

WAIKATO LAW REVIEW

TAUMAUARI

VOLUME 28, 2020

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First published in 1993, *Taumauri* – the Waikato Law Review provides authoritative and critical analysis on a broad range of legal issues. The journal is hosted by *Te Piringa* Faculty of Law at the University of Waikato and reflects the Faculty's founding objectives of biculturalism, the study of law in context, and professionalism.

This issue may be cited as **(2020) 28 Wai L Rev.**

Submissions

Articles, case notes, and book reviews should be emailed (as Microsoft Word attachments) to the Editor in Chief by **31 October**.

Submissions should comply with either the New Zealand Law Style Guide (3rd Edition) or OSCOLA (4th Edition), and should conform with the general layout of articles, case notes, and book reviews published in previous issues of the Waikato Law Review. Articles should be within the range of 8,000 to 12,000 words (maximum) including footnotes, and other submissions should be within the range of 4,000 to 8,000 words.

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Subscriptions

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Email: lawpublications@waikato.ac.nz.

Contact details for North American subscriptions: William W Gaunt & Sons Inc, 3011 Gulf Drive, Holmes Beach, Florida 34217-2199, United States of America.

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ISSN 1172-9597 (Print) ISSN 1179-3848 (Online)

EDITORIAL: CLIMATE ACTION

The 2020 issue of *Taumauri*, the Waikato Law Review, reflects the research expertise and strength of *Te Piringa* Faculty of Law in the field of International Law generally. Together, the articles in this issue provide valuable insights into the critical thinking about Climate Action that contributed to the debates at the (postponed) Conference of the Parties under the UN Framework Convention on Climate Change (COP26) held in Glasgow in November 2021.

The article by Justice Susan Glazebrook on “The Role of Judges in Climate Justice” provides a wide-ranging and comparative analysis of climate change litigation, including, the increased risk of liability faced by company directors. In particular, Justice Glazebrook emphasizes the importance of climate action before the courts by giving increased publicity and attention to climate change, and the proper role of domestic courts (within constitutional limits) in responding to the climate crisis.

Samantha Johnston critically reviews the important role played by Charity Law in supporting advocacy and crowd-funding public interest litigation in relation to environmental protection and climate action. Absent the broader conception of charitable purposes applied by the High Court in *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999, it is unlikely that legal assistance or legal aid would be available to fund public interest environmental litigation. The decision therefore plays an important role in ensuring access to justice and enabling (inter alia) climate action to be brought before the courts.

Judge Peter Spiller provides a historical analysis of the work of the Immigration and Protection Tribunal during its first 10 years of operation. In particular, Judge Spiller acknowledges the important role played by the Tribunal in determining a heavy case load in a timely way, and the transformative nature of its work on the lives of people given refugee or protected person status. The work of the Tribunal (as emphasized by Justice Glazebrook in her article) has the potential to play an important role in the future in affording protection (on humanitarian grounds) to climate change displaced persons who seek refuge in New Zealand.

The natural rights based arguments critically assessed by Yu Cheung and Cao Mingde in their article provide a powerful jurisprudential basis for developing the law in relation to climate change displaced persons from low-lying or potentially inundated countries across the Pacific and other parts of the globe, and underpin the themes addressed by Justice Glazebrook and Judge Spiller.

Further atmospheric protection is also considered by Mekala Jeewanthi Delpage regarding the use of methyl bromide and its impact on the ozone layer, who recommends more widespread prohibition of methyl bromide by removing the exemptions currently allowed for quarantine and shipping purposes under both international and domestic law. While Debbie Crawford carefully analyses the wider problem affecting all environmental media (air, land, and water) arising from the use of PFASs in a range of products (including Teflon coated non-stick frying pans) and recommends a stronger legal response by prohibiting the use of these chemical compounds in most settings to prevent further bio-accumulation and adverse effects on the environment and human health.

On a different note, Justice Mark O’Regan in his 2019 Norris Ward McKinnon lecture essays the transformative impact of the settlement process under the Treaty of Waitangi Act 1975 on the development of New Zealand law generally. While Justice Glazebrook (in her article) brings the topics considered in this journal issue full-circle by noting the dynamic impact of tikanga

Māori in providing standing for climate action based on kaitiakitanga duties of guardianship for the environment.

Dr Trevor Daya-Winterbottom FRSA FRGS

Editor in Chief

Te Piringa Faculty of Law

University of Waikato

THE ROLE OF JUDGES IN CLIMATE GOVERNANCE AND DISCOURSE

BY HON JUSTICE SUSAN GLAZEBROOK*

I. INTRODUCTION

Climate change litigation is on the rise. Of the estimated 1841 cases of climate change litigation around the world since 1986, 1006 cases have been filed since 2015,¹ as compared to a mere 834 cases between 1986 and 2014.² Over 80 per cent of cases were against national and sub-national governments, although some claims have been made by governments against corporates and others.³ Much of the global climate litigation is in the United States although this is changing, and since 2007, other countries have seen an increase in climate litigation cases. Of the 1841 cases, 58 of them are in the Global South with at least 11 of these filed in 2020 alone.⁴

* Judge of the Supreme Court of New Zealand and President of the International Association of Women Judges. This paper is based on a presentation I gave at the Asia Pacific Judicial Conference on Climate Change: Adjudication in the Time of COVID-19 (virtual, November 2020). The event was co-organised by the Asian Development Bank and the United Nations Environment Programme. Thank you to my clerks, Don Lye and Rebecca McMenamain for their invaluable assistance with this paper.

1 And thus since the United Nations Conference of Parties' Paris Agreement in 2015 (COP21): Paris Agreement (opened for signature 16 February 2016, entered into force 4 November 2016). More recently in November 2021, the Glasgow Climate Pact was agreed to by almost 200 countries at the COP26 summit: see Fiona Harvey "What are the key points of the Glasgow Climate pact?" *The Guardian* (14 November 2021) <www.theguardian.com>. Reception to the Glasgow Climate Pact has ranged from lukewarm to highly critical: see for example Matt McGrath "COP26: Evasive words and coal compromise, but deal shows progress" *BBC News* (13 November 2021) <www.bbc.com>; and Tishiko King "Empty words, no action: Cop 26 has failed First Nations people" *The Guardian* (15 November 2021) <www.theguardian.com>.

2 Joana Setzer and Catherine Higham *Global trends in climate change litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment, July 2021) at 5. For the purposes of the report, cases must generally be brought before judicial bodies and raise an issue of law or fact relating to climate change as a significant issue. Note that the sum total of 1841 cases is one more than the figures of 1,006 and 834 because one case has an unknown filing date: see 5, n 1. The report relies predominantly on the Climate Change Laws of the World (CCLW) database, accessible at <climate-laws.org>. For a regularly updated database which canvasses a wider range of cases, see Sabin Center for Climate Change Law "Climate Change Litigation Databases" <climatecasechart.com>.

3 Setzer and Higham, above n 2, at 43–44. This is a trend in the United States, where there is currently much litigation about whether these claims by cities are properly pursued at state or federal level. See for example *City of New York v Chevron Corp* 993 F 3d 81 (2d Cir); *Commonwealth v Exxon Mobil Corp* 462 F Supp 3d 31 (DC Mass 2020); *BP plc v Mayor and City Council of Baltimore* 19–1189, 17 May 2021 (United States Supreme Court) slip op; and *Shell Oil Products v Rhode Island* 20-900, 24 May 2021 (United States Supreme Court).

4 Setzer and Higham, above n 2, at 11. On climate litigation in the Global South, see Jolene Lin and Douglas A Kysar (eds) *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, Cambridge, 2020); César Rodríguez-Garavito "Human Rights: The Global South's Route to Climate Litigation" (2020) 114 *AJIL Unbound* 40; and Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, United Kingdom, 2013).

These figures show that courts worldwide are being increasingly asked to adjudicate on climate change issues and, therefore, that judges cannot avoid being part of both governance and discourse on climate change.⁵ The types of cases and arguments cover a wide field, meaning that this litigation permeates almost all areas of the work of the courts.

II. CASES INVOLVING LEGISLATION

An important function of courts is to interpret and apply legislation. Climate change is most obviously relevant where legislation directly relates to climate change.⁶ Cases have been brought to force governments to meet their perceived obligations under such legislation. For example, the Irish Supreme Court quashed Ireland's 2017 National Mitigation Plan on the basis that it failed to provide the specificity required by the legislation to meet the legislative objective of achieving a low carbon, climate resilient and environmentally sustainable economy by 2050 (the National Transitional Objective).⁷ In December 2020, Greenpeace Spain filed suit against the Spanish government, asserting that Spain unlawfully failed to produce a National Energy and Climate Plan with 2030 climate targets, in violation of national law in addition to EU regulations and Spain's Paris Agreement obligations.⁸ More recently in France, the Administrative Court of Paris found that measures taken so far by the French government were insufficient to meet its own climate targets (40 per cent emission reduction by 2030 and carbon neutrality by 2050).⁹

Climate change can also be relevant to decisions under general planning and environmental legislation. Cases have thus been brought to ensure climate change issues are considered in relation

5 See the "Declaration on Climate Change, Rule of Law and the Courts" (2020) British Institute of International and Comparative Law <www.biiicl.org/climate-change-declaration>. The Declaration builds on discussions between judges, policymakers, academics and legal practitioners at a two-day summit "Our Future in the Balance: The Role of Courts and Tribunals in Meeting the Climate Crisis" held on 7–8 July 2021.

6 For New Zealand's climate legislation, see Climate Change Response Act 2002 which was amended by the Climate Change Response (Zero Carbon) Amendment Act 2019. For a critical analysis, see Philipp Semmelmayr "The Climate Change Response (Zero Carbon) Amendment Act — A Critical Analysis of New Zealand's Response to Climate Change" (2020) 24 NZJEL 158.

7 *Friends of the Irish Environment v Government of Ireland* 205/19, 31 July 2020 (Supreme Court of Ireland). For commentary, see Orla Kelleher "A critical appraisal of *Friends of the Irish Environment v Government of Ireland*" (2021) 30 RECIEL 138.

8 For updates on the case, see Sabin Center for Climate Change Law "Greenpeace v Spain" (2021) <climatecasechart.com>.

9 *Notre Affaire à Tous v France* 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021 (Tribunal Administratif de Paris) unofficial English translation available at <www.climatecasechart.com>. In its final decision, the Court ordered the State to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by 31 December 2022: *Notre Affaire à Tous v France* 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021 (Tribunal Administratif de Paris) unofficial English translation available at <www.climatecasechart.com>. For updates on the case, see Sabin Center for Climate Change Law "*Notre Affaire à Tous and Others v France*" (2021) <climatecasechart.com>.

to particular projects, particularly mining projects or oil production projects.¹⁰ In South Africa, courts have in effect gone further than the Irish courts recently did by interpreting existing environmental planning legislation to require additional climate change considerations. For example, in what has been hailed as South Africa's first climate change-related decision, the High Court of South Africa recently ruled that climate change is a relevant consideration when granting an environmental authorisation, notwithstanding the lack of an express statutory obligation to conduct a climate-focused impact assessment.¹¹ Similarly, and in the context of the tort of negligence, the Federal Court of Australia recently ruled that Australia's Minister for the Environment owes a duty of care towards the children of Australia to take reasonable care not to cause them personal injury in exercising her statutory power under federal environmental law to approve projects producing greenhouse gases contributing to climate change.¹²

Cases have also been brought under more general legislation or regulation. There have been cases relating to allegations of misleading conduct in trade, including so-called greenwashing (misleading claims about the environmental impact of products).¹³ Exxon Mobil, in particular, has faced multiple lawsuits about making misleading statements and misrepresentations to investors as to the dangers and business risks associated with climate change as well as for deceiving consumers

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- 10 In Australia, see for example *Gray v Minister for Planning* [2006] NSWLEC 720, [2006] 152 LGERA 258; *Minister for Planning v Walker* [2008] NSWCA 224, [2008] 161 LGERA 423; and *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, (2019) 234 LGERA 257 in which the Court held that greenhouse gas emissions were causally linked to climate change and its consequences on the basis that each emission made a cumulative contribution. In New Zealand, similar cases have also been brought: see for example *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730; and *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32. *Buller Coal* has been criticised for taking an overly narrow approach: Catherine Iorns and Estair van Wagner "Commentary on *West Coast ENT Inc v Buller Coal Ltd* Broadening an Ethic of Care to Recognise Responsibility for Climate Change" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand—Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 389 at 394–395. For an example in the United States, see *Center for Biological Diversity v Bernhardt* 982 F 3d 723 (9th Cir 2020) where the Court held that the government failed in analysing reasonable alternatives to the challenged approval of an offshore oil drilling and production facility as required under the National Environmental Policy Act of 1969 because it failed to consider greenhouse gas emissions from foreign oil consumption.
- 11 *EarthLife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP). See generally Tracy-Lynn Humby "The *Thabametsi* case: Case No 65622/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*" (2018) 30 J Env Law 145.
- 12 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [*Sharma No 1*]. Since the Minister's decision to approve or not to approve the project had not yet been made, the Court declined to issue a quia timet injunction to restrain the Minister from an apprehended breach of the duty of care: at [508]. Subsequently, however, the Court issued a declaration that the Minister had a duty to take reasonable care in the exercise of her powers under the consenting legislation to avoid causing personal injury or harm to Australian residents under the age of 18 at the time of the proceeding arising from carbon emissions; the Court also ordered that the Minister pay the applicants' costs: *Sharma by her litigation representative Sister Marie Brigid Arthur (No 2)* [2021] FCA 774. Notwithstanding the declaration made by the Federal Court, the Minister granted approval for the proposed mine expansion and lodged an appeal against the judgment to the Full Federal Court. For updates on the case, see Sabin Center for Climate Change Law "Sharma and others v Minister for the Environment" (2021) <climatecasechart.com>.
- 13 Under Australian Consumer Law, it is illegal for businesses to engage in conduct that misleads consumers, including through greenwashing: Competition and Consumer Act 2010 (Cth), vol 3, sch 2. See also the New Zealand Fair Trading Act 1986. In New Zealand, the Commerce Commission has released its Environmental Claims Guidelines which provide guidance on the making of environmental claims in the media, on products and on packaging: Te Komihana Tauhokohoko | Commerce Commission New Zealand *Environmental Claims Guidelines: a guide for traders* (July 2020).

about the purported environmental benefit of some of its products and promoting a misleading “greenwashing” campaign.¹⁴

Multiple claims have also been made against corporates alleging inadequate environmental assessments of particular projects.¹⁵ More generally, there have also been cases alleging breach of disclosure requirements by corporates of climate change-related risk or a breach of directors’ duties by failing to address such risks.¹⁶

III. CLAIMS FOR DAMAGES

Outside of the context of the application of legislation, direct claims for damages for climaterelated harm have been made against corporates, including increasingly against Carbon Majors,¹⁷ for example in tort or nuisance. While legal causation has often been one of the main hurdles in establishing tortious liability, there is increasingly accurate science tying emission production in these cases to the effects of climate change which may increase the likelihood of such claims being made out.¹⁸

Some of these climate cases have been transnational – suing for damage allegedly caused in another jurisdiction. One example of this is the *Luciano Lliuya v RWE AG* case brought in Germany by a Peruvian farmer against Germany’s largest electric utilities company, RWE.¹⁹ Mr Luciano Lliuya alleges that his hometown of Huaraz, Peru is threatened by climate change, in particular, glacial melt flooding the nearby Lake Palcacocha. Mr Luciano Lliuya’s claim was that RWE caused part of that climate-related damage and he seeks damages to mitigate the cost he and Huaraz authorities are expected to incur to establish flood protections. Based on the Institute of Climate

14 See *Commonwealth v Exxon Mobil Corp*, above n 3; Sabin Center for Climate Change Law “*Ramirez v Exxon Mobil Corp*” <www.climatecasechart.com>; *Ramirez v Exxon Mobil Corp* 334 F Supp 3d 832 (ND Tex 2018); and *People of the State of New York v Exxon Mobil Corp* 199 NYS 3d 829 (SC NY 2019).

15 See for example *ClientEarth v Polska Grupa Energetyczna* [2020] District Court of Lodz (Poland) where the Court required Europe’s largest power plant, the Belchatow coal plant, to engage in negotiations with ClientEarth to reduce its climate impacts.

16 See for example *McVeigh v Retail Employees Superannuation Pty Ltd (Rest)* (about climate risk disclosure and breach of trustees’ duties, filed in the Federal Court of Australia in 2018 but dismissed by consent of the parties after they settled); *O’Donnell v Commonwealth* (about the Australian government’s climate risk disclosure failures, filed in the Federal Court of Australia in July 2020); and *Abrahams v Commonwealth Bank of Australia* (about the Commonwealth Bank’s climate risk disclosure failures, filed in the Federal Court of Australia by the defendant’s shareholders but withdrawn after the Commonwealth Bank released a 2017 annual report acknowledge the risk of climate change and pledging to undertake climate change scenario analysis to estimate business risks).

17 The 100 major fossil fuel companies responsible for producing 52 per cent of global industrial greenhouse gases since the industrial revolution: Paul Griffin *The Carbon Majors Database: CDP Carbon Majors Report 2017* (Climate Accountability Institute, Carbon Disclosure Project, July 2017) <<https://climateaccountability.org/>> at 5.

18 See the recent leading research by Petra Minnerop and Friederike E L Otto “Climate Change and Causation: Joining Law and Climate Science on the basis of Formal Logic (2020) 27 Buff Env L J 49. See also Michael Burger, Jessica Wentz and Radley Horton “The Law and Science of Climate Change Attribution” (2020) 45 Colum J Envtl L 57; and Sophie Marjanac and Lindene Patton “Extreme weather event attribution science and climate change litigation: an essential step in the casual chain” (2018) 36 Journal of Energy & Natural Resources Law 265.

19 *Luciano Lliuya v RWE AG* 2 O 285/15, 15 December 2016 (District Court Essen) unofficial English translation available at <www.climatecasechart.com>.

Responsibility's estimation that RWE has contributed 0.47 per cent of all greenhouse gases since the industrial age, the damage claimed is 0.47 per cent of the estimated mitigation cost. While the case was unsuccessful at first instance, it is currently on appeal to the Higher Regional Court of Hamm where the Court has recognised the complaint as admissible.²⁰

IV. FINANCIAL RISK

The fact that climate risk is a financial risk is now well-accepted.²¹ Regulation is responding to require proper accounting of climate risks. The G20 Financial Stability Board Task Force on Climate-related Financial Disclosures (TCFD), established in 2015, has provided a voluntary framework on how companies can make climate related disclosures.²² The International Financial Reporting Standards Foundation (IFRS) is currently developing a new global standard for sustainability reporting based off the TCFD framework aiming for publication by mid-2022.²³ New Zealand is the first country in the world to require the financial sector to disclose the impacts of climate change on their business and how they will manage climate-related risks.²⁴

In Australia, the Senate Economics Reference Committee has issued recommendations that the Australian Securities and Investment Commission (ASIC) and the Australian Stock Exchange review their guidance to directors to ensure that carbon risk is properly taken into account.²⁵ In September 2018, ASIC published a report indicating that directors and officers of listed companies

20 For updates on the case, see Sabin Center for Climate Change Law “Luciano Lliuya v RWE” <www.climatecasechart.com>; and Climate Change Laws of the World “Luciano Lliuya v RWE” <www.climate-laws.org>.

21 On how climate change affects businesses, see generally; World Economic Forum *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy* (2020); Noel Hutley and Sebastian Hartford Davis “Climate Change and Directors’ Duties: Supplementary Memorandum of Opinion” (The Centre for Policy Development, 26 March 2019); Noel Hutley and Sebastian Hartford Davis “Climate Change and Directors’ Duties: Further Supplementary Memorandum of Opinion” (The Centre for Policy Development, 23 April 2021); Alice Garton “The Legal Perspective: Climate Change’s Influence on Future Business Ventures” (Keynote address, European Refining and Technology Conference, Cannes, 28 November 2018); Chapman Tripp “Managing climate risk in New Zealand in 2020: A toolkit for directors” (November 2020); and Susan Glazebrook “Meeting the challenge of corporate governance in the 21st century” (2019) 34 *Aust Jnl of Corp Law* 1 at 14–17.

22 Task Force on Climate-Related Financial Disclosures Final Report: Recommendations (June 2017). The G7 nations, have also recently agreed to mandate climate reporting following the TCFD recommendations: Matt Mace “G7 agree on ‘historic steps’ to make climate reporting mandatory” Euractiv (online ed, Brussels, 7 June 2021).

23 Huw Jones “New standards board targets mid-2022 for global climate company disclosures” *Reuters* (online ed, London, 1 May 2021).

24 David Clark and James Shaw “NZ becomes first in world for climate reporting” (press release, 13 April 2021). See Ministry advice on the legislation: Hīkina Whakatutuki | Ministry of Business, Innovation and Employment “Mandatory climate-related disclosures” (25 May 2021) <www.mbie.govt.nz>. The United Kingdom has also followed suit: Department for Business, Energy and Industrial Strategy and others “UK to enshrine mandatory climate disclosures for largest companies in law” (press release, 29 October 2021).

25 Senate Economic References Committee *Carbon risk: a burning issue* (April 2017). The Australian government’s response was to suggest that ASIC consider its high-level guidance on disclosure to ensure corporate governance of ASX-listed entities remains best practice: *Australian Government response to the Senate Economics Reference Committee report: Carbon risk: a burning issue* (March 2018) at 2.

“need to understand and continually reassess existing and emerging risks (including climate risk) that may affect the company’s business. This extends to both short-term and long-term risks.”²⁶

These developments are likely to mean that there could be more cases challenging the adequacy of financial reporting in the area of climate change risks. The risk of climate change litigation would also have to be factored in. As Australian barristers Noel Hutley and Sebastian Hartford Davis, in a widely published joint opinion commissioned by the Australian Centre for Policy Development in 2019, said:²⁷

It is increasingly difficult in our view for directors of companies of scale to pretend that climate change will not intersect with the interests of their firms. In turn, that means that the exposure of the individual directors to ‘climate change litigation’ is increasing, probably exponentially, with time.

V. CLIMATE CHANGE ACTIVISTS

It should be noted that polluters are not the only defendants in climate cases. There have been criminal cases for civil disobedience brought against climate change protestors who then rely on statements about climate change or claims of a defence of necessity in answer to charges.²⁸ In Switzerland, 12 climate activists, convicted of trespassing for occupying a bank branch to protest against the bank’s fossil fuel investments, were initially successful on appeal in arguing that their actions were a necessary and proportional means in achieving their goal.²⁹ However, their acquittal was overturned by the Court of Appeals, which was then upheld by the Federal Court.³⁰ An application for review of the decision of the Federal Court has been filed with the European Court of Human Rights.³¹

More broadly, the use of Strategic Lawsuits Against Public Participation (SLAPPs) by big polluters against environmental advocates is highly concerning.³² The objective of these SLAPPs is

26 Australian Securities and Investment *Commission Climate risk disclosure by Australia’s listed companies* (Report 593, September 2018) at 12. See also Governance Institute of Australia *Climate change risk disclosure: A practical guide to reporting against ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations* (February 2020). 58 per cent of Australia’s ASX100 companies are now following the recommendations of the TCFD, with 78 per cent ASX100 companies acknowledging climate change as a financial risk: KPMG Australia *Towards net zero: Australian supplement – How the top Australian companies report on climate risk and carbonisation* (November 2020) at 2.

27 Hutley and Davis “Climate Change and Directors’ Duties: Supplementary Memorandum of Opinion”, above n 21, at 9. Some of that climate litigation has been canvassed in Helen Winkelmann, Susan Glazebrook and Ellen France “Climate Change and the Law” (Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) <www.courtsofnz.govt.nz> at [111]–[127].

28 For an extensive overview of cases, see Climate Defense Project *Climate Necessity Defence Case Guide* (28 March 2019) <www.climatedefenseproject.org>. See also Lange N Long and Ted Hamilton “The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases” (2020) 38 *Stan Env LJ* 57.

29 *Credit Suisse Protesters Trials* 13 January 2020 (Lausanne District Court).

30 *Credit Suisse Protesters Trials* 317, PE19.000742/PCL, 22 September 2020 (Court of Appeals in Renens). For updates on the case, see Sabin Center for Climate Change Law “Credit Suisse Protesters Trials” <www.climatecasechart.com>.

31 See Emma Farge “Activists take Credit Suisse climate case to Europe human rights court” *Reuters* (5 November 2021) <news.trust.org>.

32 For a discussion of SLAPPs generally, see Oscar Reyes *Sued into Silence: How the rich and powerful use legal tactics to shut critics up* (Greenpeace European Unit, July 2020).

to pressure, intimidate and silence environmental activists, often seeking grossly disproportionate amounts in damages.³³ In response to the use of such lawsuits, some jurisdictions have enacted anti-SLAPPs legislation.³⁴ The application of such legislation was the subject of the recent *Pointes Protection* judgment by the Supreme Court of Canada.³⁵ In *Pointes Protection*, the Court dismissed a CA\$ 6 million defamation and breach of contract suit by a developer against Pointes Protection which had previously testified that the development would cause a significant loss of coastal wetlands leading to serious environmental damage.

VI. HUMAN RIGHTS

An increasing trend is for claims to be made or arguments supplemented by allegations of human rights violations in relation to climate change.³⁶ A benefit to reliance on human rights law is recourse to international obligations in respect of human rights and possible access to regional human rights courts and international human rights treaty bodies. Virtually all countries in the world have some human rights guarantees in the constitution so cases which invoke human rights to protect the environment seek to place the environment at the very heart of the state.³⁷

The most prominent human rights climate case is *Urgenda Foundation v Kingdom of the Netherlands*.³⁸ In December 2019, the Supreme Court of the Netherlands confirmed that the Dutch government must reduce its greenhouse gas emissions to prevent dangerous climate change and that inaction breached the European Convention on Human Rights (ECHR) and, in particular, the right to life (art 2) and the right to private and family life (art 8).³⁹ In response, the Dutch Government announced a new package of measures to lower greenhouse gas emissions, including a 75 per cent reduction in the capacity of the country's coal power stations and a €3 billion investment package (including earlier compliance measures) in solar energy, energy efficient technology, subsidies to compensate farmers for livestock reduction and changes in the use of concrete.⁴⁰

33 For a snapshot of 24 SLAPPs brought by 12 carbon majors, mining companies and an industry association, see Business & Human Rights Resource Centre *Silencing the Critics: How big polluters try to paralyse environmental and human rights advocacy through the courts* (30 September 2019).

34 See for example, in Ontario, the Protection of Public Participation Act 2015 S O 2015 c 23, which amended the Courts of Justice Act RS O 1990 c C43.

35 *1704604 Ontario Ltd v Pointes Protection Association* 2020 SCC 22.

36 Setzer and Higham, above n 2, at 32.

37 Additionally, as of 2017, 150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions, while 164 countries have created cabinet-level bodies responsible for environmental protection: United Nations Environment Programme *Environmental Rule of Law: First Global Report* (24 January 2019) at viii.

38 *Urgenda Foundation v Kingdom of the Netherlands* 19/00135, 20 December 2019 (Supreme Court of the Netherlands) English judgment available at <www.climatecasechart.com>. The claimants also relied on other principles, such as the “no harm” principle of international law, the doctrine of hazardous negligence, and the prevention principle embodied in European climate policy, but the decision was made on the basis of the European Convention on Human Rights (ECHR). See also *Notre Affaire à Tous v France*, above n 9, which concerned the right to life (art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR)) and the right to respect for private and family life (art 8 of the ECPHR).

39 *Urgenda*, above n 38, at [9].

40 Jonathan Watts “Dutch officials reveal measures to cut emissions after court ruling” *The Guardian* (24 April 2020) <www.theguardian.com>.

Similar rights-based approaches have also been taken in other cases. The Lahore High Court in *Leghari v Federation of Pakistan* held that the national government's delay in implementing Pakistan's climate policy framework violated the fundamental rights of citizens to life and human dignity (arts 9 and 14 of the Pakistan Constitution).⁴¹ Germany's highest court also recently ruled that the climate measures taken by the German federal government were incompatible with fundamental rights, ordering the government to set clear goals for reducing greenhouse gas emissions after 2030.⁴² The Court also considered that the State's duty to protect life and physical integrity under art 2(2) of the Basic Law for the Federal Republic of Germany includes risks to life and health caused by climate change.⁴³

Nevertheless, human rights arguments have not invariably been successful. For example, while the outcome reached in *Friends of the Irish Environment* was largely similar to *Urgenda* in that the Supreme Court of Ireland quashed the national mitigation plan, the Court did so based on its conclusion that the plan failed to reach a sufficient level of specificity to achieve the National Transitional Objective required by the Climate Action and Low Carbon Development Act 2015 (Ireland).⁴⁴ As to the rights-based arguments, the Court did not consider it appropriate to address them, holding that Friends of the Irish Environment, as a corporate entity, did not have standing.⁴⁵ While reserving its position "whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation" in a case in which those issues would be crucial, the Court made obiter statements rejecting a derived or unenumerated right to a healthy environment in the Irish Constitution, expressing the provisional view that such a right would either be superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or be excessively vague (if it does extend beyond those rights).⁴⁶

Another exception to the success of the human rights arguments in climate litigation was the Norwegian decision of *Greenpeace Nordic Association v Ministry of Petroleum and Energy*. The Court of Appeal rejected the application of arts 2 and 8 of the ECHR (which had been successfully argued in the *Urgenda* case) as the consequences of climate change globally are beyond the Norwegian State's obligations under the Convention.⁴⁷ The Court distinguished *Urgenda* as a claim involving issues regarding general emissions targets and not, as in this case, specific future emissions from individual fields that might be used in the future to produce oil.⁴⁸ The Court further

41 *Leghari v Federation of Pakistan* WP 25501/2015, 4 and 14 September 2015 (Lahore High Court Green Bench) English judgment available at <www.climatecasechart.com>. For commentary, see Jacqueline Peel and Hari M Osofsky "A Rights Turn in Climate Change Litigation" (2017) 7 TEL 37.

42 *Neubauer v Germany* [2021] 2 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021 (Federal Constitutional Court of Germany) official English translation available at <www.climatecasechart.com>. The German government pledged to swiftly adjust its climate change laws in response to the Court's ruling: "Germany pledges to adjust climate law after court verdict" *Associated Press* (online ed, Berlin, 1 May 2021).

43 *Neubauer v Germany*, above n 42, at [99].

44 *Friends of the Irish Environment*, above n 7. In response, the Irish government has now enacted the Climate Action and Low Carbon Development (Amendment) Act 2021 (Ireland) which puts into place a more sophisticated architecture to achieve its climate objectives.

45 *Friends of the Irish Environment*, above n 7, at [9.4].

46 At [9.5].

47 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 18-060499ASD-BORG/03, 23 January 2020 (Bogarting Court of Appeal) [*Greenpeace Nordic Association (CA)*] at 34–35, unofficial English translation available at <www.climatecasechart.com>.

48 At 35.

held that there was no “direct and immediate link” between the emissions that might result and the art 8 ECHR rights for Norwegian citizens.⁴⁹ While accepting that the right to an “environment that is conducive to health and to a natural environment whose productivity and diversity are maintained” in art 112 of the Norwegian constitution was a justiciable right,⁵⁰ the Court of Appeal thought that “the risk of local environmental harm is so low that the decision is not contrary to Article 112”.⁵¹ The Court of Appeal did recognise that the scope of Norway’s responsibilities included environmental harm caused by the use of exported Norwegian oil in other countries (at least in respect of the constitutional right to the environment) but held that there must still be effects of climate change arising in Norway for the claim to succeed.⁵² The Supreme Court, by a majority of 11–4, upheld the Court of Appeal’s ruling, holding that the net effect of exported oil on global emissions was too uncertain – “[c]uts in Norwegian oil production may be replaced by oil from other countries”.⁵³ The plaintiffs have challenged this decision in the European Court of Human Rights.⁵⁴

These decisions (whether successful or unsuccessful) now form the foundation of an increasing “rights-turn” trend in climate litigation. There are now 112 human rights cases captured in climate litigation databases with 34 filed in the last two years alone.⁵⁵

VII. YOUTH

Another trend in climate litigation is a burgeoning number of cases being brought by young people to hold governments and corporates to account.⁵⁶ Their arguments are predicated on the importance of preserving the environment not only for younger generations, but for future unborn generations.

The first human rights climate case to be heard by the European Court of Human Rights was filed in September 2020 by Portuguese youth against 33 countries (the 27 European Union countries plus the United Kingdom, Switzerland, Norway, Russia, Turkey and Ukraine). The claimants, relying on arts 2 and 8 of the ECHR, as well as art 14 which protects against age discrimination, allege that the respondents are failing to reduce their territorial emissions sufficiently and to take responsibility for their overseas emissions.⁵⁷ One of the main features of this case is the claim made of presumptive responsibility: the claim presumes that the respondents are responsible for the harm that climate change at its current trajectory poses to the claimants. The European Court of Human

49 At 35.

50 At 18.

51 At 33.

52 At 21–22.

53 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 20-051052SIV-HRET, 22 December 2020 (Supreme Court of Norway) [*Greenpeace Nordic Association (SC)*] English judgment available at <www.climatecasechart.com> at [234]. The minority would have held that possible future global emissions of greenhouse gases should have been considered in the impact assessment required to grant the licenses: at [274].

