COUNTRY REPORT: NEW ZEALAND

The Legitimacy of Climate Change Litigation: *Buller Coal* in The Supreme Court

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Introduction

This Country Report focuses on the ongoing debate about the legitimacy of climate change litigation in New Zealand in light of the Supreme Court decision in *West Coast ENT Inc v Buller Coal Ltd*.[1]

The case concerned a suite of resource consent applications, including an application for land use consent, made by Buller Coal under the *Resource Management Act* 1991 (RMA) for the development of an open cast coal mine on the Denniston Plateau in the Buller District of the South Island. At issue was the question of whether climate change effects arising from the end use of burning the coal overseas could be considered by the territorial authority when deciding the land use consent application.[2] The matter was litigated by two environment NGOs, West Coast ENT and the Royal Forest and Bird Protection Society, utilising their submission, hearing, and appeal rights under the RMA regarding the publicly notified applications.[3] To resolve this question, Buller Coal applied to the Environment Court

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[1] [2013] NZSC 87.

[2] While the suite of resource consent applications made by Buller Coal included consents sought from the regional council for disturbing waterways and discharging contaminants into the environment, and land use consent from the territorial authority for coal mining, the litigation focused on other land use consents sought from the territorial authority for ancillary elements of the proposed mining activity. Coal mining is classified as a restricted discretionary activity under the relevant district plan, and the matters to which the territorial authority's discretion was resticted under the rule did not include the climate change effects of burning coal; whereas, ancillary elements of the proposed activity (for example, roading) are classified as discretionary or non-complying activities under the district plan, and the territorial authority's discretion was not similarly restricted.

[3] Where a resource consent application is notified under the RMA any person can make a submission about the application to the relevant consent authority; and submitters may exercise their rights to appear and be heard at a hearing before the consent authority, to appeal any adverse decision by the consent authority to the Environment Court on both merits and law, and to appeal any adverse decision by the Environment Court to the High Court on questions of law. These submission, hearing,

seeking a declaration that climate change effects were irrelevant in this context. The Environment Court granted the declaration sought by Buller Coal, and relied on the provisions of the *Resource Management (Energy and Climate Change) Amendment Act* 2004,[4] and the previous decision of the Supreme Court in *Genesis Power Ltd v Greenpeace New Zealand Inc*.[5] This decision was appealed to the High Court by West Coast ENT and the Royal Forest and Bird Protection Society.[6] Dismissing the appeal, Justice Whata said:[7]

> *… The central question remains whether the discharges and their effects are subject to the jurisdiction of a local authority. The starting point must be s 15, as this section controls the need or otherwise to obtain consent. Given that s 15 cannot apply outside of New Zealand's territorial boundary, there is no remit to require consent for overseas discharges. Accordingly the discharge can only be amenable to oversight by way of collateral jurisdiction. But where there is no primary jurisdiction to regulate activities extra-territorially (and nothing in ss 30 or 31 confers such jurisdiction), there can be no collateral jurisdiction to do so. Any endeavour to regulate those activities by the side route of s 104(1)(a) could not have been within the contemplation of the legislators and, in my view, must be impermissible.*

Leave was granted for a further appeal direct to the Supreme Court, bypassing the Court of Appeal, due to "the exceptional nature" of the proceedings".[8]

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and appeal rights may be exercised without leave. Further appeals to the Court of Appeal and the Supreme Court may be allowed, with leave, in appropriate cases.

[4] The *Resource Management (Energy and Climate Change) Amendment Act* 2004 inserted (inter alia) s 70A and s 104E into the RMA which preclude local authorities from considering the adverse effects of climate change when preparing regional plan rules pertaining to air discharges or when deciding air discharge permit applications.

[5] [2008] NZSC 112, [2009] 1 NZLR 730.

[6] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552. See: Country Report: New Zealand "Recent Developments in Resource Management and Climate Jurisprudence" (2013) 4 IUCNAEL EJournal 186, 191-193 for previous comment on the High Court decision.

