

Making the Zero Carbon Act work: the Climate Commission and the Courts

A Zero Carbon Act research paper (November 2017)



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Overview

The long-term goal of net zero carbon emissions by 2050 is eminently achievable. We must put that goal into law, and set up an ecosystem of accountability to ensure we get there.

In particular, it is important to properly design the Climate Commission as the central institution, and the courts can provide a mechanism of enforcement in the last resort. This paper is a primer on Generation Zero's vision for how these important actors will play their part.

The five actors

The challenge of responding effectively to climate change will be made easier by the Zero Carbon Act. But simply putting carbon targets into legislation will not in itself ensure we meet them. It is common wisdom that a challenge is more easily met when responsibility for doing so is shared and everyone knows their role. A range of people and agencies will need to work together towards the goal of net zero emissions by 2050.

A key purpose of this paper is to identify these five actors who together will make the Zero Carbon Act work:

1. Parliament
2. The government of the day
3. The Climate Commission
4. The people of Aotearoa New Zealand
5. The courts

In the first part of the paper we explain what role each of these actors will play, and how they interact. If you are interested in getting a general overview of how the Zero Carbon Act will work, this is a good place to start.

In the second and third parts of this paper, we zoom in on two particular actors and explain in more technical detail how they work. The second part discusses the role of the Climate Commission. This will be a new agency to advise the government on how it can best achieve its climate goals while at the same time holding the government to account in meeting them. Finally, in the third part of this paper we explain how the courts will interact with the Zero Carbon Act through their well-established power to review the lawfulness of government decisions.

An ecosystem of accountability

In broad terms, there are five groups of people who will each have important roles in making the Zero Carbon Act work: Parliament, the government of the day (also known as the Executive), the Climate Commission, the courts and the people of Aotearoa New Zealand. The responsibilities of these actors and their relationships are represented below in Figure 1.