54 For updates on the case, see Sabin Center for Climate Change Law “Greenpeace Nordic Ass’n v Ministry of Petroleum and Energy” <climatecasechart.com>.

55 Setzer and Higham, above 2, at 32.

56 Joana Setzer and Rebecca Byrnes *Global trends in climate change litigation: 2020 snapshot* (Grantham Research Institute on Climate Change and the Environment, July 2020) at 18.

57 Overseas emissions such as are exporting fossil fuels or financing fossil fuel extraction elsewhere.

Rights has granted the case priority status due to its urgency and rejected motions by defendant governments to overturn its fast-tracking decision.⁵⁸

In the United States, a highly significant case brought by young people was *Juliana v United States*.⁵⁹ This was a claim that the United States federal government violated the constitutional rights of the claimants, 21 children, by causing dangerous carbon dioxide concentrations.⁶⁰ The majority of the United States Court of Appeals for the Ninth Circuit accepted that “[c]opious expert evidence” established that the “unprecedented rise [of carbon levels] stems from fossil fuel combustion and will wreak havoc on the Earth’s climate if left unchecked”.⁶¹ Further, that the government’s contribution to climate change was one of affirmatively promoting fossil fuel use.⁶² However, the majority dismissed the case on the basis that the plaintiff’s requested remedial action (an order requiring the government to develop a plan to phase out fossil fuel emissions and draw down greenhouse gases) was beyond the constitutional power of the Court.⁶³ The majority “reluctantly” concluded that “the plaintiffs’ case must be made to the political branches or to the electorate at large” and “[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on ... courts, no matter how well-intentioned, the ability to step into their shoes”.⁶⁴ The Ninth Circuit rejected the plaintiff’s petition for a rehearing en banc.⁶⁵

The youth phenomenon is by no means restricted to Europe and the United States.⁶⁶ *Kim v South Korea*, the first climate litigation case kind in East Asia, has recently been filed in the Constitutional Court of Korea by 19 young persons.⁶⁷ The applicants claim that South Korea’s emissions targets are inadequate to meet the Paris Agreement goal to keep the rise in global average temperatures under two degrees,⁶⁸ thus violating their constitutional rights to life, dignity, a healthy environment and equality before the law and non-discrimination.⁶⁹

In South America, a significant case, *Future Generations v Ministry of the Environment*, was brought and won by a group of 25 young persons between the ages of 7 and 26 against several

58 For updates on the case, see Sabin Center for Climate Change Law “Duarte Agostinho and Others v Portugal and 32 Other States” <www.climatecasechart.com>.

59 *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).

60 The claim was for infringement of the Fifth Amendment due process right to a “climate system capable of sustaining human life” (at 1164 per Circuit Judge Hurwitz) – which is comparable to the cases brought under art 2 of the ECHR.

61 At 1166 per Circuit Judge Hurwitz.

62 At 1167 per Circuit Judge Hurwitz.

63 At 1165 per Circuit Judge Hurwitz.

64 At 1175 per Circuit Judge Hurwitz.

65 For updates on the case, see Sabin Center for Climate Change Law “Juliana v United States” <www.climatecasechart.com>.

66 See also cases in Australia: *Sharma No 1*, above n 12; and *Sharma No 2*, above n 12.

67 For updates on the case, see Sabin Center for Climate Change Law “Do-Hyun Kim et al v South Korea” <www.climatecasechart.com>.

68 Paris Agreement, above n 1, art 2(1)(c).

69 There is a specific right to the environment in the South Korea Constitution: art 35(1) provides that “All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment”.

Colombian government entities and a number of corporations.⁷⁰ The Supreme Court of Justice of Colombia held that the fundamental rights of life, health, minimum subsistence, freedom and human dignity are “substantially linked and determined by the environment and the ecosystem”, declaring that the Colombian Amazon was entitled to protection, conservation, maintenance and restoration.⁷¹

These are examples of the younger generation taking up an active role in tackling the climate crisis and calling on various actors (State or otherwise) to uphold their climate obligations. This is unsurprising given that the issue of climate change is one that will particularly affect the younger generation and future generations.

VIII. THE INTERNATIONAL DIMENSION

Climate cases have increasingly taken a further international dimension where international environmental law⁷² and treaty obligations⁷³ have been the subject of litigation, either directly or as a supplement to other arguments.⁷⁴

Beyond national and regional courts, claimants have also now filed cases in international decision-making bodies. One of the highest profile cases is the *Sacchi v Argentina* case brought by a group of youth activists in September 2019 to the United Nations Committee on the Rights of the Child.⁷⁵ Sixteen youths, including Greta Thunberg, alleged that Argentina, Brazil, France, Germany and Turkey have breached their rights under the Convention on the Rights of the Child by failing to sufficiently reduce their greenhouse gas emissions and failing to encourage the world’s biggest emitters to curb carbon pollution. The rights breached include the right to life, health,

70 *Future Generations v Ministry of the Environment* STC4360-2018, 5 April 2018 (Supreme Court of Justice of Colombia) unofficial English translation available at <www.climatecasechart.com>.

71 At 13. The Court’s findings are further discussed below in the Indigenous cases section of this paper.

72 Including the polluter pays principle (*Rio Declaration on Environment and Development* UN Doc A/CONF.151/26 (12 August 1992), principle 16); the precautionary principle (see for example United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), art 3(3)); the no harm principle (customary international law, affirmed in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226; see also *Rio Declaration*, principle 2); and the preventative principle (see for example International Law Commission *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* [2001] vol 2, pt 2 YILC 58. See also James Crawford *Brownlie’s Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 340–345; and Vernon Rive “International Environmental Law” in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 731 at [14.3.3].

73 For example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005); and the Paris Agreement, above n 1. The Paris Agreement has both legal and non-legal obligations: see Daniel Bodansky “The Legal Character of the Paris Agreement” (2016) 25 *Rev Eur Comp & Int’l Env Law* 142.

74 See for example in *Urgenda*, above n 38; *Kim*, above n 67; *Misdzi Yikh v Canada* 2020 FC 1059, [2020] FCJ 1109; *Future Generations v Ministry of the Environment*, above n 70; and *Friends of the Earth v Canada* 2008 FC 1183, [2009] 3 FCR 201. See also Brian J Preston “The Impact of the Paris Agreement on Climate Change Litigation and Law” (paper presented to Dundee Climate Conference, University of Dundee, United Kingdom, 27–28 September 2019); and Lennart Wegener “Can the Paris Agreement Help Climate Change Litigation and Vice Versa?” (2020) 9 *TEL* 17. How international treaties are applied by domestic courts differs based on each country’s constitution and whether the country follows a monist or dualist tradition: see James Crawford *Brownlie’s Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) ch 3.

75 For updates on the case, see Sabin Center for Climate Change Law “*Sacchi et al v Argentina et al*” <www.climatecasechart.com>.

and the prioritisation of the child's best interests as well as the cultural rights from indigenous communities. For example, one of the claims is that rising sea levels poses an existential threat to the culture of indigenous communities.

The Committee, in its recent decision, however, considered that the complaints were inadmissible because domestic remedies had not been exhausted – domestic proceedings had not been initiated by the complainants in any of the States Parties.⁷⁶ Nevertheless, the Committee's findings represent a significant advancement in international human rights law with respect to State obligations in the context of climate change. The Committee found that States Parties can be held responsible for the negative impact of carbon emission on the rights of children both within and outside that States Party's territory.⁷⁷

Another issue that will likely arise more and more is that of "climate change refugees". One such example in New Zealand was *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*.⁷⁸ Mr Teitiota claimed refugee or other protection from deportation on the basis that his homeland, Kiribati, was suffering the effects of climate change. His claim was rejected by the New Zealand courts,⁷⁹ and Mr Teitiota was duly deported to Kiribati. He then took a case to the United Nations Human Rights Committee. In January 2020, however, the Human Rights Committee held that ultimately it was not in a position to conclude that the claimant's right to life (art 6 of the International Covenant on Civil and Political Rights) was violated upon his deportation.⁸⁰ The Committee did, however, observe that protection of art 6 extends to "reasonably foreseeable threats and life-threatening situations that can result in a loss of life" and that environmental degradation can compromise or violate effective enjoyment of the right to life.⁸¹

As the effects of climate change increase, we are likely to see a burgeoning of cases in this regard as climaterelated migration spills over from being within States to inter-State migration.⁸² Sea level rise is one of the long-term changes to the climate system from anthropogenic emissions and poses existential challenges to low-lying coastal areas and islands. This has not only socio-economic

76 *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No 104/2019* UN Doc CRC/C/88/D/104/2019 (8 October 2021) at [10.20]–[10.21].

77 At [10.7]–[10.10].

78 See *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173; [2014] NZAR 688; and *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; [2014] NZAR 162. Leave to appeal from the decision of the Court of Appeal was declined by the Supreme Court: *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2015] NZSC 107 [*Teitiota (SC)*].

79 The Supreme Court agreed with the Courts below that on the particular facts of the case, Mr Teitiota could not bring himself within either the Refugee Convention or New Zealand's protected persons jurisdiction (ss 129 and 131 of the Immigration Act 2009: *Teitiota (SC)*, above n 78, at [12]. However, the Court emphasised that its decision did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction: at [13].

80 *Teitiota v New Zealand: Deportation to the Republic of Kiribati* UN Doc CCPR/C/127/D/2728/2016 (Human Rights Committee, 7 January 2020) at [9.12]–[9.14].

81 At [9.4]–[9.5].

82 The International Panel on Climate Change's (IPCC) has said, "[i]ncreased warming amplifies the exposure of small islands, low-lying coastal areas and deltas to the risks associated with sea level rise for many human and ecological systems, including increased saltwater intrusion, flooding and damage to infrastructure (high confidence): IPCC *Global Warming of 1.5°C: Summary for Policymakers* (IPCC, Switzerland, 2018) at 9–10. See also IPCC *Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC, Switzerland, 2019).

implications resulting from forced migration,⁸³ but also significant legal implications for States facing the complete loss of their territory.⁸⁴

IX. INDIGENOUS CASES

Notable too have been cases brought by indigenous peoples relying on duties owed to them⁸⁵ and on indigenous peoples' duties of guardianship of the environment, called *kaitiakitanga* in New Zealand.⁸⁶

Indigenous rights are sometimes directly relied on. For example, in *Misdzi Yikh v Canada*, a case by First Nations groups against the Canadian government, the claim was that Canada's climate policies were a breach of ss 7 and 15(1) of the Canadian Charter of Rights and Freedoms (the right to life and equality before the law, respectively).⁸⁷ On the equality argument, the claimants said that younger and future generations were being denied the equal protection and benefit of the law due to the fact that high emission projects were permissible under current laws.⁸⁸ They also asserted that Canada's historical treatment of indigenous leaders and ongoing racial discrimination exacerbate the psychological and social trauma caused by climate change.⁸⁹ This argument was not specifically addressed by the Court. In November 2020, the Federal Court struck out the claim as non-justiciable and held that there was no reasonable cause of action.⁹⁰ An appeal to the Federal Court of Appeal was filed in December 2020.

A similar indigenous-specific claim was made in New Zealand recently in *Smith v Fonterra Cooperative Group Ltd*.⁹¹ The claimant, Mr Smith, of Māori whakapapa (genealogy), claims a customary interest according to *tikanga* (indigenous law) in the land at issue in the case where there

83 Poor people and poor nations are most vulnerable to climate-related shocks due to people living in at-risk areas such as flood prone areas and due to high levels of subsistence living: see generally Stephane Hallegatte and others *Shock Waves: Managing the Impacts of Climate Change on Poverty* (International Bank for Reconstruction and Development, 2016).

84 Whether States can exist separate from their territory may be an open question in international law: see for example *the Island of Palmas Arbitration (Netherlands v United States)* (1928) II RIAA 829 at 839. See generally Benjamin Johnstone "The Unprecedented Sinking Island Phenomenon: The Legal Challenges on Statehood Caused by Rising Sea Level" (2019) 23 NZJEL 97.

85 See Rodríguez-Garavito, above n 4.

86 In modern usage, *kaitiakitanga* has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources: see Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105–114.

87 *Misdzi Yikh v Canada*, above n 74, at [4]. There was also a claim under the Constitution Act 1867 that Parliament must legislate to address greenhouse gas emissions in accordance with the Paris Agreement: at [5].

88 At [14].

89 See *Misdzi Yikh v Canada* Claimants' Statement of Claim, 2 October 2020 at [79]–[80] available at Sabin Center for Climate Change Law "Lho'imggin et al v Her Majesty the Queen" (2021) <www.climatecasechart.com>.

90 The Federal Court noted that just because something is a political issue does not mean that there cannot be sufficient legal elements to render something justiciable: *Misdzi Yikh v Canada*, above n 74, at [20]. But in this case, there was no sufficient legal component to anchor the analysis: at [72]. The finding that there was no reasonable cause of action was on the basis that the claimants did not reference specific sections of law that cause specific breaches of the Charter rights: at [94]–[102].

91 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 [*Smith v Fonterra (CA)*]; and *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [*Smith v Fonterra (HC)*].

are various sites of customary, cultural, historical, nutritional and spiritual significance on that land, situated in close proximity to the coast, waterways, low-lying land or the sea.⁹² The High Court held that the climate change-related damage claimed by Mr Smith was neither a particular nor a direct result of the defendant's greenhouse gasemitting activities and that it was not appreciably more serious or substantial in degree than that suffered by the public generally as a result of climate change.⁹³ On that basis it therefore struck out the public nuisance and negligence claims.⁹⁴ It did not, however, strikeout a novel tortious duty of care claim – the breach of inchoate duty.⁹⁵

On appeal, the Court of Appeal upheld the strike-out applications for the public nuisance and negligence claims and struck out the novel tort claim.⁹⁶ Mr Smith has now filed a notice of application for leave to appeal to the Supreme Court.

Another way in which indigenous peoples have striven to protect the environment is by claiming that the ecosystem should receive legal recognition under their respective legal systems. For example in 2017, the New Zealand Parliament passed Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, as part of a Treaty settlement,⁹⁷ which recognised Te Awa Tupua | Whanganui River as a legal person with all the rights, powers, duties, and liabilities of a legal person.⁹⁸ Since then, other jurisdictions have followed suit with Muteshekau Shipu | the Magpie River being designated as a legal person in Canada by the Innu Council of Ekuanitshit and the Minganie Regional County Municipality.⁹⁹ Nor are these developments isolated to regulatory, legislative or indigenous bodies. In *Future Generations v Ministry of the Environment*, the Supreme Court of Justice of Colombia recognised the Colombian Amazon as a “subject of rights”, entitled to government-led “protection, conservation, maintenance and restoration”.¹⁰⁰ It ordered the government to formulate and implement action plans to address deforestation in the Amazon.

The effect of these legal developments remains to be seen. For instance, notwithstanding the legal rights obtained by the Whanganui river, a water company continues to divert 80 per cent of the river's flow for hydropower until 2039.¹⁰¹ Nevertheless, the concept possesses transformative power, signalling a growing trend, of necessity, to move away from an “anthropocentric exploitation”

92 *Smith v Fonterra (HC)*, above n 91, at [5].

93 At [62]–[63].

94 At [73] and [100].

95 At [104]. While accepting the significant hurdles such a novel legal duty would face, the Judge did not rule out the possibility of an evolution of the law of tort to recognise such a duty making corporates responsible to the public for their emissions: at [102]–[103], citing Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand “Climate Change and the Law” (paper presented to the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019).

96 *Smith v Fonterra (CA)*, above n 91, at [36].

97 Treaty settlements, in New Zealand, are agreements between Māori and the Crown seeking to provide redress to Māori for historical grievances arising from breaches of Te Tiriti o Waitangi | the Treaty of Waitangi.

98 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14. See also Te Urewera Act 2014, which had earlier recognised a national park, Te Urewera, as a legal entity: s 11.

99 For other jurisdictions which have also recognised ecosystems as legal persons, see generally Patrick Barkham “Should rivers have the same rights as people” *The Guardian* (25 July 2021) <www.theguardian.com>.

100 *Future Generations v Ministry of the Environment*, above n 70, at 14. The Court characterised the Amazon in a similar manner to the way the Colombian Constitutional Court had recognised the Atrato River as a subject of rights: *The Atrato River case* T622-2016, 10 November 2016 (Constitutional Court of Colombia).

101 See Jeremy Lurgio “Saving the Whanganui: can personhood rescue a river?” *The Guardian* (29 November 2019) <www.theguardian.com>.

conception of nature to one of “protection and stewardship”, more in line with indigenous values. At the very least, the conferment of legal personality avoids issues of standing – such as arguments to the effect that all persons are equally affected or that the effects are not felt locally.

X. ROLE OF THE COURTS

From the summary above, it is clear there is a wide range of cases involving climate change that come before the courts. Individuals, groups, civil society and even governments have turned to litigation as a tool to “strengthen government and allocate responsibility for loss and damage”.¹⁰² What do these cases say about the role of the courts in climate change governance and discourse?

A. *Discourse*

Taking discourse first, the main point is that, win or lose, the issues related to climate change are aired in public due to the principle of open justice and the requirement courts provide reasoned judgments on the case before them. Because of the nature of the issues and the interests at stake, cases will often have numerous interlocutory stages and go through a number of levels of appeal. This means that the publicity (discourse) arising from one case can extend over a number of years.

Even in cases where the claimants are unsuccessful, there have been strong judicial acknowledgements from the courts about the climate crisis, such as the statements of the majority in *Juliana* as discussed above. Even court orders can have considerable rhetorical force, as noted by the dissenting judge in *Juliana*:¹⁰³

The majority portrays any relief we can offer as just a drop in the bucket. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs’ injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order – even one that merely postpones the day when remedial measures become insufficiently effective – would likely have a real impact on preventing the impending cataclysm.

The idea of discourse between the courts and legislatures parallels the dialogue model of constitutional jurisprudence which has its origins in Canada.¹⁰⁴ This is sometimes called the Commonwealth Model of Rights Protections.¹⁰⁵ It can be seen in the declarations of incompatibility available to United Kingdom courts under s 4 of the Human Rights Act 1998 (UK)¹⁰⁶ and in the declarations of inconsistency recently found to be available to New Zealand courts as a remedy

102 Preston, above n 74, at 52.

103 *Juliana*, above n 59, at 1182 per District Judge Staton.

104 Peter Hogg and Allison Bushell “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75. There has been extensive discussion on the merits and demerits of the dialogue model: for a snapshot of that discussion, see the articles and commentaries contained in “Charter Dialogue: Ten Years Later” (2007) 45 Osgoode Hall LJ 1 at 1–202.

105 See Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013).

106 Since the Human Rights Act 1998 (UK) came into force (in 2000) until the end of July 2019, 42 declarations of incompatibility had been made, the most recent being *R v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), [2019] 4 All ER 527. For a catalogue of those cases, see Ministry of Justice *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2018–2019* (October 2019) <www.gov.uk>, annex A.

for breaches of the New Zealand Bill of Rights Act 1990.¹⁰⁷ It can be argued as being particularly valuable in Westminster systems where courts do not have the power to overturn legislation, such as in New Zealand. The value of the dialogue/discourse metaphor, however, is not in its ability as a literary device to describe precisely the complex interactions between the judiciary and Parliament. But rather, it captures the idea that court decisions in the climate arena will, by necessity, leave room for a range of legislative responses and will generally receive one.¹⁰⁸

B. Governance

In terms of governance, the cases discussed above illustrate the most important (and traditional) role of the courts: to make sure that laws are observed, that governments and private parties are acting within the law and that redress is granted where that has not been the case. Where those laws either directly or indirectly involve climate change issues, then the courts are obviously fulfilling a vital climate change governance role.

The contribution of the courts to governance is, however, both defined and limited by the nature and role of courts. It is trite to say that the main function of the courts is to adjudicate cases that come before them. This points to a major limitation of the courts in climate change governance. They are by nature reactive, rather than proactive.

A second limitation is that courts mostly adjudicate on past events and, with the exception of specialist environment courts, are not usually involved in assessing the future impact of current actions or in assessing scientific evidence in this regard.

Third, courts are for the most part reliant on the material, evidence and arguments placed before them by the parties which makes them institutionally unsuited to general policy design. The judicial process is by its very nature adversarial and does not allow for the views of all affected stakeholders to be presented. A systemic view is needed: for example, in trying to solve the climate issue it is important to ensure that other existing inequalities are not exacerbated.¹⁰⁹ This is a task which the political branches of government may be better suited to do with their consultation, debate and review mechanisms.

Fourth, national courts are usually concerned with cases that relate to their own jurisdiction. However, the effects of climate change transcend nation-state borders, and this suggests that what is required is global rather than purely national solutions. Some national courts have taken a more global perspective towards cases before them.¹¹⁰

107 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 held that declarations of inconsistency are available in New Zealand. Unlike the Human Rights Act 1998 (UK), the New Zealand Bill of Rights Act 1990 does not have an explicit provision for this remedy. See the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 which will provide a mechanism for the executive and legislative branches of government to respond to judicial declarations of inconsistency.

108 Peter W Hogg, Allison A Bushell Thornton and Wade K Wright “Charter Dialogue Revisited—Or ‘Much Ado About Metaphors’” in “Charter Dialogue: Ten Years Later” (2007) 45 Osgoode Hall LJ 1 at 4.

109 See the comments of New Zealand’s Minister for Climate Change: Henry Cooke “James Shaw says climate transition must avoid sparking ‘yellow-vest’ protests” *Stuff* (online ed, New Zealand, 7 July 2021).

110 See for example the statements in *Neubauer v Germany*, above n 42, at [201]–[203]. But contrast the Norwegian courts’ approach in *Greenpeace Nordic Association* as discussed above in the Human Rights section of this paper. See for example the statements in *Neubauer v Germany*, above n 42, at [201]–[203]. But contrast the Norwegian courts’ approach in *Greenpeace Nordic Association* as discussed above in the Human Rights section of this paper.

Fifth, it is also necessary to ask whether climate change litigation is an effective tool in influencing policy outcomes and changing societal behaviour (corporate, government, or otherwise).¹¹¹ Generally speaking, litigation as a governance strategy is financially costly and may divert resources away from other efforts.¹¹² And that is not to mention the uncertain outcomes inherent in the court process as well as the significant time needed to hear and decide cases. While climate litigation has solidified its status as an important tool in the arsenal of climate activists, it will be clear from this paper that it is no silver bullet.

C. Causation

Another limitation arises out of the very nature of the problem. To some degree, we are all responsible for climate change and all are affected, albeit to varying degrees.¹¹³ Climate change has been described as “a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible”.¹¹⁴ The fact that greenhouse gasses sit in the atmosphere and affect the whole of the climate (rather than just the climate of the place from which they were emitted) – the very nature of climate change – raises challenges to traditional concepts of causation.¹¹⁵

Causation and proximity tests can be seen as line-drawing tests to answer the question of whether it is fair to hold someone responsible for some harm, based on their connection to the harm. In practice, these tests can represent significant hurdles for climate change cases to overcome.¹¹⁶ For example, with respect to causation, the de minimis rule would say that the specific contribution of individual polluters is so small that causation cannot be proved. On the other hand, attribution research is becoming more accurate and climate science may increasingly enable courts in drawing causative links between climate change and various polluting activities.¹¹⁷

In a 2006 case in New South Wales, the Court in *Gray v Minister for Planning* found that, since a proposed coal mine would cause the release of substantial greenhouse gases which contribute to climate change, the test of causation in that particular case based on “a real and sufficient

111 Nor can such impact be easily evaluated given the diversity of the types of cases brought as well as the underlying objectives of the litigants involved. For a brief discussion on assessing the impact of climate litigation see Kim Bouwer and Joana Setzer *Climate Litigation as Climate Activism: What Works?* (The British Academy, November 2020) at 7–14.

112 Setzer and Higham, above n 2, at 12.

113 Groups specially affected by the effects of climate change, including youth, indigenous peoples, women, people living in the least developed countries, displaced peoples, and peoples living in small island states. See Winkelmann, Glazebrook and France, above n 27, at App 2.

114 Douglas A Kysar “What Climate Change Can Do About Tort Law” (2011) 41 *Environmental Law* 1 at 4.

115 See for example as discussed in David A Murray “Will Climate Change the Courts?” (2019) 57 *The New Atlantis* 14. Brian Preston, Chief Judge of the Land and Environment Court of New South Wales, has argued that “[a]s societal views and norms evolve, our understanding of existing legal rights and responsibilities similarly must evolve”: Preston, above n 74, at 52.

116 For a discussion of selected tort cases in the United States, see Winkelmann, Glazebrook and France, above n 27, at [101]–[108].

117 See articles cited above n 18. The work of the IPCC is also invaluable in this regard: for a recent report see Intergovernmental Panel on Climate Change *Climate Change 2021: The Physical Science Basis – Summary for Policymakers* (9 August 2021).

link” was met.¹¹⁸ The Court also noted that, notwithstanding that the impact from the greenhouse emissions (both globally and in New South Wales) were at the time “currently not able to be accurately measured, [that] does not suggest that the link to causation of an environmental impact is insufficient”.¹¹⁹

By contrast, in *Greenpeace Nordic Association (SC)*, the Court considered that the net effect of Norwegian petroleum production on combustion emissions was “complicated and controversial” given its link “to the global market and competition situation for oil and gas”.¹²⁰ For example, a decrease in exports of Norwegian gas, if replaced by coal from other providers will have a negative effect on combustion emissions, but if replaced by gas from other providers may have none.¹²¹ The Court therefore considered that it would have been more appropriate for the Norwegian government to address the question of climate effects on a societal level as part of Norwegian climate policy, rather than for the Court to attempt to address it in an individual environmental assessment.¹²²

Similarly, the District Court of Essen in *Luciano Lliuya v RWE AG*, in considering how emissions from RWE AG contributed to the melting of mountain glaciers near Huaraz, found that that it was “impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage”.¹²³ The case is currently on appeal, and in February 2021, an independent study from the University of Oxford claimed to have established “a direct link between emissions and the need to implement protective measures now, as well as any damages caused by flooding in the future” by Lake Palcacocha.¹²⁴ The study concluded that it is virtually certain (more than 99 per cent probability) that the retreat of Palcaraju glacier causing the expansion of Lake Palcacocha cannot be explained by natural variability alone and that the glacier’s retreat by 1941 represented an early impact of anthropogenic emissions.¹²⁵

More recently, and in the broader context of the greenhouse gas emissions of States as a whole, the Supreme Court of the Netherlands overcame the de minimis argument in *Urgenda* holding that “a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope”.¹²⁶ The Court held that countries could not be allowed to “easily evade its partial responsibilities by pointing out [the contributions of] other countries” – instead, “‘partial fault’ also justifies partial responsibility”.¹²⁷ The Court emphasised that the serious global consequences of climate change were such that “each reduction of greenhouse gas emissions has a positive effect on combatting

118 *Gray v Minister for Planning*, above n 10, at [97]. The case concerned a judicial review of a decision of the Director-General of the Department of Planning, made under legislation, in relation to an environmental assessment of a proposed coal mine.

119 At [98].

120 *Greenpeace Nordic Association (SC)*, above n 53, at [234].

121 At [234].

122 At [234].

123 *Luciano Lliuya v RWE AG*, above n 19, at 5-6.

124 “Severe flood threat caused by climate change – landmark Oxford study” (4 February 2021) University of Oxford <www.ox.ac.uk>.

125 RF Stuart-Smith and others “Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat” (2021) 14(1) *Nature Geoscience* 85 at 85.

126 *Urgenda*, above n 38, at [5.6.1]–[5.8].

127 At [5.7.6]–[5.7.7].

dangerous climate change” and therefore that “no reduction is negligible”.¹²⁸ Likewise, the Court in *Neubauer v Germany* stated that the “state may not evade its responsibilities here by pointing to greenhouse gas emissions in other states”, emphasising Germany’s part to play in the overall international effort to halt climate change.¹²⁹

D. Standing

Standing, as a condition for parties seeking a legal remedy, may be problematic on a conceptual level because it assumes a certain type of claimant exists to assert an individual right. But there are also collective human rights and Western human rights systems do not often treat collective rights as distinct. Nor do they currently manage to reconcile tensions between individual and collective rights or rights of environment per se.¹³⁰ Recognition of collective rights is particularly important given the strong connections of many indigenous cultures to the land (such as kaitiakitanga and whakapapa, in Māori culture) and in light of the disproportionate effect indigenous people are likely to bear in terms of the impact of climate change.¹³¹

Standing has been a major issue in some of the cases discussed above. For example, in *Friends of the Irish Environment*, the Supreme Court of Ireland refused to recognise standing for corporate bodies (such as Friends of the Irish Environment) to raise constitutional and ECHR rights.¹³² In that case, Friends of the Irish Environment was considered by the Court to be relying on personal rights it did not enjoy (the right to life and the right to bodily integrity). Nor did Friends of the Irish Environment sufficiently explain why the proceeding could not have been brought in the ordinary way by persons who enjoy those personal rights.¹³³ The Court of Appeal in *Greenpeace Nordic Association* reached a similar result – environmental organisations are not a “victim” under art 34 of the ECHR and so are not entitled to bring action under arts 2 and 8 of the ECHR.¹³⁴

The position was different in *Urgenda*. The Court of Appeal of the Netherlands held that, since individuals who fall under the state’s jurisdiction may rely on arts 2 and 8 of the ECHR, which have direct effect in the Netherlands, Urgenda may also do so on behalf of the residents of the Netherlands pursuant to art 3:305a of the Dutch Civil Code, which permits foundations or associations to institute legal proceedings on behalf of interest groups.¹³⁵ This was upheld by the Supreme Court: the fact that Urgenda itself does not have a right to complain under art 34 of the ECHR to the European Court of Human Rights does not detract from its right to institute proceedings under Dutch law.¹³⁶ Similarly, the outcome in *Leghari* was available because the standing hurdle was

128 At [5.7.8].

129 *Neubauer v Germany*, above n 42, at [201] and [202].

130 I discuss this further in Susan Glazebrook “Custom, human rights and Commonwealth constitutions” (paper presented to the Sir Salamo Injia Lecture series, Papua New Guinea, 29 November 2018); and Susan Glazebrook “The Declaration on the Rights of Indigenous Peoples and the Courts” (2019) 25 Auckland U L Rev 11.

131 Winkelmann, Glazebrook and France, above n 27, at [74]–[79] and [153].

132 *Friends of the Irish Environment*, above n 7, at [7.5]–[7.24].

133 At [7.22]. The Court noted that Friends of the Irish Environment could instead have provided support in whatever way it considered appropriate to such individuals (who had standing to bring the claims).

134 *Greenpeace Nordic Association (CA)*, above n 47, at 10.

135 *Urgenda Foundation v Kingdom of the Netherlands* 200.178.245/01, 9 October 2018 (Hague Court of Appeal) at [36], unofficial English translation available at <www.climatecasechart.com>.

136 *Urgenda*, above n 38, at [5.9.3].

cleared as Pakistani law provides a public interest litigation exception to common law standing rules to allow the enforcement of fundamental rights protected under Pakistan's constitution in respect of a group or class of people, such as the poor or other vulnerable groups.¹³⁷

Again, we see that the domestic constitutional context will limit or widen action that courts can take in response to climate litigation claims.

E. Constitutional role of the courts

Finally, and most importantly, the courts must respect the boundary between their proper constitutional role and judicial overreach. This is a fine line to draw and it will be drawn in different places by different jurisdictions. For example, the courts in India,¹³⁸ Pakistan,¹³⁹ South Africa¹⁴⁰ and Colombia¹⁴¹ have gone much further than courts elsewhere in requiring and supervising the implementation of actions related to climate change.

But all must draw the line somewhere. *Juliana* is a good example of a court, in the United States, “reluctantly” saying that other branches of government are where the issues should be raised and solved. Similarly, in *Misdzi Yikh*, the Federal Court of Canada said that “[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government.”¹⁴² To a different degree, the Irish Supreme Court in *Friends of the Irish Environment* also considered the limits of the judicial role. The Court considered that, although how the Irish government might choose to achieve the National Transition Objective might not be justiciable, whether the government's plan complies with legislation (such as the specificity requirement) is clearly justiciable as a matter of law.¹⁴³ With respect to

137 *Leghari*, above n 41. See also Ahmed Rafay Alam “Public Interest Litigation and the Role of the Judiciary” (paper presented to the International Judicial Conference, Islamabad, August 2006).

138 In India, the National Green Tribunal was established in 2010 as a specialised judicial body equipped with expertise solely for the purpose of providing effective and expeditious remedies in cases relating to environmental protection. See Gitanjali Nain Gill *Environmental Justice in India: The National Green Tribunal* (Routledge, Abingdon, 2016). See for example *Society for Protection of Environment and Biodiversity v Union of India* 677/2016, 8 December 2017 (National Green Tribunal), in which the Court held that the government's exemption of the construction industry from an environmental regulatory approval process was illegal and also in derogation of India's commitments under the Paris Agreement (above n 1) and the Rio Declaration (above n 72).

139 See *Leghari*, above n 41, at [25] in which the Court in crafting its remedy to the breach of fundamental rights by the lack of implementation of the national climate policy constituted a Standing Committee on Climate Change, to act as a link between the court and the executive government and to assist government agencies to ensure that the national climate policy is implemented. In Pakistan, like in India, there are “green divisions” in the High Courts as well as the Supreme Court, in response to the recommendations of the “Bhurban Declaration 2012 – A Common Vision on Environment for the South Asian Judiciaries” (South Asian Conference on Environmental Justice, Supreme Court of Pakistan, 24 March 2012).

