pastoral farming and reductions in animal stocking rates is likely to be slow. For example, there is currently incomplete regional plan coverage across New Zealand to regulate these activities or to provide incentives for changes to land use

climate change? (Oxford Smith School of Enterprise and the Environment, Working Paper No 20-02, 8 May 2020), 5-6.

90 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021).

91 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 45-47.

92 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 12-13.

93 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 118.

94 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 70 and 174.

95 Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 46.

or farming practice. The freshwater planning process inserted into the RMA is designed to put in place operative regional plan changes by 2025,[96] but regional plan implementation periods for improving freshwater quality by regulating farming practice and animal stocking rates is likely in some cases to have long time horizons (e.g. Plan Change 1 to the Waikato Regional Plan currently sets an ultimate compliance period ending in 2098).[97] Beyond that, the National Policy Statement for Freshwater Management and the National Environmental Standard for Freshwater that came into effect on 3 September 2020 are likely to force change in farming practice by restricting further land use change until 31 December 2024,[98] and by limiting the discharge of synthetic nitrogen fertiliser to land and by requiring the reporting of fertiliser use.[99] These regulations effectively provide interim measures while the freshwater planning process under the RMA is implemented. However, unless the operative time period for these regulations is extended there is likely to be an implementation gap until regional plans achieve their ultimate long-term objectives.

Additionally, the advice noted that existing policy initiatives could also play a part in creating forest sinks to reduce GHG emissions. For example:

> Efforts could be also be made to promote a native forestry industry. This could have particular relevance for Iwi/Maori. Native afforestation could be incentivised by extending grant schemes such as One Billion Trees or by developing ecosystem services payment schemes that could reward the other environmental benefits of native forests.[100]

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[96] RMA, s 80A, inserted by the Resource Management Amendment Act 2020, s 22, on 1 July 2020.

[97] www.waikatoregion.govt.nz.

[98] Resource Management (National Environmental Standards for Freshwater) Regulations 2020, regs 16-19.

[99] Resource Management (National Environmental Standards for Freshwater) Regulations 2020, regs 32-36.

[100] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 100.

The One Billion Trees programme was developed by the Ministry for Primary Industries (MPI) in 2018 to increase tree planting across New Zealand by doubling the planting rate to achieve the goal of one billion trees by 2028. The most recent data from MPI (as of 8 March 2021) indicates that 258,686,000 trees have been planted since the programme was announced in 2018, including 95,400,000 seedlings. The fund administered by MPI has directly funded 44,961,000 of the trees planted since 2018, with 70 per cent native trees being planted and 30 per cent exotic species (plantation pines) being planted. For the purposes of the programme trees are defined as "woody perennial plant species that can grow to a height of at least 5 metres".[101] Funding applications for the programme closed on 23 December 2020 because the number of applications received by that date would (if approved) exceed the total value of the fund. While the programme has provided an important incentive to increase tree planting across New Zealand it is now clear that it is unlikely to achieve the ultimate goal of one billion trees by 2028 unless additional funding is made available by the Government. Beyond that, the draft National Environmental Standard for Indigenous Biodiversity (NESIB) published by the Minister for the Environment under the RMA in November 2019 includes proposals for regional councils to set objectives for increasing native tree cover within their regions by preparing regional plans.[102] The NESIB is likely to take effect in July 2021 but is unlikely to be fully implemented across New Zealand until 2036 due to the time periods specified for compliance in the NESIB and the steps currently required under the RMA for preparing regional plans.[103]

In relation to transport, the Commission proposed that land transport should be decarbonised by 2050 through the increased uptake of electric vehicles in the national fleet and through land use policies focused on providing for "more compact urban form and encouraging remote working"

[101] www.mpi.govt.nz.

[102] www.mfe.govt.nz.

[103] RMA, schedule 1.

to reduce the need to travel.[104] The advice is, however, "ambitious" and included a ban on the import of "internal combustion engine light vehicles" (cars, vans, and utility vehicles) after 2032.[105] But the advice also noted the sobering reality that rates of vehicle ownership and personal travel are high in New Zealand, and that investment in public transport has been underfunded for "decades".[106] In particular, the advice noted in relation to the proposed increase in the uptake of electric vehicles that:

> One important constraint will be the availability of EVs, particularly those that are second hand. The country's vehicle market is small, remote, left-side driving, and heavily dependent on used vehicle imports from Japan. However, Japan is prioritising investing in hydrogen and conventional hybrids and has limited EV supply.[107]

Generally, successive Governments have been slow to intervene in driving land use change in urban areas with the first National Policy Statement on Urban Development Capacity under the RMA coming into effect on 16 December 2016 and the replacement National Policy Statement on Urban Development coming into effect on 20 August 2020.[108] Similarly, the most recent statistics about the New Zealand vehicle fleet paint a stark picture with only 14 light vehicles per 1000 being petrol/diesel hybrids and only 4 light vehicles per 1000 being fully electric vehicles. There has also been a "significant change since 2000" with the average age of light vehicles now being "almost 20% older than in 2000" and used light vehicle imports from the 1990s continuing to be "a key factor" in the composition of the New Zealand vehicle fleet and the average light vehicle age being 14.1 years. Likewise, light vehicle

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[104] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 57-58.