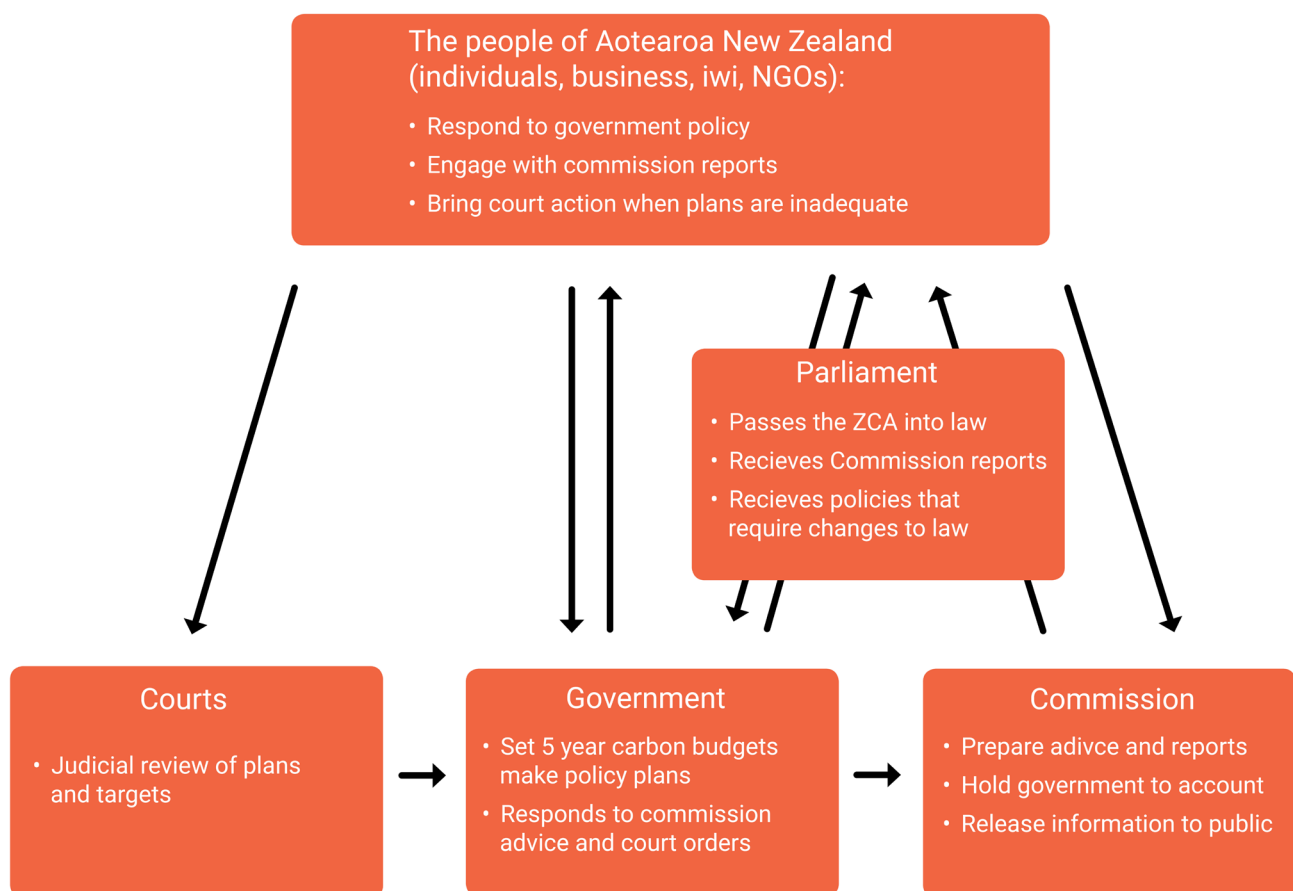


Figure 1: The relationships between the five main actors in the ecosystem of accountability under the Zero Carbon Act

1. Parliament

Let's start with Parliament. As the institution with power to make laws for New Zealand, it alone can create the Zero Carbon Act. By doing so, it endows the other actors with their respective responsibilities and sets out how they are to interact. But it does not simply fade into the background once the Act becomes law — it remains a key player as the vehicle through which the people elect their government and through which the government is criticised, celebrated and generally overseen.

2. The government of the day

The next actor to consider is the government. It will take a leadership and policy role in ensuring we meet our carbon targets. Its role is to set five-year carbon budgets 12 years in advance and to put in place plans and policies to meet those targets. These policies might be laws passed through Parliament that New Zealanders will need to comply with, or incentives to encourage New Zealanders to take steps to reduce their emissions and make decisions geared toward a decarbonised future.

The Zero Carbon Act is not prescriptive about what plans and policies the government introduces. It simply requires for these to be made in a transparent and reasoned manner, subject to certain considerations and consultation with the people of Aotearoa New Zealand, and for the policies to drive our transition to net zero carbon by 2050 or sooner. An active government can help to create the necessary conditions for transition toward a 21st-century economy through interventions such as investment, regulation, taxation and education — many of which will need to be fed back through Parliament by way of changes to the law to create a framework for zero carbon prosperity.

The government also has an important role in setting an adaptation strategy for New Zealand. It will be required to prepare reports every five years identifying risks caused by climate change, such as sea level rise, and explaining what action the central and local governments should take to respond to these risks. We do not focus on the adaptation role of the government in this paper, but it must not be overlooked in implementing the Zero Carbon Act.

The government cannot perform its essential tasks in an institutional vacuum. Indeed, it must be supported and held to account by the Climate Commission.

3. The Climate Commission

The Climate Commission has two key roles: advice and accountability.

- **Advice:** The advice role requires the Commission to make recommendations to government around the setting of five-year carbon budgets, and the emissions reductions from each sector of New Zealand's economy required to achieve these budgets. The government will need to listen to this independent advice and take it into account. If the government wishes to depart from the Commission's advice by setting a different carbon budget, it must provide reasons for doing so.
- **Accountability:** The Commission's accountability role involves it scrutinising the government's plans, policies and actions for whether they are adequate to meet the targets. The Commission will table annual reports to Parliament on our actual and projected emissions. These reports must be made available to the public, and will explain whether or not we are on track to meet our carbon budgets. The government and the public will need to listen to these reports. If we are not on track towards meeting our targets, the government will be required to review its policy plans, and the public will be able to put pressure on the government to ensure it maintains its pursuit of the overarching goal of a zero carbon economy.

4. The people of Aotearoa New Zealand

It is by now clear that a fundamental role must be played by the people of Aotearoa New Zealand. Members of the public, either as individuals or organisations, must engage with the government's policy plans as well as the Commission's feedback on these. Indeed, government would have a duty to consult with the public, and in particular with Māori, when formulating its policy plans. When policy plans are inadequate the public will be able to apply pressure for the government to fix them – either through political influence or through the courts (more on this in the third part of this paper).

The surest safeguard for holding the government to account in meeting New Zealand's emissions targets will be its people. This is why the people collectively form the foundation for the pyramid of responsibility set out below in Figure 2.

Through campaigning, putting pressure on MPs, and highlighting inadequate government action in the media, the people can push the government to take more meaningful action on climate change. People can unite through non-governmental organisations – such as ActionStation, WWF-New Zealand, churches and unions – to amplify their voices and their cause for concern. This already happens to some extent, but it will be bolstered by the presence of legal obligations on the government to take action on climate change. Further, the credibility of public pressure groups will be enhanced by the expert reports from the Commission, which will shine a light on how New Zealand's emissions are tracking and whether our action is strong enough.

The people of Aotearoa New Zealand are not simply agitators. They also have a responsibility to reduce their emissions through a combination of (a) complying with legal standards of behaviour set by the laws enacted by Parliament; (b) responding to green incentives created by government policy; and (c) making reductions on their own initiative.

All of these points apply with even greater urgency to the large commercial players in New Zealand's business community, who must confront the fact that they create greater emissions than many individuals combined and must therefore play their part in supporting the overarching goals of the Zero Carbon Act.