140 See *EarthLife Africa Johannesburg*, above n 11. After the High Court's decision that the Minister's decision failed to consider a relevant consideration (climate change), the Minister remade the decision. The Minister reasoned that while the power plant would have significant greenhouse gas emissions and therefore cause climate change impacts, the power generation benefit of the project outweighed those harms. The Minister's decision was reviewed a second time. Subsequently, pursuant to an agreement between the parties, the High Court issued an order setting aside all governmental authorisations for the coal-fired power plant: *EarthLife Africa NPC v Minister of Environmental Affairs* 21559/2018, 19 November 2020 (High Court of South Africa, Gauteng Division).

141 *Future Generations v Ministry of the Environment*, above n 70.

142 *Misdzi Yikh*, above n 74, at [77].

143 *Friends of the Irish Environment*, above n 78, at [6.27].

the argument for an “unenumerated” right to a healthy environment in the Irish constitution, the Court also cautioned against “a blurring of the separation of powers by permitting [more properly political and policy matters] to impermissibly drift into the judicial sphere”.¹⁴⁴ Instead, any such right would have to “derive from judges considering the Constitution as a whole”, its “rights values and structure” as opposed to “judges looking into their hearts and identifying rights which they think should be in the Constitution”.¹⁴⁵

Courts do, however, have a role in developing the law. For common law countries this is most obvious in the incremental development of the common law. We could therefore see developments in the law to accommodate issues arising from climate change, including the possible development of rules related to causation, the relaxation of standing requirements, further development of the public trust doctrine (the view that natural resources belong to the public)¹⁴⁶ and more use of environmental law principles such as the polluter pays principle. Even where legislation is involved, the courts have to interpret that legislation and apply it to circumstances that may not have been thought about when the legislation was passed. Courts also have to give substance to legislation that may be drawn in terms of broad principles, a common characteristic of environmental and human rights legislation.

F. Advantages of court procedures

Some of the limitations discussed above may have advantages for both governance and discourse. For example, the application of the law to particular facts puts substance into the law in terms relating it to individual situations in a practical context. The courts are also fora where evidence is presented, there is (usually) rational argument based on that evidence and a reasoned judgment follows. This may be missing from more general public and political discourse.

In addition, subject to rules on standing and issues of justiciability, courts have to adjudicate the cases that come before them and all are equal before the courts (subject to issues of cost and general access to justice issues).¹⁴⁷ This can give a voice to those who traditionally might be excluded and who have not historically had their point of view heard and taken into account. Regardless of the success of cases, bringing climate issues before the courts may nevertheless represent a moral victory as it creates a broader public-relations benefit and may influence private sector responses.¹⁴⁸

144 At [8.9].

145 At [8.6]. The Court did not rule out the role constitutional rights could play in climate litigation, but said that exactly how such rights should be characterised and defined should be a matter addressed in cases where they are material to the outcome of the case: at [8.17].

146 See for example *Illinois Central Railroad v People of the State of Illinois* 146 US 387 (1892) which is widely regarded as the foundational case for the public trust doctrine in the United States.

147 Cost issues in public interest litigation are a real issue: see Rachel Pepper “Costs in Public Interest Climate Change Litigation” (seminar presented to the Australian National University, 11 October 2019), recording available at <www.law.anu.edu.au>; and Jeremy McGuire “The challenges of an appellate audience” [2018] NZLJ 61. See also the majority in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* (costs) [2014] NZSC 167 at [31]–[49] per McGrath, Glazebrook and Arnold JJ. On access to justice issues generally, 1.4 billion people in the world have unmet civil and administrative justice needs and that is particularly the case for traditionally marginalised groups: see World Justice Project *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries* (Washington, 2019).

148 See David A Murray “Will Climate Change the Courts?” (2019) 57 *The New Atlantis* 14; Douglas A Ksyar “What Climate Change Can Do About Tort Law” (2011) 41 *Environmental Law* 1 at 3; and Robert French “Lecture on Climate Change – Opening Remarks” (presented to the University of Western Australia, 30 January 2020).

XI. CONCLUSION

A note of caution. The tensions that result from the limitations on the courts will inevitably affect public perceptions of the courts.¹⁴⁹ These limitations may leave all dissatisfied. Governments may consider the courts are encroaching too much on the role of the legislature and executive. Corporates may consider the courts are increasing the costs and risks of business unnecessarily. And climate change activists may consider the courts too timid in confronting a problem that is obvious and that needs decisive and immediate attention. This, however, might be no more than the perennial problem facing courts. In any adjudication, there must be one or more losers.

There is no sign that recourse to litigation on climate change issues will diminish. If anything, recourse to climate litigation is likely to increase, subject to overcoming the difficulties arising in the courts through restrictions caused by COVID-19.¹⁵⁰ A survey of cases contained in a comprehensive database of climate cases has found that 58 per cent of cases had direct outcomes favourable to climate change action.¹⁵¹ This is a reasonable success rate, but the point has been made that whether or not these cases received favourable immediate outcomes, they gave increased publicity and attention to the climate crisis, thereby serving to advance the cause of combatting climate change.¹⁵² As a whole, it seems incontrovertible that judges and courts have a critical part to play, within the limitations of their nature and role, to ensure that the ultimate loser is not the environment on which we all depend on to live.

149 See Winkelmann, Glazebrook and France, above n 27, at [136]–[137]; and Rick Bigwood *Public Interest Litigation* (LexisNexis, Wellington, 2006) at 235–241.

150 Setzer and Byrnes, above n 56, at 13.

151 Setzer and Higham, above n 2, at 19. “Favourable” is used in the sense that the judge ruled in favour of more effective climate regulation or ruled against an outcome that would have resulted in increased greenhouse emissions: Setzer and Byrnes, above n 56, at 11.

152 This is a broader approach which tries to understand the overall impact of the case. These impacts may include changes to the behaviours of the parties, changes to public opinion, financial and reputational consequences for a variety of actors, and further litigation: Setzer and Higham, above n 2, at 18.

CRITICAL REVIEW OF ADVOCACY IN NEW ZEALAND CHARITY LAW

BY SAMANTHA JOHNSTON*

I. INTRODUCTION

The law around charity law is recognised as “a moving subject”.¹ In 2014, the Supreme Court of New Zealand in *Re Greenpeace of New Zealand Inc (Greenpeace (SC))*² determined that if there is a recognised public benefit, a political purpose can be seen to be a charitable purpose.³ This development was a departure from the United Kingdom approach, which New Zealand charity law has followed for almost a century.⁴ This traditional approach is more commonly referred to as the doctrine of the exclusion of political purposes (“the doctrine”).⁵ Recently in 2020, the High Court, in the case of *Greenpeace of New Zealand Inc v Charities Registration Board (Greenpeace (HC))*⁶ applied the precedent of *Greenpeace (SC)* and held that the organisation Greenpeace of New Zealand Inc (Greenpeace NZ) to be charitable for the purpose of advocating for and protecting the environment. This law change allows associations with a dominant political purpose to apply and potentially succeed at receiving charitable status. Such was the case for Family First New Zealand (Family First). Family First, like Greenpeace NZ, has been contending for charitable status for many years, and the recent 2020 decision of the Court of Appeal in *Family First New Zealand v Attorney-General (Family First (CA))*⁷ has, controversially, awarded the association charitable status.

The central proposition of this research is that the decision in *Family First (CA)*⁸ has done little to improve clarity around the application and understanding of what constitutes a charitable political purpose.

In support of this proposition, a critical review will be done, inter alia, of the *Greenpeace (SC)* and *Greenpeace (HC)* cases, the three-stage public benefit test developed for political purposes, as well as the case under scrutiny *Family First (CA)*.

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1 *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 (HL) at 154 per Lord Wilberforce.

2 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

3 At [69].

4 The New Zealand legal framework was founded and structured from the English common law system.

5 When reference is made to “the doctrine” it shall only stand for this historic doctrine of exclusion and will not refer to any recent changes in the doctrine.

6 *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999.

7 *Family First New Zealand v Attorney-General* [2020] NZCA 366.

8 *Family First New Zealand v Attorney-General (CA)*, above n 7.

II. PRINCIPLES OF CHARITY LAW

For the proposition to be justified, it first ought to be contextualised. New Zealand inherits much of its law from the United Kingdom. Accordingly, New Zealand has followed the United Kingdom's approach to charity law and political purposes up until the case of *Greenpeace (SC)*. Charitable status is determined on a case by case basis, by analogy that the purpose generally falls within the "spirit and intendment" of the preamble to the Statute of Charitable Uses 1601, commonly known as the Statute of Elizabeth.⁹ The Statute of Elizabeth was enacted to reform the use and abuse of charitable trusts which had not been employed with charitable intent.¹⁰ The preamble to the Statute of Elizabeth¹¹ is the starting point for determining whether a purpose can be considered charitable. It contains a non-exhaustive list that underpins modern charity.

The case of *Commissioners for Special Purposes of the Income Tax v Pemsel (Pemsel)* summarised the purposes set out in the preamble into four heads of charity.¹² Lord Macnaghten provided a definition that resulted in a structured approach to the concept for latter courts to refer to:¹³

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Pemsel's four heads of charity have been codified into New Zealand legislation¹⁴ under s 5 of the Charities Act 2005 (the Act).¹⁵ The purpose of the Act is to provide specific requirements for the registration and monitoring of charities.¹⁶ The definition of charitable purpose in New Zealand states as follows:¹⁷

- 5 Meaning of charitable purpose and effect of ancillary non-charitable purpose
- (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
- (2) However, —
- (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and
- (b) ...

9 Statute of Charitable Uses 1601, 43 Eliz 1, c 4.

10 *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [19].

11 Statute of Charitable Uses, above n 9.

12 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 583.

13 At 583.

14 The United Kingdom codified an expanded list of the preamble's charitable purposes in their Charities Act 2006 (UK), repealed and updated by the Charities Act 2011 (UK). There are now 13 recognised heads of charity in the United Kingdom.

15 Charities Act 2005, s 5.

16 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533 at [37].

17 Charities Act, s 5. The most applicable components of this section have been included; subss (2)(b) and (2A) have been excluded.

(2A) ...

- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

Section 13(1)(b) of the Act sets out the two essential requirements which qualify an association for registration as a charitable entity:

- (i) it is established and maintained exclusively for charitable purposes; and
- (ii) it is not carried on for the private pecuniary benefit of any individual.

An association must have a charitable purpose, but it also must carry out its purpose for public benefit.¹⁸ There is a presumption of public benefit under the first three heads of charity, which can be rebutted with evidence that proves contrary.¹⁹ Under the fourth head of “any other purpose beneficial to the community”, it must be expressly shown that there is a public benefit and falls within the spirit and intendment of the Statute of Elizabeth.²⁰ *New Zealand Society of Accountants v Commissioner of Inland Revenue* sets out the public benefit requirement in a two limb test:²¹

1. Whether the purpose of the trust confers a benefit on the public or a section of the public; and,
2. Whether that class of persons constitutes the public or a least a section of it.

This case also noted that not every purpose which is beneficial to the public is charitable, as it must be seen to fall in the spirit and intendment of the preamble to the Statute of Elizabeth.²² The case of *Oppenheim v Tobacco Securities Trust Ltd* (Oppenheim) developed a two-limb test for determining whether a class of persons can be regarded as a section of the community.²³

1. The possible beneficiaries are numerous; and,
2. The quality which distinguishes them from other community members does not depend on their relationship to a particular individual.

Until recently, New Zealand did not consider a political purpose to fall within the spirit and intendment of the preamble. However, the Supreme Court in *Greenpeace (SC)* held that political and charitable purposes are not mutually exclusive.²⁴ Accordingly, a political purpose can be

18 Charities Act, s 5.

19 Juliet Chevalier-Watts *Charity Law: International Perspectives* (1st ed, Routledge, 2018) at 17.

20 Statute of Charitable Uses, above n 9.

21 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA).

22 At 152.

23 *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297 (HL) at 317.

24 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [3].

charitable so long as the organisation can show public benefit. This is a development from the previous position in New Zealand, whereby political purposes could only be ancillary to the dominant purpose of the association.

III. THE LAW UNDER THE POLITICAL PURPOSE DOCTRINE

The context from which the doctrine emerged must be considered. This historical background will provide a basis for the doctrine but remain brief, with only essential information included.²⁵ It will follow the timeline of the doctrine to when it reached the courts of New Zealand before ultimately ending in the decision of *Greenpeace (SC)*, as will be discussed later in this research.

Associations seeking charitable status are required to be established and operated for an exclusively charitable purpose.²⁶ Historically, a political purpose has not been considered charitable. The reasoning for this is that the Court cannot supposedly judge whether a proposed change in the law will benefit the public.²⁷ This well-established doctrine dates to the 1917 House of Lord's case *Bowman v Secular Society*²⁸ and remains in the United Kingdom and Canada. As "New Zealand's charity law is a reflection of the heritage of its colonial ancestry",²⁹ the doctrine was soon firmly established in New Zealand jurisprudence³⁰ as demonstrated by the case of *Molloy v Commissioner of Inland Revenue*.³¹

The case of *Bowman v Secular Society Ltd (Bowman)* is often treated as the origin of the political purpose exception.³² The case concerned a gift given for the purposes of the Secular Society rather than to the Society itself, which required that consideration be given to whether these purposes were charitable at law. Lord Parker of the Court characterised the objects of the Secular Society as being "purely political" and observed that a political object does not explicitly pertain to party political measures.³³ Nowadays, most, if not all, latter cases involving political purposes refer to Lord Parker's famous dictum: "a trust for the attainment of political objects has always been held invalid".³⁴

Lord Parker's argument became the leading approach favouring the doctrine that a court cannot determine where the public good lies when distinguishing between competing views of a

25 Whilst there is a magnitude of information on the historical background of the doctrine, this research is focused on the effect of the removal of the doctrine; as a result, this section is confined to the information deemed most important.

26 Adam Parachin "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2007-2008) 45(4) *Alta L Rev* 871 at 873.

27 *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442.

28 *Bowman v Secular Society Ltd*, above n 27.

29 Juliet Chevalier-Watts "The changing face of political purposes and charity law in New Zealand" (2015) 21(10) *Trusts & Trustees* 1121 at 1121.

30 The authority of *Bowman* was initially entrenched in New Zealand law by *Re Wilkinson (Deceased)* [1941] NZLR 1065 (SC).

31 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.

32 *Bowman v Secular Society Ltd*, above n 27.

33 *Bowman v Secular Society Ltd*, above n 27.

34 *Bowman v Secular Society Ltd*, above n 27.

controversial political nature.³⁵ It should be noted that whilst this statement was spoken as obiter, it has since been relied upon by subsequent courts.³⁶ Parachin maintains that Lord Parker relied on the opinions of Amherst Tyssen,³⁷ despite not citing him, as no prior decision had established the doctrine.³⁸ Due to this, Parachin described Lord Parker humorously as a “poor historian”.³⁹

Tyssen was later cited and quoted in the case of *National Anti-Vivisection Society v Inland Revenue Commissioners (National Anti-Vivisection Society)* by Lord Wright.⁴⁰ In this case, the House of Lords concluded that the purpose of obtaining a law reform, specifically the abolition of vivisection, was a political purpose that disqualified the association from charitable status.⁴¹ Additionally, the Court concluded that there was no public benefit associated with this purpose on the evidence provided.⁴² Lord Wright and Lord Simmonds affirmed the observations of Lord Parker in defining political purposes or objects to be construed in the broader sense and to include “activities directed to influence the legislature to change the law to promote or effect the views advocated by the society.”⁴³

The latter case of *McGovern v Attorney-General (McGovern)* cited *Bowman* as an authority for determining whether the purposes of a trust established by Amnesty International met the criteria to be a valid charitable trust.⁴⁴ In this case, Slade J developed the five types of trust, with guidance from *Bowman* and *National Anti-Vivisection Society*, that would be deemed trusts with political purposes.

Slade J explicitly noted that this categorisation was “not intended to be an exhaustive one.”⁴⁵ The general argument favouring the doctrine, in this case, was that the courts should be precluded from determining whether a change in the law is of public benefit. Parachin held that by doing so, the Courts would “usurp the functions of the legislature,” thereby prejudicing an institution that is meant to remain impartial.⁴⁶

Molloy v Commissioner of Inland Revenue (Molloy) was a New Zealand case where a society that opposed changes to the legislative provisions relating to abortion was held to be political.⁴⁷ The Court of Appeal, in this case, affirmed that Lord Parker’s reasoning in *Bowman* must be applicable as the Court has no means of judging the public benefit for political purposes, despite the purpose

35 Juliet Chevalier-Watts “Shedding the shackles of Bowman: A critical review of the political purpose doctrine and charity law in New Zealand” [2015] NZLJ 108 at 109.

36 Parachin, above n 26, at 876.

37 Parachin, above n 26, at 879; referencing Amherst D Tyssen “The Law of Charitable Bequests: With an Account of the Mortmain and Charitable Uses Act” (1888) William Clowes and Sons at 177.

38 Parachin, above n 26, at 877.

39 Parachin, above n 26, at 877.

40 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 50.

41 Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the politics of charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation” (2011) 35(2) MULR 353 at 357.

42 Parachin, above n 26, at 882.

43 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 40, at 51–52.

44 Chevalier-Watts, above n 35, at 110.

45 Chevalier-Watts, above n 35, at 110.

46 Parachin, above n 26, at 882.

47 *Molloy v Commissioner of Inland Revenue*, above n 31.

being for a stay of law rather than a change.⁴⁸ Regardless, the Court recognised that charity might not be negated should the political purposes be “ancillary, secondary, or subsidiary” to the main object rather than the dominant purpose.⁴⁹

*Aid/Watch v Federal Commissioner of Taxation (Aid/Watch)*⁵⁰ is a pivotal case that impacted the decision of *Greenpeace (SC)*⁵¹ as it changed the law in Australia for political purposes and charities. *Aid/Watch* designed their campaigns to stimulate public debate by challenging government policy and legislation, thus making the organisation politically focused and motivated.

Before *Aid/Watch*, the doctrine developed by *Bowman* was upheld in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*.⁵² Notwithstanding this history, the High Court of Australia in *Aid/Watch* rejected the principle in *Bowman*, arguing instead that the Australian constitution requires agitation for legislative and policy changes to occur.⁵³ The majority stated that, where a statute requires the common law for its operation, a broader interpretation should be applied so that the statute develops with the case law.⁵⁴

The Court developed the proposition that a political purpose can be charitable should it be for the public benefit by applying the process-based test. Through applying this test, the majority accepted that *Aid/Watch*'s purposes generated public debate around the best methods to alleviate poverty.⁵⁵ Therefore, they had a charitable purpose of public benefit. Critics of the case state that the ruling in *Aid/Watch* rests on “Australia's particular constitutional framework”, and other jurisdictions should be wary of departing from the doctrine.⁵⁶

The majority decision emphasised the constitutional value of free political speech, which means a one-sided political view could be considered for public benefit.⁵⁷ The majority did not comment on whether generating public debate outside the three heads would meet the public benefit test.⁵⁸ No consideration was given to whether other forms of political activity, such as lobbying for a political party, would be covered by their reasoning.⁶⁰ Overall, there is still uncertainty to the scope of the *Aid/Watch* decision in the Australian legal framework; nevertheless, it is still a modern approach to extinguishing the doctrine.⁶¹

48 At 696.

49 At 695.

50 *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

51 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

52 *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396.

53 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [45].

54 At [23].

55 At [45].

56 Chia, Harding and O'Connell, above n 41, at 380.

57 At 378.

58 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [48].

59 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [48]–[49].

60 *Re Draco Foundation (NZ) Charitable Trust* (2011) 3 NZTR 21-009, (2011) 25 NZTC 20-032 (HC).

61 At [56]. This was the first New Zealand case which sought to apply the decision of *Aid/Watch* in New Zealand, which was denied.

IV. CASE ANALYSIS OF THE SUPREME COURT DECISION OF GREENPEACE

For clarity, this section will critically examine the critical points of decision in *Greenpeace (SC)*. Greenpeace NZ is the New Zealand based portion of the larger international Greenpeace movement. This movement seeks a more peaceful and greener future for the world.

Greenpeace (SC) was a pivotal moment of clarity in New Zealand charity law. The appeal concerned the application and interpretation of s 5 of the Act, which New Zealand has historically accepted as a codification of the doctrine.⁶²

The Act defines charitable purpose; however, the courts readily accept that the legislature allows for the concepts of charity to be developed in case law.⁶³ In addition, the Supreme Court clarifies that the common law approach to charities is not capable of codification, which allows charity law to develop over time.⁶⁴

The majority's interpretation of s 5(3) of the Act was that the section is included to provide latitude for charities seeking charitable status when also engaged in non-charitable purposes. The concluding decision of the Court was that s 5(3) was a general application for all ancillary purposes, with "advocacy" being provided as an example.⁶⁵ The subsection is not "expressed as an exclusion of advocacy from charitable purposes" where the advocacy is of a more than ancillary nature.⁶⁶ Accordingly, the Supreme Court disagreed with previous Courts that s 5 of the Act enacted a general political purpose exclusion. There was no suggestion in the "structure or language" to justify using the example advocacy to be treated as an outright exclusion.⁶⁷ This position taken by the Court elucidates the legislative position in New Zealand, opening the doors to the possibility of charitable political purposes.

The overarching conclusion by the Supreme Court was that political purposes and charitable purposes are not mutually exclusive and that a blanket exclusion of political purposes obscures the focus of charitability.⁶⁸ The doctrine "risks rigidity in an area of law which should be responsive to the way society works."⁶⁹

The Court refers to examples such as the abolition of slavery, protection of the environment and human rights as charitable purposes in themselves.⁷⁰ The Supreme Court set out the three-stage test: of end, means and manner, to determine whether advocacy is advancing public benefit.⁷¹ *Greenpeace (SC)* did endeavour to provide clarity on judging the public benefit for political purposes. However, the guidance provided was sparse and did not necessarily aid in understanding each aspect of the test. Whilst the Court was not specific about how this test should be applied,

62 *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [9].

63 At [16].

64 At [56].

65 At [57].

66 At [57].

67 At [57].

68 At [59].

69 At [70].

70 At [71].

71 This three-stage test will be discussed later in the research.

*Better Public Media Trust v Attorney-General (Better Public Media Trust)*⁷² and *Greenpeace (HC)* clarified the topic.

The dissenting views of William Young and Arnold JJ echo the arguments in previous cases in favour of the doctrine. Arguments are made to the practical difficulties and policy issues that a Judge may encounter in making such a decision. Additionally, that such an inquiry falls outside the “scope of the judicial role.”⁷³ A well-founded point, when considering that Greenpeace NZ’s purpose requires policy changes to achieve its end. However, as the latter case of *Greenpeace (HC)* will demonstrate, this issue is addressed by including the means and manner aspects of the three-stage test.

The Supreme Court remitted Greenpeace NZ back to the Charities Commission, now the Charities Registration Board (“the Board”),⁷⁴ for consideration in light of the Court’s findings. The Board declined registration, to which Greenpeace NZ appealed to the High Court.

V. END, MEANS AND MANNER

An understanding of the three-stage test developed in *Greenpeace (SC)* is necessary before considering the application of the test in *Greenpeace (HC)* and *Family First (CA)*. As mentioned earlier in this research, an association must be both charitable and for the public benefit. This three-stage test relates to the first limb of the test set out in *New Zealand Society for Accountants v Commissioner of Inland Revenue*.⁷⁵ *Greenpeace (SC)* set out the three-stage test for determining whether a political purpose is for the public benefit:⁷⁶

Assessment of whether advocacy or promotion of a cause or law reform was a charitable purpose depended on consideration of the end advocated, the means promoted to achieve that end and the manner in which the cause was promoted in order to assess whether the purpose could be said to be of public benefit within the spirit and intendment of the Statute of Charitable Uses 1601.

This three-stage test is exclusive to political purposes, as “the organisation claiming to be charitable is not itself performing the charitable acts”; instead, it advocates that others perform the acts.⁷⁷ As a result, both the cause and the way in which it is advocated must be considered charitable.

This test was primarily formulated and based on the dissenting judgment of Kiefel J in *Aid/Watch*, as her Honour considered that the motives of an organisation are not sufficient to establish a public benefit.⁷⁸ This takes a different approach to that of the majority in *Aid/Watch*, which concluded that a Court is not to “adjudicate the merits” of the ends promoted by an organisation.⁷⁹ Instead, the majority favoured that it is the process by which an organisation seeks to change that generates

⁷² *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [53].

⁷³ *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [125].

⁷⁴ At this time, the Charities Commission was dismantled, and the role of registering charities was allocated to the Charities Registration Board.

⁷⁵ *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 21.

⁷⁶ *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [76].

⁷⁷ *Better Public Media Trust v Attorney-General*, above n 71, at [54].

⁷⁸ *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [82].

⁷⁹ At [45].

the public benefit by contributing to the overall public welfare.⁸⁰ However, the Supreme Court in *Greenpeace (SC)* furthered this test by requiring an assessment of the benefit of achieving the stated purpose (the end) rather than just the benefit of pursuing it.⁸¹

The end, means and manner test was applied and further explicated by Cull J in *Better Public Media Trust*.⁸²

The *end* is the ultimate goal or objective for which the organisation is advocating ... The *means* is then the way in which the organisation advocates achieving the *end* ... Finally, the *manner* is the way in which the organisation conducts its advocacy.

The end will generally be created at a high level of abstraction so long that it does not appear to favour one particular form.⁸³ *Greenpeace (SC)* gives examples of abstract ends, including abolishing slavery, advancing human rights, and protecting the environment.⁸⁴ The means are the more practical application; the steps in which the association supports are being taken to achieve the end goal.⁸⁵ They are the processes of achieving the “end” without taking a specific standpoint. The manner is distinct from the means in that it assesses the practical steps the association takes to advocate for its cause.⁸⁶

This three-stage test will be critically reviewed regarding its application in New Zealand versus the Australian public benefit test.

VI. CRITIQUE OF PUBLIC BENEFIT

The three-stage test is not without its critics. Kós P, in his opening address at the Charity Law Association of Australia and New Zealand (CLAANZ) Conference, stated that the ends, means and manner analysis is “obscure.” He believed that the means and manner aspects were not “particularly illuminating in deciding whether an entity serves charitable purposes.”⁸⁷

Since 1805, the case authority regarding public benefit has predominantly required both the public benefit and the charitable object to be within the same sense.⁸⁸ This is affirmed by Kós P, who stated that historically the focus has been “upon the existence of demonstrable public benefit in the ends pursued.”⁸⁹ Accordingly, his Honour preferred the majority approach in *Aid/Watch* instead of the dissenting judgment of Kiefel J.⁹⁰

80 At [45].

81 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [47].

82 *Better Public Media Trust v Attorney-General*, above n 71, at [53].

83 Juliet Chevalier-Watts “Post-Greenpeace, Better Public Media Trust, and advocacy: on the current charity law landscape” (2020) 6(1) NZLJ 190 at 193.

84 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [71].

85 *Better Public Media Trust v Attorney-General*, above n 71, at [53].

86 At [53].

87 Hon Justice Stephen Kós, President of the Court of Appeal of New Zealand “Murky Waters, Muddled Thinking: Charities and Politics” (Charity Law Association of Australia and New Zealand Conference, 4 November 2020) at [31].

88 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [29].

89 Kós, above n 86, at [31].

90 At [35].

The majority in *Aid/Watch* held that the doctrine of political purposes no longer applied in Australia. However, it did state that in a “particular case, the ends and means involved could result in a finding that there was insufficient public benefit.”⁹¹ It is the process (manner) by which the association takes which is initially assessed though. With this in mind, the approaches do not appear too dissimilar. What differs is the “starting point” for each approach. *Greenpeace (SC)* supports an “end” focused approach, where the end is assessed with reference to the means and manner used to achieve the end. *Aid/Watch* supports a “process based” approach, favouring the manner used that generates benefit.

However, whilst the “end” focused test has been argued as more difficult for charities to prove public benefit,⁹² this area of charity law is complex and arguably needs a more demanding test to ensure that those which meet the threshold are charitable.

VII. HIGH COURT JUDGMENT OF GREENPEACE

The Supreme Court remitted Greenpeace NZ for consideration of charitable status by the Board and Chief Executive. The Board denied Greenpeace NZ charitable status because, inter alia, Greenpeace NZ’s advocacy did not meet the Supreme Court’s three-stage test.⁹³ Greenpeace NZ appealed this decision to the High Court, whose decision was a straightforward application of how a political purpose is determined to be charitable in New Zealand.⁹⁴

Firstly, the High Court followed the approach of the Supreme Court in determining an association’s purpose. In deciding if an association is established and maintained for charitable purposes, the associations “stated objects, as well as current and proposed activities, will be considered.”⁹⁵ Accordingly, the association’s purpose may be “inferred from its activities” as stated in *Greenpeace (SC)* and s 18(3) of the Charities Act.⁹⁶ This aids in determining the “relative weight” of the association’s stated objects, as well as assists in determining if the potential consequences of pursuing said purpose are not considered charitable.⁹⁷ Where the charity of an object is unclear, the inference from the activities will provide a better understanding of the purpose.

This general approach to determining an association’s purpose is not without criticism specifically pertaining to when the Court can infer a purpose from the association’s activities and what the Court is to look for. Section 18(3) of the Act does not provide guidance or criteria on what the Court is to look for in the activities, nor does it state whether the activities must be charitable. Furthering this argument, Ellis J in *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia (Anti-Aging)* observed that an association’s activities

91 Chia, Harding and O’Connell, above n 42, at 375; referencing *Aid/Watch Inc v Commissioner of Taxation* (2010) CLR 396 at [49].

92 Jane Calderwood Norton “Controversial charities and public benefit” (2018) NZLJ 64 at 65.

93 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [7].

94 The issues within this case relating to “advancing education”, “illegal purpose”, or “judicial review” are outside the scope of this research.

95 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

96 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [14].

97 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

should be regarded as relevant “only to the extent that the entity’s constituent documents were unclear to its purpose” or where there was evidence of activities that contradict the stated purpose.⁹⁸

This constraint is reasonable for the reasons, among other things, that it ensures that associations are complying with their constituting document, and it provides a more standardised process to purpose determination. *Greenpeace (HC)* does not support this notion, as it states that “regard must be had to the entity’s current and proposed activities.”⁹⁹ Greenpeace NZ made amendments to their objects and activities and stopped campaigning for peace and nuclear disarmament; to fully comprehend their primary purpose, the Court had to look at the activities. A potential alteration to the observation of Ellis J is to regard activities as relevant where an association’s purpose is ancillary to their dominant purpose. Despite the conflict in approaches, there is still a clear allowance of inference of an association’s activities in determining what the purpose is, as supported by *Greenpeace (SC)* and *Greenpeace (HC)*.

Secondly, the High Court applied the three-stage test established in *Greenpeace (SC)* when determining whether Greenpeace NZ’s purpose was charitable. Greenpeace NZ’s primary purpose and “end” is advocating for the protection of the environment. Therefore, Greenpeace NZ’s end to be considered charitable would depend on what is being advocated and how that advocacy is being carried out, i.e., the means and manner, respectively. Regarding the means, the Court confirmed that competing interests are not relevant; public benefit is gained through “raising awareness of environmental issues” and ensuring that the “public’s interest in protecting the environment” is considered.¹⁰⁰

Campaign activities are generally the means by which Greenpeace NZ promote their objects.¹⁰¹ The manner in which this is undertaken is through advocating for measures, by engaging in the democratic process, to mitigate climate change, improving freshwater quality, protection of the ocean and sustainable fishing. Mallon J held that there is a charitable public benefit in this form of advocacy, as it requires “broad-based support and effort” for achieving the end goal of protecting the environment.¹⁰² This purpose was stated in *Greenpeace (SC)* to be charitable.

Thirdly, regarding Greenpeace NZ’s purpose to promote peace, nuclear disarmament and the elimination of weapons of mass destruction, the High Court held that this was ancillary to the association’s dominant purpose.¹⁰³ This was evidenced by the lack of activity in relation to peace, nuclear disarmament and elimination of weapons.¹⁰⁴ In the *Greenpeace (HC)* decision, Mallon J viewed the promotion of peace and nuclear disarmament as different from that of protecting the environment.¹⁰⁵ This was primarily because advocating for peace and nuclear disarmament as a general end was very broad and theoretical and included various considerations about the “right way” to achieve this end.¹⁰⁶ Around the means and manner of the purpose, these issues would

98 *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 at [85].

99 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

100 At [86].

101 At [61].

102 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [71].

103 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [125].

104 At [82].

105 At [83].

106 Juliet Chevalier-Watts “Greenpeace, advocacy, and the long winding road” (2020) 10 NZLJ 354 at 355.

make the public benefit “difficult to establish.”¹⁰⁷ Additionally, the Supreme Court supported the dissenting judgment by Kiefel J in *Aid/Watch*, which stated that “reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views.”¹⁰⁸

This indicates that it will unlikely be seen to be in the public benefit for an association to say that they advocate for “justice”, a highly abstract goal, with no specific means or manner of achieving it.¹⁰⁹ It also indicates that if the activities of achieving justice regarded propaganda materials, it would be challenging to establish public benefit from the assertion of this view.