[7] [2012] NZHC 2156, [2012] NZRMA 552 at [52]-[53].

[8] [2013] NZSC 87 at [112]. See also: *West Coast ENT Inc v Buller Coal Ltd* [2012] NZSC 107 granting leave to appeal. Buller Coal had applied for the declaration in "the hope of avoiding what they saw as a potentially lengthy and expensive debate about the climate change effects of the burning of coal": [2013] NZSC 87 at [105].

Supreme Court Decision

The majority decision of the Supreme Court[9] focused on the background context of New Zealand's international obligations under the UN Framework Convention on Climate Change 1992[10] and the Kyoto Protocol 1997,[11] the position before the enactment of the 2004 Amendment Act, relevant RMA provisions, and the Parliamentary history of the 2004 Amendment Act - before turning to the current position post enactment of the 2004 Amendment Act and its effect on the case put forward by West Coast ENT.

Background Context of New Zealand's International Obligations

The Court noted that under the Kyoto Protocol, New Zealand was obliged to reduce its average green house gas emissions by 5 per cent during the 2008-2012 commitment period, and that this obligation will be met. The Court also noted that the *Climate Change Response Act* 2002 had been enacted to comply with these obligations, and that the Act had subsequently been amended to establish the New Zealand emissions trading scheme in 2008, which applies to industrial activities (for example, mining) but does not extend to coal which is exported from New Zealand.[12] However, the Court noted that:[13]

> *New Zealand has … declined to give any further commitment under the Protocol beyond the expiry of that period. Instead it has offered a voluntary pledge that 2020 emissions will be between 10 and 20 per cent less than 1990 levels.*

Position before the Enactment of the 2004 Amendment Act

West Coast ENT submitted that before the enanctment of the 2004 Amendment Act, climate change effects arising from burning coal (mined in New Zealand) overseas would have been a relevant matter to be taken into account by the territorial authority when deciding the land use consent applications under s 104(1)(a) of the RMA. The majority was not persuaded by this argument. They considered that:

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[9] Justices McGrath, William Young, and Glazebrook: [2013] NZSC 87 at [95]-[178].
[10] 1771 UNTS 107
[11] 2303 UNTS 148
[12] Climate Change Response Act 2002, s 207(a).
[13] [2013] NZSC 87 at [100]. See: Country Report: New Zealand "Recent Developments in Resource Management and Climate Jurisprudence" (2013) 4 IUCNAEL EJournal 186, 193 for the Minister's comments on this position.

- The effects were indirect because the effects of burning the coal were not relevant to deciding the restricted discretionary activity application for coal mining. As a result, the issue was only relevant in the context of ancillary elements of the proposed activity (for example, roading), and that it would be odd if matters that were not relevant to deciding the primary activity were found to be relevant to deciding ancillary elements of the proposed activity.[14]
- The effects were not tangible as the need for coal by overseas industry would remain, regardless of whether it is or is not met by exporting New Zealand mined coal. Further, while they could be classified as cumulative effects under s 3 of the RMA, the *Climate Change Response Act* 2002 provided a strong counter-argument regarding the relevance of these effects as a result of its commitment to establishing "national mechanisms" to address greenhouse gas emissions.[15]

Relevant RMA Provisions

The majority noted the background statutory context,[16] and that the RMA as amended by the 2004 Amendment Act does not expressly preclude regional councils or territorial authorities from having regard to the effects of greenhouse gas dicharges on climate change in other decision making contexts under the RMA. For example, it was unclear whether authorities could have regard to climate change effects when deciding applications for coastal permits, permits for disturbing river beds, water permits, permits for disharges onto land or into water, land use consents, or preparing regional plan rules or district plan rules governing these activities.[17]

Parliamentary History of the 2004 Amendment Act

Turning to the Parliamentary history of the 2004 Amendment Act for assistance with interpreting its purpose and intent, the Court noted:

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[14] [2013] NZSC 87 at [117]-[119]. They noted that a similar conclusion had previously been made in *Beadle v Minister of Conservation* [2002] NZEnvC A74 at [91] where the Court emphasised the need to avoid turning consideration of ancillary elements of a proposed activity into an appeal about the primary activity.
[15] [2013] NZSC 87 at [121]-[127].
[16] [2013] NZSC 87 at [128]-[138] referring to: RMA, s 5(2)(c), s 7(i), s 43, s 43A, s 15, s 70A, and s 104E respectively.
[17] Ibid at [139].

- The explanatory note to the Bill which emphasised the objectives of the Bill as (inter alia) removing climate change considerations from decision making concerning "industrial discharges of greenhouse gases".[18]
- The statements in both the explanatory note to the Bill and the regulatory impact and compliance cost statement, that the climate change effects of greenhouse gas discharges were "most" appropriately addressed at national level.[19]
- The confusion caused by the reference in the regulatory impact and compliance cost statement and in the speeches in the first reading debate, which implied that the ability to control land uses for climate change purposes remains unchanged.[20]

The majority rationalised these conflicting references by relying on the fact that territorial authorities sometimes consider the transport effects of development in the context of urban planning and the reference to this in the Select Committee report on the Bill, and also drew comfort from the previous Supreme Court decision in *Genesis Power Ltd v Greenpeace New Zealand Inc*, where the Court concluded that:[21]

> *Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.*

Additionally, the Court also noted that the statutory purpose in s 3 of the 2004 Amendment Act was not inserted into the amemded RMA. Section 3 provided that the purpose of the statutory amendment was "to require local authorities":

- to plan for the effects of climate change; but
- not to consider the effects of climate change discharges into air of greenhouse gases.

The majority considered that had this provision been inserted into the amended RMA that it "would have disposed of the appellant's arguments".[22]

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[18] Ibid at [143].
[19] Ibid at [143] and [144].
[20] Ibid at [144] and [145].
[21] [2008] NZSC 112, [2009] 1 NZLR 730 at [62]; [2013] NZSC 87 at [150].
[22] Ibid [2013] NZSC 87 at [97] and [140].

The Majority Decision

West Coast ENT relied on a "literal approach" to the 2004 Amendment Act. It argued that local authority functions under the RMA must be carried out in a way that has regard to the indirect effects of greenhouse gas discharges on climate change, and that the restriction on regional council control of the direct effects of greenhouse gas discharges on climate change was justified by the intention that they would be subject to national regulation. The majority was not persuaded by this argument, which they proceeded to test by reference to a series of examples.[23] For example, in cases where:

- Concurrent resource consent applications to mine and burn coal are made, they found it inconsistent that the RMA could allow the territorial authority to consider indirect effects on climate change, whereas the regional council would be prohibited from considering any direct effects on climate change arising from the same proposed activity. They preferred to interpret the RMA in a way that avoided such inconsistencies.[24]
- Two resource consent applications for mining and burning coal are applied for separately by the miner and an electricity generator, they again found that the territorial authority would be allowed to consider indirect effects on climate change when deciding the land use consent application, but the regional council would be prohibited from considering any direct effects on climate change when deciding the air discharge permit application. They considered that this approach would be "perverse" as it would enlarge the role of territorial authorities while diminishing the role of regional councils.[25]
- A resource consent application to mine coal is made, and where no consent is required to burn coal in New Zealand (i.e. because the discharge will not be emitted from trade or industrial premises or does not contravene a national environmental standard or a regional plan rule), they questioned whether the regional council should consider indirect effects on climate change when deciding any other permits pertaining to the proposed activity. They concluded that a regional council that had regard to such effects in these circumstances would "be taking into account irrelevant considerations".[26]

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[23] [2013] NZSC 87 at [151]-[156].
[24] Ibid at [157]-[158].
[25] Ibid at [159]-[160].
[26] Ibid at [161]-162].