5. The courts

The final actor in the ecosystem of accountability are the courts. They have a role to play when something has gone seriously wrong. Members of the public who are concerned that the government's policy plans for meeting the targets are somehow inadequate will be able to bring a claim in the High Court. If the Court agrees, it can either set the government's plan aside or order that it be reconsidered and made adequate to meet our carbon budgets. The courts will perform this function in an independent manner – that is, without being influenced by political considerations – but with the expert assistance of the Commission's reports.

It is unlikely that recourse to the courts will be commonplace. In most cases, the process of applying political pressure to the government to take stronger action will suffice. But the courts are there as a fallback of last resort when a dispute about the necessary action on climate change under the terms of the Zero Carbon Act cannot otherwise be resolved.

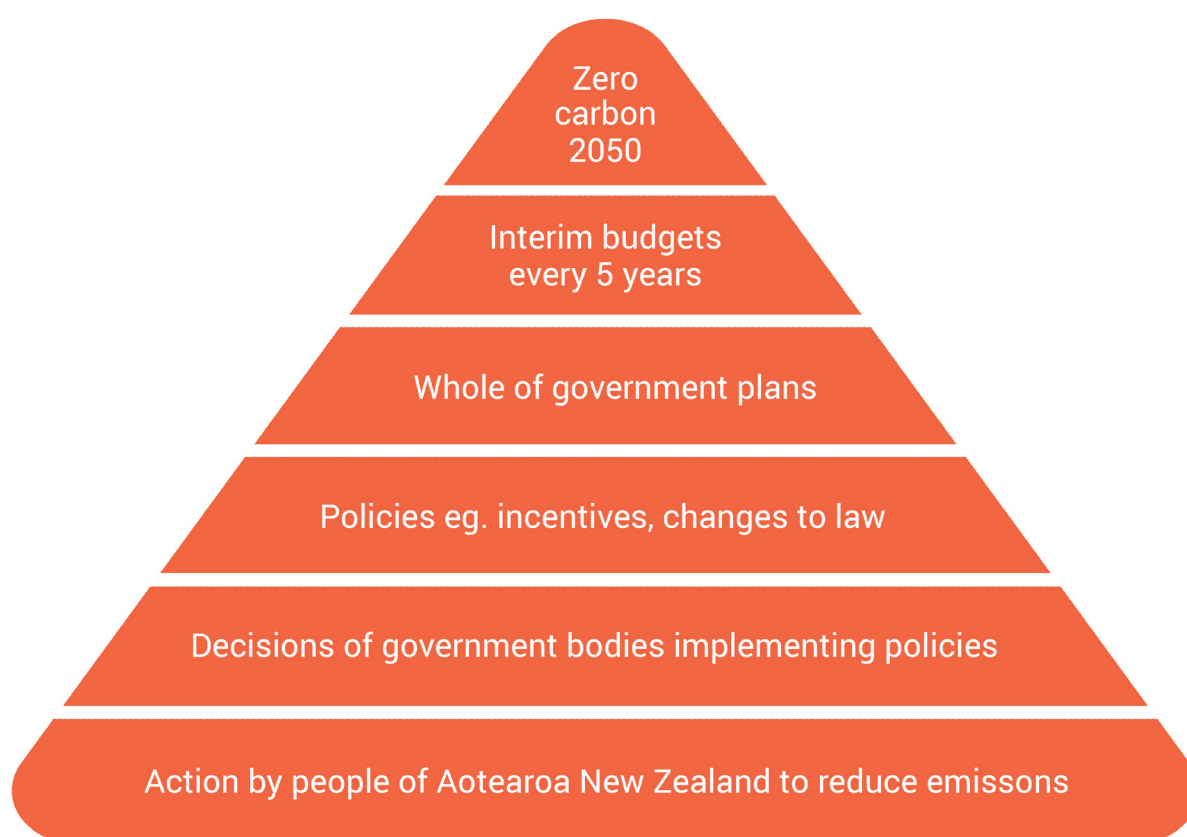


Figure 2: The 2050 goal drives plans and policies that lead to emissions reductions by the people of Aotearoa New Zealand

Collaboration and accountability

The relationship between these five actors — Parliament, the government, the Climate Commission, the people and the courts — is one of collaboration and accountability. We all need to work together, listen to each other and cooperate where appropriate, but not be shy to challenge when it appears we are not on track to meet the targets. These will all be features of a successful legal regime for responding to climate change: an ecosystem of accountability.

Having set out the general roles of the five groups we see as key to the success of the Zero Carbon Act, we now zoom in on two particular issues that will need to be considered as the Act is implemented:

- How should the Climate Commission be structured?
- How will the legal processes of the courts be used to enforce the Zero Carbon Act?

Structure of the Climate Commission

The United Kingdom model

It is helpful first to explain how the Climate Committee in the United Kingdom (the UK Committee) operates because this resembles the model we would adopt for New Zealand. There will be some differences for the New Zealand's Climate Commission given our particular national context, which we explain later on.