Contrarily, the “end” of advocating for the protection of the environment will likely require broad-based support and effort, which then enables the public interest to be assessed. In examining the two purposes, *Greenpeace (HC)* has effectively demonstrated where political purposes would fail to meet the criteria of the three-stage test. Overall, the *Greenpeace (HC)* case applied the principles and tests established in *Greenpeace (SC)*, providing comprehensibility as to what will and will not be recognised as a charitable political purpose in New Zealand.

VIII. CASE ANALYSIS OF FAMILY FIRST

Similar to the critical review done of the Greenpeace NZ decisions, the provision of the necessary case history for Family First will be given before setting out how the Court of Appeal case provided limited-to-no clarity on the determination of charitable political purposes in New Zealand law.

A. Case History

Family First is an organisation devoted to advocating on a broad range of issues, including abortion, prostitution, censorship, anti-smacking legislation, euthanasia and cannabis legislation.¹¹⁰ Family First seeks to promote a conservative and traditional perspective on strong families, marriage and the value of life, specifically referring to a union being between a man and woman.

The Board deregistered Family First because the organisation did not exist solely for charitable purposes.¹¹¹ This was the second deregistration decision by the Board, as the first decision was quashed by the decision in *Greenpeace (SC)* and was referred back to the Board for reconsideration. The decision did not change, and Family First appealed to the High Court. The High Court upheld the decision of the Board that Family First’s “core purpose of promoting the traditional family unit cannot be shown to be in the public benefit in the charitable sense under the Act.”¹¹² The purpose argued by the association is that Family First is to educate and conduct research relating to family values and family life. The association also seeks to promote these family values and participate in the democratic process to advance the interests of families. The association also engages in “issues of the day” or day-to-day issue advocacy. Therefore, assessing whether there is public benefit for

107 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [83].

108 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [73]; citing *Aid/Watch* at [69].

109 This is a basic example of a theoretical, general end; this is not an assumption on whether this sort of advocacy will or will not meet the public benefit criteria.

110 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [11].

111 *Re Family First New Zealand* [2015] NZHC 1493.

112 *Re Family First New Zealand* (HC), above n 110.

this advocacy in a charitable sense requires consideration of the end promoted and the means and manner of that promotion.

Family First requested to take this decision to the Court of Appeal, which is the case in discussion. This analysis will outline the approaches taken by the Court and how these approaches and outcomes have re-complicated what was simplified in *Greenpeace (SC)* and *Greenpeace (HC)*.¹¹³

B. Over-generalisation of the Purpose and “End”

The Court of Appeal has over-generalised the association’s purpose and “end”, despite Family First’s stated objects being very narrow in scope. Case law dictates that the purpose of an association should be construed and understood as a whole in the context of the relevant activities.¹¹⁴ Charitable status depends principally on purposes and the stated objects, not activities.¹¹⁵ However, as outlined earlier by Elias CJ in *Anti-Aging*, the Court should turn to the activities where they appear to conflict with the stated objects.¹¹⁶

The majority contends that the objects stated have an underlying theme of family and marriage. However, when taken as a whole, the activities of Family First support a specific form of family and marriage, being the union between a man and woman. This specificity is where the Court in *Family First (CA)* complicated the approach to advocacy as a charitable purpose.

A straightforward approach on how the Court is to determine the “end” of an organisation would ensure a more standardised application. As described in *Greenpeace (SC)*¹¹⁷ and *Better Public Media Trust*,¹¹⁸ an end is an abstract and general goal that the entity aims to achieve. The “end” determined by Family First was general in nature and was stated by the Court to be abstracted from the day-to-day issue advocacy that Family First are engaged in.¹¹⁹ The majority interpreted the “end” advocated for to be for the support and promotion of family and marriage.¹²⁰ However, Family First’s promotion of marriage and family is specific and narrow.

The Court acknowledged that Family First’s two “Statements of Principle” clarify the organisation’s exact position on the term’s “marriage” and “family.”¹²¹ Family First emphasised that such principles were intended to “bring us back to the core values of the family,” those values of a “traditional” or “natural” family.¹²² This supports the notion that Family First supports a specific family form being promoted. Adversely, the “end” of promoting family and marriage, as set out by the majority, suggests incorporating all family and marriage forms, a position that Family First does not support. This differs from Greenpeace NZ’s end advocated for. Greenpeace NZ’s purpose of protecting the environment defines the association’s position regarding that form of advocacy,

113 For legibility, each issue should be read independent of other issues discussed, unless explicitly referred to.

114 G E Dal Pont *Law of Charity* (2nd ed, LexisNexis Australia, 2017) at [13.17] [13.18].

115 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [87].

116 *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia*, above n 97, at [85].

117 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

118 *Better Public Media Trust v Attorney-General*, above n 71.

119 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [90].

120 At [136].

121 At [137].

122 At [99]; referencing Family First New Zealand “Family First releases ‘Principles of Family’” (press release, July 2006).

and their activities further emphasise this purpose. Unlike Family First's end, there is coherency between Greenpeace NZ's purpose and activities.

The majority have generalised the dominant purpose of Family First to its broadest interpretation. One which the majority stated is not dissimilar to peace or nuclear disarmament as once sought by Greenpeace NZ. However, peace and nuclear disarmament were stated by the Courts in *Greenpeace (SC)* and *Greenpeace (HC)* to be challenging to prove a public benefit for due to the nature of the means and manner necessary to achieve the end. The effect of this interpretation distorts the approach to determining the "end" of an association. It opens the possibility of the Courts to "create" rather than "interpret" what an association's purpose might be.

C. *Public Benefit Application*

An explicit deliberation in determining how Family First's purpose is of "self-evident" public benefit could have been better understood when a purpose meets this threshold. Initially, the majority appears to argue that Family First's purpose of advocating for family and marriage is of self-evident public benefit under the fourth head of charity, providing legislation to support this statement.¹²³

As stated earlier, the Court determined that the association has an "end" goal of promoting the support of family and marriage. This is abstracted to the extent that it could be considered to include all family forms. This version of the abstraction will be used to demonstrate the argument. If the "end" included all family forms, the reasoning given by the Court, including references to supporting legislation, could support the proposition of "self-evident" public benefit. Firstly, the legislation provided to "support" the majority's "self-evident" claim is general in nature. As an example, art 16 of the Universal Declaration of Human Rights states:¹²⁴

1. Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. Furthermore, they are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Universal Declaration of Human Rights¹²⁵ does not define what constitutes a "family."¹²⁶ Accordingly, the term "family" should be given its definition under New Zealand legislation.

A family relationship will exist where one person has "a close personal relationship with the other person".¹²⁷ A family group, in relation to a child or young person, means a family group:¹²⁸

123 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [138].

124 Universal Declaration of Human Rights GA Res 217A (adopted 10 December 1948), art 16.

125 Above n 123.

126 It should be noted that neither do the International Covenant on Economic, Social and Cultural Rights A/RES/2200 (opened for signature 6 December 1966, entry into force 3 January 1976) and the Convention on the Rights of the Child E/CN.4/RES/1990/74 (opened for signature 20 November 1989, entry into force 2 September 1990); both legislative pieces which were provided as evidence supporting a "self-evident" claim.

127 Family Violence Act 2018, s 14.

128 Oranga Tamariki Act 1989, s 2.

- (a) in which there is at least 1 adult member—
 - (i) with whom the child or young person has a biological or legal relationship; or
 - (ii) to whom the child or young person has a significant psychological attachment; or
- (b) that is the child’s or young person’s whanau or other culturally recognised family group

This includes extended family as well. However, there is nothing in the legislature to suggest a specific form of accepted “family” in New Zealand; this directly contradicts the position of Family First.

Article 16 of the Declaration supports the “end” of promoting family and marriage; however, it does not explicitly support the “end” of the traditional family and marriage between a man and a woman. This entails that the Declaration supports the family forms of same-sex, single, adoptive and any other family form so long as it constitutes a family in terms of ordinary meaning. As explained previously, the “end” of Family First pertains to a more specific and confined understanding of family and marriage. Within the “Principles on Family”, Family First affirms the “natural family” to be the union of a man and a woman.¹²⁹ This “natural family” cannot change into some new shape, nor can it be re-defined by social engineering.¹³⁰ As the purpose is for a particular form of family, the “end” promoted and advocated for should reflect this purpose, and the three-stage test should be applied where the public benefit is not “self-evident.” I refer to the majority’s argument that the end being promoted by Family First is of “self-evident” public benefit.

1. Interpretation

It is unclear how *Family First (CA)*¹³¹ decided that Family First’s purpose is of self-evident public benefit. If the “end” advocated for were for the family in the term’s ordinary meaning, this statement would be clearer—however, Family First advocates for the “traditional” family and “traditional” marriage. As a result, it cannot be said that the public benefit is self-evident for the reasons outlined earlier. A more developed explanation of what constitutes “self-evident” public benefit and how this assessment is undertaken would have assisted future application.

D. Assessment of Potential Harms

An assessment of the fiscal consequences of Family First’s purpose of promoting family and marriage would have aided in the clarity of factors to consider in relation to political purposes. Unfortunately, the lack of deliberation by the majority in *Family First (CA)*¹³² to the potential harms associated with Family First’s purpose has resulted in ambiguity as to what the judiciary, and Charities Board, should consider relevant in determining whether a political purpose is charitable.

1. Prior New Zealand precedent

The Act does not prescribe that this assessment be done, so Courts must look to the common law. Mallon J in *Greenpeace (HC)*¹³³ stated that the purpose of an entity could be inferred from

129 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [10].

130 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [10].

131 *Family First New Zealand v Attorney-General (CA)*, above n 7.

132 *Family First New Zealand v Attorney-General (CA)*, above n 7.

133 *Greenpeace of New Zealand v Charities Registration Board (HC)*, above n 6, at [22].

its activities. These activities may also assist in determining the consequences of pursuing a purpose that has not been adjudged as charitable. In examining each of the political activities and types of advocacy Greenpeace NZ undertakes, his Honour examined and weighed the potential consequences of such advocacy.¹³⁴ One example of advocacy that Greenpeace NZ undertakes concerns sustainable fishing practices. Mallon J determined that such advocacy is of public benefit despite the competing interests of the fishing industry and other economic considerations.¹³⁵ Also supporting this assessment, albeit differently, is the Court in *Re Centrepoint Community Growth Trust (Centrepoint)*. The Court had to determine whether a revised scheme for the community could be held to be for the relief of poverty, the first head of charity.¹³⁶ The Court, in this case, considered the harms of not providing relief, that those within the community had no life skills, personal assets and would struggle to find work and housing.¹³⁷ This would result in them being a burden on New Zealand society, and for this reason, Cartwright J held that payments under the relief of poverty could be justified on these grounds. Despite the public distaste towards this decision, the harms and consequences were assessed according to the charitable purpose.

2. *Family First (CA) assessment of potential harms*

The majority in *Family First (CA)* did not scrutinise the different political activities, and advocacy Family First involves itself in. In this case, Mr McKenzie, senior counsel for Family First, provided the Court with a summary of Family First's activities, including advocacy on sex education.¹³⁸ Regarding sexuality and sex education being taught in schools, Family First provides this comment:¹³⁹

The government is currently pursuing and promoting a curriculum where children are indoctrinated on “gender identity” ideology and the harms of gender stereotypes, and given dangerous messages that they’re sexual from birth, that the proper time for sexual activity is when they feel ready, and that they have rights to pleasure, birth control, and abortion.

Family First engages in activities that seek to grant fewer privileges to the LGBTQ+ community, women and certain forms of family life.¹⁴⁰ Family First undertakes and projects such as “Ask Me First,” an initiative that opposes transgender women access to female bathrooms and toilets,¹⁴¹ and “Protect Marriage,” which opposes the legal recognition of same-sex marriage.¹⁴² In Family First's “Principles on Family”, they acknowledge the “contribution made by single, adoptive and step-parents and extended whānau in society.”¹⁴³ However, Family First also describes other family

134 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [93-94].

135 At [93-94].

136 *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325 (HC).

137 At [51].

138 *Family First New Zealand v Attorney-General* (CA), above n 7, at [44].

139 Family First New Zealand “Sexuality Education in Schools” <<https://familyfirst.org.nz/>>.

140 Jane Calderwood Norton and Jordan Grimmer “The charity conundrum: should Family First get the same status as Greenpeace?” (University of Auckland, News and opinion, 1 September 2020). <www.auckland.ac.nz/en/news/2020/09/01/the-charity-conundrum--should-family-first-get-the-same-status-a.html>.

141 Family First “Ask Me First” <<http://askmefirst.nz/>>.

142 Protect Marriage NZ “One Man. One Woman. That’s Marriage.” <<https://protectmarriage.org.nz/>>.

143 Family First New Zealand “Principles” <<https://familyfirst.org.nz/principles/>>.

forms as “incomplete or fabrications of the state.”¹⁴⁴ With these considerations provided, it appears that Family First’s advocacy for the traditional family entails working against other forms of family life, effectively harming them.

3. Interpretation

The issue is not whether the purpose is controversial, as demonstrated in *Centrepoint*, as a controversial purpose can still be proven to be charitable, so long as there is a public benefit. Instead, this issue lies in what type of assessment the Court should undertake when assessing a purpose’s potential harm and whether this harm negates that purpose’s public benefit. This can become a problem in the future concerning the reliability of charities in the public eye as if harms and consequences are not taken into account, it devalues the concept of charity. It also opens the window for organisations that undertake particular activities which could be construed as “harmful” to apply for charitable status under the premise that *Family First (CA)* does not set out the requirement that an assessment is done. These potential situations support the argument that an assessment on the fiscal consequences of Family First’s purpose would have aided in the clarity of factors a court is required to consider in relation to public benefit and demonstrates how *Family First (CA)* failed to assist in this aspect.

E. Focus on the Traditional Family

The Court of Appeal’s determination of Family First’s purpose contradicts within itself and provides little direction for how such a purpose should be defined. As previously mentioned, the purpose and “end” of Family First has been construed in the most general sense. It is difficult to see the majority’s reasoning to determine this abstract end of a family, later to define Family First’s focus as the traditional family. These appear to be contradicting purposes.

The majority state that Family First’s focus on the “traditional family” did not bar them from obtaining charitable status.¹⁴⁵ The reasoning to support this notion was that traditional families constitute a larger portion of families in contemporary New Zealand. The majority state that it would be “curious” if the promotion of the traditional family were not of public benefit because of the growing acceptance of other family forms.¹⁴⁶ The majority appear to be stating that advocating for the traditional family is self-evidently in the public benefit despite other forms of family life being accepted in New Zealand. Simon France J in *Family First (HC)* observed that whilst Family First’s promotion of the “traditional family” form is likely to be supported by a section of the community. However, if it is achieved at the cost of other family models, it cannot benefit the public.¹⁴⁷ This links back to previous arguments made in this research regarding implementing an assessment of fiscal consequences.

1. Two-limb test

Outlined by Gilbert J in the dissenting judgment, it could be argued that the majority erred in determining that the “traditional family” or “family” is of public benefit “in the sense the law regards

144 Family First New Zealand (CC42358) Charities Board Decision D2013-1, 15 April 2013 (First deregistration decision) at [3].

145 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [145].

146 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [147].

147 *Re Family First New Zealand (HC)*, above n 110, at [65].

as charitable, rather than a section of society on whom charitable benefits may be conferred.”¹⁴⁸ Gilbert J is referencing the aforementioned two-limb public benefit test.¹⁴⁹ The two-limb test sets out that the purpose must confer a benefit on the public or at least a large section of it, and the class of persons receiving the benefit constitute this section of the public. The majority state that Family First’s purpose is to promote the support of family and marriage. For this purpose, the application of the two-limb test would determine that the benefit of the purpose would be the “support” aspect. These would be the activities such as, among others, publishing media releases, articles on topics relevant to its cause, commissioning reports, and making submissions on legislation.¹⁵⁰ Thus, the public or section of the public aspect of the two-limb test would be the “family” or “traditional family”, which Family First advocates for. This section of the public benefits from the advocacy the support of Family First. The majority’s analysis “appears to conflate” these two separate limbs and puts forward the proposition that the “family” is the benefit.¹⁵¹ However, under this analysis, it is unclear who the section of the public would be which is benefitting from the “family” other than the family itself.

F. Endorsement of the Australian Approach

The endorsement by *Family First (CA)* of the argument set forward CLAANZ¹⁵² has created the potential for a hybridised public benefit approach whilst also confusing New Zealand jurisprudence about what approach should be taken in determining the public benefit of advocacy. CLAANZ argues that there is a public benefit associated with political discourse in a free and democratic society and that the content of the position advocated for is not essential.¹⁵³ Their submission to the Court of Appeal supports that if the political advocacy furthers some “unquestionably beneficial law or policy change,” such as advocating for the environment, such benefits can be demonstrated directly by the end advocated for.¹⁵⁴ However, regarding incidental, wider benefits, these might be shown through the means and manner in which the advocacy is undertaken.¹⁵⁵ Where CLAANZ deviates from the principal in *Greenpeace (SC)*¹⁵⁶ is that they submit that the possibility of incidental wider benefits should be considered, regardless of the end advocated for.¹⁵⁷ This approach aligns closely with the majority decision in *Aid/Watch* in support of the “process-based” approach to public benefit, detailed in previous sections. This creates confusion as to which approach is more appropriate in New Zealand jurisprudence for the following reasons.

Firstly, the endorsement contradicts the earlier affirmation of the three-stage public benefit test set out by *Greenpeace (SC)*.¹⁵⁸ *Greenpeace (SC)* aligns with Kiefel J in that “matters of opinion

148 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [197].

149 *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 21, at 152.

150 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [32].

151 At [197].

152 At [153].

153 At [53].

154 At [53].

155 At [53].

156 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

157 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [53].

158 At [123].

may be impossible to characterise as of public benefit either in achievement or in the promotion itself.”¹⁵⁹ Based on this reasoning, *Greenpeace (SC)* set out the three-stage test so that all aspects of the advocacy are considered in determining whether the advocacy is beneficial or not. On the other hand, the Australian High Court solely focused on the means that the organisation was pursuing and avoided assessing the benefit of the ends if they were achieved.¹⁶⁰ These are two distinct approaches in determining the public benefit, endorsed by *Family First (CA)* in the same legal jurisdiction.

Secondly, as these are two distinct approaches, there is also a difference between the purpose and activities of Family First and Aid/Watch. As per the Australian High Court, Aid/Watch encouraged general public debate about how poverty is best relieved.¹⁶¹ Family First, however, seeks the end goal of promoting family and marriage by changing specific laws and policies on matters related to the family, as demonstrated through their day-to-day issue advocacy. Note also that the Australian High Court found that the Aid/Watch advocacy was not favouring particular changes in the law but rather encouraging general public debate on the activities of the government concerning the relief of poverty. In this way, Aid/Watch and the approach taken by the Court in relation to the organisation differs from Family First.

Thirdly, the majority judgment in *Aid/Watch* is heavily reliant on aligning with the Australian Constitution. This system requires an “agitation” for legislative and political change, which the majority assumed would contribute to public welfare.¹⁶² New Zealand does not have a single written constitution; as a result, the constitutional arrangements are derived from a variety of written and unwritten sources. This includes the New Zealand Bill of Rights Act 1990, which confirms the protection of fundamental rights, such as the freedom of expression. This is not to say that the Australian approach cannot be applied in New Zealand because of the lack of a written constitution; it merely demonstrates that New Zealand can be more fluid and evolving in its legal development.

Finally, by undertaking and endorsing the majority’s approach in *Aid/Watch* and aligning with a more “process-based” decision, there comes the point of contention that was addressed earlier. In Australian law, when determining the public benefit of an entity, the Australian Charities and Not-for-profits Commission (ACNC) is required to take into account public detriment. This considers any harms that an entity’s purpose or activities might have on a group of people. As stated previously, the majority in *Family First (CA)* has not considered the harms of Family First’s advocacy in their discussion. This creates confusion as it demonstrates that Family First have not entirely undertaken the Australian public benefit approach despite endorsing it and undertaking certain aspects of it as previously discussed.

To conclude, the endorsement of the CLAANZ approach contradicts the approach of *Greenpeace (SC)*. The endorsed approach is also applied to Family First with little regard to whether the means of Family First’s advocacy is charitable in the same sense as *Aid/Watch*. Overall, it appears that

159 *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [74].

160 Norton, above n 91, at 67.

161 At 68.

162 Chia, Harding and O’Connell, above n 41, at 375.

*Family First (CA)*¹⁶³ has hybridised the *Greenpeace (SC)*¹⁶⁴ and *Aid/Watch*¹⁶⁵ majority decisions. This creates confusion as to which approach: end-focused, process-based, or hybridised version, should be applied in New Zealand.

G. *Dominant vs Ancillary Purposes*

The lack of differentiation between Family First's dominant and ancillary issue advocacy creates more difficulty in determining whether a political purpose is charitable. It is a well-established principle that its purposes must be exclusively charitable for an entity to be charitable.¹⁶⁶ Any non-charitable purposes would not necessarily negate the charity of the organisation so long as they are considered ancillary to the dominant purpose.¹⁶⁷ The Court of Appeal concluded that the position Family First took regarding euthanasia could be charitable. However, the other issues regarding abortion "fall outside the penumbra" of the recognised public good, their purpose of promoting family and marriage.¹⁶⁸ The majority found these other day-to-day issues to be no more than ancillary to the purpose. This specific aspect of the majority judgment did not clearly explain how these issues that "fall outside the penumbra" are distinguishable from those considered charitable. Gilbert J regarded Family First's primary purpose as to engage in issue advocacy. Family First's purposes closely mirror the purposes considered in the case of *Molloy*,¹⁶⁹ which *Greenpeace (SC)*¹⁷⁰ indicated would continue to be non-charitable even in the absence of the political purpose exclusion. This issue advocacy could not be demonstrated to have public benefit under the three-stage test from *Greenpeace (SC)*.¹⁷¹

The majority could be criticised for inferring the organisation's purpose from the day-to-day issue advocacy, yet, later in the judgment, determined that some of those issues are held not to advance this purpose. It is recognised that ancillary purposes do not have to be charitable, nor do they have to support the dominant purpose of the entity. However, as the majority based their determination of the purpose off the day-to-day issue advocacy undertaken by Family First, it is reasonable to assume that this advocacy would be supporting the purpose which the majority set out, that being to support and promote marriage and family. The issue arises because the majority has determined that the issue advocacy is only ancillary, despite inferring the purpose of these activities. Furthermore, the majority have done little to distinguish the promotion of family and marriage in the abstract from advocating for particular positions in debates concerning family and marriage. This adds to the confusion in determining whether a political purpose and the advocacy that is undertaken is charitable.

163 *Family First New Zealand v Attorney-General (CA)*, above n 7.

164 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

165 *Aid/Watch Inc v Commissioner of Taxation*, above n 50.

166 Chevalier-Watts, above n 19, at 60.

167 Chevalier-Watts, above n 19, at 60.

168 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [176].

169 *Molloy v Commissioner of Inland Revenue*, above n 31.

170 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

171 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

H. The Warning

Family First (CA) provided Family First with a warning regarding some of the issue advocacy undertaken. This warning by the Court could create issues in the future and could open the floodgates to charities undertaking activities not related to their purpose. The majority conceded that there were issues that Family First advocates for that fall outside the “end” for advocating for family and marriage as it is currently recognised in society. The majority warned Family First that it will need to “bear that in mind as it determines its priorities and activities for the future.”¹⁷² This form of aversion by the Court could be viewed as troublesome in the future. When an association is already undertaking advocacy on a specific position that is not ancillary to its primary purpose, issues may arise as to the policing of this advocacy. A similar procedure of political audits undertaken in Canada caused controversy due to those being audited feeling targeted.¹⁷³ One can expect a response not dissimilar in New Zealand should the government implement this.

1. Opposing argument

Some arguments oppose the hypothesis, which will be addressed accordingly.

It is agreed that Family First had a “strong case for saying that promoting the role of the family in society would be charitable.”¹⁷⁴ The statement supports the argument that:¹⁷⁵

... some level of controversy in an organisation’s purposes, and arguably an inability to definitively conclude which side of the controversy is correct, would not seem to prevent an assessment of public benefit.

However, the majority’s approach to determining Family First’s purpose and applying the three-stage test makes it difficult to determine whether the advocacy controversy impedes its ability to be charitable. The purpose of peace and nuclear disarmament was regarded by both *Greenpeace (SC)*¹⁷⁶ and *Greenpeace (HC)* to unlikely be considered in the public benefit because of the incapability of which approach to achieve peace is “best”. Greenpeace NZ’s purpose of protecting the environment could be considered controversial, as there were opposing views. However, the benefit stemmed from the awareness and broad-based support. In application to Family First, the issue is not solely regarding the controversy of the end promoted; it is the means and method the association achieves that end through their issue advocacy.

For these reasons, it is argued that the majority in *Family First (CA)* have caused more issues than clarity by blurring the lines between New Zealand and Australian approaches to advocacy as a charitable purpose.

172 *Family First New Zealand v Attorney-General (CA)*, above n 7, at [176].

173 Susan Glazebrook “A charity in all but law: The political purpose exception and the charitable sector” (2019) MULR 42(2) 632 at 639.

174 *Re Family First New Zealand (HC)*, above n 110, at [52].

175 *Re Family First New Zealand (HC)*, above n 110, at [52].

176 *Re Greenpeace of New Zealand Inc (SC)*, above n 2.

IX. CONCLUSION

Where does this leave New Zealand in relation to advocacy in charity law? Respectfully, I agree with the description set forward by Matthew Harding that advocacy in New Zealand charity law is “murky and unfriendly waters”.¹⁷⁷ This research has argued that the decision of *Family First (CA)* has not aided in clarity on the topic of advocacy, as it has created more questions than answers.

The case of *Aid/Watch* has impacted the development of New Zealand charity law in relation to advocacy, and *Family First (CA)* demonstrated that *Aid/Watch* continues to impact the approach New Zealand Courts take. The majority decision in *Aid/Watch* places a heavy emphasis on the constitutional value of free political speech, ensuring that even one-sided views may be found to be for public benefit.¹⁷⁸ The High Court in *Aid/Watch* held that the Courts are not required to adjudicate the proposed law or policy change being put forward by an organisation, rather than generating debate in itself is in the public welfare.¹⁷⁹ The New Zealand position before *Family First (CA)* aligned more closely with the dissenting judgment of Kiefel J than with the majority in *Aid/Watch*.

The Supreme Court in *Greenpeace (SC)* held that an enquiry into the public benefit of a political advocacy purpose must focus on the end advocated for before addressing the means and manner that this end is to be carried out.¹⁸⁰ Both of the *Family First (HC)*¹⁸¹ and *Family First (CA)*¹⁸² cases applied, what they stated to be, the approach set out in *Greenpeace (SC)*.¹⁸³ The stark difference between the two cases is in defining Family First’s purpose and applying the public benefit test to this purpose. The arguments concerning the purpose and end determination and an assessment of public benefit support the hypothesis that the Court has done little to improve the clarity of the law, as it has ultimately changed the approach as to what to assess in a public benefit test.

The principle that *Family First (CA)* has made clear is that much of the difficulty in cases where the public benefit is in question lies in the interpretive exercise undertaken by decision-makers in determining the purpose of that organisation. New Zealand charity law appears to be missing a coherent and practicable theory of advocacy as a charitable purpose to aid judicial decision-making. Until such a theory is developed and consistently applied by the Courts, advocacy in charity law will continue to be misunderstood. The courts will continue to struggle to differentiate charitable political purposes from those that are not.

In light of the registration of Family First, the Attorney-General has applied for and been granted leave to appeal to the Supreme Court about the Court of Appeal’s decision that Family First qualifies for registration under the Charities Act 2005.¹⁸⁴ The upcoming case may bring more clarity to the acceptance of advocacy in New Zealand charity law.

177 Matthew Harding “An Antipodean View of Political Purposes and Charity Law” (2015) 131 LQR 181 at 183.

178 Glazebrook, above n 168, at 667.

179 *Aid/Watch Inc v Commissioner of Taxation*, above n 50.

180 *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [76].

181 *Re Family First New Zealand (HC)*, above n 110.

182 *Family First New Zealand v Attorney-General (CA)*, above n 7.

183 *Re Greenpeace of New Zealand Inc (SC)*, above n 2, at [76].

184 Charities Services “Update from Te Rātā Atawhai, the Charities Registration Board on the Family First Court of Appeal decision” (11 January 2021) <www.charities.govt.nz/news-and-events/hot-topics/update-from-te-rata-atawhai-the-charities-registration-board-on-the-family-first-court-of-appeal-decision/>.

THE IMMIGRATION AND PROTECTION TRIBUNAL: ITS FIRST TEN YEARS

BY JUDGE PETER SPILLER*

On 29 November 2020, the New Zealand Immigration and Protection Tribunal (the Tribunal) celebrated its 10th anniversary.¹ The Tribunal is a specialist appellate body that hears appeals and applications from decisions of Immigration New Zealand and the Refugee Status Unit (agencies within the Ministry of Business, Innovation and Employment (MBIE)).² The appeals relate, variously, to people whose applications for residence have been declined, who have become liable for deportation, or whose claims to refugee and protected person status have been declined. The overall purpose of the Tribunal's governing legislation is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.³

This article reflects on the genesis of the Tribunal and its work during the 10 years of its existence.

I. BACKGROUND TO THE ESTABLISHMENT OF THE TRIBUNAL

The Tribunal was preceded by four separate tribunals. The oldest of these was the Deportation Review Tribunal (DRT), established in 1978.⁴ The Minister of Immigration had the discretion to deport persons who were not New Zealand citizens, and who were convicted of a certain criminal offence within a certain period of time.⁵ The DRT was set up to hear and decide appeals from such persons who were ordered to leave.⁶ There was seen to be the need for a forum for those whose residence status was in jeopardy, to “argue the balance of public interest as against their personal and private need”.⁷

In 1991, two further tribunals were established by statute, reflecting the widely accepted view that government powers in immigration matters should not be exercised arbitrarily or unfairly.⁸ The

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1 The Tribunal came into existence on 29 November 2010 (see Immigration Act 2009 Commencement Order 2010 (SR 2010/185)).

2 Prior to June 2019, the Refugee Status Unit (RSU) was known as the Refugee Status Branch (RSB).

3 Immigration Act 2009, s 3(1).

4 Immigration Amendment Act 1978, s 22B.

5 Immigration Act 1964, s 10.

6 Immigration Amendment Act 1978, ss 21(1) and 22C. The enabling Bill was introduced by the Hon Frank Gill ((4 July 1978) 418 NZPD 1408).

7 (4 July 1978) 418 NZPD 1411, per David Lange. The introduction of appeal to the DRT was seen to be “a further act of common sense and humanitarianism [sic] by the Government, which has been solving very many thorny immigration problems” ((5 July 1978) 418 NZPD 1571, per Anthony Malcolm). The jurisdiction of the DRT was later extended to include humanitarian appeals against the revocation of permits (Immigration Act 1987, section 22(1)).

8 (3 July 1991) 516 NZPD 610, per Hon William Birch.

Residence Appeal Authority ((RAA), renamed, in 2003, the Residence Review Board (RRB)) was established to decide appeals from persons whose applications for New Zealand residence visas or permits had been declined.⁹ There was now a greater emphasis on residence permits being based on detailed immigration policy requirements rather than on preferences for people from specific countries.¹⁰ It was noted that appeals against the refusal of residence were currently occupying an excessive amount of ministerial time, and that the new Authority would conduct an independent review of residence appeals without input from the immigration service.¹¹ The Removal Review Authority (RRA) was created to decide appeals from persons (sometimes called “overstayers”) on whom removal orders had been served for being unlawfully in New Zealand.¹² There had hitherto been an appeal by such persons to the Minister of Immigration on humanitarian grounds, and this jurisdiction was now transferred to the RRA.¹³ The RRA was intended to be part of a new streamlined process designed to obviate the substantial delays occurring in the existing process.¹⁴

From the 1970s, refugee claims had been investigated by an interdepartmental committee of the Ministries of Foreign Affairs and Immigration, and its recommendations had then been decided upon by the two Ministers concerned.¹⁵ The 1980s saw a significant increase in refugee claims, and the evident limitations in the existing system pointed to the need for an impartial and independent tribunal.¹⁶ In 1991, the Refugee Status Appeal Authority (RSAA) was established, not by statute, but under terms of reference issued by the New Zealand Government.¹⁷ Subsequently, the Court of Appeal twice expressed reservations as to the appropriateness of refugee procedures being extra-statutory.¹⁸ In 1999, the RSAA was given a statutory basis, to ensure that New Zealand

9 Immigration Amendment Act 1991, s 9; and Immigration Amendment Act (No 2) 2003, s 12. The replacement of the RAA with the RRB came with new procedures for residence decisions and the removal of rights of appeal or review where a person was not invited to apply for residence ((28 August 2003) 611 NZPD 8200).

10 D Tennent *Immigration and Refugee Law* (2nd ed, Lexis Nexis, Wellington, 2014) at 12.

11 (3 July 1991) 516 NZPD 610, per Hon William Birch.

12 Immigration Amendment Act 1991, s 31. See *Kumar v Minister of Immigration* HC Auckland M1324/93, 7 September 1993.

13 Immigration Act 1987, s 63.

14 (3 July 1991) 516 NZPD 610-611, per Hon William Birch (current “legal avenues can permit a person who is unlawfully here to remain in this country for extended periods with concomitant costs to the country in servicing those persons”).

