International Law Workshop, COVID & Beyond, Faculty of Law, Victoria University Wellington, 24 November 2020

COVID-19, RMA reform, and abrogating the Rule of Law

My presentation will interrogate the forces that threaten the Rule of Law for the Environment by critically examining the phenomena of domestic moves in New Zealand to streamline and simplify environmental adjudication through the principled lens of administrative law and the New Zealand Bill of Rights Act 1990 (NZBORA). My presentation is focused on three issues.

1 Streamlining and simplifying the consent process

Public participation in environmental decision-making is an important aspect of the *Resource Management Act 1991* (RMA). However, public participation under the RMA has been eroded by successive ad hoc amendments designed to streamline and simplify the consent process. For example, significant amendments in 2009 and 2017 removed (respectively) the presumption in favour of notification and the general discretion of local authorities to notify consent applications. Cumulatively, these streamlining and simplifying reforms have reduced the likelihood that consent applications will be notified to the point where only 2 per cent of applications are now publicly notified. While the *Resource Management Amendment Act 2020* was designed to roll back these reforms it is unlikely, in practice, to increase public participation because the basic architecture of the previous amendments remains intact.

The impact of local authority decisions about notification of consent applications is stark. Absent notification, interested members of the public are deprived of the rights to make submissions about applications, to be heard before the relevant local authority, and to appeal decisions to the Environment Court on merits and law and beyond that to the Senior Courts on questions of law.

The RMA amendments in 2009 and 2017 significantly narrowed the scope of the notification assessment and the Senior Courts are generally reluctant to quash non-notification decisions unless satisfied that the local authority has acted unreasonably or irrationally in the *Wednesbury* sense, has taken irrelevant considerations into account or has failed to take account of relevant considerations, has made the decision based on insufficient information regarding the degree of any adverse environmental effects, or has applied the wrong legal test (e.g. when defining the environmental baseline for the assessment of effects).

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. 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.

2 Alternative planning processes

Generally, the RMA provides open standing for any interested member of the public to make submissions about proposed policy statements and plans, to be heard before the relevant local authority, and to appeal decisions to the Environment Court on merits and law and beyond that to the Senior Courts on questions of law. However, these public participation rights have also been eroded by ad hoc statutory amendments designed to provide for alternative planning processes.

For example, the *Resource Management Amendment Act 2020* provides for an alternative freshwater management process to address persistent issues regarding water quantity (allocation) and water quality (discharges)

across New Zealand. Provision is made for freshwater hearings panels (nominated by the relevant regional council) to be convened by the Chief Freshwater Commissioner appointed by the Minister for the Environment. Similar to the *Local Government (Auckland Transitional Provisions) Amendment Act 2013* provision is made for appeals to the Environment Court on merits and law where panel recommendations are rejected by the relevant local authority, or to the High Court on questions of law where panel recommendations are accepted by the relevant local authority. But no further appeal lies to the Supreme Court "by leave or otherwise". The right to judicial review is not affected but any application for judicial review is required to be lodged with the High Court concurrently with any statutory appeal.

Most recently, the report of the Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (June 2020) noted the concerns of some submitters about delays in the resource management system through appeals to the Senior Courts. In response, the report observed that the number of such appeals is "miniscule", that any delay inherent in further appeals is outweighed by the importance of preserving access to the Senior Courts, and that continued access should be provided to the Supreme Court given its capacity to deliver landmark judgments. But the report shied away from making a formal recommendation supporting continued access to the Supreme Court. Providing access to the Senior Courts, including the Supreme Court, is however a fundamental aspect of New Zealand's continuing commitment to the rule of law.

3 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* [1983] NZLR 129 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 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. 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 the *COVID-19 Recovery (Fast-track Consenting) Act 2020*). 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 *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 could expose political fault lines between the government and the courts (similar to *R (Miller) v Prime Minister* [2019] UKSC 41) that should preferably be avoided.

Putting aside the need to justify prohibiting a statutory right of appeal to the Supreme Court under the NZBORA, it is unclear whether the right to judicial review could be constrained in the same way. For example, Tom Bingham expressed doubt as to whether Parliament could oust the judicial review jurisdiction of apex courts in his book on *The Rule of Law*, and the majority of the United Kingdom Supreme Court (UKSC) made a similar observation in *R (Privacy International) v Investigatory Powers Tribunal*

[2019] UKSC 22. 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. Additionally, Philip Joseph has also emphasised the constitutional importance of judicial review in giving practical effect to the rule of law. 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.

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