A selection of the UK Committee on Climate Change's 2017 reports to the UK Parliament, all publicly available at <<https://www.theccc.org.uk/publications/>>

The UK Committee is an independent statutory body, which is publicly funded. It has a chair and five to eight other members, who are appointed by the relevant Ministers of England, Scotland, Wales and Northern Ireland. In making appointments, Ministers must have regard to the desirability of the UK Committee, as a whole, having experience and knowledge in the following areas:

- Business competitiveness.
- Climate change policy at the national and international levels, and in particular the social impacts of such policy.
- Climate science, and other branches of environmental science.
- Differences in circumstances between England, Wales, Scotland and Northern Ireland and the capacity of national authorities to take action in relation to climate change.
- Economic analysis and forecasting.
- Emissions trading.
- Energy production and supply.
- Financial investment.
- Technology development and diffusion.

Members of the UK Committee hold office for terms of five years. The national authorities of England, Scotland, Wales and Northern Ireland determine what remuneration and allowances are payable to the members of the UK Committee and its staff. Members of the UK Committee are entitled to resign at any time during their appointment, but can only be removed by the national authorities where the member has been continually absent, becomes bankrupt, or is otherwise unfit to carry out their duties.

New Zealand's Climate Commission

The establishment of the New Zealand's Climate Commission will be one of the most important steps in the Zero Carbon Act's implementation. Much of the Act's success will be dependent on the Commission's effectiveness, independence, credibility, and mana from the outset. These characteristics of a successful Commission must influence how it is designed. They will inform its constitution, appointment process, funding, functions and powers, and transparency, as we now explain.

Constitution

The NZ Climate Commission should be constituted by a Chair and four to seven Members, like the UK Committee. The ultimate number of Members should be odd so as to ensure an outright majority in its resolutions. The Members will need to have expertise relevant to the Commission's role, so that it is able to produce high quality reports. The Commission as a whole should possess experience and knowledge in the following areas:

- Agricultural science and practices.
- Business competitiveness.
- Climate and environmental science.
- Climate change policy, and in particular the social impacts of climate change policy, including public health.
- Economic analysis and forecasting.
- Emissions trading.
- Energy production and supply.
- Financial investment.
- Industry policy and labour markets.
- Te Tiriti o Waitangi, tikanga Māori, and Māori interests.
- Technology development and diffusion.

For particularly important areas, the Act should require the Commission to possess this expertise, rather than it being merely desirable. It is of particular constitutional importance that the Zero Carbon Act should require expertise in te ao Māori and tikanga on the Commission.

The Commission should be designed to enhance its independence from the government, but to also permit it to collaborate with other government departments in the formulation of policy advice. Independence is essential to the Commission's accountability function, but collaboration will assist its advisory role. There is a degree of tension between preserving independence whilst permitting collaboration and this informs our discussion of its possible legal structure.

We have considered two possible ways the Commission should be constituted: as an Independent Crown Entity, or as an Officer of Parliament. Either could be made to work. The former would require some departures from the default provisions of the Crown Entities Act 2004, such as the extent to which the Minister can amend the Commission's Statement of Intent and thereby influence its strategic direction. On the other hand, if constituted as an Officer of Parliament, there would need to be provision for the Commission to engage in dialogue with government departments so that its advice takes into account whole-of-government directions, fiscal budgets, and internal modelling. It should also be recognised that Officers of Parliament such as the Ombudsmen and the Parliamentary Commissioner for the Environment are not usually involved in the development of government policy.

What matters ultimately is not the Commission's institutional clothing. Rather, what is vital is that the Commission has sufficient independence to hold the government to account, whilst being able to give robust advice towards setting carbon budgets and how they can be met. It may well be that the government prefers to design a unique or hybrid legal vehicle for the optimal performance of the Commission, but that would have to be considered closely by Parliament during the passage of the Zero Carbon Act.

Appointment process

Members of Independent Crown Entities in New Zealand are typically appointed by the relevant Minister, as are the Members of the UK Committee. In our view, this model of appointment by Ministers will not guarantee a sufficient level of independence in our tight-knit political context. New Zealand only has a small pool of experts, and there is a risk of those experts being unwilling to challenge the dominant political views of the day.

Another concern, which highlights the need for independence, is that the Commission would very likely need to assess the effectiveness of plans created by one government and implemented some time later by another government with different political stripes. So the Commission must be entirely separate from the government of the day and its Ministers. We therefore recommend that the appointment process for Members of the Commission should involve cross-party consultation, as is the process for Officers of Parliament.

Funding

It is obviously important that the Commission remains adequately funded to perform its roles. It must not feel constrained from criticising a wayward government by threats of funding cuts. The salaries for the Members of the Commission will be funded by standing appropriations in the Zero Carbon Act at rates set by the Remuneration Authority, which is the independent body set up by Parliament to handle the payment of key office holders. This will be supplemented by appropriations for the cost of operating the Commission's office and employing support staff such as expert researchers. Further to funding by these appropriations, the Commission should be empowered to borrow money if necessary to perform its functions. This power to borrow would be a clear signal from Parliament of the significance of the Commission being politically independent and adequately funded.