15 R Haines *An Overview of Refugee Law in New Zealand: Background and Current Issues* (International Association of Refugee Law Judges, 10 March 2000); and B Burson “Give Way to the Right: The Evolving Use of Human Rights in New Zealand Refugee Status Determination” in B Burson and D Cantor *Human Rights and the Refugee Definition* (2016) 26.

16 See the judgment of the High Court in *Minister of Foreign Affairs v Benipal* HC Auckland A878/83, 29 November 1985 per Chilwell J.

17 The initial terms of reference, to deal with applications for refugee status, were approved on 17 December 1990 (Haines, above n 15).

18 *Butler v Attorney-General* [1999] NZAR 205 (CA) at 218–220 (“if there is good reason for the other immigration tribunals to be established by legislation there is at least equal reason in the case of the Authority”); and *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 at 294 (“again draw attention to the desirability of legislative attention to this matter – its importance should not be overlooked”).

properly met its obligations under the 1951 Refugee Convention.¹⁹ The RSAA determined appeals from persons whose claims to refugee status had been declined, or whose refugee status had been cancelled because it had been obtained by fraud or the like.²⁰

In late 2004, there commenced a review of the Immigration Act 1987.²¹ The review was concluded five years later with broad parliamentary support. The resulting Immigration Act 2009 replaced the four preceding tribunals with the single Tribunal, administered by the Ministry of Justice.²² This new jurisdiction was meant to streamline and simplify New Zealand's immigration and refugee processes,²³ and to prevent people with no right to remain in New Zealand from delaying their departure through multiple, sequential appeals to different appellate bodies.²⁴ Whereas three of the preceding tribunals had been administered by the Department of Labour, the Ministry of Justice was made responsible for the administration of the new Tribunal. This arrangement was designed to eliminate any perception of a conflict of interest, which had been a concern in the previous structural arrangement.²⁵

II. COMPOSITION OF THE TRIBUNAL

A. *The Chair of the Tribunal*

The Tribunal is headed by a chair, being a District Court Judge.²⁶ A key reason for the requirement that the chair be a District Court Judge was so that proceedings before the Tribunal that involve classified information would be heard by one or more District Court Judges.²⁷ There has not, as yet, been any matter before the Tribunal involving classified information.

19 Immigration Amendment Act 1999, s 40. See (29 September 1998) 572 NZPD 740–741, per Hon Tuariki Delamere (“the provision of a statutory basis for refugee status determination and appeal bodies will also clarify the interface between the Immigration Act, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees to which New Zealand is a signatory. In particular, the obligation not to remove or deport a refugee will be clearly spelt out”); and (18 March 1999) 575 NZPD 845, per Hon Max Bradford (“The substantial thrust of this legislation was really to try to regularise the situation in respect of refugee claimants, and to manage the risk in this area much more successfully, but without removing the inherent humanitarian rights of genuine refugees who have every right to claim refugee status in New Zealand under our commitments to the United Nations High Commissioner for Refugees”).

20 Immigration Amendment Act 1999, s 40.

21 (29 October 2009) 658 NZPD 7638, per Hon Nathan Guy.

22 Immigration Act 2009, s 218(1), and sch 2, cl 5. The third reading of the Act passed by 108 votes (National, Labour, Act, Progressive and United Future parties) to 12 (Green and Maori parties).

23 “Administrative efficiencies are made by joining the various appellate bodies into one” ((22 September 2009) 657 NZPD 6747, per Hon David Cunliffe).

24 (16 August 2007) 641 NZPD 11231, and (29 October 2009) 658 NZPD 7638.

25 The RRA, RRB and RSAA had been administered by the Department of Labour, and the DRT had been administered by the Department for Courts (later, the Ministry of Justice). See the Immigration Act 1987, sch 3 cls 1–2; sch 3A cl 3; sch 3B cl 3; and sch 3C cl 5.

26 Immigration Act 2009, s 219(1)(a). The chair is appointed by the Governor-General on the advice of the Attorney-General, after consultation with the Minister of Justice and the Minister of Immigration (s 219(2)).

27 Section 240(1). Classified information includes, for example, information which, if disclosed, would be likely to endanger the safety of any person (section 7).

The chair has a responsibility to decide appeals.²⁸ In this way, the chair can remain in touch with the core functions of the Tribunal, and help address the fluctuating inflow of appeals into the Tribunal. The chair also has a supervisory and pastoral role in relation to members,²⁹ and administrative functions in relation to the practice and procedure of the Tribunal.³⁰ The chair aims to set high work standards for the members of the Tribunal, create a supportive work environment, and promote good relations with the Ministry staff who service the Tribunal. The chair conducts bi-annual performance review meetings with members, chairs monthly meetings, participates in annual training of members, and helps to ensure adequate reference materials and other resources for members.³¹

The inaugural chair of the Tribunal was Judge Bill Hastings, who served from July 2010 to February 2013. Appropriately, he was himself an immigrant, having come to New Zealand in 1985 from Canada. He lectured in law at Victoria University and served on tribunals, notably as Chief Censor for nearly 11 years, before being appointed as District Court Judge and the Tribunal's first chair.

Judge Hastings was succeeded as chair by Judge Carrie Wainwright, who served from April 2013 to May 2014. She came to the Tribunal having practised at the bar, been appointed to the Maori Land Court bench in 2000, served on the Waitangi Tribunal for 10 years (including six years as the deputy chair), and sat on the District Court bench from 2010.

Since August 2014, the chair of the Tribunal has been Judge Peter Spiller. He, like Judge Hastings, was an immigrant, having come from South Africa in 1988. Before his appointment as Chair, he taught at Law Schools at the Universities of Natal, Canterbury and Waikato, served as Principal Disputes Referee (2005–2010), and then worked as a District Court Judge in the criminal and civil jurisdictions (from 2009).

B. Deputy Chairs of the Tribunal

There is provision for the Minister of Justice to designate one or more members of the Tribunal as deputy chairs.³² If the chair of the Tribunal is unable to act as chair by reason of illness, absence from New Zealand, or other sufficient cause, a deputy chair may act as chair.³³

There were initially four deputy chairs of the Tribunal, as a transitional measure reflecting the four streams of work inherited by the Tribunal. The deputy chairs were Martin Treadwell, David Plunkett (until June 2011), Allan Mackey (until September 2011) and Melissa Poole (until

28 Section 220(1).

29 This role includes making practicable arrangements to ensure that the Tribunal members discharge their functions in an orderly and expeditious manner and in a way that meets the purposes of the Act; directing the education, training, and professional development of members of the Tribunal; and dealing with complaints made about members of the Tribunal (s 220(1)).

30 The chair has authority to issue practice notes for the purposes of regulating the practice and procedure of the Tribunal; develop a code of conduct for members of the Tribunal; and require particular members of the Tribunal to determine particular appeals (s 220(2)).

31 Tribunal members have access to Practice Notes, Procedures Manuals, a Code of Conduct, the website of Tribunal decisions and other resources.

32 Immigration Act 2009, sch 2 cl 3.

33 This role is subject to, in the case of proceedings involving classified information, the deputy chair being a District Court Judge.

September 2014).³⁴ Deputy chairs have not been appointed to replace those who have left the Tribunal, and therefore, since September 2014, Martin Treadwell has functioned as the sole Deputy Chair.³⁵ The presence of a single Deputy Chair has worked well, given the size of the Tribunal, and the increasing tendency for members to work across several streams of work.

C. Tribunal Members

The Tribunal also comprises members who are lawyers who have held a practising certificate for at least five years or have other equivalent or appropriate experience.³⁶ Members hold office either full-time or part-time, for a period up to five years, and may be reappointed.³⁷

At the establishment of the Tribunal in 2010, 17 members (including the four Deputy Chairs) were appointed to serve with the Chair.³⁸ Of those members, 13 had served in one or more of the predecessor immigration and refugee tribunals. As the workload of the Tribunal increased, or sitting members reduced their time commitment to the Tribunal, new members were appointed.³⁹ There are currently nine full-time members and 13 part-time members of the Tribunal. A notable feature of the composition of the Tribunal has been its stability. Of the original 17 appointees, 12 still continue to serve in the Tribunal, with departures being the exception and reappointments being the norm.

A notable feature of the Tribunal's membership has been that the work of members has come to be respected in New Zealand and, particularly in the refugee sphere, overseas. Members of the Tribunal have been asked to serve on and contribute to international refugee bodies and to assist in the development of protection systems in other countries.⁴⁰ Members have been invited as delegates to a number of UNHCR Expert Roundtables on various protection issues, and have been responsible for organising and/or speaking at significant international conferences and workshops,

34 David Plunkett resigned to take up appointment as Chair of the Legal Aid Tribunal; Allan Mackey retired from full-time work; and Melissa Poole resigned to take up appointment as Principal Tenancy Adjudicator.

35 Martin Treadwell had, prior to his appointment as deputy-chair, been a member of all four of the predecessor bodies.

36 Immigration Act 2009, s 219(1)(b). The members are appointed by the Governor-General on the recommendation of the Minister of Justice made in consultation with the Minister of Immigration (s 219(3)).

37 Schedule 2 cl 1(1)–(2). A person cannot be appointed as a member if he or she is (or has been in the previous five years) an immigration officer or a refugee and protection officer (s 219(4)). There is also provision for a representative of the United Nations High Commissioner for Refugees (UNHCR) to serve as an *ex officio* member in relation to matters relating to refugees, and for a District Court Judge seconded to the Tribunal to exercise the jurisdiction of the Tribunal in relation to proceedings involving classified information (s 219(1)(c)–(d)). However, these provisions have not as yet been used.

38 The new members were: Sharelle Aitchison, Bruce Burson, Annabel Clayton, Bridget Dingle, Jeanne Donald, Peter Fuiava, Denese Henare, Allan Mackey, Andrew Molloy, Louise Moor, Sharon Pearson, David Plunkett, Melissa Poole, Virginia Shaw, Graham Taylor, Martin Treadwell and Veronique Vervoort.

39 In 2011, Matthew Martin was appointed to replace David Plunkett; in 2012, Zoe Pearson was appointed to replace Alan Mackey and Larissa Wakim was appointed to a new position; in 2013, Moana Avia was appointed to replace Graham Taylor; in 2015, Debra Smallholme was appointed to replace Melissa Poole and Aaron Davidson was appointed to cover the reduction in time of another member; in 2016, Martha Roche was appointed to a new position; and, in 2018, Stewart Benson and Tracy Cook were appointed to new positions, and Mark Benvie was appointed to cover the reduction in time of another member.

40 The current Deputy Chair, Martin Treadwell, is secretary of the International Association of Refugee and Migration Judges (IARMJ) and President of the Asia Pacific Chapter of the IARMJ. He and Bridget Dingle have led training in numerous jurisdictions, including Korea, Japan, the Philippines, Taiwan, Vanuatu, Australia and Hong Kong.

both in New Zealand and abroad.⁴¹ Decisions of the Tribunal (particularly in the refugee sphere) have come to be cited by overseas courts and tribunals as authority.⁴² The Tribunal's refugee jurisprudence has been instrumental in shaping refugee protection in the work of the UNHCR, for example, in relation to Palestinian refugees and in the context of disasters and climate change.⁴³

D. Tribunal Administration

The Tribunal's headquarters are in the Tribunals' office of the Ministry of Justice in Auckland, and there is also a branch in the Tribunals' office in Wellington.

The administration of the Ministry of Justice has undergone restructuring, but the essential features of administration have remained intact, and expertise has developed as the Tribunal has evolved.⁴⁴ The Tribunal is currently administered by a Manager Justice Services (Tribunals), a Service Manager, and 20 other personnel including Support Officers, Case Managers, and Legal Research Advisors.⁴⁵ The administration team provides active case management of all appeals, prepares all appeal files, corresponds with interested parties, and attends to legal research, proof reading, dispatch and publication of decisions.

The Tribunal interacts with MBIE primarily through the Immigration and Protection Tribunal Liaison Team (IPTLT). This team was established within MBIE to ensure a separation of function and role between the original decision-maker at MBIE (both Immigration New Zealand and the Refugee Status Branch) and the Tribunal. The IPTLT transfers information to the Tribunal, including case files for all appellants, and contact with the IPTLT is made exclusively via the Tribunal administration team.

The Tribunal has developed a website which provides information about the Tribunal and its processes, and includes a searchable database of published Tribunal decisions.⁴⁶ The database provides important assistance and guidance to appellants, counsel, representatives and other users of the Tribunal.⁴⁷ However, refugee and protection decisions must (for confidentiality reasons) be edited so as to remove the name and any particulars likely to lead to the identification of the appellant or those affected; and the Tribunal exercises its discretion to depersonalise all residence decisions, as well as those deportation decisions necessitating this process (for example, to protect

41 These include the 2016 IARMJ Asia Pacific conference in Seoul, the 2018 IARMJ Asia Pacific conference in Parliament Buildings, Wellington, and the 2019 IARMJ Regional Workshop on credibility in Melbourne.

42 On 24 October 2019, the United Nations Human Rights Committee upheld Bruce Burson's decisions in *AF (Kiribati)* [2013] NZIPT 800413 and *AC (Tuvalu)* [2014] NZIPT 800517-520, accepting that disaster and climate can in principle raise protection issues.

43 UNHCR *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* HCR/GIP/17/13, December 2017; and UNHCR *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters* 1 October 2020.

44 The administrative requirements for the Tribunal were determined during its implementation phase and were based on the extensive experience of the legacy bodies and the forecasting that the then Department of Labour was able to provide. The overall number of people supporting the Tribunal remains the same as was determined initially, although some roles and titles now differ.

45 The current Manager Justice Services (Tribunals) is Jessie Henderson, and the current Service Manager is Minja Pesic, both of whom are long-serving staff members.

46 <www.justice.govt.nz/tribunals/immigration/immigration-and-protection>.

47 While the Tribunal's decisions have important persuasive force, the Tribunal may, if required, depart from previous decisions (see *JO (Skilled Migrant)* [2016] NZIPT 202934).

victims of offending).⁴⁸ The Tribunal also has the discretion to prohibit the publication of any evidence received by it, or any report or description of the proceedings or of any part of the proceedings.⁴⁹ The Tribunal exercises this discretion where publication is likely to identify the appellant or person concerned (in relation to a sensitive or highly personal issue) or endanger the safety of the appellant or others.⁵⁰

III. JURISDICTION OF THE TRIBUNAL

In line with the jurisdictions of the tribunals which were replaced, the Tribunal hears appeals in four streams of work.⁵¹ In two of the Tribunal's streams, namely, residence and deportation non-resident, jurisdiction is exercised on the papers.⁵² In the other two streams, namely, deportation-resident and refugee and protection, the Tribunal's exercise of jurisdiction involves hearings.⁵³

A. Residence Appeals

The Tribunal has jurisdiction to determine appeals against decisions of Immigration New Zealand to decline to grant residence class visas.⁵⁴ Residence appeals have comprised 50.8 per cent of the total workload of the Tribunal to date. Appeals have included those under the Skilled Migrant, Family, Business and other categories of residence instructions. During most of the Tribunal's history, residence appeals have constituted the largest work stream for the Tribunal. However, in the last two years, changes in immigration instructions and Immigration New Zealand's work priorities have resulted in a significant reduction in residence appeals.

The Tribunal has allowed nearly 34 per cent of residence appeals. Where the Tribunal has done so, the most common decision has been to cancel Immigration New Zealand's decision as being incorrect, and refer the matter back, with directions, to Immigration New Zealand for a correct assessment.⁵⁵ Less commonly, the Tribunal has noted the correctness of Immigration New Zealand's decision at the time it was made, but has, in light of additional information, cancelled the decision and referred the matter back to Immigration New Zealand.⁵⁶ On very rare occasions, the Tribunal has itself reversed the decision of Immigration New Zealand as being incorrect or because of additional information properly provided to the Tribunal.⁵⁷

48 Immigration Act 2009, sch 2 cl 19(2)–(4). See *BR (Samoa)* [2020] NZIPT 600644.

49 Schedule 2, clause 18(4).

50 Section 151(1). See *HI (Fiji)* [2020] NZIPT 801758.

51 The figures reflected below are for the period from 1 December 2010 to 30 June 2020 (the end of the 2019/20 court year).

52 Immigration Act 2009, s 234(2). There is a discretion for the Tribunal to offer a hearing in deportation non-resident appeals (s 233(2)), but this discretion is very rarely exercised (see *AE (Japan)* [2013] NZIPT 501382).

53 Sections 233(1) and 233(3). There are exceptional circumstances where a refugee hearing does not have to be held, as for, example, where the Tribunal considers that the appeal is *prima facie* manifestly unfounded or clearly abusive (s 233(3)).

54 Sections 217(2)(a)(i) and 187(1)(a)(i).

55 Section 188(1)(e). This occurs where the Tribunal is not satisfied that the appellant would, but for the incorrect assessment, have been entitled in terms of residence instructions to the visa or entry permission. See *MJ (Skilled Migrant)* [2020] NZIPT 205733.

56 Section 188(1)(d). See *FJ (Partnership)* [2020] NZIPT 205725.

57 Section 188(1)(b). See *BM (Partnership)* [2019] NZIPT205419.

In 53 per cent of residence appeals, the Tribunal has confirmed, without qualification, the decisions of Immigration New Zealand as correct.⁵⁸ In a further 13 per cent of appeals, the Tribunal has confirmed Immigration New Zealand's decision as having been correct, but recommended that the special circumstances of the appellant were such as to warrant consideration by the Minister of Immigration as an exception to residence instructions.⁵⁹ Recommendations have generally been considered by the Associate Minister of Immigration. In over 91 per cent of the recommendations considered to date, residence has been granted as an exception to instructions.

Residence appeals involve the careful scrutiny of applicable immigration instructions governing the grant of residence.⁶⁰ A range of issues arise in residence appeals regarding correctness: these include character, health, English language ability, identity, adoption and other children's issues, the genuineness and stability of partnerships, the use of DNA testing, whether employment is skilled, and whether a person's business was different from his business proposal.⁶¹ The Tribunal tries to ensure that principles of natural justice have been adhered to, and that Immigration New Zealand's decisions have been made in accordance with residence instructions.⁶² Through its interpretation of instructions, the Tribunal provides guidance to Immigration New Zealand, counsel and representatives, and the broader public.⁶³

Where appeals involve potential referral to the (Associate) Minister for the grant of residence as an exception to instructions, the Tribunal assesses whether the personal circumstances of the appellant and his or her family are uncommon or out of the ordinary.⁶⁴ For example, a matter was successfully referred to the (Associate) Minister where the appellant was permanently disqualified from obtaining residence on the basis of her relationship with her New Zealand-resident partner, and where she would remain the only member of her nuclear family without residence status (including her autistic son who required her ongoing care and support).⁶⁵

B. *Deportation Non-resident Appeals*

The Tribunal has jurisdiction to determine appeals against liability for deportation.⁶⁶ Deportation non-resident appeals have comprised 29.9 per cent of the total workload of the Tribunal. Such appeals have been brought by persons who: were unlawfully in New Zealand; were temporary visa holders and Immigration New Zealand determined that there was sufficient reason to serve them with a deportation liability notice; or had claimed refugee or protected person status.⁶⁷

58 Section 188(1)(a). See *IO (Dependent Child)* [2020] NZIPT 205760.

59 Section 188(1)(f). See *FT (Partnership)* [2020] NZIPT 205770. The (Associate) Minister need not give reasons for the decision and is not bound to look beyond the Tribunal's decision which made the recommendation.

60 The immigration instructions can be found in the Immigration New Zealand (INZ) Operational Manual (see www.immigration.govt.nz/opsmanual).

61 See, for example, *HD (Skilled Migrant)* [2015] NZIPT 202764; *IL (Dependent Child)* [2020] NZIPT 205529; and *EX Entrepreneur Residence Visa* [2020] NZIPT 205768.

62 See, for example, *KW (Parent)* [2016] NZIPT 203089.

63 See, for example, *AG (Migrant Investor)* [2014] NZIPT201938; *LF (Skilled Migrant)* [2014] NZIPT202205; and *FY (Dependent Child)* [2017] NZIPT203960-961.

64 *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24].

65 *ZH (Partnership)* [2019] NZIPT 205268.

66 Immigration Act 2009, s 217(2)(a)(v).

67 Sections 154(1), 157(1) and 194(5).

The sole statutory grounds of appeal in deportation non-resident cases are that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.⁶⁸ The Tribunal may not properly consider the merits of Immigration New Zealand's decision.⁶⁹

The Tribunal has, in view of the high threshold, allowed only 31 per cent of appeals in deportation non-resident cases. Having done so, the Tribunal is able to order the grant of either a resident visa or a temporary visa for a period not exceeding 12 months.⁷⁰ The former visa has been granted where the appellant's exceptional circumstances have been seen to be compelling and permanent, and the latter visa where the exceptional circumstances have been seen to be of a contingent or more short-term nature.⁷¹

Where the Tribunal has declined a deportation non-resident appeal, the Tribunal may reduce or remove the period of prohibited entry to New Zealand.⁷² This order has commonly been made where the appellant has had close family in New Zealand and it was considered appropriate to allow him or her the opportunity to apply for a visa to return in the near future.⁷³ The Tribunal may also, if it considers it necessary to enable the appellant to remain in New Zealand for the purposes of getting his or her affairs in order, order that the deportation of the appellant be delayed for up to a year; or order that a temporary visa, valid for a period up to a year, be granted to the appellant.⁷⁴ The Tribunal has delayed deportation or ordered a temporary visa where, for example, the appellant has been in New Zealand for an extended time and invested in a property or business, or the appellant or his or her children have been near the completion of an educational term or qualification.⁷⁵

Deportation non-resident appeals involve people who have had no entitlement to or legitimate expectation of long-term immigration status. Appeals have commonly been declined where they were brought on the basis of the disputed merits of Immigration New Zealand's decision, or a preference for New Zealand's higher standard of living.⁷⁶ The High Court has affirmed that the stringent statutory test of exceptional circumstances of a humanitarian nature cannot simply be equated with compassionate factors.⁷⁷ However, appeals have been allowed where, for example, appellants have lived in New Zealand for an extended time and it was in the best interests of their New Zealand-citizen children that the appellants remain in New Zealand.⁷⁸

68 Section 207(1).

69 *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977 at [13] and [19].

70 Immigration Act 2009, s 210(1).

71 Compare *Le v Minister of Immigration* [2020] NZIPT 504950 with *Tevesi v Minister of Immigration* [2018] NZIPT 503970.

72 Immigration Act 2009, s 215(1).

73 See *HF (Fiji)* [2020] NZIPT 600657.

74 Immigration Act 2009, s 216(1).

75 See *Thapar v Minister of Immigration* [2020] NZIPT 504903.

76 See *Kartseva v Minister of Immigration* [2015] NZIPT 502502, confirmed by the High Court in *Kartseva v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 97.

77 *Minister of Immigration v Jooste* [2014] NZHC 2882 at [45].

78 *Sio v Minister of Immigration* [2020] NZIPT 504864.

C. *Deportation Resident Appeals*

Deportation appeals may also be brought by those with residence status.⁷⁹ These appeals have comprised only 4.7 per cent of the total workload of the Tribunal. The paucity of appeals reflects the fact that deportation resident appellants are drawn from a comparatively small number of people who have obtained residence but not citizenship in New Zealand. Also, there are (as is seen below) restrictions on the jurisdiction to render residents liable for deportation, and, even where this is possible, the Minister of Immigration (or delegated authority) has a discretion whether to issue deportation liability notices.⁸⁰ Since 2014, there has been increasing use (particularly in cases of lower level offending) of the ministerial discretion to issue a deportation liability notice but to suspend this on condition that there be no further offending within a set period.⁸¹

The most common reason why residents have become liable for deportation has been that they have been convicted a criminal offence of sufficient seriousness within a period after they first held a resident visa.⁸² Such residents may appeal on humanitarian grounds, which are the same as for deportation non-resident appeals.⁸³

The second (less common) reason for residents' deportation liability has been that Immigration New Zealand has determined that the resident visa was obtained through fraudulent, forged, false or misleading information or the concealment of relevant information.⁸⁴ Such residents have an appeal on the facts (the merits of the ministerial decision), as well as on humanitarian grounds.⁸⁵

On rare occasions, the Tribunal has had to hear appeals where an appellant has breached the conditions of deportation liability which has been suspended by the Tribunal in a previous hearing.⁸⁶ In these cases, the Tribunal has a broad discretion whether to reactivate liability for deportation, bearing in mind the overall purpose of the Act.⁸⁷

The Tribunal has allowed the appeal in 35.6 per cent of deportation resident cases. Where appropriate (as noted above), the Tribunal may suspend liability for deportation for up to five years, subject to conditions.⁸⁸ Where the Tribunal declines the appeal, it may make the same orders as are available on declining a deportation non-resident appeal.⁸⁹

79 Immigration Act 2009, s 217(2)(a)(v).

80 The Minister of Immigration may, at any time, cancel a person's liability for deportation (s 172(1)).

81 Section 172(2). Until a statutory amendment of 24 October 2019, persons issued with a suspended deportation liability notice were still required to lodge a humanitarian appeal within 28 days of the notice, with the result that the Tribunal accumulated over 100 deportation-resident appeals that would have little likelihood of being heard (in view of the low incidence of breach of suspension conditions). Since the change, such persons have been allowed to defer the lodging of an appeal until served with a reactivation notice (s 173A), and most have taken up this option, resulting in fewer deportation-resident appeals.

82 Section 161(1). The offending ranges from an offence with the maximum sentence of three months or more committed with two years after the holding of a resident visa, to an offence with the maximum sentence of five years or more committed with 10 years after the holding of a resident visa.

83 Sections 206(1)(c) and 207(1).

84 Section 158(1).

85 Section 158(1)(b). Such appellants have an appeal on the facts unless they have been convicted of the immigration fraud in question (s 158(1)(a)).

86 Section 212(2).

87 Section 212(3) and *Minister of Immigration v Vili* [2020] NZIPT 600661 at [77].

88 Section 212(1).

89 Sections 215(1) and 216(1).

Deportation resident hearings, more so than refugee hearings, are run on mixed inquisitorial and adversarial lines. The decision-maker often plays an active role in testing evidence. However, the Ministry is always represented because of the Crown and public interest, particularly in terms of any offending or fraud. The Tribunal has been assisted by the fact that, in appeals on humanitarian grounds, the essential facts giving rising to deportation liability (for example, regarding the appellant's previous convictions) have not been open to question; and that the appellant has often been in New Zealand for some time and so familiar with the English language and local norms.⁹⁰

Deportation resident appeals commonly involve difficult judgement calls. Frequently, competing demands of law and justice are keenly felt.⁹¹ A common scenario has been where an appellant has been convicted of serious criminal offending, but where he and his family have, as residents, established roots in New Zealand. The Tribunal has then had to apply the strict statutory test, involving the integrity of the immigration system and the broader public interest, in the realisation that deportation would mean the end of a family unit to the detriment of an innocent spouse and children.⁹² However, the remedies available to the Tribunal have been of some assistance. Thus, where the appellant's exceptional circumstances have only marginally outweighed the public interest (particularly as to risk of reoffending), the latter has been acknowledged by allowing an appeal and suspending deportation liability on condition that the appellant not reoffend within a prescribed period.⁹³ On the other hand, where the appellant has not met the statutory test, but there have been significant family or other personal circumstances, these have been acknowledged by removing the statutory bar on re-entry or by delaying deportation to get affairs in order, or both.⁹⁴

D. Refugee and Protection Appeals

The Tribunal has jurisdiction to determine appeals against decisions in relation to recognition or otherwise as a refugee or a protected person.⁹⁵ Refugee and protection appeals have comprised 14.6 per cent of the total workload of the Tribunal.

A refugee is a person recognised as such within the meaning of the 1951 *Refugee Convention*.⁹⁶ This Convention provides that a refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁹⁷ A protected person is a person recognised as such under the 1984 *Convention Against Torture*, or under the 1966 *International Covenant on Civil and Political Rights*, as being

90 See *Minister of Immigration v Hai* [2020] NZIPT 600640.

91 Deportation resident cases have an important public interest dimension, and for this reason the hearings of these cases are open to the public (Immigration Act 2009, sch 2 cl 18(1)). However, the Tribunal may receive any particular evidence in private, or deliberate in private as to its decision on the appeal or as to any question arising in the course of the proceedings (sch 2 cl 18(2)).

92 See *Minister of Immigration v Kumar* [2018] NZIPT 600436, confirmed by the High Court (*Kumar v Immigration and Protection Tribunal* [2018] NZHC 2928).

93 See *Minister of Immigration v Sharma* [2020] NZIPT 600645.

94 See *Minister of Immigration v Grant* [2020] NZIPT 600638, and *Minister of Immigration v Singh* [2020] NZIPT 600639.

95 Immigration Act 2009, s 217(2)(a)(ii)-(iv).

96 Section 129(1) and sch 1.

97 Article 1A(2).

in danger of being subjected to torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment.⁹⁸

Refugee and protection appeals arise out of the decline of claims to refugee and protected person status by the Refugee Status Unit (formerly Branch) of Immigration New Zealand. The Tribunal may allow or dismiss the appeal, but (other than in strictly limited circumstances) may not refer the claim back to a refugee and protection officer for reconsideration.⁹⁹

The Tribunal has allowed appeals in 41.3 per cent of refugee and protected person cases. The higher rate of successful appeals reflects the lower statutory threshold required of refugee appellants than, for example, deportation appellants. It is also an accepted principle that the benefit of the doubt can be given to a refugee appellant when all available evidence has been obtained and checked and when the decision-maker is satisfied as to the appellant's general credibility.¹⁰⁰

Refugee and protection appeal hearings have distinctive features. In view of the potential vulnerabilities of refugee appellants, refugee hearings are confidential and have to be conducted in private.¹⁰¹ They are conducted *de novo*, so that the appellant's claim is heard afresh, as if in a new hearing, though regard is had to the evidence gathered at first instance.¹⁰² Hearings are run on inquisitorial lines, as the decision-maker almost always conducts hearings without the presence of Ministry counsel. The decision-maker is required to establish essential facts while grappling with different cultural norms and being normally dependent on the services of an interpreter.

Refugee and protection hearings require an assessment of the credibility of the person's claim, a task made more difficult due to the complexities of the jurisdiction. Appellants may provide contradictory, questionable or illogical evidence, or fail to provide key witnesses who can be expected to be available.¹⁰³ Appellants are often traumatised or experience psychological issues which may affect their ability to deliver evidence or accurately recall events.¹⁰⁴ Further, where appellants flee their home countries, collecting necessary documentary evidence before, or after, they flee can present unique challenges.¹⁰⁵ Decisions as to questions such as the genuineness of commitment to another religion, or a person's sexuality, concern inherently internal characteristics, involving limited tangible evidence.¹⁰⁶

Where the person's claim is found to be credible, there is then an assessment of whether his or her claim has reached the objective standard of well-founded fear of persecution or being in danger of one of the protected person forms of other qualifying harm. It is a common experience for the Tribunal to be satisfied that a credible appellant has a sincerely-held fear of serious harm.¹⁰⁷ However, this subjective fear is not always backed by objective evidence of a real chance of serious

98 Immigration Act 2009, s 130(1) and 131(1).

99 Section 198(3). The exceptions are contained in ss 196 and 197.

100 The appellant's statements must be coherent and plausible, and must not run counter to generally known facts: *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

101 Immigration Act 2009, s 151 and sch 2 cl 18(3).

102 Sections 196–198.

103 See *CF (Bangladesh)* [2018] NZIPT 801343, and *FR (Sri Lanka)* [2019] NZIPT 801462.

104 See *AL (Nigeria)* [2017] NZIPT 801085.

105 See *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

106 See *XX (Iran)* [2020] NZIPT 801734.

107 See *JK (India)* [2020] NZIPT 801699.

harm, arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection.¹⁰⁸ The Tribunal's assessment involves examination of available country information, which can be contradictory and changing.¹⁰⁹ The hearing is often a journey of discovery for the decision-maker, as to countries and situations hitherto unknown, but also a scene of sadness and relived trauma for the appellant.¹¹⁰ Discernment, care and sensitivity by the decision-maker are prerequisites for work of this kind.

An appellant may establish that he or she has a well-founded fear of being persecuted, but may not be able to show that the persecution in question is for a reason recognised by the Refugee Convention.¹¹¹ In the small minority of appeals where this situation has occurred, the Tribunal has on occasions then found (for reasons commonly connected to crime) that the person has protected person status.¹¹² Thus, for example, the Tribunal found that harm suffered by the appellant in pre-trial detention, in the course of efforts to extract a confession from him, would not be for any Convention reason, but would be because the Chinese authorities routinely engaged in the practice of extracting confessions from suspects by torture or other serious mistreatment.¹¹³

On occasions, the Tribunal has to consider whether a person who has reached the threshold for protected person status should be excluded from protection.¹¹⁴ This question has arisen where there have been serious reasons for considering that the person has committed serious crimes, such as crimes against humanity, war crimes or serious non-political crimes.¹¹⁵

From the complex range of issues which refugee and protection appeals have presented, the Tribunal has, over the years, fashioned some key principles which have shaped the Tribunal's jurisprudence. These principles have covered, for example, procedural fairness,¹¹⁶ the definition of being persecuted,¹¹⁷ credibility assessments,¹¹⁸ and self-imposed restrictions on behaviour being in breach of the right to freedom of belief, thought and conscience.¹¹⁹

108 See *CN (Tonga)* [2019] NZIPT 801731.

109 See *AP (Ethiopia)* [2019] NZIPT 801482; and *BS (Afghanistan)* [2019] NZIPT 801562.

110 See *CL (Pakistan)* [2017] NZIPT 801042; *BM (Bangladesh)* [2017] NZIPT 801057; *EF (Sri Lanka)* [2017] NZIPT 801092; and *EI (Iran)* [2018] NZIPT 801344-345.

