Climate change update

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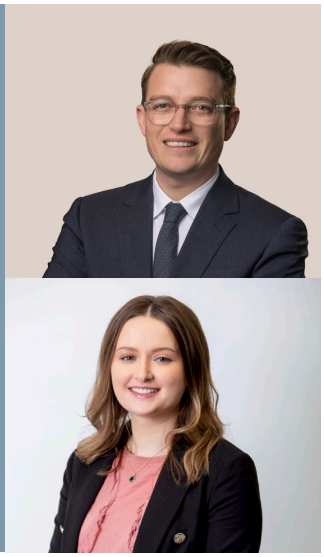

Since 30 November 2022, amendments to the Resource Management Act 1991 (RMA) have allowed the consideration of climate change in resource management decision making. This was a significant shift from the RMA's previous position which expressly precluded local authorities from considering the effects of greenhouse gas discharges on climate change when determining applications or when making rules to control greenhouse gas discharges.

However, the RMA does not provide any direction as to the relevance of climate change effects for resource consenting decisions relating to activities which only indirectly result in greenhouse gas discharges. Recent decisions from the New Zealand higher courts, although context dependent, indicate that activities which indirectly result in greenhouse gas discharges, also referred to as "end use" or "downstream" effects, generally cannot be considered in resource consenting decisions. Overseas, the legal position is evolving. This article explores this evolution.

Consideration of climate change has also recently surfaced outside of the RMA in relation to civil liability claims and rights legislation. This article also comments on these developments.

CLIMATE CHANGE UNDER THE RESOURCE MANAGEMENT ACT 1991

Previous Position

Previously, the RMA precluded a regional council from having regard to the effects of a discharge on the climate, in making a rule to control a discharge of a greenhouse gas into the air in accordance with s 70A. The exception to this was the extent to which the use and development of renewable energy enabled a reduction in the discharge of greenhouse gases. Similarly, consent authorities

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were precluded from having regard to the effects of a greenhouse gas discharge into air on climate change when making decisions on discharge permit or coastal permit applications under s 104E, except in regard to an application involving the use and development of renewable energy.

The Supreme Court in the 2008 decision *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112. (2008) 15 ELRNZ 15 took a literal view of these provisions, effectively impeding regional councils from imposing rules or conditions which could avoid or mitigate the discharge of greenhouse gases.

2020 Amendments

The Resource Management Amendment Act 2020 (Amendment Act), which came into force on 30 November 2022, changed the regime for the regulation of climate change effects under the RMA. The Amendment Act effectively overturned *Greenpeace New Zealand Inc v Genesis Power Ltd* allowing regional councils to consider the effects of greenhouse gas discharges on climate change when making decisions on discharge or coastal permit applications. The Government achieved this by repealing ss 70A and 104E of the RMA, as well as ss 70B and 104F. These sections of the RMA, altogether, had the effect of precluding such consideration of effects on climate change. However, the Amendment Act did not provide any direction in relation to the relevance of climate change effects for consenting decisions relating to activities which only indirectly result in greenhouse gas discharges. These kinds of effects have been referred to in case law as "end use" or "downstream" effects.

The Amendment Act is limited to discharge or coastal permit applications and does not capture land use consents. In the writers' opinion this is consistent with the judicial approach of the higher courts that end use effects will only be relevant if there is a sufficient causal link between the activity and effects. That causal link is closest at the time of discharge of the greenhouse gas rather than the land use component (for example the mining or drilling of the relevant resource). Accordingly, consideration of the effect of a discharge is to be made at the time the discharging activity is consented.

End Use Effects

New Zealand courts have held that end use effects of an activity are beyond the scope of consideration in relation to a resource consent application in various contexts. For end use effects to be relevant to a resource consent application, there must be a causal legal relationship between the proposed activity and the effect.

In the context of a resource consent application for a water take proposal, in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, (2022) 24 ELRNZ 487, the Court of Appeal held that the environmental effects of the use and disposal of plastic water bottles (being the "end use" following the water take) were beyond the scope of consideration. We await the Supreme Court's view on this, following an appeal of the Court of Appeal's decision by Te Rūnanga o Ngāti Awa. The appeal was heard in November 2023, and we expect a decision sometime this year.