Functions and powers

In producing reports through their advisory and accountability roles, the Members of the Commission should try their best to reach a unanimous view. A single report providing clear guidance is best wherever possible. However, there may be times when the Members of the Commission are unable to reach consensus. In such situations the Commission would be able to produce a report in accordance with the views of the majority with a summary of the minority view published at the same time, similar to the format for Select Committee recommendations. This recognises that the best response to climate change will at times be contestable, even among the best of experts, and the government and the public should nonetheless enjoy the benefit of multiple viewpoints on vexing questions of policy.

The Commission should have powers to gather information so that it has its finger on the pulse of the state and the economy when preparing its reports. It should be able to request that authorities (including government agencies), businesses and individuals provide the information necessary to fulfil its advisory or reporting functions. These powers should also enable the Commission to collaborate with other bodies when appropriate. The present powers of the Office of the Ombudsman under the Ombudsmen Act 1975 provide a helpful point of reference.

Transparency

Given that a key function of the Commission is ensuring there is transparency in how well New Zealand is meeting its carbon targets, the Commission should also be transparent about its operations. It should be required to make information about its internal operations available to the public on request in accordance with the usual provisions of the Official Information Act 1982. The Commission's advice and reports, however, will always be publicly released, without needing to be requested under the Official Information Act. Transparent reporting is a cornerstone of the Commission's role as an independent watchdog.

Conclusion

All these facets of how the Climate Commission should be structured are all driven by the need for the Commission to produce robust and independent reports that provide sound advice to government and hold it accountable when there is inadequate progress towards New Zealand's emissions targets. If properly established, the Commission will be a key driving force in the ecosystem of accountability under the Zero Carbon Act.

Judicial review: a last resort

Now that we have considered the broad organisational structure to be set up under the Zero Carbon Act, let us turn to how the role of the courts might operate in practice. In an ideal world, all future governments would place the goal of transitioning to a zero carbon society at the top of their agendas, listen to the expertise of the Climate Commission, and therefore set ambitious targets, plans and policies.

But we do not live in an ideal world — hence the climate crisis! Disagreement is inevitable in law and politics, so we need to know how disputes will be resolved. Dispute resolution is the basic function of the courts.

There are two important government decisions to be made under the Zero Carbon Act, which stem from the obligations to (1) set five-year carbon budgets, which limit emissions over that period; and (2) publish a policy plan as to how the government will meet a particular carbon budget. These obligations have been designed deliberately to allow the government some latitude in its assessment of the many sectors of New Zealand's complex economy. But there is an inherent risk that a future government will take its eye off the ultimate goal of reaching net zero carbon emissions by 2050, and it is foreseeable that a Minister could begin to set inadequate carbon targets or produce policy plans that will be inadequate to meet interim targets.

A well-established enforcement mechanism is the legal process known as judicial review. On the application of an interested party, a judge can review a decision made by the government to ensure it is within the scope of the powers intended by Parliament.

An introduction to judicial review

Let us step back for a moment and take a crash course in constitutional law. Parliament makes the laws of New Zealand, but the government of the day is responsible for applying the laws. Sometimes these laws require a decision-maker, such as a government Minister, to exercise powers in order to ensure the efficient operation of all the many things for which the state is responsible — social welfare, immigration, infrastructure projects, economic and environmental regulation, and so on. When disputes inevitably arise about what a law means or how to apply it, citizens can go to the courts.

The judges cannot substitute their own view for the expertise of the decision-maker, but often a judge will be called upon to explain how a decision should have been made in order to comply with the relevant Act of Parliament. If the decision was made unlawfully or failed to take into account all relevant considerations and voices, then the courts are equipped to force the decision-maker to go back to square one and do it properly.

Climate change in the courts

The issue of climate change has already been raised in the courts of New Zealand. In 2013, for example, the Supreme Court decided that the consequences of burning coal should not be taken into account when West Coast councils were determining land use and other consents required to operate an open-cast coal mine. This conclusion was the result of the Court's detailed analysis of the intention of Parliament when it made several amendments to the Resource Management Act 1991. These amendments reflected the government policy to deal with emissions at the national level rather than the local level. The Court decided it cannot have been Parliament's intention to allow councils to regulate coal mining by reference to the effects on climate change which result indirectly from that activity through the burning of the mined coal upon export to China and the ultimate discharge of greenhouse gases.

An essential lesson of the West Coast case is that the courts will not step in to interfere with a government decision unless they can find a solid foothold to do so by reference to an Act of Parliament. That is where the Zero Carbon Act can fill a gap in the legislative landscape by providing a clear framework for judicial review.