111 The recognised grounds are race, religion, nationality, membership of a particular social group, or political opinion (Article 1A(2) of the Refugee Convention).

112 See *AK (South Africa)* [2012] NZIPT 800174-176 and *AN (Malaysia)* [2016] NZIPT 800888.

113 See *ES (China)* [2019] NZIPT 801466.

114 Article 1F of the Refugee Convention and s 198(1)(c) of the Immigration Act 2009.

115 See *CK (China)* [2017] NZIPT 800775-776. Where the issue of exclusion has arisen, the Crown has usually appeared and played an active role because of the public interest.

116 *AN (Bangladesh)* [2014] NZIPT 800542.

117 *DS (Iran)* [2016] NZIPT 800788.

118 *DJ (India)* [2017] NZIPT 801064.

119 *DS (Iran)* [2016] NZIPT 800788. See also *AC (Syria)* [2011] NZIPT 800035; *AB (Germany)* [2012] NZIPT 800107-111; *AH (Egypt)* [2013] NZIPT 800268-272; *AD (Ethiopia)* [2013] NZIPT 800438; *AC (Tuvalu)* [2014] NZIPT 800517-520; and *AL (Myanmar)* [2018] NZIPT 801255.

IV. PRACTICE AND PROCEDURE

A. *Despatch of Tribunal Business*

In the tribunals that preceded the Tribunal, there had been instances of appellants delaying their departure from New Zealand by appealing from one tribunal to the next,¹²⁰ and cases involving elongated processes and delayed decisions.¹²¹ There was also the costly deployment of resources in multi-member panels for all deportation-resident appeals.¹²² The 2009 Act thus emphasised the need for the expeditious despatch of Tribunal business.¹²³

The Tribunal is required to determine appeals with all reasonable speed.¹²⁴ The chair of the Tribunal must make such directions as are necessary to ensure that appeals are heard in an orderly and expeditious manner.¹²⁵ A refugee and protection appellant who wishes also to lodge a humanitarian appeal is required to lodge this appeal at the same time as lodging the refugee and protection appeal.¹²⁶ The chair may direct that more than one appeal be determined together by the same member, and the Tribunal may issue a single decision in respect of the appeals.¹²⁷ The Tribunal consists of only one member, except where the chair directs that, because of the exceptional circumstances of a case, it is to be heard and determined by more than one member.¹²⁸ On any appeal, the Tribunal may rely on any finding of credibility or fact by the Tribunal in any previous appeal determined by the Tribunal that involved the appellant, or by any appeals body in any previous appeal or matter determined by the appeals body that involved the appellant.¹²⁹

These provisions rightly recognise the need for Tribunal proceedings and decisions to be concluded promptly. In recent years, the Tribunal has made considerable progress towards the goal of expeditious despatch of Tribunal business. By the end of June 2013, the average time from receipt of an appeal to the release of the decision was over 13 months. By the end of June 2017, this period had reduced to less than six months, a period which has been maintained to the present.

120 “Whereas there were four appeal authorities before, which created—and a number of us who were Ministers at the time had to deal with this—the ability for those who were inappropriately in New Zealand to, bluntly, drag the chain through appellate body after appellate body after appellate body, and then make request of Ministers. ... the House has accepted a single appellate tribunal to deal with all those rights in an efficient but fair way” ((29 October 2009) 658 NZPD 7638, per Hon Clayton Cosgrove). See also (16 August 2007) 641 NZPD 11231. Reference was also made to individuals who had launched multiple appeals and publicised their cases to the point where, ultimately, the final appellate body ruled that they could not go home because they had raised the awareness of their cases to the point where they feared reprisals from the authorities in their own country ((22 September 2009) 657 NZPD 6747).

121 See, for example, *Refugee Appeal Nos 74796/7* (19 April 2006), where the first hearing had been conducted in December 2003; and *Refugee Appeal No 75574* (29 April 2009), where the first hearing had been conducted in June 2007.

122 The Immigration Act 1987 required the DRT to consist of three members (s 103(2)). While this Act required that in the RSAA was normally to consist of one member (s 129N(6)), multi-member panels were not uncommon in the RSAA.

123 “It is clearly understood that an important task for this tribunal will be to deal with all appeals as quickly as possible” ((16 August 2007) 641 NZPD 11231, per Christopher Finlayson).

124 Immigration Act 2009, s 222(1).

125 Section 223(1).

126 Section 194(6): this provision was a key safeguard against multiple, sequential appeals.

127 Sections 223(2)–(3) and 235.

128 Section 221(1)–(2).

129 Section 231(1).

The improvement in timeliness has not been at the expense of maintaining the quality of decisions. The Tribunal has continued to ensure that every decision is peer reviewed by another member, and then proof-read by a legal research advisor.

B. Nature of Proceedings and Evidence

The proceedings of the Tribunal may be of an inquisitorial or adversarial nature or both, as the Tribunal thinks fit.¹³⁰ The Tribunal may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the proceedings before it, whether or not it would be admissible in a court of law.¹³¹ These provisions have given the Tribunal flexibility to respond to the needs of each appeal as appropriate, particularly in hearings.¹³²

It is the responsibility of an appellant to establish his or her case or claim, and an appellant must ensure that all information, evidence and submissions that he or she wishes to have considered in support of the appeal are provided to the Tribunal before it makes its decision.¹³³ When considering an appeal, the Tribunal may seek information from any source and it has powers of investigation and to summon witnesses.¹³⁴ However, the Tribunal is not obliged to seek any information, evidence or submissions further to those provided by the appellant, and may determine the appeal only on the basis of the information, evidence and submissions provided by the appellant.¹³⁵

These provisions reflect the combined adversarial and inquisitorial aspects of the Tribunal's process. The Act makes clear that it is not appropriate for the Tribunal to establish or create the appellant's case, and the responsibility for doing this rests squarely with the appellant.¹³⁶ The Tribunal decision-maker is not an investigative journalist, and lengthy seeking out of further information is contrary to the Act's clear goal of expeditious despatch of business.¹³⁷ Nevertheless, there are situations where it is appropriate for the Tribunal to exercise its inquisitorial function and seek further information. These situations occur particularly where the appellant is unrepresented, where there have been obvious gaps in the evidence presented (such as, for example, that relating to the best interests of children concerned), or in complex refugee and protection claims requiring further country information and analysis of new issues.¹³⁸

130 Section 218(2).

131 Schedule 2 cl 8(1).

132 See *Pham v Minister of Immigration* [2020] NZIPT 600409 at [56]; and *CD (South Africa)* [2018] NZIPT 600419–423 at [62].

133 Immigration Act 2009, s 226(1).

134 Section 228(1) and sch 2 cls 10–11.

135 Section 228(2).

136 See *CM (India) v Minister of Immigration* [2016] NZIPT 600061 at [114].

137 See *Minister of Immigration v Wu* [2019] NZCA 237 at [53].

138 See *Hai v Minister of Immigration* [2019] NZCA 55 at [50]. Refugee and protection hearings are largely inquisitorial by nature of the unique characteristics of refugee law and the challenges faced by refugee or protected person appellants in obtaining all relevant evidence themselves. See *AM (Myanmar) v Minister of Immigration* [2019] NZIPT 801382.

C. Representation of Parties

Parties may appear personally, or be represented by a licenced immigration adviser or a lawyer.¹³⁹ Most appellants in the Tribunal have been represented. Appellants have a significant incentive to be represented, in wanting either to enter or to stay in New Zealand. Appellants who have not had a formal representative (a licenced immigration adviser or lawyer) have sometimes had a family member or friend to assist in a less formal manner.¹⁴⁰ There is however no right or necessity for appellants to be represented.¹⁴¹

Deportation resident and refugee and protection appellants are more likely to be represented, particularly by lawyers, than other appellants, as legal aid is more likely to be awarded. Residence and deportation non-resident appellants do not generally qualify for legal aid.

Lawyers are normally members of the New Zealand Law Society, and some are members of the Auckland District Law Society.¹⁴² Advisers are required to be licensed by the Immigration Advisers Authority and are subject to a code of conduct, competency standards, and a complaints and disciplinary regime.¹⁴³ Lawyers and advisers are also members of associations that provide collegial and professional support, notably, the New Zealand Association for Migration and Investment (NZAMI) and the New Zealand Association of Immigration Professionals (NZAIIP).¹⁴⁴

D. Further Appeal and Judicial Review

Decisions of the Tribunal are final, once notified to the appellant or affected person.¹⁴⁵ However, on application by a party, or on the Tribunal's own motion, the Tribunal may correct a decision it gives to the extent necessary to rectify clerical mistakes or omissions.¹⁴⁶ The provision for correction of decisions has been used only rarely, acknowledging that the Tribunal (unlike certain other tribunals) does not have the power to order rehearings of its proceedings.¹⁴⁷

There are restricted rights of appeal and judicial review from the Tribunal to higher courts. A party to a Tribunal decision who is dissatisfied with a determination of the Tribunal as being erroneous in point of law, may, with the leave of the High Court (or, if the High Court refuses leave, with the leave of the Court of Appeal), appeal to the High Court on that question of law.¹⁴⁸ In determining whether to grant leave to appeal, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its

139 Immigration Act 2009, sch 2, cl 13.

140 See *Nukulasi v Minister of Immigration* [2020] NZIPT 504960.

141 See *Singh v Immigration and Protection Tribunal* [2018] NZHC 2409.

142 The New Zealand Law Society handles regulatory and disciplinary matters on behalf of the legal profession (in terms of the Lawyers and Conveyancers Act 2006, Part 5). The Auckland District Law Society is incorporated under the Incorporated Societies Act 1908 and carries out collegial and representative responsibilities for its members.

143 Immigration Advisers Licensing Act 2007, s 6 and 34-55.

144 See <www.nzami.org.nz> and <www.nzaip.org.nz>.

145 Immigration Act 2009, sch 2 cl 17(6).

146 Schedule 2 cl 20.

147 See, for example, the Disputes Tribunals Act 1988, s 49(1), and the Residential Tenancies Act 1986, s 105(1).

148 Immigration Act 2009, s 245(1).

decision.¹⁴⁹ There are similar provisions in respect of applications for judicial review proceedings in respect of appeals determined by the Tribunal.¹⁵⁰

Only 2.8 per cent of Tribunal decisions have been subject to appeal or judicial review proceedings. Of the appeals and applications for review determined by the higher courts since the Tribunal's inception, 58.5 per cent have been dismissed, 10.8 per cent have been allowed, and the rest have been withdrawn, struck out or discontinued. The overall result is that 99.75 per cent of Tribunal outcomes have been left intact, a pointer to the ongoing quality of the Tribunal's decisions. Although there have been comparatively few superior court proceedings on appeal from the Tribunal, some landmark decisions of the higher courts have formed important precedents for the Tribunal.¹⁵¹

V. CONCLUSION

The first 10 years have seen the Tribunal establish itself as a respected legal institution both internationally and within New Zealand. Reference has been made above to the Tribunal becoming one of the leading global centres of learning and practice in refugee status determination. Within the New Zealand context, the personnel and work of four distinct tribunals have blended into a coherent single entity which has played an important role in the administration of justice in New Zealand, in the following respects.

First, the Tribunal's work has provided a means of redress for a considerable number of people. From the commencement of its work in December 2010 to the end of June 2020, the Tribunal disposed of over 12,700 appeals.¹⁵² This number represents only appellants themselves, and does not include the considerable number of people (including relatives and others connected with appellants) who have been affected by the Tribunal's decisions.

Second, the decisions of the Tribunal have had a significant and often profound effect on the lives of the people who have come before it. The Tribunal has been required to decide whether people who wished to settle in New Zealand qualified for ongoing immigration status here as residents. It has determined whether people who have come here should be deported back to the country from which they came. It has also decided whether people who have sought haven in New Zealand should be accorded refugee or protected person status. In making these decisions, the Tribunal has been required to balance the aspirations of people wishing to settle in New Zealand with the broader public interest as expressed in law.

Third, in addressing the affairs of the appellants who have come to the Tribunal, it has played a key role in the development of immigration and refugee law. The Tribunal has guided Immigration New Zealand's practice and interpretation of instructions, defined the parameters of the statutory tests in deportation cases, and formulated principles governing refugee law practice. The Tribunal's contribution in this regard has extended well beyond the individual cases before the Tribunal, and assisted government officials, counsel and representatives, and the broader public in approaching

149 Section 245(3).

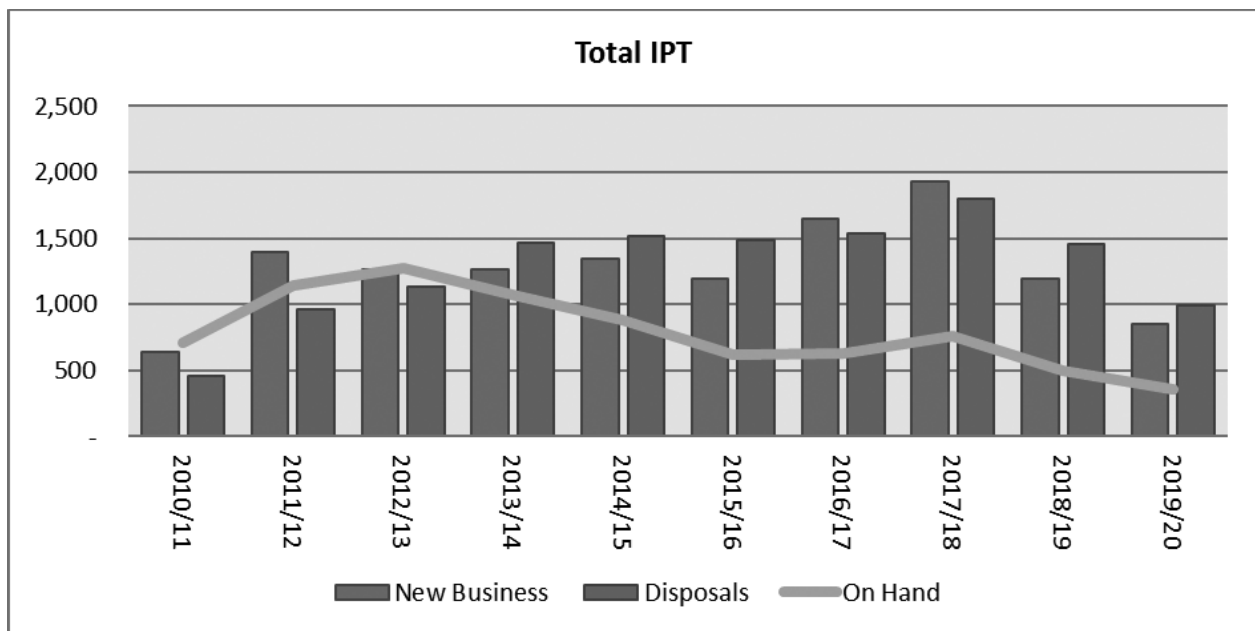
150 Section 249.

151 For example, *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) (special circumstances in residence appeals); *Ye v Minister of Immigration* [2010] 1 NZLR 104 (SC) (grounds of appeal in deportation appeals); and *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) (onus of establishing refugee claims and benefit of the doubt).

152 These include over 10,300 decided appeals and over 2400 appeals that were administratively processed.

like cases. The miniscule percentage of successful appeals from the Tribunal to higher courts indicates that, in the vast majority of cases, the development of case-law principles has vested in the Tribunal itself.

Finally, the Tribunal has made progress towards the aspirational (and time-honoured) goal of its creators, namely, the expeditious and efficient despatch of business.¹⁵³ The Tribunal has faced, and will continue to face, uncertainties as to the volume and nature of incoming appeals, human variables, and other factors (such as the COVOD-19 epidemic) beyond its control. However, as the workflow graph below indicates, the Tribunal has, by its 10th anniversary, reached the position where it provides reasonably swift resolutions to the important issues presented by the people who come before it.



153 “*Expedit reipublicae ut sit finis litium*. It is for the public good that there be an end of litigation”.

DISCOURSE ON THE INSTITUTIONAL REGIME OF REMEDYING LOSS AND DAMAGE INCURRED BY CLIMATE REFUGEE COUNTRIES: FROM THE PERSPECTIVE OF NATURAL RIGHTS

BY YU CHEUNG AND CAO MINGDE*

I. INTRODUCTION

As an emerging academic concept, the “climate refugee country” is derived from the concept of “eco-refugee country” proposed by Cara Nine, a professor of political philosophy in the UK.¹ Climate refugee countries refer to those countries that have suffered loss and damage caused by climate change and are no longer fit for human habitation.² In general, the uncontrolled greenhouse gas emissions of human society directly lead to serious threats to human life, health, property, and environment. Although climate change is a global phenomenon affecting all regions and mankind as a whole, its impacts on different countries and regions are different.³ Because of the unbalanced distribution of natural environmental conditions and economic and social conditions, it brings inevitable adverse consequences to the survival and sustainable development of countries or regions with more fragile climates, which can necessitate the forced migration of all inhabitants. As some scholars said, considering a certain pre-existing commitment to sea-level rise due to the long thermal lags of the ocean system, several million people living in coastal areas and small islands will inevitably be displaced by the middle of the century.⁴

In fact, climate refugee countries can be understood as the most extreme consequence of the loss and damage caused by climate change. The core concept of the climate refugee countries is that of “territorial disappearance”, including “active disappearance” and “passive disappearance”.

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1 Cara Nine “Ecological Refugees, State Borders, and Lockean Proviso” (2010) 27 *Journal of Applied Philosophy* 359.

2 In recent years, warming earth has resulted in rising seas and increasing extreme weather events that force many people to be climate refugees. A “famous” climate refuge country may be Kiribas in Pacific area, but Kiribas is not the only case, it’s a worldwide phenomenon, 40 per cent of the world’s population lives within 60 miles of the coast, 145 million live in less than three feet above sea level. People in some places do have other higher grounds to relocate to, but those on Kiribas have no place to run. CBS News “Climate Refugees” 21 August 2017 <www.cbsnews.com/video/climate-refugees-nations-under-threat/>. Actually, some climate-related resettlement projects are under way in Vietnam, Mozambique, on the Alaskan coast, the Chinese territory of Inner Mongolia and in the South Pacific. Eco-Business “Countries must plan for climate refugees - report” <www.eco-business.com/ebcircle/>.

3 Randall S Abate and Elizabeth Ann Kronk *Climate Change and Indigenous Peoples* (Edward Elgar Publishing Ltd, 2013). Randall S Abate and Elizabeth Ann Kronk *Climate Change and Indigenous Peoples* (Edward Elgar Publishing Ltd, 2013).

4 Sujatha Byravan and Sudhir Chella Rajan “Providing new homes for climate change exiles” (2006) 6 *Climate Policy* 247-252.

The former refers to the sinking of a country's territory to the seabed due to rising sea levels, and the tangible territory is no longer exists; the latter is caused by survival pressures such as land salinization and lack of freshwater resources. Territorial disappearance is not purely a natural phenomenon, it has also triggered a series of international law issues, including, but not limited to, whether a climate refugee state that no longer occupies physical territory can retain its national status as a state, or whether it becomes a "special international legal entity". Are climate refugee countries and their nationals entitled to seek relief for their loss and damage? What damages can be obtained if so? What rights are available to climate refugee countries and their nationals on which relief is claimed, and to what extent do these rights challenge the powerful legal rights granted to States by contemporary international law, including the territorial rights or the permanent sovereignty over natural resources?⁵

However, the disorder of the international community occasionally resembles that of the jungle. And it makes the "positive international law" more incomplete than "positive domestic law".⁶ This imperfection of international law is reflected in many aspects from legislation to law enforcement. Generally speaking, the positive international law embodies a serious characteristic of hysteresis at the level of law-making. As the norms of international law embody the common will of States, they must negotiate for a long time in order to reach an agreement. However, such negotiations are prone to deadlock due to the lack of leadership authority. Furthermore, international law itself cannot provide effective sanctions for such non-compliance, which is the reason why some norms of international law are known as soft law.⁷ Obviously, this limitation is particularly evident in terms of loss and damage caused by climate change, which also include the loss and damage of climate refugee countries.

In order to break the deadlock in positive international law, international legislators began to establish a global climate negotiation system that could be used to remedy the loss and damage caused by climate change. However, its ambition was limited by many factors, such as the structural shortcomings of the international community (no country can enjoy privileges above others), the reality of conflicts of interest among diverse countries and the complexity and the novelty of the issues regarding climate refugee states. Many climate negotiations on United Nations Framework Convention on Climate Change (UNFCCC) have avoided the topic altogether, or only taken a

5 Territorial rights and permanent sovereignty over natural resources are two rights clearly recognized by current positive international law. These two rights are generally understood as sovereign rights, which must be respected and not interfered by other countries. Under general international law, the exercise of these two rights is limited by the no-harm principle, namely the responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction. Philippe Sands *Principles of International Environmental Law* (Cambridge University Press, 2003) 235-246. However, on the issues regarding loss and damage caused by climate change, it is difficult to prove the causality, which limits the application of the no-harm principle. In this sense, sovereign rights have become unlimited rights that climate refugee countries must show their respects to. Benoit Mayer "The Relevance of the No-Harm Principle to Climate Change Law and Politics" (2016) 19 *Asia-Pacific Journal of Environmental Law* 79-104.

6 Positive international law, also called international positive law, are the laws that made by the international legislators rather than natural law.

7 For further information about international soft law. Jaye Ellis "Shades of Grey: Soft Law and the Validity of Public International Law" (2011) 25 *Leiden Journal of International Law* 313; Francesco Francioni "International 'soft law': a contemporary assessment" in Vaughan Lowe(ed) *Fifty Years of the International Court of Justice* (Cambridge University Press, 1996) 167-178.

limited involvement in this subject.⁸ Therefore, climate refugee countries, no matter whether collectives nor as individual nationals, are able to enjoy the right of positive international law relief against other sovereign states under the existing rules of international law. In such circumstances, many theorists in international relations and law have begun to discuss the question of whether natural rights can be the legal basis for climate refugee countries and their nationals to enjoy the right to claim remedy for loss and damage caused by climate change.

Part I of this paper explores the concept of natural rights and its status in international policy and law. Then Part II focuses on how to find a scientific and reasonable legal basis for establishing responsibility rules from the perspective of legal philosophy. Based on two kinds of natural rights, international legislators have three kinds of remedy programs to choose. However, the best institutional choice in theory is not necessarily in line with international political reality. Under the objective international background, this paper then discusses in detail three remedy programs mentioned in Part II and another program based on global distributive justice which highlights responsibilities of states rather than natural rights. Part III applies cost-benefit analysis and determines the De-territorial Countries Remedy Program to be a relatively rightful choice among the four options. This paper also gives attention to international political prospects of the De-territorial Countries Remedy Program in Part IV and its challenges to developing countries, especially for China.

A. *The Concept of Natural Rights and Its Status in International Law*

The concept of natural rights here refers to a kind of “subjective human rights”, which does not derive from the concept of natural rights in the objective sense of natural law norms, obligations, orders, and responsibilities discussed by the Stoics in ancient Greece.⁹ The exact time of the origin of this subjective concept of natural rights has already become the focus of theoretical research for nearly half a century. According to Tierney’s latest research, the origin of the modern subjective concept of natural rights is related to the commentary activities of church law that was popular in the 12th and 13th centuries.¹⁰ This viewpoint was subsequently supplemented by Auckley’s interpretation that the development of the modern concept of natural rights has been gradual and evolutionary, which started from Church Law of the 12th and 13th centuries, first to the medieval academic jurisprudence, then to the philosophical thought of natural rights in 17th century, and evolved continually into the 18th century.¹¹

8 As early as during the 1991 climate negotiations on United Nations Framework Convention on Climate Change (UNFCCC), Vanuatu, on behalf of the Alliance of Small Island States (AOSIS), advocated the establishment of an international insurance fund to compensate the most vulnerable small island countries and the least developed countries for the losses and damage caused by sea level rise. However, as the parties to the Convention did not reach agreement on the proposal, the AOSIS made it clear when signing the UNFCCC that they reserved the right to claim damages for loss and damage caused by climate change. Later, many climate negotiations on UNFCCC have avoided the topic altogether, or only taken a limited involvement in this subject. Cheng Yu “Brief Study on the Loss and Damage Caused by Climate Change and Their Regulations of International Law” (2016) 24 *Pacific Journal* 12; Elisa Calliari “Loss and Damage: A Critical Discourse Analysis of Parties’ Positions in Climate Change Negotiations” (2016) 21 *Journal of Risk Research* 725–747.

9 Leo Strauss *Natural Right and History* (PENG Gang tr, 1st ed, Zuo An Culture Publishing House 2005) 226.

10 Brian Tierney “The Idea of Natural Rights—Origins and Persistence” (2004) 2 *Northwestern Journal of International Human Rights* 3–4.

11 Francis Oakley *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (Wang Tao tr, The Commercial Press, 1st ed 2015) 95–118.

Since then, “the concept or discourse of natural rights has finally got rid of the subordinate status of the objective norms of natural law and become a modern sense of “moral contract”.¹² Almost at the same time, the concept of natural rights began to be replaced by modern sense of human rights,¹³ and it also began to move from the “theoretical altar” to “institutional practice”, which developed vigorously in the French Revolution and the American War of Independence, and was finally reaffirmed by the Declaration of Independence and the Declaration of the Rights of Man and of the Citizen.¹⁴ As some scholars have summarized, the development of the concept of natural rights since the 12th century has undergone a long and complex evolution process, “from natural law to natural rights and then to human rights.”¹⁵ Nevertheless, with the legislation of natural rights, they gradually turned into positive legal rights (namely positive rights), continuously losing its initial value, which directly resulted in the rejection of natural rights by modern social science and gave rise to the criticism of the concept of natural rights by the Positive School of Law and the Historical School of Law. These asserted that laws and rights originate from the state, and sovereign states will not be bound by any law in the 19th and 20th century.¹⁶ However, this practice of excluding the concept of natural rights has obvious defects, which easily leads to “absolutism” and “nihilism”. On the one hand, rejecting natural rights amounts to arguing that all rights are positive rights, which means that “what is a right” all depends on the will of legislators; on the other hand, without natural rights, the conflict between different rights demands may not be solved.¹⁷ In this context, a large number of legal theorists, represented by Leo Strauss, began to emphasize the need to recall and revive the concept of natural rights, and focus on the relationship between natural rights and positive rights.

After discussing the necessity of reiterating and reviving the concept of natural rights, we must turn to its connotations. For a long time, there has been no general consensus on the concept of natural rights, but according to the generally accepted theory in academia, natural rights can be understood as the “inherent rights” and “birthrights” that people should enjoy by human nature, which are based on the moral authority of natural law.¹⁸ Obviously, the nature of human beings is to preserve and continue their life. This teleological preservation has been recognized as a basic principle by natural law. Some scholars even extend this concept from the preservation of

12 At 118.

13 In the 17th and 18th centuries, some classical political philosophy scholars began to use the concept of modern human rights to replace the concept of natural rights, such as Grotius, Spinoza, Locke and Rousseau. Through the combing of these scholars abovementioned, modern “human rights theory” was established, which we call “natural human rights”.

14 Chen Linlin “From Natural Law to Natural Rights: Western Human Rights in Historical Perspectives” (2003) 33 *Journal of Zhejiang University (Humanities and Social Sciences)* 82.

15 Zhou Lian “The Western Right Theory in Vision of Post Metaphysics” (2012) *Social Sciences in China* 47.

16 Strauss, above n 9, at 83.

17 Strauss, above n 9, at 2–6.

18 For example, Hobbes defined the natural right as “the free ability to preserve one’s life by all possible means”. Thomas Hobbes *Leviathan, The Matter, Form and Power of a Common Wealth Ecclesiasticall and Civil* (LI Sifu and LI Tingbi trs, 1st ed, The Commercial Press, 2012) 98. Locke further extended the scope of natural rights to property rights (including life, freedom and property). John Locke *The Second Treatise of Government* (YE Qifang and QU Junong trs, 1st ed, The Commercial Press 1964) 6. Kant understood the natural rights as “rights granted by nature”, believing that they are the rights enjoyed by everyone according to nature, independent of all laws and regulations in experience, and that freedom is the only natural right, while property rights are classified as the right to obtain. Immanuel Kant *The Philosophy of Law: an Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (SHEN Shuping tr, 1st ed, The Commercial Press, Shanghai 1991) 49.

individual life to the preservation of human collective life.¹⁹ Therefore, many scholars begin to understand natural rights as the rights that people should enjoy in order to preserve their life, which is an obligation of natural law, namely the essential means of ability or freedom to realize the purpose of human life preservation.²⁰

There has been change regarding the rights and abilities that human beings need to depend on to preserve their lives, but its basic connotation has relatively definite characteristics. In other words, although it may be difficult to outline the whole picture of natural rights, we can at least list several indispensable elements of natural rights. According to Locke's classical analysis framework, people in primitive societies should enjoy at least the following four rights: first, people should have the right to occupy essential resources on the earth to maintain their survival, which is property rights; second, people should have the right of self-determination to freely decide on matters related to their own development without compulsion, which is right of individual freedom; third, people should enjoy the right to life which shall not be infringed by others; and finally, if there is any infringement of natural rights, people should enjoy the right to implement the corresponding penal regulations of natural law. However, as is known to all, human society cannot remain in the primitive social state of disorder in which everyone enjoys the right to enforce rules of natural law. By "transfer of rights" and "social contract", a modern political society can be built. In addition, due to the hostility of *the Positivist Law School* and *the Historical Law School* to the uncertainty of natural rights, many natural rights begin to be confirmed by legal norms adopted by legislators in political society, and become positive rights in laws and regulations, namely legal rights, or statutory rights.²¹ Thus, a self-evident legal axiom is developed which is only after natural rights has become positive rights can the protection of these rights be guaranteed by law.

However, due to the limitations of human cognitive ability and the complexity of certain natural rights, the transformation from natural rights to positive rights is an incomplete transformation. For those natural rights that have not been transformed for the time being, they are not no longer legally valid, and their legal validity is not necessarily lower than the legal rights confirmed by positive law. This is because natural rights are "pre-institutional rights" existing before any laws and societies. They are of indelible and eternal moral authority, and only some of them have been transformed into positive rights (namely legal rights, statutory rights) through "social contract" and "Rule of Recognition".²²

19 John Locke *Essays on the Law of Nature* (SU Guangen and YANG Shun trs, 1st ed, East China Normal University Press 2014) 118.

20 In fact, both Hobbes and Locke argued for a definite distinction between natural law and natural rights. Hobbes believe that natural law is a "rational discipline or universal law that keep people from doing damage to their own lives or depriving of means preserving his life", while the natural rights means "everyone has the way according to their willingness to use their power save their own nature of life (that is, save our freedom)". However, Locke said, "rights are based on the fact that we are free to use something, and a law is to enforce or prohibit the use of something." Therefore, natural law is the moral rule made by the Creator for the whole human being, while natural rights define the moral relationship among people, and provide more specific instructions for the individual's action space in accordance with natural law. The action space brought by the explicit nature rights promise the feasibility of human fulfilling the obligation of natural law. Hobbes, above n 18, at 96; Locke, above n 18, at 118.

21 From the perspective of domestic law, the legislators from parliament establish a whole set of civil rights spectrum on behalf of the peoples' will. From the perspective of international law, states establish a realistic modern human rights system through the peoples' common will.

22 Huang Tao "Out of Passion: German Idealism's Critique of Early Modern Natural Right Theories" (2017) 49 *Academic Monthly* 91.

Besides the aforementioned characteristics of eternal morality, natural rights have several other characteristics. First, natural rights are objective basic rights human beings should enjoy, not merely hypothetical rights used to justify the natural state of a political social establishment. They are based upon natural law that is more profound than positive law. In other words, natural rights are not “fatherless children”,²³ their legitimacy is deeply rooted in human nature, morality, rationality and others.²⁴ Secondly, natural rights are not entirely independent and separable rights enjoyed by atomic individuals, but universal rights based on interpersonal interaction, aiming to adjust the relationship between individuals and each other.²⁵ Thirdly, as preservation of life sometimes depends on the collective freedom of action or ability, the subject of natural rights is not limited to individuals, it may also be applicable to people as a collective, or even the humanity as a whole, depending on the situation. Fourthly, from the perspective of the application effect, natural rights are basic and general moral rights, which are of universal application. Even the minor interests of minorities are inviolable basic rights that cannot be deprived of.²⁶ Obviously, these characteristics of natural rights determine that they shall be in a core status in modern international law.

Theoretical research needs to pay special attention to the relationship between natural rights and legal rights. Based on the theory of interaction between natural international law and positive international law already established by scholars,²⁷ the relationship between natural rights and positive rights can be summarized as follows: firstly, natural rights are the core concept of natural international law, and the protection of specific natural rights depends on general legal principles

23 Zhang Wenxian, a famous scholar of jurisprudence, once said, “right is the son of law, and natural right is the son of fatherless”. “In a more or less civilized society, the only reason that a man can have all rights, and that he can have all sorts of expectations and enjoy all sorts of things which he thinks belong to him, is the law.” Zhang Wenxian *Contemporary Western Legal Thoughts* (Liaoning People’s Publishing House, 1988) 357.