- Regional plan rules purport to control ancillary coal mining activities to address climate change effects, they questioned whether the regional council could adopt such a rule under s 68(3) of the RMA as this would be prohibited by s 70A of the RMA, and concluded that adopting such a rule would likely be ultra vires. However, if the regional council could lawfully adopt such a rule, they considered that this would be contrary to the statutory objective of the 2004 Amendment Act of addressing climate change effects more appropriately at national level.[27]
- A territorial authority adopts a district plan rule pertaining to activities that may give rise to greenhouse gas discharges, they noted the express provision made for the proposed Rodney power station (ultimately allowed as a result of the *Genesis Power* decision), and the fact this rule could have been opposed if the "literal interpretation" advocated by West Coast ENT was applied.[28]
- A resource consent application to build and operate a coal fired power station, they noted that following the approach advocated by West Coast ENT that the regional council would be prohibited from considering climate change effects in relation to the air discharge permit, but would be allowed to consider such effects in relation to any other permits required from the regional council. They concluded that it would be difficult to rationalise why climate change effects would be relevant to ancillary elements of the proposed activity but should be "ignored" regarding the primary activity.[29]

The majority adopted "an overall scheme and purpose approach to the RMA as amended in 2004",[30] which led them to conclude that the drafters did not "envision" that a literal approach to statutory interpretation would allow indirect climate change effects to be considered "by the backdoor".[31] Based on the select list of examples identified in the judgment, it appeared to them that the number of "anomalous outcomes" arising from a "literal approach" could in practice be much wider than the selected "hypothetical situations", and that this could "subvert" both the overall scheme and purpose of the RMA and the national approach to regulating climate change effects.[32] As a result, climate change effects arising from greenhouse gas discharges likely to result, directly or indirectly, from a proposed activity are not relevant when deciding any type of resource consent application in New Zealand.

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[27] Ibid at [163].
[28] Ibid at [164]-[165].
[29] Ibid at [166]-[167].
[30] Ibid at [174] and [176].
[31] Ibid at [169].
[32] Ibid at [170].

Minority Opinion

Notwithstanding the similar approaches to statutory interpretation adopted by the High Court and the majority in the Supreme Court, Chief Justice Elias delivered a minority opinion which (inter alia) concluded that:[33]

> *… the legislation properly construed in accordance with its terms, purpose, scheme, and legislative history does not justify an interpretation [sic] s 104(1)(a) which excludes the consideration of the effects of climate change of the activities for which consents are required under the Resource Management Act.*

Conclusion

The pragmatic approach adopted by the majority in the Supreme Court in deferring to an interpretation of the RMA as amended by the 2004 Amendment Act, consistent with a national approach to climate change under the *Climate Change Response Act* 2002 and the New Zealand emissions trading scheme, should not be surprising. It was foreshadowed by the Environment Court decision in *Environmental Defence Society Inc v Auckland Regional Council* dealing with the efficacy and appropriateness of consent conditions requiring forest planting to mitigate greenhouse gas emissions from a gas fired power station, where the Court held against including such conditions on the grant of resource consent. The Court was persuaded by:[34]

> *… the clear preferred policy of the New Zealand Government to address greenhouse gas emissions as an international issue, and that sectional emissions should be considered at national level to ensure a consistency of approach to guarantee an efficiency compatible with achieveing the best social, environmental and economic outcome …*

It is relevant to note that this decision was made in advance of the *Climate Change Response Act* 2002 being enacted or amended to provide for the New Zealand emissions trading scheme. Overall, the practical effect of the *Buller Coal* decision is that climate change litigation is unlikely to be justiciable in New Zealand in contrast to the position in other jurisdictions (for example, Australia and USA).

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[33] Ibid at [85] and [94].
[34] [2002] NZEnvC A183, [2002] NZRMA 492 at [88].