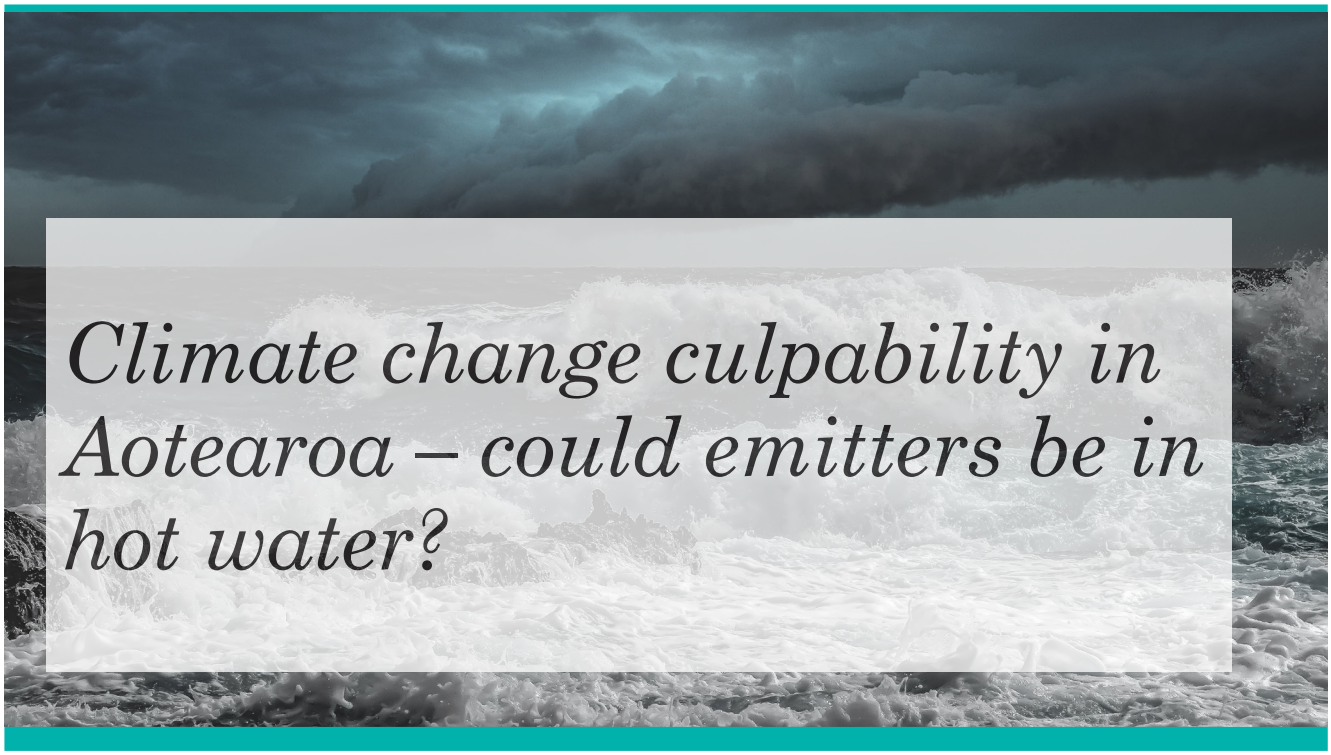

Climate change culpability in Aotearoa – could emitters be in hot water?

INTRODUCTION

Climate change poses a current threat to us all. The Intergovernmental Panel on Climate Change's (IPCC) *Sixth Assessment Report* (IPCC, Working Group II contribution, *Climate Change: Impacts, Adaptation and Vulnerability* (February 2022)) concludes (at SPM-8) that weather and climate extremes have already led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt, and that: "The extent and magnitude of climate change impacts are larger than estimated in previous assessments." In New Zealand, the impacts of climate change already being experienced include sea and land temperature increases, drier soil, melting glaciers, rising sea levels, ocean acidification and increased flooding.

The role of the judiciary in climate change mitigation and adaptation continues to develop internationally, as litigants seek to test the boundaries of the law to address the looming climate crisis. Climate change litigation in New Zealand to date has generally been brought against government inaction (eg, *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160).

The Court of Appeal's decision in *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 (*Smith*) late last year sets a new precedent in terms of the application of tort law in a climate change context. The Supreme Court has recently granted leave to appeal from the Court of Appeal's decision in *Smith*. Accordingly, the time is apt to consider the analysis in *Smith* in the context of recent government responses to climate change and international trends, as we await the Supreme Court's ultimate decision.