24 Li Buyun “On the Origin of Human Rights” (2004) 22 *Tribune of Political and Science and Law Journal of China University of Political and Science and Law* 14.

25 Tan Ankui “Interaction and Institutionalization: The Logic of the Transition from Natural Rights to Human Rights in the Early Modern Times” (2017) 8 *Journal of the History of Political Thought* 22.

26 John Finnis *Natural Law and Natural Rights* (DONG Jiaojiao etc. trs, 1st ed, China University of Political Science and Law Press 2005) at 160.

27 International law embodies positive international law and natural international law. Paulo Emílio Macedo said that the law of nations is between a kind of mixture which is between natural law and positive law. Paulo Emílio Macedo *Catholic and Reformed Traditions in International Law: A Comparison Between the Suarezian and the Grotian Concept of Ius Gentium* (Springer International Publishing AG 2017) at 13-63. Degan Vladimir-Đuro “Rules of Natural and Positive (International) Law in Multicultural World” (2007) 23 *L’ Observateur des Nations Unies* 95–116. It’s also true in Chinese research. The author creating this kind of interactive theory in China is professor Luo Guoqiang, a famous scholar of international law, who holds that international law is the combination of natural international law and positive international law, and the relationship between them is an interactive one. On the one hand, natural international law determines positive international law. Natural international law is transformed into positive international law. The formal factor of positive international law is the agreement of peoples’ will, while the substantial factor is the embodiment of natural international law. Natural international law complements the absence of positive international law; positive international law cannot ultimately violate natural international law. On the other hand, positive international law can have a reverse effect on the natural international law. This reaction is manifested in the following aspects: natural international law is mainly realized through international law; The degree of development of positive international law restricts the degree of discovery of natural international law. The rights and wrongs of real international law will affect the realization of natural international law. LUO Guoqiang *On the noumenon of international law* (2nd ed, China Social Sciences Publishing House 2015) at 304–313.

or rules of *jus cogens* of natural international law, while positive rights are the core concept of positive international law which right-holders can directly apply and invoke certain “protection provisions” of positive international law; secondly, positive rights originate from natural rights, in this sense rules of natural rights can be used to evaluate and guide rules of positive rights, and even give remedies for infringements or fill in the blanks in case of any incomplete rules of positive rights. In addition, the rules aiming to protect positive rights cannot seriously violate or erode natural rights; thirdly, the protection of natural rights is mainly realized through enshrining positive rights, and the extent to which positive rights are protected restricts the discovery and realization of natural rights. Simply put, we cannot view natural rights and positive rights separately, especially when the current rules of positive rights are not adequate to meet the requirements of rules of natural law to preserve human life. International legislators should turn their attention to natural rights that can complement or restrict positive rights. The issues of climate refugee countries, as this paper focuses on, is essentially a survival problem and closely related to the proposition of natural rights that are also concerned about survival. Therefore, when current normative system for protecting positive rights under international law cannot provide protection for them, climate refugee countries and their nationals can then in theory invoke the rules for the protection of natural rights to seek relief for their loss and damage.

II. OPTIONAL REMEDY PROGRAMS BASED ON NATURAL RIGHTS

It is obvious that climate refugee countries and their nationals suffer from a variety of tangible or intangible loss and damage, including but not limited to the loss of national culture and identities, the loss of nationals’ and states’ land and property, personal injury, the loss of various ecological resources and so forth. The most significant and urgent need for climate refugee countries is to regain the land supporting their nationals’ survival. This land relief could be individual “civil rights relief”, which means that other countries have responsibility to accept nationals of climate refugee countries as immigrants²⁸ or refugees.²⁹ In addition, the remedy program could also be “collective territorial relief”, which means, as communities, climate refugee countries have the right to acquire new territories to maintain their existence as states or other special international legal entities. Nevertheless, in current normative system for protecting positive rights under the framework of positive international law, do climate refugee countries and their nationals have positive rights to require collective territories or retain mandatory acceptance of citizens by large greenhouse gas emitters or the broader international community? The answer is no. Those theoretically accessible

28 Some scholars propose a mechanism by which these exiles would be given immigration benefits by countries through a formula that ties numbers of immigrants to a country’s historical greenhouse gas emissions. Byravan, above n 4, at 247.

29 Some scholars argue that the logic of the refugee convention (namely UNHCR) can and should be extended to those fleeing the results of climate change. Matthew Lister “Climate Change Refugees” (2014) 17 *Critical Review of International Social and Political Philosophy* 618–634.

rules for protecting climate refugee countries and nationals suffer from the difficulty of application due to incomplete legal interpretation and the lack of existing legal practice.³⁰

In response to the flaws and shortcomings of these rules of positive rights, theorists began to re-interpret the current theoretical rules of positive rights related to loss and damage of climate refugee countries from the perspective of natural rights, expecting to amend and supplement these existing rules so that they can be better applied to deal with loss and damage of climate refugee countries. In general, remedy programs that are based on natural rights for loss and damage of climate refugee countries could theoretically be divided into two basic approaches, namely the abovementioned individual and collective remedy programs. The first one is a remedy program based on individual natural rights, which means that nationals of climate refugee countries, as the co-owners of the earth, have the right to propose emergency refuge claims against other countries in case of urgent events threatening their survival. The second one is a remedy program based on collective natural rights, which means, as a group, nationals of climate refugee countries would have the right to request that the international community provide them with a new territory in order to maintain their collective right to self-determination or territorial rights in the event of “territorial disappearance”.

A. Individual Right of Emergency Refuge Based on the Collective Ownership of the Earth

By citing a case concerning crew members and shipwreck victims who were forced to seek refuge in another country’s seaport due to storms, Pauline Kleingeld has pointed out that the Right to Safe Haven was implied in Kant’s cosmopolitan legal theory.³¹ The Individual Right of Emergency Refuge refers to the right of individuals or collectives (here “collective” is not a concept in the sense of national state, but only a group concept) to have a necessary and essential right prevailing over the rights of other individuals, groups or states in case of particular urgent needs. The long history of the right of emergency refuge can be traced back to the Western Colonial Era. In order to answer whether citizens of one country have the right to settle in another country, discussion on

30 Throughout the existing academic achievements, many scholars discussed the issues of climate refugees under the framework of traditional positive international law (including international refugee law, international immigrant law, international human rights law, international environmental law and etc), and mentioned these laws’ limitations in terms of relieving climate loss and damage of climate refugees. Such document literature includes, but is not limited to, Bonnie Docherty and Tyler Giannini “Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees” (2009) 33 *Harvard Environmental Law Review* 349 at 392; Angela Williams “Turning the Tide, ‘Recognizing Climate Change Refugees in International Law’” (2008) 30 *Law & Policy* 502 at 514; Kara K Moberg “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” (2009) 94 *Iowa Law Review* 1107 at 1115–1130; Elizabeth Burleson “Climate Change Displacement to Refuge” (2010) 25 *J Envtl L & Litig* 19 at 23; Hari M Osofsky “Learning from Environmental Justice: A New Model for International Environmental Rights” (2005) 24 *Stanf Environ Law J* 71 at 75–78; Tiffany T V Duong “When Islands Drown: The Plight of ‘Climate Refugees’ and Recourse to International Human Rights Law” (2010) 31 *U Pa J Int’l L* 1239 at 1241; Benoit Mayer “Governing International Climate Change-Induced Migration: The Chaos and the Dancing Star” (8th Napsipag International Conference, Dec 2011) <<http://ssrn.com/abstract=1955819>>; Tanja Dreher and Michelle Voyer “Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific” (2014) 9 *Environmental Communication* 58–76; Emma Lees “Responsibility and Liability for Climate Loss and Damage after Paris” (2016) 17 *Climate Policy* 59–70.

31 Pauline Kleingeld “Kant’s Cosmopolitan Law: World Citizenship for a Global Order” (1998) 2 *Kantian Review* 72–90.

“the Right of Emergency Refuge” or “the Guest Right” were launched by Grotius, Pufendorf and others in western society between the 16th and 17th centuries.³²

Generally speaking, the right of emergency refuge could be divided into two situational rights. One is the right of emergency refuge in the sense of domestic private law; and the other is the rights of resettlement which residents from one country can claim against another country in the event of an urgent need, which is related to the issues of climate refugee countries discussed in this paper. The essence of these issues is that nationals in climate refugee countries have to face the difficulties of survival and development that force them to relocate. Actually, whether enjoyed as independent sovereign states or as citizens or refugees of other countries, they are in fact require the sharing of living resources of other countries and their nationals, which conforms to the function of the right of emergency refuge. Therefore, the right of emergency refuge is often used to analyze the issues of climate refugee countries. Some scholars have summarized the applicable conditions of this refuge as follows: (1) the State is obliged to provide relief to individuals at risk rather than to collectives; (2) the individuals at risk have to meet certain criteria and they have to claim remedies against a country that is not their home country; (3) the other state’s responsibility towards risky individuals is not based on corrective justice, which means all countries, instead of the specific states emitting GHGs, have responsibilities to provide remedy; and (4) another state’s responsibility is to potentially and permanently accept some or all qualifying individuals.³³

As regard to justifying the second kind of the right of emergency refuge in the sense of public international law, namely the right of resettlement, there are two arguments in current academia. The first one is “simple analogy” raised by Wyman, which means, the reason for the existence of the right of emergency refuge in international law which is derived from the collective ownership of the earth lies in its “right similarity” to other rights of emergency in domestic law, which means certain individual rights may prevail over other individual or state’s rights in events of urgent needs.³⁴ The second justification is the Risee-style “circuitous interpretation”, which is based on the collective ownership of the earth raised by Grotius and combines the collective ownership of the earth with natural rights.³⁵ It then derives the right of emergency refuge and the right as a member of the global social community, which then draws two global obligations for states to be members of the global social order.³⁶ The reasoning thus is similar to Kant’s understanding of “the right to resettlement”, which means, based on the collective ownership of the earth, individuals enjoy the rights to free access of the world and resettlement due to survival risk.³⁷

Hence, it shows that the right of emergency refuge under international law is in line with that under domestic private law, and both of them are based on the collective ownership of the earth. In fact, the dynamic relationships among these three rights could be explored with a more

32 The authors who discuss the similar rights of emergency refuge in relevant works mainly include Grotius, Puffendorf, Kant, Locke and so on. Katrina Miriam Wyman “Sinking Islands, Property in Land and Other Resources” in Daniel H Cole and Elinor Ostrom (eds) *Property in Land and Other Resources* (Lincoln Institute of Land Policy, 2012) 447–448.

33 At 449–450.

34 At 449–450.

35 Hugo Grotius *The Rights of War and Peace* (MA Chenyuan and TAN Rui trs, 1st ed, China University of Political Science and Law Press 2016) 53.

36 Frank Dietrich and Joachim Wundisch “Territory Lost-Climate Change and the Violation of Self-determination Rights” (2015) 2 *Moral Philosophy and Politics* 83–105.

37 Immanuel Kant *Perpetual Peace* (HE Zhaowu tr, Shanghai People’s Publishing House 2005) 24–25.

complete and systematic approach. On the one hand, we argue that the arguments of Grotius and others regarding the right of emergency refuge in the sense of domestic private law could be logically and self-consistently extended to the field of international law. Imagining in the early state of human society (namely the early political society said by Locke), due to human's limited competence to exploit natural resources and the unpredictable and unstable nature of natural resources, exploitation of natural resources is community-based and this kind of joint community development cannot completely exclude other groups from sharing natural resources during drought and famine. Then, with the development of human's ability to utilize natural resources, human society has experienced the evolution from private property (such as livestock), natural co-ownership (such as water, rivers), to the institution that nature is completely privately owned by different communities.³⁸ Therefore, in order to realize the core interests of human self-preservation and to ensure that humans have the lowest coping capacity in the face of many difficult situation of survival threats, logically, two dimensions should be included in right of emergency refuge: firstly, the right of emergency refuge against the members' property within the community; secondly, the right of emergency refuge against natural resources and property of the members of other communities.

Subsequently, as "pre-institutional natural rights", the right of emergency refuge at the community level has realized the evolution of being domestic legal rights during the transformation from a specific primitive community into a modern state. Regarding the right of emergency refuge against other communities, it has only partially transformed into positive rights in the evolution of international relations (namely the asylum rights of refugees in the international human rights law).

Since the legal effect of natural rights will not diminish or disappear just because they have not wholly been converted into positive rights or have not been converted in a short time, there are also two dimensions of the right of emergency refuge in modern political society: firstly, the right of emergency refuge in domestic private law between individual citizens (namely act of rescue) in a country often confers on the government the obligation to protect, which provides necessary conditions for individual survival, in the form of the state's relief obligation to its nationals stipulated in domestic law; secondly, the individual emergency right of refuge against other communities in primitive society will turn into a collective right of emergency refuge against other countries. The individuals could claim remedies against other countries when they are unable to survive by themselves and this right, in the framework of positive international law, takes the form of a remedy obligation that a country has towards other countries' citizens.

On the other hand, we could also interpret the close relationship between the right of emergency refuge and the collective ownership of the earth through the method of right-decomposition used in empirical analysis of law. In general, the collective ownership of the earth is non-universal "egalitarian ownership". It does not mean that each individual enjoys the average individualized ownership of specific resources or space on the earth, but everyone enjoys the symmetric claim against corresponding resources or space on the earth.³⁹ Logically, in the initial state, there are at least two elements contained in the collective ownership of the earth in order to realize the self-preservation of human beings: (1) privilege, which means everyone could freely possess and utilize resources on the earth and others have no right to demand his non-possession and non-utilization; (2) right

38 Maurice Godelier "Territory and property in primitive society" (1978) 17 *Social Science Information* 399 at 417–418.

39 Mathias Risee "The Right to Relocation: Disappearing Islands Nations and Common Ownership of the Earth" (2009) 23 *Ethics and International Affairs* 283–294.

or claim in strict sense, which means each one enjoys the right to occupy the minimum resources for survival and others bear the duty of non-interference.⁴⁰ Privileges correspond to negative obligations that all other collective owners should not require others not to possess or use specific earth resources; rights or claims in a strict sense may correspond to negative obligations that other collective owners have the obligation not to interfere in other's possession or use of resources to maintain basic survival, or they may also be positive obligations, which means other collective owners with abundant natural resources have the obligation to provide corresponding resources when anyone cannot meet the basic survival needs. In other words, rejecting others' survival needs under urgent circumstances could be regarded as "negative interference" of basic rights in a strict sense. In this way, the right of emergency refuge can be understood as the element of positive obligation contained in the second dimension of the collective ownership of the earth.

The following conclusions could be drawn when the logic of the right of emergency refuge is applied to the issues of climate refugee countries: as the collective owner of the earth, nationals from climate refugee countries should enjoy rights in a strict sense against all other citizens of the earth, which leads to two natural responsibilities born by states to support the survival and development of nationals of climate refugee countries, including: (1) negative responsibilities, non-interference in the right of all owners of the earth to possess and use resources in order to maintain their basic survival; and (2) positive responsibilities, to provide resources to collective owners of the earth when there is an urgent need for their survival. This is what Risse said about the two global guaranteed responsibilities of modern states.⁴¹

Consequently, we can summarize the above methods of demonstration as follows: during the transition from the primitive society to modern one, not only did the institutions of private property rights (including the private property rights under domestic law and territorial sovereignty and permanent sovereignty over natural resources under international law) appear, but also the pre-institutional natural rights restricting property rights was retained. Accordingly, these private property rights being recognized in a country and globally are not absolutely unconstrained. They are always restricted by the right of emergency refuge. In other words, natural law duties (namely provide some of properties to other person who is in urgent need) imposed on the legitimacy of property rights (namely urgent needs constitute an exception to limiting and excluding other's property rights) was temporarily sealed during primitive society's transition into modern political one. That is to say, human beings must take "reserving respect for the original common collective ownership" as the precondition of agreeing to constructing a political society (namely the rules of contractual property).⁴² This is also true for international relations: the property rights of natural resources enjoyed by one country are not absolutely unrestrained rights with respect to another country. Instead, the property rights enjoyed by one country are always subject to a precondition, that is, respect for the right of emergency refuge of other countries' nationals. It can be said that when the tragedy of climate refugee countries occurs, the preconditions implicit in human property rules will be activated, and natural resources on the earth will be restored to the "original state of common ownership".⁴³ Nationals of climate refugee countries can claim their original collective

40 Kleingeld, above n 31, at 72–90.

41 Risse, above n 39, at 283–284.

42 Grotius, above n 35, at 54.

43 Wang Tiexiong *The Foundation of Natural Law in American Property Law* (Liaoning People's Publishing House 2006) 126.

ownership of the Earth's natural resources and use the resources already occupied by other countries to achieve their self-preservation.

So far, we have demonstrated the justification of the right of emergency refuge and its implications, according to which the nationals of climate refugee countries can claim the right of emergency refuge, and the international community correspondingly assumes responsibilities to provide land and other necessary resources for their continued survival. However, it is noteworthy that the remedy program here is not a collective territorial relief, but only an individual remedy program. In other words, although the right of emergency refuge can also be exercised by a community or the state on all nationals' behalf, its right ultimately base on individuals rather than nations or states. Therefore, it is a minimum individual remedy program, meaning nationals of climate refugee countries can only obtain a status as individual international refugees⁴⁴ or international immigrants.⁴⁵

B. Collective Rights to Self-determination and Territorial Rights of States

After a long history of development and evolution, based on the universal recognition and acceptance by the international community, the right to self-determination has been established as a basic legal principle in modern international law. Generally, its basic meaning has been summarized as follows: "all nations under foreign colonial rule, foreign occupation and slavery enjoy the right to determine their own destiny, political status and autonomously handle its internal and external affairs, and such rights should be respected by the international community. All countries should assume responsibilities not to obstruct, interfere, destroy, or deprive this right in any way. Otherwise, it constitutes an internationally wrongful act, and the state concerned shall bear international responsibilities. The people and peoples of these countries have the right to independently handle their internal and external affairs, choose their favorite political and social systems and develop their own economy, society and culture, while other countries are obliged to respect and not interfere with these rights".⁴⁶ It is thus clear that the existing right to self-determination (namely a legal right) in positive international law is limited to the category of national separation and national independence and unification, which corresponds to other countries' negative responsibilities to respect other nations' determination on self-determined issues such as independence and other basic human rights. In other words, in the current context of international law, other states do not have positive responsibilities towards climate refugee countries' claim of providing new territory to help them maintain their collective rights to self-determination.

For this reason, some theoreticians begun to extend the connotation of the right to self-determination (that is to regard it as a positive respecting duty), and link title to territory with the collective rights to self-determination, so as to justify the collective territorial relief. When climate refugee countries' sovereignty over territory is violated as the "territory disappearance", their status as self-determined entities are subsequently impossible. So, new territory is required so as to

44 Wyman, above n 32, at 449–450.

45 Risee, above n 39, at 283–294.

46 Yang Zewei "On the Natural Self-determination and State Sovereignty" (2002) 19 Law Science Journal of Northwest University of Politics and Law 40.

ensure adequate remedy.⁴⁷ In fact, this is already an understanding of the right to self-determination from the perspective of natural rights, which means collective rights to self-determination enjoyed by a particular nation or group includes the right to require other countries to provide necessary conditions to ensure that the right to self-determination can be realized, instead of only the negative duty to respect this right. In other words, when collective rights to self-determination of climate refugee countries have been violated because of “territorial disappearance”, other states are naturally responsible for providing them with new territory to help climate refugee countries maintain the status as “autonomous” “independent” legal entities.

In fact, a logical premise of the above view is to regard territorial rights as the basis of collective rights to self-determination. However, this logical premise is not necessarily true. Although the collective rights to self-determination and the titles to territory are two mutually independent positive rights deriving from the exercise of the same natural right (namely natural union right), the basis of the two rights are different intrinsic value-based natural rights. Natural union right, as a natural right, derives from the social attributes of “the natural state”. According to John Dunn, “Locke’s natural state is not a non-social state, but a non-historical state,”⁴⁸ as relationships among people are involved. In other words, natural rights are not individualized rights that are in isolation and have no connection with others, but rather “social rights” based on interpersonal interactions. The “nature” aspect of natural rights only emphasizes that it can exist independently of the recognition of public power, rather than its non-social nature. Taking the collective ownership of the earth in the first remedy program as an example, although it is an individualized right, it is still based on symmetry.⁴⁹ The social attributes of natural union rights can also be understood from another angle: to ensure the self-preservation of individuals, human beings must have the right to freely unite with each other and at the same time, enjoy the rights to possess and use natural resources based on collective ownership of the earth. “Conditions for human seem to be worse than that of livestock, because few other animals are so vulnerable as human beings.” To achieve the miracle of individuals’ growth, human beings must help each other and improve their competence to cope with threats to survival.⁵⁰ However, as an instrumental right based on individual rights of freedom, the role of natural union rights is only to achieve the union among individuals, instead of being the manifestation of the intrinsic value that individuals should enjoy in the natural state.

Combining the Hohfeldian analysis of the collective ownership of the earth mentioned above, Locke’s classic theory of natural rights and the purpose of this paper together, it is argued that, in order to achieve self-preservation, individuals in the natural state should at least enjoy three different natural rights of intrinsic value: firstly, the collective ownership of the earth and its derived individual right of emergency refuge; secondly, the right to self-determination (a sort of individual freedom) which individuals enjoy to freely dispose their own development; and thirdly, the individuals in the original state also enjoy a corresponding right to enforce rules of natural law when the first two rights are interfered with or obstructed by others. Therefore, we have to answer the question of how the natural rights of different intrinsic value will change after individuals

47 Cara Nine “A Lockean Theory of Territory” (2008) 60 *Political Studies* 252–268; Cara Nine “Territory is Not Derived from Property: A Response to Steiner” (2008) 56 *Political Studies* 957–963; Avery Kolers “Floating Provisos and Sinking Islands” (2012) 29 *Journal of Applied Philosophy* 333–343; Dietrich, above n 36, at 83–105.

48 John Dunn *The Political Thought of John Locke* (Cambridge University Press 1969) 97.

49 Risee, above n 39, at 283–294.

50 Samuel Baron von Pufendorf *The Rights and Obligations of a Citizen and a Person* (JU Chengwei, 1st ed, The Commercial Press 2010) 80–83.

come from the natural state to the modern political society by exercising their natural union rights. As a matter of fact, the right of emergency refuge is attached to the property rights as natural law duties. While the individual right to self-determination and the right to enforce rules of natural law are transformed respectively into “collective rights to self-determination” of the “common destiny” and the “title to territory” of the “state” through the social contract. Specifically speaking, after individuals enter into modern political society, individuals’ right to choose their development are naturally aggregated to the collective level due to the similarity of involved matters. It is up to the collective to decide the matters involved in the overall development in order to achieve “autonomy” and “independence”.⁵¹ Furthermore, individuals naturally unite into a “common destiny” to improve their ability of self-preservation and realize the transformation from natural state to political society. And the transfer of the enforcement power of the rules of natural law give birth to the territorial rights of the state.⁵² It can be seen that the value basis of collective rights to self-determination lies in the natural aggregation of individual rights to self-determination (a natural right), and that of territorial rights comes from the transfer of the individual right to enforce the rules of natural law (a natural right). Although both of them are generated from the process of exercising the natural union rights, the former right cannot be directly and simply understood as the source and moral value basis of the latter one. The only connection between these two rights may be that the object of rights or the result of the exercise of both rights will objectively point to the natural resource carriers such as land and sea. Therefore, damage to territorial rights does not necessarily lead to damage to collective rights to self-determination. On the contrary, remedy for damage on collective right to self-determination is not necessarily to be achieved by restoring territorial rights.

For reasons above, some theoreticians attempted to reinterpret the relationships between the collective right to self-determination and territorial rights. For example, departing from the approach of Cara Nine, Jorgen Odalen adopts the concept of self-determination in the relatively weak sense that is defined by Buchanan who argued that self-determination is a gradual spectral concept, and the enjoyment of complete titles to territory may be only a special case for realizing self-determination.⁵³ What may be achieved in the real world is the self-determination to some extent. Based on the re-understanding of the relationship between the two rights, Odalen proposed a relatively collective self-determination remedy program for climate refugee countries,⁵⁴ namely the De-territorial Countries Remedy Program. In this program, nationals of climate refugee countries can live in host countries as collective cultural communities or nations. The international community shall also recognize the new collective as an independent international legal entity holding certain degree of autonomy (do have its own language habits and cultural traditions). And this entity shall continue to exercise its sovereignty over the underwater land and corresponding marine areas after the original territory disappeared. Therefore, there are two basic preconditions for the establishment of Odalen’s scheme. Firstly, this program recognizes collective rights to self-determination and territorial rights as two relatively independent rights. Thus, the remedy of collective right to

51 Nine, above n 1, at 359–375.

52 Bas Van der Vossen “Locke on Territorial Rights” (2015) 63 *Political Studies* 713–728.

53 Jorgen Odalen “Underwater Self-determination: Sea-level Rise and De-territorialized Small Islands States” (2014) 17 *Ethics, Policy & Environment* 225–237.

54 In this sense, different from the absolute relief scheme for the damage of collective self-determination in the absolute sense that other international communities provide a new territory for the climate refugee countries, the “national program for demoralization” is a relatively meaningful scheme for the restoration of collective self-determination.

self-determination does not necessarily mean compensation by transferring territorial, and climate refugee countries can maintain collective self-determination without enjoying territorial rights and continue to act as independent international political and legal entities. Secondly, this program recognizes the property dimension of territorial rights. Although climate refugee countries have lost their ability to establish a just order in their original territory, they still can have independent control over the original territory and its natural resources. Therefore, to some extent, the relief of territorial rights promotes the realization of the collective rights to self-determination, and in a general sense, the restoration of collective self-determination in absolute sense can be achieved by providing a new territory for the injured nationals whose rights to collective self-determination is impaired by the disappearance of their territory. However, we cannot conclude that the remedy of collective self-determination can only be achieved through remedying territorial rights. Logically, there are two remedy programs when collective rights to self-determination are damaged: firstly, the program of restoring collective self-determination in absolute sense; secondly, the program of restoring collective self-determination in relative sense.

Theoretically, if international legislators adopt this kind of program and expand the concept of collective rights to self-determination, it will inevitably lead to a collective remedy program for loss and damage incurred by climate refugee countries. That is to acknowledge the legitimate existence of an injured state as a national collective, and the specific method of compensation may be to provide and transfer a new territory for the injured state, or it may be an institutional arrangement of embedded limited sovereignty between host countries and nationals of climate refugee countries. However, a problem may arise that if the international legislators do not adopt the remedy program of individual right of emergency refuge which is based on the collective ownership of the earth, the concrete restoration plan of the collective right to self-determination could not be constructed in light of the principle of global climate distributive justice (which is applied in the aforementioned individualized remedy program), instead the principle of global climate corrective justice should come into play. In other words, the collective remedy program is based on the concept of global corrective justice, which emphasizes that the loss of rights held by climate refugee countries should be linked with specific countries generating GHGs according to some specific principles and standards attributing responsibilities.⁵⁵

III. A COMPARISON OF OPTIONAL REMEDY PROGRAMS: INTEGRATION OF IDEALISM AND REALISM

In addition to the aforementioned optional remedy programs centering on natural rights, some theoreticians emphasize a duty-oriented option, advocating the redistribution of natural resources of all countries within the framework of global distributive justice. In this remedy program, international legislators need to consider how to assign excessive natural resources of rich countries to climate refugee countries in order to ensure refugees may survive. In order to analyze issues regarding climate refugee countries, Bell tried to introduce Rawls and Bates's ideas of liberal international justice (namely the Global Society of People and the Cosmopolitan Approach). After

55 Quite a few scholars have elaborated on how to establish a regime to identify which countries should take the responsibility for relieving loss and damage caused to climate refugee countries from the perspective of correction justice and the scope of their respective obligations, but they are not the focus of this paper. Margaret Moore "Natural Resources, Territorial Right, and Global Distributive Justice" (2012) 40 *Political Theory* 84–107; Kolers, above n 47, at 332–343; Dietrich, above n 36, at 83–105.

a comparative analysis with the Rawls's theory, Bell believes that Bates's principles of global resources redistribution (RRP, applicable to natural resources) and principles of global differences (GDP, applicable to the income and wealth generated from the utilization of natural resources) based on Rawls's principles of social equity and justice distribution is more helpful to solve the problems of natural resources concerning climate refugees.⁵⁶ To correct Bates's inadequate treatment of natural resources as only of instrumental value, Bell holds that the rights of climate refugees to obtain equally distributed natural resources and wealth should be ensured, and they can exist as people enjoying the collective rights to self-determination (that is specific persons living in a specific place).⁵⁷ Skillinton further advocated that a more scientific and rational agreement on the redistribution of global natural resources and cooperation should be established to ensure climate refugees' rights of emergency refuge and the collective rights to self-determination, facilitating their resettlement.⁵⁸ Therefore, both Bell and Skillinton attempted to combine the two moral value bases mentioned in the individual and collective remedy programs, namely the individual right of emergency refuge and collective right to self-determination. Finally, it is worth mentioning that although Margaret Moore didn't directly refer to climate refugee countries, her views on the dichotomy of control over natural resources and the right to obtain national income generated from natural resources together with her views on the restriction of the individual right to life on the exercise of collective right to self-determination can also be indirectly applied to solve the issues regarding climate refugee countries.⁵⁹

In summary, all the programs above advocate adjusting the unfair and unequal distribution of natural resources on a global scale in accordance with the principle of global distributive justice, aiming at transferring an excess of natural resources to individual or collective climate refugees through the global redistribution system. The implementation of this remedy program does not require the individual right of emergency refuge and the collective right to self-determination. Actually, it is an analysis that weakens the focus on rights and only emphasizes state responsibility under the framework of global distributive justice. However, the efforts of its proponents to weaken analysis of rights are not convincing. When they make the case for global natural resources redistribution, they still rely on natural rights to discuss the responsibilities of states with rich natural resources towards climate refugee countries. Moreover, its proponents take the individual right of emergency refuge and the collective right to self-determination proposed by the aforementioned individualized and collectivized remedy programs as its moral justifications without any demonstration. For example, Bell's collective ownership of the earth, collective right to self-determination, and Skillinton's right of emergency refuge, collective right to self-determination, and Moore's right to life and collective right to self-determination. Thus, we can regard the global redistribution scheme of natural resources under the framework of global distributive justice as a compromise between the individual and collective remedy programs. Whether this simple integration can effectively solve the inherent dilemma of the two remedy programs remains to be tested.

Therefore, it can be demonstrated that there are currently four remedy programs for climate refugee countries in the theoretical field (See Table 1, following below). In theory, these four

56 Derek R Bell "Environmental Refugees: What Rights? Which Duties?" (2004) 10 *Res Publica* 135–152.

57 At 135–152.

58 Tracey Skillinton "Reconfiguring the Contours of Statehood and the Rights of Peoples of Disappearing States in the Age of Global Climate Change" (2016) 5 *Social Sciences* 46 at 54–55.

59 Moore, above n 55, at 86–107.

options are feasible, but whether they could become practical remedy programs for climate refugee countries should be evaluated by cost-benefit assessment. In order to simplify analysis, this paper selects “political feasibility” and “normative acceptability” as evaluative criteria. An assessment of “political feasibility” means that under the current international political framework, examining whether and to what extent a remedy program can be adopted and accepted by all rational countries. It can be understood as a cost consideration. Generally, the least objected-to program is the most feasible one in politics. “Normative acceptability” means the extent to which a remedy program can achieve the damage relief goal. It can be understood as a benefit consideration, which means the program that can best compensate the loss and damage incurred by the climate refugee countries should be considered as the best choice.

Firstly, regarding the remedy program of the individual right of emergency refuge, it is a minimum individualized remedy, namely international climate immigration or a refugee mechanism. As this program does not require any transfer of territory, states can accept only part of the climate refugees/immigrants based on the concept of global distributive justice, which can avoid an influx of large-scale collective refugees/migrants and be met with a relatively low level of resistance from rational states. However, in the current international refugee law and immigration law, each state has the power to determine their own qualifications for refugees, which may pose significant challenges to this individual remedy program. The program is also merely a minimum level of relief, that is to say the host country may only grant partial citizenship (namely refugee status) to climate victims, and even if it grants full citizenship (as immigrants), this program cannot adequately remedy various losses suffered by climate victims (such as the loss of political identity, language habits, cultural tradition, acknowledgement of political community, and psychological loss).

Secondly, in terms of the remedy program of the collective right to self-determination, it advocates the re-delimitation of national borders and the transfer of territories to ensure nationals of climate refugee countries to relocate as collectives in new territories. The resulting costs (of transferring territories and natural resources) and its possible adverse impacts on host countries (such as the risk of “refugee governance”) will readily lead to staunch resistance from rational countries. After all, it is current international reality that no land is without an ‘owner’, and state sovereignty reigns supreme. No state is willing to voluntarily transfer its own territory no matter how high the price is. However, this collective remedy program has high “normative acceptability”. While relieving individual victims, it can at the same time compensate climate refugee countries for the damage to the collective right to self-determination and maintain the survival of their nationals as ethnic collectivity.