[105] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 57.

[106] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 105-106.

[107] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 107.

[108] www.mfe.govt.nz.

ownership rates remain high at over 0.8 vehicles per capita.[109] The trajectory toward a decarbonised transport sector by 2050 therefore appears to be overly ambitious absent further Government investment in public transport and incentives to encourage the more rapid uptake of electric vehicles.

More importantly, the Commission noted that the package of measures included in its draft advice to Government will require the purchase of GHG emissions mitigation credits from overseas. For example, it estimated that the likely "gap between the first NDC and our recommended emissions budgets is 43 Mt CO2-e", and observed that a more rigorous NDC is required "to make it compatible with the 1.5^{0}C goal" entailing the increased acquisition of overseas credits beyond that required to close the current NDC gap.[110] While reliance on importing overseas GHG emissions mitigation credits may provide a pragmatic interim solution to compliance with the objectives set by the Paris Agreement, this strategy is unlikely (based on New Zealand experience under CP1) to drive change in the seemingly intractable agricultural and transport sectors of the New Zealand economy and a more ambitious approach is required under current and future NDCs to close the gap.

VII. Conclusions

The policy options and legal measures for climate change mitigation and land use control utilized in the New Zealand context demonstrate the potential for the courts to play a constitutional role in government decision-making on climate change. For example, the decisions in the EDS climate change litigation, *Thomson*, and *Hauraki Coromandel Climate Action* firmly sheeted home the scientific evidence to the latest and most up to date IPCC assessment reports. In particular, the decision in the EDS climate change litigation and the minority judgment of Elias CJ in *Buller Coal* demonstrate that the relative scale of GHG emissions

[109] Ministry of Transport, *Annual fleet statistics 2019*, 6-11.

[110] Climate Change Commission, *2021 Draft Advice for Consultation* (31 January 2021), 157.

should not be ignored as de minimis. Put simply, the debate should focus on the cumulative impact of GHG emissions globally.

Climate change mitigation has arguably been hampered by the slow search for a preferred policy package and by the reluctance to impose a cap on GHG emissions and to include all sectors (particularly, agriculture) in the ETS. Likewise, the failure (to date) to prescribe limits on the use of accumulated surplus international transfers from CP1 has reduced the potential influence of the ETS on climate change mitigation. Similarly, the reluctance to utilize land use controls under the RMA has left agricultural conversion and intensification to proceed unabated as evidenced by the increase in GHG emissions as a result of the increases in the size of the national dairy herd and the application of synthetic nitrogen fertiliser to pasture.

Equally, the New Zealand experience demonstrates the need for high political professionality manifested by the regressive impact of the Resource Management (Energy and Climate Change) Amendment Act 2004 and the Climate Change Response (Zero Carbon) Amendment Act 2019 on public participation locally and nationally that prevent the courts from playing a proper role in government decision-making on climate change. Arguably, reliance on the court of public opinion and General Elections is not sufficient in the context of an emergency.

Likewise, the combination of the Resource Management (Energy and Climate Change) Amendment Act 2004 and the majority decision in *Buller Coal* effectively shut out public participation in land use control, coupled with bringing agricultural activities into the ETS late removed any real opportunity to provide incentives for sustainable land management (or GHG emissions reductions) in relation to the agricultural sector. It is currently unclear what the influence of the Climate Change Response (Zero Carbon) Amendment Act 2019 and the Resource Management Amendment Act 2020 on the agricultural sector will be in getting to neutral GHG emissions.

However, despite the setbacks regarding the EDS climate change litigation and the NZHC decision in *Thomson* as a result of subsequent regressive statutory reforms there is some real hope that continued climate change litigation (where permissible) will influence the future trajectory of climate change mitigation in New Zealand. For example, the reluctance of the NZHC to close the door to novel tort claims in *Smith* to establish a duty of care to cease dangerous GHG emissions, and the apparent impatience with inadequate efforts to respond to climate change in *Thomson* and the extrajudicial writings from Winkelmann CJ and other members of the NZSC bench also provide hope that the Senior Courts will continue to nudge the New Government into a more rapid response to climate change mitigation. More importantly, the NZHC decision in *Hauraki Coromandel Climate Action* has drawn firm attention to the intersection with human rights and the emerging right to a healthy environment.

Finally, the strong encouragement provided by the Government for New Zealand society to accept to strict regulation in response to COVID-19 also provides hope for the future, but whether the influence of the public sector will have any real impact on the wider economy by putting in place measures to reduce GHG emissions to net-zero in response to the climate emergency remains a work in progress.