Authors:

Kierra Parker, Senior Associate, Resource Management, DLA Piper; Matthew Dicken, Solicitor, Resource Management, DLA Piper

GOVERNMENT RESPONSE TO CLIMATE CHANGE

To set the scene for the recent litigation in this space – it is useful to consider recent Central Government developments towards mitigation and adaption. The Climate Change Response (Zero Carbon) Amendment Act 2019, which amended the Climate Change Response Act 2002, has enshrined the commitment to reaching net zero greenhouse gas emissions by 2050, and to reduce biogenic methane emissions by between 24-47 per cent by 2050 (Climate Change Response Act 2002, s 5Q). The Climate Change Response (Zero Carbon) Amendment Act 2019 established the *He Pou a Rangi* Climate Change Commission (Commission) which advises on mitigating

climate change and monitors the Government's progress. In May 2021, the Commission's first report to Government concluded that at present policy settings, New Zealand will fail to meet recommended emissions budgets and the 2050 targets (*Ināia tonu nei: a low emissions future for Aotearoa: Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022–2025* (*He Pou a Rangi* Climate Change Commission, 31 May 2021, at [6.2]).

On 27 April 2022, the Draft National Adaptation Plan (NAP) (Ministry for the Environment *Draft National Adaptation Plan*, 28 April 2022) was released for consultation, with the final version expected in August. The NAP outlines the actions the government will take over the next six years to build climate resilience. The NAP has three focus areas: reforming institutions to be fit for a changing climate; data, information and guidance to enable everyone to assess and reduce their own climate risks; and embedding climate resilience across government strategies and policies (at 15). Work to develop a legislative framework for managed retreat is a critical action. The NAP is clear that the risks and costs of managed retreat will fall across different segments of society, including local and central government, property owners, banks and insurers. Accordingly, questions remain as to how this complex issue will be tackled in the proposed Climate Change Adaptation Bill (anticipated to be introduced next year).

The Emissions Reductions Plan (ERP) and Emissions Budget (2022-25) were released by the Ministry for the Environment on 16 May 2022. The first ERP contains strategies, policies and actions for achieving the Emissions Budget as a stepping stone to the 2050 emissions targets of the Climate Change Response Act 2002. Notably, the total of the Emissions Budgets is 2.3 per cent lower than the Commission recommended, and the budget is expressed as a reduction in all gases (ie, there is no split target for methane).

It is also worth noting that the Resource Management Amendment Act 2020 provisions concerning climate change will come into effect on 30 November 2022. One of the purposes of the Resource Management Amendment Act 2020 was to clarify the relationship between the Resource Management Act 1991 and climate change mitigation under the Climate Change Response Act 2002. This is achieved in part by requiring regard to be had to the NAP and the ERP when changing a regional policy statement and regional or district plan (via amendments to Resource Management Act 1991, ss 61, 66, and 74).

As policy work continues towards emissions reduction and adaptation, which will be tied into some Resource Management Act 1991 decision making, questions remain as to how the government's aspirations will be achieved on the ground. As central government continues to make progress, litigants might look to initiate legal action against private emitters as the target defendant in order to compel emissions reductions.

HOW SHOULD TORT LAW RESPOND TO CLIMATE CHANGE?

On 21 October 2021, the Court of Appeal released its judgment (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552) on an appeal (and cross-appeal) against a High Court decision delivered in March 2020 (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419). The Court of Appeal's decision has significant bearing on climate change litigation in New Zealand, asking the question - what should the response of tort law be to climate change?

The plaintiff is Mr Smith of Ngāpuhi and Ngāti Kahu and the climate change spokesperson for the Iwi Chairs Forum. Mr Smith claims customary interests in lands and other resources situated in or around Mahinepua, Northland. Mr Smith issued proceedings in the High Court against seven companies, which are either involved in an industry which releases greenhouse gases or manufactures and supplies products which release greenhouse gases – such as dairy, steel, and oil and gas. Mr Smith advanced three causes of action in tort: public nuisance, negligence, and a proposed new tort described as breach of duty to "cease contributing to damage to the climate system" (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15]). The relief sought was an injunction requiring the respondents to be "net zero" by 2030 (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [2]).

The High Court struck out the claims in nuisance and negligence but declined to strike out the claim for a breach of a novel duty (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [109]). That decision was respectively appealed by the parties. The Court of Appeal ultimately struck out all of Mr Smith's claims (*Smith v Fonterra Co-*

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Operative Group Ltd [2021] NZCA 552 at [125], [126]).

In the Court of Appeal, Mr Smith urged the Court to be bold when determining whether tort law could provide an appropriate response to climate change (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [14]). However, the common law tradition of incremental development was preferred over radical change and departure from fundamental principles. The Court of Appeal concluded that climate change cannot be appropriately or adequately addressed by tort claims pursued through the courts. Rather, the issue calls for "a sophisticated regulatory response at a national level, supported by international co-ordination" (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [16]).

Mr Smith's claim wrestled with the issue of causation. The Court of Appeal considering that the claim involves a scenario in which every person in New Zealand (and to some extent, the world) is responsible for causing the harm (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [18]). None of the defendants standing alone make a material contribution to climate change. If their activities amounted to a tort, it would follow that every entity and individual responsible for greenhouse gas emissions is committing the same tort. The Court of Appeal considered that this would have large social and economic consequences. Further, Mr Smith did not suffer any "special damage" that separated him from the general public (including iwi and hapū) who would be affected as a result of climate change (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [79]-[82]). Accordingly, while the harm may have been reasonably foreseeable, the harm contributors are virtually limitless and there is no physical, temporal, or causal proximity to create a direct relationship between Mr Smith and the respondents (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [103]).