Applicants for judicial review have been successful in other countries such as the Netherlands, where in 2015 a court ordered the Dutch government to raise its emissions reduction target from 17% to the more ambitious target of 25% below 1990 levels by 2020. That sort of order is pretty foreign to New Zealand's constitution — our courts will not direct the government to pursue hard targets of that nature. Instead a judge will focus more on the lawfulness and fairness of the process adopted by the government in reaching its ultimate decision. If not, the Judge will usually direct the Minister to make the decision afresh.

Indeed, in a timely judgment still hot off the press, Waikato law student Sarah Thomson applied for judicial review of the Minister for Climate Change Issues on the basis that the Minister had acted unlawfully in:

- failing to review the 2050 emissions target — set under the Climate Change Response Act 2002 — following the release of an updated assessment of climate science prepared by the Intergovernmental Panel on Climate Change (IPCC); and
- failing to take into account fully the costs of dealing with the adverse effects of climate change, especially in vulnerable places such as Tokelau, when setting the 2030 emissions target as part of New Zealand's nationally determined contribution (NDC) under the Paris Agreement.

On 2 November 2017, Justice Mallon delivered her decision regarding Sarah's lawsuit. The Judge said she might have directed the Minister to review the 2050 target but that the new Government's intention to pursue a more ambitious target meant the point was now moot, and that the NDC decision could have been made differently but the Minister nonetheless took into account all relevant considerations under the international legal framework.



Sarah Thomson outside the Wellington High Court earlier this year, preparing for her judicial review of the Minister's climate change targets.

We will return to some of the helpful comments Justice Mallon made in reaching her decision, but let us first situate her decision in the process of judicial review in a little more detail to see how the Zero Carbon Act would fit with the existing law.

Standing

There are certain criteria that must be satisfied in order to apply to the High Court for judicial review of a government decision. The first hurdle to overcome is called standing — the person or organisation applying to review the government decision must have a sufficient interest in what is at stake. Although it might seem trite that an issue as massive as climate change affects anyone and everyone, the Zero Carbon Act should expressly tell the courts that any Kiwi has legal standing to step up and represent the public interest in challenging a decision they believe fails to account for all relevant considerations or does not adequately pursue the overarching goals.

As we noted in an earlier report, *International case studies and lessons for New Zealand*, the UK's Climate Change Act and Ireland's Climate Action and Low Carbon Development Act are very vague as to who is able to bring an application for judicial review. We should make this clear in the Zero Carbon Act. In particular it is important to ensure that public-interest litigants — such as the Royal Forest and Bird Protection Society, the Environmental Defence Society, Greenpeace Aotearoa New Zealand, or incorporated community groups — have sufficient standing as these are the bodies that are often the most willing and able to hold the government to account through judicial review.

Reviewability

Second, once an applicant establishes that they have standing, it must be shown that the decision is reviewable, which simply means it is the sort of decision for which it would be appropriate for the courts to intervene. Courts exercise a fairly broad oversight of administrative decisions, and the basic principle is well put by Matthew Smith: *“Exercises of power measurable by legal yardsticks are likely to be reviewable.”*

These legal yardsticks should be made clear in the Zero Carbon Act. The provisions of Ireland's climate legislation are largely couched in abstract language, failing to offer clear guidance as to whether executive specification of policy measures to manage emissions can be challenged, and there is an ongoing academic contest as to how enforceable the UK regime is under the English law of judicial review. In order for decisions to be reviewable, the Zero Carbon Act will have to set out the Minister's powers and obligations in clear terms and specify the considerations that a Minister must take into account when setting carbon budgets and publishing policy plans, as well as the extent to which the Minister must consult with the public prior to doing so.

The decision to set a carbon budget under the Zero Carbon Act should be reviewable and very clear in setting the parameters of the Minister's power. By contrast, the power under the Climate Change Response Act to set a target is very vague, which sends a signal from Parliament to the courts that the government should have a lot of leeway in the considerations it takes into account, aside from the requirement that the Minister “must review the target following publication of an IPCC report”. Under the Zero Carbon Act, the obligation to set carbon budgets must be framed in much clearer terms by setting out relevant considerations (more on this shortly). The very fact it will sit under the overarching target of net carbon neutrality by 2050 — locked in primary legislation — will already provide a much better yardstick for the courts to review the Minister's decisions compared with the present regime.

The obligation to publish policy plans should also be reviewable. For example, under the Conservation Act 1986 the Minister “may” approve statements of general policy for the implementation of the Department of Conservation's strategy, and by transforming this power into a “must” under the Zero Carbon Act we will have a statutory power of decision that is clearly reviewable if the Minister fails to publish the plan. Where a plan is plainly inadequate to meet the carbon budget, that may also be a ground for review — the budget would constitute a legal instrument against which subsequent decisions would have to be measured.

Moreover, in a recent decision concerning the proposal to downgrade conservation land to make way for the controversial Ruataniwha Dam, a majority of the Supreme Court held that the Minister of Conservation could not make decisions that contradicted the policies contained in its statutory planning instruments. In a similar way, the policy plans under the Zero Carbon Act would provide an additional yardstick against which to measure the lawfulness of other decisions made by the government.