Another example is *Te Korowai o Ngāruahine Trust v Hiringa Energy Ltd* [2022] NZHC 2810, (2022) 24 ELRNZ 269 in relation to a proposed renewable hydrogen hub which would produce urea (an organic compound used as a fertiliser and feed supplement). The High Court held that the end use effects of the urea in fertiliser on farms and the associated production of greenhouse gas emissions from stock grazing as argued by Greenpeace Aotearoa Incorporated could not be considered in relation to the proposal as these effects were "well down the chain" (at [313]). The end use of the urea did not have a sufficient nexus to the effects of the proposal sufficient to decline the application (at [315]). This decision was upheld by the Court of Appeal in *Greenpeace Aotearoa Inc v Hiringa Energy Ltd* [2023] NZCA 672, (2023) 25 ELRNZ 546, although the appeal was focused on different points.

Consideration of end use effects internationally

The United Kingdom Supreme Court (UKSC) has recently addressed end use effects. In *(R) Finch v Surrey County Council* [2024] UKSC 20, the UKSC held that the Surrey County Council's grant of planning permission in relation to the expansion of an oil production project was unlawful due to failure to consider the end use effects of the proposal. This decision reverses the approach taken by the England and Wales Court of Appeal in *R (Finch) v Surrey County Council* [2022] EWCA Civ 187.

The applicable United Kingdom law for this case is

contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (Regulations) which implemented European Union Directive 92/11/EU. The Regulations required the applicant to undertake an Environmental Impact Assessment which (among other matters) needed to "identify, describe and assess in an appropriate manner… the direct and indirect significant effects" of the proposal on the environment including the climate (reg 4(2), reflecting art 3(1) of the European Union Directive 92/11/EU).

The Surrey County Council accepted the applicant's argument that it was not required to provide an assessment as to the indirect effects of the proposal as part of its Environmental Impact Assessment (at [33]–[37]). Therefore, in deciding to grant planning permission for the proposal, the Surrey County Council's consideration was limited to the direct releases of greenhouse gases from within the well site boundary during the lifetime of the proposal (at [38]).

By a three to two majority the UKSC held that the grant of planning permission was unlawful as it failed to assess the emissions that would arise from the combustion of fuel following refinement of the oil (at [174]). The majority found that the express requirement to assess indirect as well as direct effects in the Regulations "…was clearly intended to emphasise the wide causal reach of the required assessment" (at [83]).

The UKSC was unanimous in rejecting the view of the Court of Appeal that whether the indirect effects of the proposal required an evaluative judgment turned on whether there was a sufficient causal connection between the extraction of the oil and its eventual combustion (at [59]). The UKSC held that the concept of a "sufficient causal connection" is intrinsically vague and would leave a wide range of cases where there would be no right or wrong answer as to whether a particular environmental impact was an effect of a project (at [59]).

Although the wording of the relevant United Kingdom regime is clear that indirect and direct effects must both be considered, which differs from the New Zealand situation, this decision is an example of evolving thinking from higher courts overseas on this matter.

CLIMATE CHANGE AND OTHER AREAS OF LAW

While outside the RMA context, the Supreme Court's recent decision in *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, (2024) 25 ELRNZ 607 relates to a potential but, in the authors' view, unlikely alternative form of relief sought in relation to greenhouse gas emissions in New Zealand. The plaintiff Michael Smith's claim was brought against seven respondents in three causes of action being public nuisance, negligence, and a novel proposed "climate system damage" tort. The claim had been previously struck out by the Court of Appeal on all three causes of action (*Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, (2021) 23 ELRNZ 191).

The Supreme Court found that the high threshold for granting a strike out application had not been met in this instance. The Supreme Court provided that this decision is not an assessment that the claim is bound to succeed at trial (at [84]). Rather, it is a finding that it cannot be said, at a preliminary stage, that Mr Smith's claim is bound to fail. We look with interest to the High Court's decision at trial which will determine the substance of the claim. We also note the comment from New Zealand First about a potential legislative overhaul of the Supreme Court's decision, presumably to limit the regulation of climate change issues to legislation only.

In Parliament, consideration of climate change has broadly arisen in relation to rights legislation. On 10 April 2024, Parliament considered and voted against an amendment bill to the New Zealand Bill of Rights Act 1990 which proposed to create of the right to a sustainable environment.