The relief sought also posed a hurdle, as the Court of Appeal considered that there was no remedy available that could address the harm complained of. Companies operating lawfully cannot be subject to an injunction to cease operations on an ad hoc basis. The Court of Appeal was concerned about the arbitrary and inefficient approach bringing proceedings against subsets of emitters, requiring the Courts to draw a line as to which emitters were culpable (*Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [25]-[27]).

On the whole, the Court of Appeal's judgement represents a clear refusal to extend the bounds of tort law into the jurisdiction of addressing climate change from a principled policy perspective.

INTERNATIONAL TRENDS IN TORTIOUS CLIMATE CHANGE LITIGATION

Climate change litigation is a global phenomenon as litigants have sought to use the Courts to require progress in emissions reduction. When considering the Court of Appeal's approach in *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, it is useful to consider similar developments in climate change litigation taking place in other jurisdictions, most relevantly in Australia. Civil litigation in the United States relating to the impacts of climate change is also seeing a growing number of diverse and novel theories of liability not usually akin to climate related harm – with mixed outcomes.

Last year the Federal Court of Australia had found that a novel duty of care was owed by the Minister for the Environment to Australian children not to cause them harm resulting from the extraction of coal by approving an extension to the Vickery coal mine in New South Wales in *Sharma v Minister for the Environment* [2021] FCA 560. The Court found that the alleged duty of care existed on the basis that the risk of harm was reasonably foreseeable (*Sharma v Minister for the Environment* [2021] FCA 560 at [271], [513]), the Minister had direct control over the risk (*Sharma v Minister for the Environment* [2021] FCA 560 at [284]), and Australian children are extremely vulnerable to "climate hazards" (*Sharma v Minister for the Environment* [2021] FCA 560 at [289]). These arguments were also made in *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, though the *Smith* case concerned a claim against private companies rather than the government.

On 15 March 2022, the Full Federal Court of Australia overturned that decision, finding that no duty of care could be established, adopting an approach more akin to *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 (*Sharma v Minister for the Environment* [2022] FCAFC 35). Despite this setback, the Court made an order that the proceeding discontinue on a representative basis, leaving it open to future claims at a time where harm could be established (*Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65 at [11]). This indicates a clear precedent

across the ditch where Courts are grappling with the same issues raised here.

Mr Smith's claim also has parallels with a class action recently filed by a group of Torres Strait Islanders against the Australian government, seeking an order that Australia reduce emissions by 74 per cent by 2030 on the basis that it owes them a duty of care to take reasonable steps to protect them, their traditional way of life and their marine environment (*Pabai Pabai v Commonwealth of Australia*, VID622/2021 see [81] of the statement of claim). This claim is yet to be heard as at the time of writing, and does not target private emitters but does seek to use tort law to compel climate action.

IMPLICATIONS OF THE SUPREME COURT APPEAL

On 31 March 2022, the Supreme Court granted leave to appeal *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, on the question of whether the Court of Appeal was correct to dismiss the appeal and allow the cross appeal (*Smith v Fonterra Co-operative Group Ltd* [2022] NZSC 35). The Supreme Court's ultimate decision whether to strike out Mr Smith's claims will be significant. Testing the legal boundaries of tort law and its capacity to deal with such an issue will have large scale ramifications, regardless of the outcome.

If the approach of the Federal Court of Australia is anything to go by, allowing the novel duty of care to "cease contributing damage to the climate system" to avoid strike out may be a realistic prospect. The Supreme Court may prefer the view of the High Court on that issue – that "the law, on appropriate occasion, evolves… it can also allow for the injection of new ideas and for the creation of new responses as required" (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [101]).

The Supreme Court might agree that Mr Smith's claim should not be struck out, despite the inherent causation challenges it faces. As the High Court stated, "it may be that climate change science will lead to an increased ability to model the possible effects of emissions. These are issues which can only properly be explored at trial." (*Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [103]). Especially when Courts around the world have accepted climate science as settled and endorsed the "carbon budget" approach which establishes that there is a set amount of greenhouse gases which can be admitted in future to remain within two degrees of warming (*Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 (NSW) at [525] and [550]). This gives rise to being able to establish a causal link between an emitter and the harm caused by climate change in future. Under the carbon budget model, the only way not to contribute to climate change is to reduce emissions.

Regardless of whether Mr Smith's claim is ultimately struck out by the Supreme Court, the arguments and evidence in the case are sure to provide an interesting examination of the current state of the evidence on the ability (or lack of) to establish a link between a large greenhouse gas emitter and the harm of climate change experienced by an individual.