Because climate change warrants a whole-of-government response, it is Generation Zero's ambition that the Zero Carbon Act will permeate the public sector in the same way that the principles of Te Tiriti o Waitangi and the New Zealand Bill of Rights Act 1990 are now taken into account at every level.

There are several legal layers that will cascade from the Zero Carbon Act, and the courts can measure the lower decisions by reference to the higher decisions: the carbon budgets must be set in pursuit of the 2050 goal, the policy plans must be adequate to meet the budgets, and other decisions of government must align with the plans. So there will be clear legal yardsticks built into the Zero Carbon Act to provide guidance for the courts on how to review decisions that fall outside of the bounds of legality. In a way this internal legal hierarchy mirrors the broader pyramid of social responsibility set out above in Figure 2.

Aside from the statutory mechanics of the Zero Carbon Act, we can glean some insight from the promising observations made by Justice Mallon in her recent judgment about the general reviewability of government decisions concerning climate change:

[Overseas] courts have not considered the entire subject matter [of climate change policy] is a "no go" area, whether because the state had 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 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. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body.

However, Justice Mallon reminds us that ultimately the question of reviewability depends more on the ground of review rather than the subject matter of the decision.



Grounds of review

The third requirement for judicial review is that an applicant must bring her complaint within one of established grounds of judicial review, which are the different categories through which a decision can be challenged. Those most likely to apply under the Zero Carbon Act are that (1) a decision-maker must abide by procedural fairness; (2) they must recognise any legal constraints on their discretionary power; and (3) the ultimate decision must be free from errors of law and fact.

Judicial review is focused mostly on process rather than the substance or merits of a decision, so the preservation of procedural fairness is an important function for the courts. A fair decision-making process must remain free from the appearance of bias or predetermination, and might include a duty on the government to consult with interested parties before making the decision, and perhaps to provide reasons for why it made a particular decision. The courts can superimpose these obligations on an Act but often it is helpful for Parliament to insert specific procedural requirements to ensure certainty and fairness.

In exercising discretion under a statutory power, the decision-maker is never unfettered. Often the courts are called upon to identify and explain the constraints on a Minister's powers. The Minister can only exercise a power for its proper and intended purpose, which also means that she must take into account any relevant considerations and exclude any irrelevant considerations. A common approach is for Parliament to specify a list of factors that the Minister may, must, or must not take into account. Clearly the advice and recommendations of the Climate Commission would be mandatory considerations when exercising powers of decision under the Zero Carbon Act, as would consistency with the principles of Te Tiriti o Waitangi. Parliament may want to prescribe further matters for the Minister to consider before setting the carbon budget or publishing a policy plan.

Moreover, the Minister is always constrained by the bounds of rationality: in certain circumstances the courts will intervene on the ground that the decision is one that no reasonable decision-maker could ever have made. But the degree of judicial scrutiny is low if the relevant decision is one for which the decision-maker should be allowed a lot of latitude.

The main decisions under the Zero Carbon Act require a comprehensive assessment of New Zealand's economy, so it is unlikely that the courts will be willing to interfere on this exceptional ground of unreasonableness. For example, while Justice Mallon formed the view that another Minister may well have set a more ambitious 2030 target for New Zealand's NDC, the Judge could not say there was no rational basis for the Minister to believe the NDC target will strengthen the global response to climate change when the Minister had in fact acted within the bounds of international law and considered all relevant matters. Under the Zero Carbon Act, however, a plan that had no logical connection to meeting the 2050 target or a five-year carbon budget would be vulnerable to judicial review on the ground of unreasonableness.

Finally, the decision should be free from material errors. An error of law is perhaps an obvious ground of review, which is when the decision-maker has misinterpreted their statutory discretion or has misapplied it to the facts in the relevant circumstances. Also the decision-maker may have operated under a false assumption about a material fact. A vast body of economic and scientific facts will have to be compiled and analysed before setting carbon budgets and publishing plans, so there is a lot of opportunity for error, oversight or at least disagreement. In such circumstances, a judge will often feel compelled to tell the decision-maker to make the assessment again by reference to the correct interpretation of the law or the true facts of the matter.

In light of these established grounds of review, there will have to be reflection in the drafting process of the Zero Carbon Act of how the Minister's decisions might be challenged by judicial review. Clear signals should be sent from Parliament to the courts as to how intense judicial review should be in respect of decisions made under the Zero Carbon Act.

Legal reasoning and court processes are often slow, and a complex judicial review application can extend over many years if it's appealed to the higher courts. A perpetual jousting goes on between the demands of efficiency and legality, and the stakes are very high when we need to adapt rapidly to abrupt climate change. But New Zealand prides itself on its commitment to the rule of law, which will not be compromised by our world-class courts. Moreover, transparency and accountability are touchstones of the Zero Carbon Act, so it is essential to maintain access to enforcement mechanisms.

Remedies

The courts have discretion as to what they can do if an applicant is successful in their judicial review. The remedy which would usually follow is that the judge will set aside the decision – for example, the making of a particular carbon budget – and direct the decision-maker to do it again. The judge will tell the decision-maker how they went wrong and often offer guidance as to how that decision should be made, such as what factors must be taken into account.

However, the judge can tailor the remedy to the particular situation to avoid undue disruption of the business of government, so it may be the case that only one aspect of a complex decision needs to be set aside and decided afresh. This is the likely case if the policy plans were to be reviewed for consistency with the carbon budgets, as the courts would not want to disturb political and commercial certainties. But where the Minister has completely failed in his or her obligation to make a particular decision by the statutory deadline, then the courts are more than willing to direct that decision to be made.

It is important to recognise the flipside of permitting judicial review in the public interest: a self-interested private individual or organisation would be able to seek review of decisions on the basis that the government has moved too quickly in pursuing the goal of a carbon-neutral economy.

An affected party, such as an investor in a carbon-intensive industry who benefits from the status quo, would perhaps want to challenge the carbon budget or plan on any of the grounds mentioned above. And established economic actors often have a lot more resources to challenge government decisions than those groups who litigate in the interests of people and the planet. Sir Geoffrey Palmer has observed that *"[p]olitical ideology, Conservative think tanks, and bias in the mainstream media have all contributed to the [climate change] deniers securing more support than their case deserves. The corporate vested interests in the fossil fuel industries are massive and some of them fund the mischief."*

Even when the stakes are low, judicial review often turns into a battle of expert witnesses: each party finds their own economist or scientist willing to support a favourable finding, and the contest can drag through the courts for a very long time.

Judicial review in this sense is a double-edged sword. But while challenges to government decisions under the Zero Carbon Act could come from card-carrying climate deniers, it is far more likely that litigation will arise from sectors that are hard done by or disproportionately affected by a policy plan. It is important that all affected parties have recourse to the courts in the event they believe that justice has not been done in combatting climate change – the Zero Carbon Act is based on principles of responsibility, intergenerational equity, and Te Tiriti o Waitangi in ensuring that the New Zealand's transition to a zero-carbon economy is fair, cost-effective, environmentally sustainable, and consistent with the Crown's obligations to Māori.

In considering whether challenges are likely to succeed, it is important to bear in mind that the role of the Climate Commission as an independent and expert adviser to the government is so important that it might be best to install a presumption under the Zero Carbon Act that the recommendations of the Commission should be adopted by the Minister. This would involve a rigid requirement on the Minister to give reasons where departing from the advice of the Commission. Where the Minister has followed the Commission's recommendations, this would place a heavy onus on an applicant for judicial review to produce evidence and explain why, for example, the Minister should have set a different carbon budget to that recommended by the Commission.

This raises a further question: could the advice of the Climate Commission itself be challenged through judicial review? It is well settled that the courts should be cautious about intervening in decisions made by specialist bodies, and there is a general reluctance to adjudicate on matters of science. Marcelo Rodriguez Ferrere has cautioned that decisions involving determinations on scientific debate should not be reviewable because it would be inappropriate for the courts to interfere with issues that they have no expert ability to resolve. On the other hand, Justice Mallon's recent decision demonstrates the ability of the courts to receive expert evidence to determine the lawfulness of government decisions where there is broad consensus on the science.

It is important to think hard about the extent to which we want the public to be able to bring legal proceedings that might do more harm than good in terms of pursuing a zero carbon future. The ecosystem of accountability to be set up under the Zero Carbon Act places certain jobs in the hands of different experts, and the courts need not always have the final say. Unelected judges can only do so much in our constitutional culture and, in any event, judicial review should be an enforcement mechanism of last resort only for when the government has clearly departed from its mandate. We anticipate that the emphasis on transparency and accountability under the Zero Carbon Act, together with the role of the Climate Commission, will ensure the people of Aotearoa can keep a close eye on the government's performance and therefore hold the government to account through non-legal pressure in the political domain.

Overall conclusion

The goal under the Zero Carbon Act of net zero emissions by 2050 is ambitious but eminently achievable. We must put that goal into law, and set up an ecosystem of accountability to ensure we get there. Parliament, the government, the Climate Commission, the courts and the people of Aotearoa New Zealand will need to engage in an exercise of collaboration under the Act. If we slip off the rails, the Commission and the courts are there to nudge us back on track.

Given the important role of the Commission and the courts, we have considered in some detail how these organs should operate within the framework to be installed by the Zero Carbon Act. The Commission should be formed so as to best protect its independence, mana and robustness in performing its accountability and advisory functions. The High Court will be able to step in when a citizen of Aotearoa New Zealand brings an action claiming something has gone wrong in the government's process of setting carbon budgets and preparing policy plans. The courts can then compel the government to make the decision afresh in line with the law. This process of judicial review is an important enforcement mechanism, although we have emphasised that there are some complexities and unknowns in how it will operate. This is going to require careful consideration when the Government puts pen to paper in drafting the bill that will become New Zealand's Zero Carbon Act.

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