Therefore, each remedy program has its own advantages and disadvantages. In light of this, can the De-territorial National Remedy Program and the global redistributive justice program, which aim to integrate the individual and collective remedy programs, make up for the limitations of those remedy programs? As regard to the global redistributive justice program, its intention is to introduce the principle of fairness and justice in the field of global natural resource redistribution and to promote the equalization of wealth. However, every country in the international community tends to pursue the supremacy of national sovereignty, and the powers of each country are equal in principle. Therefore, this remedy program cannot break through the problems of political feasibility that an individualized remedy program will face; in terms of normative acceptability, the global distributive justice program focuses upon transferring excessive (natural) resources of other countries. However, it is difficult to define what is “excessive”, and as a result, countries may

argue that their own (natural) resources are scarce in order to shirk some of their responsibilities. Ultimately, resources for relieving climate refugees will be too scarce to achieve the goal, and the acceptability of norms is relatively low.

As far as the De-territorial National Remedy Program is concerned, it adopts a flexible response plan: on the one hand, it has the advantage of higher political feasibility than the individual remedy program, recognizing multiple relief schemes. Even the collective remedy program is not a collective scheme based on the transfer of real territory. That is to say, the collective can exist as an independent political legal entity within the territory of a new country and retains the right to self-government, but it does not have absolute territorial rights to the new territories in which it resides, weakening direct conflicts with the territorial rights of the host country. On the other hand, the De-territorial National Remedy Program also takes into account the remedy of the collective rights to self-determination of climate refugee countries, which advocates measures of “alternative compensation” to help climate refugee countries to maintain their autonomous natural resources (such as effective control of the “abandoned” territory, institutional resources provided for the establishment and maintenance of the government in exile, the economic resources needed to exploit the natural resources in the original “disappeared” territory, and institutional resources for effective allocation of natural resource rents and so on),⁶⁰ improving normative acceptability of the remedy program.

Table 1: A Comparison of Four Optional Remedy Programs

Remedy Programs	Political feasibility	Normative acceptability
The Remedy Program of Individual Right of Emergency Refuge	High	Low
The Remedy Program of Collective Right to Self-determination	Low	High
Global Distributive Justice Remedy Program	Low	Low
De-territorial Countries Remedy Program	High	High

IV. INTERNATIONAL POLITICAL PROSPECTS OF THE DE-TERRITORIAL COUNTRIES REMEDY PROGRAM AND ITS CHALLENGES TO DEVELOPING COUNTRIES

In comparison with other remedy programs, the relatively collective self-determination remedy program (namely the De-territorial National Remedy Program advocated by Jorgen Odalen) is a more normatively accepted and politically feasible choice for climate refugee countries and the best institutional choice for international legislators. However, as the UNFCCC has become the main platform for addressing climate-related issues, including loss and damage caused by climate change, it is therefore necessary to explore the compatibility of the De-territorial National Remedy Program with the UNFCCC framework and its international political prospects under

60 Maxine Burkett “The Nation Ex-situ: on Climate Change, De-territorialized Nationhood and the Post-climate Era” (2011) 2 *Climate Law* 345–374.

the UNFCCC framework. In terms of compatibility, the De-territorial National Remedy Program is compatible with the fundamental legal principles established by the UNFCCC, because the UNFCCC preamble clearly provides that “no harm done to another country’s environment”, which allows for future international negotiations under the UNFCCC for climate change loss and damage.⁶¹ However, it is worth noting that this theoretical compatibility has not been completely implemented in international climate legal practice as yet.

Taking a look at the outcomes on the concern of loss and damage caused by climate change in the texts of climate agreements that have emerged from climate negotiations since the Bali Action Plan in 2007,⁶² the “return” of responsibility is still far off. In the year of 2013, the 19th Conference of the Parties to the UNFCCC directly contributed to the birth of The Warsaw International Mechanism (namely WIM). Since the establishment of the WIM, the Executive Committee of the WIM has held a lot of meetings, workshops and events for loss and damage associated with climate change impacts.⁶³ However, the Paris Agreement in 2015 only reached Article 8, specifically excluding the responsibility issue from the final text of the agreement, which also indicates that the international community has not yet demonstrated an intention to solve loss and damage under the UNFCCC framework.

Actually, after the year of 2015, Conferences of the Parties (COP) to UNFCCC tried to put the loss and damage caused by climate change into the Global Risk Reduction Framework while avoiding talking about responsibility issues, which has now become the leading path for remedying loss and damage caused by climate change under the UNFCCC.⁶⁴ In this way, future loss and damage and related issues of climate refugees are likely to be dealt with in the international legal protection mechanism of natural disasters (namely international natural disaster response law). Although the Sendai Framework for Disaster Risk Reduction 2015–2030 formulated by the Third UN World Conference on Disaster Risk Reduction in 2015, after the Hyogo Framework for Action, shifted the focus of the international natural disaster response law from ‘immediate relief in case of disaster or threat’ to ‘post-disaster recovery, restoration and reconstruction’.⁶⁵ However, it is only a guidance document with no mandatory legal binding force, which means that it falls far short of imposing international legal duties on climate wrongdoers or the whole international community. In other words, the current international natural disaster response law is rooted in soft law and lacks legal binding force. Specifically, in the current international natural disaster response law, there are only a series of soft law documents providing guidance and norms for humanitarian assistance during natural disasters. These conventions and agreements do not cover any specific duty of states to the victims of natural disasters, and not to mention the refugees’ rights to obtain remedies. Therefore, trying to solve the issues regarding climate refugee countries under the UNFCCC or the international natural disaster response framework will face considerable institutional resistance and predictably lower implementation benefits.

61 Yu, above n 8, at 12–22.

62 UNFCCC *Bali Action Plan* FCCC/CP/2007/6/Add.1, Decision 1/CP.13 (2007) <<https://unfccc.int/sites/default/files/resource/docs/2007/cop13/eng/06a01.pdf>>.

63 UNFCCC Workshops & Meetings *Excom (Loss and Damage)* <<https://unfccc.int/workshops-and-meetings>>.

64 Julia Kreienkamp and Dr Lisa Vanhala “Climate Change Loss and Damage - Policy Brief” <www.ucl.ac.uk/global-governance/news/2017/mar/climate-change-loss-and-damage>.

65 United Nations Office for Disaster Risk Reduction (UNDRR) *Sendai Framework for Disaster Risk Reduction 2015–2030* <www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf>.

The resistance comes from the essential attribute of climate refugee countries, which is in essence an issue of state responsibility and how to determine the responsible states and distribute specific responsibilities among them. Actually, state responsibility in the field of climate change is not only a problem evaded by UNFCCC, but also one that cannot be easily solved under the framework of international natural disaster law, not least because both are international soft law. Even though the UNFCCC has imposed mandatory obligations on developed to reduce GHGs emissions, the cases of the United States withdrawing from the Paris Agreement and UNFCCC starting the bottom-up Nationally Determined Contributions (namely NDCs) after 2015 Paris Agreement indicate that the coercive power of these agreements is extremely limited. As a result, the efforts of the De-territorial Countries Remedy Program to emphasize distributing specific responsibilities among different responsible states will be limited. After all, the nature of UNFCCC negotiations among parties and the humanitarian nature of international natural disaster response law makes both of them unsuited to undertake this task.

Does this mean that the De-territorial Countries Remedy Program will inevitably not be in applicable in the context of future international politics? The answer is no. Compared with the challenges about state responsibility faced by other remedy programs, the De-territorial Countries Remedy Program has two advantages. First, unlike the compensation of territorial transfers in the collective remedy program, this program allows climate refugees to live in the new country as individual migrants or national collectives, which can actually mitigate the rigidity of state responsibility to some extent. Second, the argument of this program that climate refugee countries can retain their property rights to the “disappeared” territories (namely rights to the former territories after they have been submerged by the sea) as independent international legal entities, in effect, can ensure remedy for the damage to their collective right to self-determination. Moreover, this legitimate recognition can meet the qualification for national self-determination and the rights of maritime territories would not harm the legitimate interests of other states and can be an acceptable option.

But the question is, how to determine the states that shall receive climate refugee countries as collectives? In fact, the strategies proposed by the supporters of the collective self-determination remedy program deserve attention of supporters of the De-territorial Countries Remedy Program. Frank Dietrich suggest establishing a central fund comprised of climate wrongdoers’ contributions to cover the costs of territorial compensation, as well as reaching resettlement agreements between countries willing to provide territories and collectives of climate refugee countries.⁶⁶ Tracey Skillington advocated that the responsible states and specific responsibility shares should be determined by comprehensively considering population density, natural resource reserves and other factors, and emphasized that it should be supplemented by transnational cooperative incentive systems, such as a natural resource redistribution tax or fund system.⁶⁷ In the authors’ opinion, based on both views, a similar two-stage treatment scheme can be adopted. Firstly, the fund payment duties should be allocated according to some specific principles of distributing different state’s responsibilities. The next stage is to establish transnational cooperation agreements between climate refugee countries and host countries voluntarily willing to accept climate refugees that can be supplemented by corresponding transnational incentive mechanisms to encourage cooperation. For example, climate refugee countries, as a collective, can still pay part of the rental income to the

66 Dietrich, above n 36, at 83–105.

67 Skillington, above n 50, at 54–55.

host country from sovereign funds of natural resources they still hold. But the questions of how to determine responsible states and how to allocate the shares among multiple states still need to be addressed under the UNFCCC framework. In the future, international legislators need to design a scientific and fair indicator system of responsibility distribution through the UNFCCC negotiations. Actually, it may still face the same negotiating bottlenecks as in establishing duties of reducing GHGs, which is caused by the inherent limitations of the equal-rights structure of international community. However, this is extremely high transaction costs that the international community has to pay, which is an unavoidable “natural friction force” inherent in system design.

For developing countries, if loss and damage caused by climate change and the more severe problem of climate refugee countries are not paid sufficient attention, they are bound to be in a weak position in future climate change negotiations. Moreover, developing countries tend to suffer most from loss and damage caused by climate change, and most of the countries that have emerged as being at the highest risk of becoming climate refugee countries are indeed developing countries.⁶⁸ In addition, as mentioned above, the core issue of climate refugee countries is state responsibility. The practice of developed countries perpetuating an avoidance on state responsibility will internalize the ultimate responsibility for loss and damage into the developing countries’ costs of survival and development, which is contrary to the idea of global justice. Therefore, in order to ensure the sufficient implementation of the international community’s idea of justice in the field of loss and damage caused by climate change, developing countries can and should continue to pool their efforts to advance the international legal process related to those loss and damage. However, the current divergent views among developing countries on climate loss and damage,⁶⁹ and the further decline of global climate negotiations make it difficult for developing countries to bring together bargaining strength. In the future, developing countries should attach importance to negotiation strategies, try to avoid the issues regarding compensation of territorial transfer which developed countries are most resistant to, and support the remedy program of de-territorial countries. Meanwhile, the responsibility for remedying loss and damage should be converted into financial duties that can further weaken the rigidity of state responsibility. Lastly, developing countries shall consistently advocate the remedy for damage to the right to self-determination.

Theoretically, as a member of developing countries, China shall not deny its possible responsibilities for loss and damage caused by climate change. In other words, China must take the possibility seriously that developed and some developing countries might impose more responsibilities on it, and it should not adopt a strategy of simply refusing to take responsibility, which would not only damage its international image, but also keep it out of the camp of developing countries. Therefore, to ensure that China will not be disadvantaged in dealing with the issues of climate refugee countries under the rules of future international climate laws, the Chinese government should actively promote negotiations on climate loss and damage, and especially emphasize the adverse effects that the issues of climate refugee countries will have on China through scientific research and its possible contribution to assume responsibilities for helping climate refugee countries.

68 Mathis Okka Lou and Benjamin Schraven “Climate Refugees in Europe? Climate-related Migration Affects Developing Countries in Particular” <<https://www.die-gdi.de/en/the-current-column/article/climate-refugees-in-europe-climate-related-migration-affects-developing-countries-in-particular-1/>>.

69 Wang Weiguang and Zhen Guoguang (eds) *Green Paper on Climate Change: Addressing Climate Change report* (2015) (China Social Sciences Academic Press 2016) 55-68.

Meanwhile, the Chinese government should, while emphasizing its own responsibilities and capabilities, urge developed countries to take their responsibilities for climate justice, which depends on the possibility of proposing a responsibility distribution program that is most consistent with the international justice (the key issue is how to establish a set of responsibility distribution program integrating climate distributive justice and corrective justice).⁷⁰ However, it is worth noting that since a small number of developed countries may also face the risk of becoming a climate refugee country, the distribution of responsibilities may not be limited to the traditional two-point method of developing countries and developed countries. As an active promoter of global climate governance, China should no doubt stand by the principle of Common But Differentiated Responsibility (CBDR) and take it as a basis for new negotiations, actively strengthen the work of South-South cooperation, fulfill her international climate commitments without reservation, vigorously develop a low-carbon economy, and actively promote international negotiations on the subject of loss and damage.⁷¹

Accordingly, the principle of CBDR also needs to be adjusted. Instead of unilaterally emphasizing the responsibilities of developed countries, it is necessary to redefine countries that are relatively easy to become climate refugee countries and countries that are relatively difficult to become climate refugee countries. Only in these ways can China be a responsible big power. Meanwhile, China should be alert that some developed countries may try to impose an unreasonable share of responsibility on China for loss and damage incurred by climate refugee countries.⁷²

V. CONCLUSION

Climate refugee countries has been the most extreme case of loss and damage caused by climate change. Many residents from low-coast or climate-fragile countries face the “tragic fate” of being forced to leave their hometown. Under the existing rules of international law, these climate refugee countries, no matter as collectives or as individual nationals, are not entitled to obtain positive legal relief from other sovereign states. Natural rights can be a powerful “weapon” for climate refugee countries’ nationals when they claim remedies for climate loss and damage. According to theoretical analysis, it can be inferred that there are four optional remedy programs, three programs of which are directly based on natural rights and the last one is focusing on the responsibilities of states highlighting global distributive justice. Considering the “political feasibility” and “normative acceptability” of a remedy program, the relatively collective remedy program, namely the De-territorial National Remedy Program, is a more normatively accepted and politically feasible choice for climate refugee countries and the best institutional choice for international legislators. Furthermore, the De-territorial National Remedy Program is compatible with the fundamental legal principles established by the UNFCCC, since the UNFCCC preamble clearly provides that “no harm done to another country’s environment”, which also favors future international negotiations under the UNFCCC for climate loss and damage. However, it does not mean that the De-territorial National Remedy Program will go on smoothly, it still needs other countries’ positive acceptance.

70 Cao Mingde “The Legal Standpoint and Strategy of China to Participate in International Climate Governance: From the Perspective of Climate Justice” (2016) 1 *China Legal Science* 29–48.

71 Mingde Cao and others “Remedies for Loss and Damage Caused by Climate Change from the Dimension of Climate Justice” 2016 (14) *Chinese Journal of Population Resources and Environment* 253.

72 Wyman, above n 32, at 449–450.

Due to the space constraints, this paper gives little attention to specific institutional construction regarding climate refugee countries which needs further study.⁷³

73 Due to the space constraints within this paper, it does not elaborate on the allocation of responsibility and specific implementation mechanisms of remedy programs for loss and damage incurred by climate change countries, which are the key issues to determine whether a remedy program can be effectively implemented. Therefore, the focus of future academic research should be on how to determine recipient countries of climate refugee countries from both theoretical and practical perspectives, and how to encourage more countries to accept climate refugee nationals voluntarily, whether as individuals or as collectives, through the design of international political and legal institutions. In addition, as there may be conflicts between exotic and native communities, the research on how to carry out effective community cooperation is also a theoretical concern. Finally, how to amend the existing international legislation to implement the de-territorial countries remedy program should also be the focus of academic research, specifically including two issues: firstly, to confirm that nationals of climate refugee countries maintain and ensure their status as an entity of collective self-determination by electing an “interim government” and to recognize their special status as international legal entities. Secondly, to amend the rules of international law of the sea and recognize the sovereign rights of states over their original maritime areas, such as the possibility of “freezing” the scope of their maritime areas before the territorial extinction.

FURTHER LEGAL PROTECTION FOR THE STRATOSPHERIC OZONE LAYER: FOCUSING ON THE GLOBAL USE EXEMPTIONS OF METHYL BROMIDE

BY MEKALA JEEWANTHI DELPAGE

I. INTRODUCTION

The fundamental conceptual definition of the environment is surrounding. It covers from the top of the atmosphere down to the inner core of the earth. Genetic characteristics of the environment use the law of nature to compromise and balance the eco-system. Especially from the nineteenth-century, population growth and modern technology have adversely affected this natural system. Therefore, based on various social concerns, global intervention came forward to protect the environment by the black letter law.¹ Today almost all the parts of the environment are governed by man-made law and one of the legally protected environmental organs is the “Stratospheric ozone layer”. This layer covers approximately ten to fifty kilometres from the earth’s surface, with a high concentration of ozone (O₃) to absorb harmful ultraviolet radiation from the sun. In 1985, a British research group of scientists discovered the first huge ozone loss in the southern hemisphere² which is called the ozone hole, and from then onward, global attention was directed to the ozone depleting matter.

The Vienna Convention for the Protection of the Ozone Layer (1985) established a monitoring system on ozone depletion by creating a framework to develop protocols to establish global binding actions. Accordingly, scientists identified the main threat of ozone depletion as man-made chemicals, which mainly included chlorine and bromine. These synthetic chemicals are commonly known as “ozone-depleting substances” (ODSs), and they are destroying vast amounts of ozone molecules when they reach to the stratosphere.³ Based on these scientific findings, the need for global accountability was established by enacting international legal instruments to combat ozone depletion. The 1987 Montreal Protocol was designed under the Vienna Conventional framework to phase out the production and consumption of certain ODSs with specific deadlines. Both these treaties are universally ratified and adopted by the most domestic legal systems, including New Zealand. Statistics show 98 per cent reduction of ODSs usage of the world due to this legal involvement.⁴ However, long life ODSs still stay within the atmosphere, and some forms of ODSs are still being used in industries, under the legal exemptions. One of the major exemptions of

1 Alexander Gillespie *The Long Road to Sustainability* (Oxford University Press, 2018) at 23–44.

2 David Caron “Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law-making” 14 *Hastings International and Comparative Law Review* 755 (1991) at 759.

3 Alexander Gillespie *Climate Change, Ozone Depletion and Air Pollution: Legal Commentaries Within the Context of Science and Policy* (Koninklijke Brill NV, Leiden, 2006) at 4.

4 Stats NZ “Global production of ozone-depleting substances” <www.stats.govt.nz>.

global ODS usage are the exemptions for the methyl bromide. Based on the usage, these legal exemptions allow state parties to produce and consume methyl bromide, which is a high potential ODS with a considerably long atmospheric lifetime. New Zealand is one of the highest Methyl Bromide users in the world due to the growing timber exportation industry. This methyl bromide consumption raises worldwide critical debates, including within the New Zealand society, to ban some exemptional practices.

II. METHYL BROMIDE (CH₃Br)

Methyl bromide is a colourless, odourless and non-flammable gas of a combination of Chlorine and Bromine (CH₃Br), which is produced industrially and biologically. It is an efficient pesticide, and used for fumigation purposes, fire extinguishing and upgrading soil. It controls pests and pathogens in agriculture and shipping including fungi, weeds, insects, nematodes (or roundworms), and rodents.⁵ The pesticide value of methyl bromide was first disclosed by Le Group, France in 1932 and since then has been widely used in the agriculture and timber industries.⁶

III. METHYL BROMIDE AS AN OZONE DEPLETING SUBSTANCE

Methyl bromide is a toxic gas with 0.8 to 2 years of life in the atmosphere.⁷ This gas enters to the atmosphere by both natural and anthropogenic causes. In addition to ozone depletion, it harms human health by damaging the nervous system and respiratory system. Also, it has a detrimental effect on soil biodiversity and polluting surface and ground water. However, it has less greenhouse effect, and its Global Warming Potential (GWP) is eighty-five.⁸ Among the other bromide compounds, methyl bromide is the primary carrier of bromide to the stratosphere. Within the stratospheric area, those molecules break down into the form bromide and involve in a series of ozone depleting chemical reactions. Moreover, bromide is 50 times more reactive on ozone depleting than chlorine, as it reacts with reservoir chlorine species and freezes them to react with additional ozone.⁹ According to the United Nations Environment Programme (UNEP) calculations ozone depleting potential (ODP) of methyl bromide is 0.6 or 60 per cent of CFC-11's ozone-depleting potential.¹⁰ However, this ODP can be increased based on the increments of abundant chlorine in the atmosphere.¹¹ Due to the above characteristics, methyl bromide is categorised under the group of Class I ozone depleting substances.

5 The United States Environment Protection Agency *Methyl Bromide* <www.epa.gov/ods-phaseout/methyl-bromide>.

6 Ministry of Primary Industries *Methyl Bromide Information* <www.biosecurity.govt.nz/dmsdocument/14869/direct>.

7 Hanna Ritche and Max Roser "Ozone Layer" (2018) published online at OurWorldInData.org <www.ourworldindata.org/ozone-layer>.

8 Above n 7 "Ozone Layer".

9 Jean Ristaino and William Thomas "Agriculture, Methyl Bromide and the Ozone Hole – Can we fill the gaps" (1997) 81(9) *Plant Disease* at 965.

10 At 966.

11 At 966.

IV. METHYL BROMIDE ON MONTREAL PROTOCOL

Methyl bromide is one of the group of chemicals phased out by the Montreal protocol. It continued to receive production and consumption exemptions from the international and domestic levels until today. This anthropogenic chemical was included in the Protocol by the Copenhagen Amendment 1992 adding art 2H and Annex E. Nevertheless, in 1997 ninth meeting of the parties of Montreal Protocol established the phasing out procedure for methyl bromide use in industrial countries based on 1991 consumption as; 25 per cent reduction in 1999, 50 per cent in 2001, 70 per cent in 2003 and 100 per cent in 2005.¹² This reduction period extended another decade for the non-industrialised nations. However, this phasing out process of production and consumption was subjected to the exemptions that depicted in the specific provisions of the Protocol, according to the collective decisions made by the parties of the Montreal Protocol at the annual meetings.

V. EXEMPTIONS FOR METHYL BROMIDE UNDER MONTREAL PROTOCOL

The exemptions of methyl bromide usage are recognised by the Montreal Protocol under three categories: use as a chemical feedstock, the provisions of “critical-use exemption” and use for Quarantine and Pre-Shipment (QPS) purposes. Article 2H (5) of the Protocol depicts the “critical-use exemption” of methyl bromide, which executed under the Decision IX/6 concluded in the ninth meeting. According to this Decision, to determine the “critical use” the nominated party should clarify, the lack of availability of methyl bromide for that use would cause significant market disruption and unavailability of technically and economically feasible alternatives or substitutes for this use. Furthermore, art 2H(6) states exemptional use of methyl bromide for quarantine and pre-shipment purposes. This QPS purpose more fully clarifies by the Decision VI/11, contrasting art 5 (developing) and non-art 5 (developed) countries and more QPS related provisions were described by the several other later decisions. Besides, the Decision XX/6 of the 20th meeting (2009/2010) encouraged parties to take necessary actions to replace or reduce the use of methyl bromide for QPS purposes and related emissions.

According to the United Nations Environment programme, Methyl Bromide Technical Options Committee (MBTOC) report, in 2017 the amount of 13,553 tonnes of methyl bromide produced in the world for all the above uses. 97.5 per cent of it consumed for the quarantine and pre-shipment (QPS) purposes and the rest 2.5 per cent for the non-QPS purposes.¹³ Some countries still using methyl bromide for soil fumigation, and 50 per cent to 95 per cent of it eventually enters the atmosphere in this process.

VI. METHYL BROMIDE AND NEW ZEALAND

According to the Environment Protection Authority (EPA) “Staff report: a modified reassessment of Methyl Bromide” (2020), New Zealand is consuming methyl bromide for different purposes. It is used as fumigation to treat products before export to the selected countries, and for quarantine application in imported goods (border biosecurity requirement) under the exemption of QPS

12 United Nations Montreal Protocol on Substances that Deplete the Ozone Layer (16 September 1987), art 2 H (1)–(4).

13 United Nations Environment Programme Methyl Bromide Technical Options Committee - Assessment report (2018) at 16–17.

purposes, and it is permitted to quarantine treatment for potato wart as well.¹⁴ The methyl bromide consumptions in the New Zealand industries commence from the mid-1990s with less than 50 tonnes in annual usage, and it increased to more than 500 tonnes from 2012 onwards.¹⁵ According to the 2017 worldwide scale, New Zealand is the highest industrial user of methyl bromide in the world, and it contributes 7.7 per cent of global anthropogenic emission of this major ODS.¹⁶ Around 94 per cent of methyl bromide uses in New Zealand contribute to the fumigation of the exporting forest products (largest markets are China and India).

Following the state obligations imposed by art 2(2) of the Vienna Convention, New Zealand enacted domestic legislation to adopt the provisions in the Montreal Protocol to combat against ozone depleting substances usage including methyl bromide. The New Zealand Ozone Layer Protection Act 1996 is the foremost law in this field and the purpose of this Act is depicted in s 4 as follows:

- (1) The purpose of this Act is:
 - (a) help protect human health and the environment from adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer:
 - (b) phase out ozone depleting substances as soon as possible except for essential uses:
 - (c) give effect to New Zealand's obligations under the Convention and the Protocol ...

This Act includes the provisions to control and regulate the ODS use in New Zealand collaborates with the Ozone Layer Protection Regulations 1996, which implement under pt 3 of the Act. The Regulations include specific detailed provisions to rule ozone depleting substances and sch 1 of the regulations depicts a full list of ODS including Methyl bromide that need to be controlled. It further mentions the prohibitions on importation, exportations, manufacture and sale, along with the exemptional circumstances. Section 7 of the regulations specifically describes the provisions of quarantine and pre-shipment permits on importing methyl bromide, and those permits need to be approved by the Environment Protection Authority (EPA).

According to the QPS purposes clarification of Montreal Protocol sixth meeting Decision VI/11, New Zealand obliged to:¹⁷

... refrain from use of methyl bromide and to use non-ozone-depleting technologies wherever possible. Where methyl bromide is used, Parties are urged to minimise emissions and use of methyl bromide through containment and recovery and recycling methodologies to the extent possible;

This obligation further emphasised by the XX/6 Decision to replace and reduce this anthropogenic chemical for the QPS purpose and related emissions. Based on these obligations, in 2010, the New Zealand methyl bromide uses were reassessed under s 63 of the Hazardous Substances and New Organisms Act 1996. This reassessment was concluded by Environment Risk Management Authority Decision HRC 08002, as follows:¹⁸

14 Environmental Protection Authority *Staff report: a modified reassessment of Methyl Bromide* (2020) at 8.

15 *Envirofume Ltd v Bay of Plenty Regional Council* [2017] NZEnvC 12 at [88].

16 At [90].

17 United Nations Environment Programme *Montreal Protocol Sixth Meeting of the Parties Decision VI/11: Clarification of "quarantine" and "pre-shipment" applications for the control of methyl bromide* (1994), s 1(C).

18 Environment Risk Management Authority Decision HRC 08002 (28 October 2010 as amended on 17 June 2011), at 2.5.2.

Accordingly, the committee has given particular consideration to the possibility of minimising emissions by requiring applications of methyl bromide to be subject to recapture technology.

This decision defines recapture technologies as “a system that mitigates methyl bromide emissions from fumigation enclosures such that the residual level of methyl bromide in the enclosed space is less than the worker-exposed standard”.¹⁹ Other than the requirement of recapture technologies, this decision imposed regulations on tolerable exposures limits (TELs), workplace exposure standards (WES) and minimum buffer zones. The above decision on ‘the deadline for methyl bromide users to adopt recapture technologies’ applies from ten years after the approval, and it was namely due from 28 October 2020. However, in July 2020, the decision-making committee (DMC) for modified reassessment received an application to extend this date for another six months and, controversially, it was approved by waiving the deadline unto 28 April 2021. However, according to the most recent decision dated 11 November 2020 DMC extended that deadline to another four months based on the 21st memorandum of Council.²⁰ Therefore, the new deadline for methyl bromide users to adopt recapture technologies is 28 August 2021 and it is raising intense discussions amongst the New Zealand community groups based on environment, health, and law.

VII. METHYL BROMIDE BAN IN COUNCIL OF EUROPE

Due to the low temperatures at the northern hemisphere, there is a trend of appearing ozone loss in the arctic range of atmosphere based on seasonal changes. It grants an inherent duty to the Europe region to work on ozone depletion. Therefore, under the European Council involvements, the ozone depleting substances ODSs were regulated by Regulation (EC) No 1005/2009 on Substances that Deplete the Ozone Layer (ODS Regulation). These regulations are stronger than the obligations of the Montreal Protocol and encompassing additional substances. Article 12 of this Regulation contains provisions about quarantine and pre-shipment applications and emergency uses of methyl bromide. It was designed to lower the use of methyl bromide in QPS purposes to ensure complete phase-out of methyl bromide from 18 March 2010.²¹ Europe region has some top timber exporters in the world and those countries follow alternative methods for QPS purposes instead of using methyl bromide.²² European Council “Staff Working Document, 2019” reveals, the use of methyl bromide for QPS within the European Union was zero in recent years as per the above prohibition from 2010 onwards. Showing the outcome of progressive steps taken by the European Council, in April 2020 Copernicus’ Atmospheric Monitoring Service reported, “the largest hole ever observed in the ozone layer over the Arctic has closed.”²³

19 At 16.11.

20 Environment Protection Authority “Direction and Minute WGT026 of the Decision-Making Committee (DMC)” (11 November 2020) at 5.

21 United Nations Environment Programme Ozone Secretariate *European Union Strategy to Reduce the Uses and Emissions of Methyl Bromide for Quarantine and Pre-Shipment Purposes* Ref Ares (2010)315100 - 08/06/2010 (June 2010) at 4.

22 At 15–16.

23 Copernicus’ Atmospheric Monitoring Service “CAMS tracks a record-breaking Arctic ozone hole” <<https://atmosphere.copernicus.eu/cams-tracks-record-breaking-arctic-ozone-hole>>.

VIII. ALTERNATIVES, REPLACEMENTS AND RECOMMENDATIONS FOR METHYL BROMIDE USAGE

Evaluating the feasible chemical or non-chemical alternatives or replacements for the current methyl bromide use is an essential discussion of this content. Montreal Protocol 11th meeting Decision XI/13 emphasises this requirement regarding the QPS exemptions. Before that, Decision IX/6 showed the methyl bromide “critical use exemption” applications need to prove unavailability of feasible alternatives. The Methyl Bromide Technical Options Committee (MBTOC) is working on to identify feasible alternatives, and it is funded by the Montreal Protocol Multilateral Fund. According to the European Council Regulation (EC) No 1005/2009 member states of the EU are required to report their annual efforts to develop non-methyl bromide alternatives for QPS purposes. Besides, these alternatives need to agree with the provisions of International Plant Protection Convention 1997 (IPPC).

Accordingly, ISPM -15 treatments 2017 (International Standards of Phytosanitary Measures Publication No. 15 – Guidelines for regulating wood packaging in international trade) Appendix I depicts effective methyl bromide alternatives as follows:²⁴

- Fumigants: Methyl Iodide, Phosphine, Sulfuryl Fluoride (SF).
- Controlled Atmosphere (CA).
- Heat/ Cold treatment.
- Controlled Pressure Impregnation (CPI).
- Radiations (Gamma radiation, microwave energy).

Methyl bromide is considered as the most suitable method in quarantine disinfestation. Thus, there are some efficient alternatives exist with physical methods, including heat treatment.²⁵ The New Zealand timber industry considered phosphine for alternative fumigation as major timber export markets (including China, Malaysia) were agreed to use it. However, phosphine is a toxic gas, and it is not suitable for the deck transporting logs. The most recently approved phytosanitary alternative in New Zealand is ethanenitrile (EDN), and the Ministry of Primary Industries already submitted the research result to the key trading partners to assess and negotiate. However, New Zealand is still considering adopting recapture technologies for methyl bromide use which suggest a decade ago. Nevertheless, the New Zealand law is not yet binding the stakeholders to use alternative or replacements for methyl bromide on the QPS purposes.

IX. CONCLUSION

Methyl bromide uses are exempt for the quarantine and pre-shipment purposes under art 2H(6) of the Montreal Protocol. Although there are no legal provisions in the Protocol to control the amount of this usage. When considering global factors, it is obvious there are sufficient and efficient alternatives to methyl bromide uses, especially quarantine and pre-shipment applications. Accordingly, within the timber industry, there is a possibility to export or import processed timber instead of raw timber to avoid phytosanitary treatments. Therefore, this is the possible time for a further phasing out of the global use of methyl bromide by banning the exemption for quarantine

24 FAO *Recommendation on replacement or reduction of the use of methyl bromide as a phytosanitary measure* (2017).

25 Paul G Field and Noel D G White “Alternatives to Methyl Bromide Treatments for Stored-Product and Quarantine Insects” (2002) 47 *Ann Rev Entomol* 331 at 345.

and pre-shipment applications. Within this suggestion, if any specific circumstance occurred to consume methyl bromide for a QPS purpose, it would probably be considered under the critical use exemption for limited usage. The above-mentioned phasing out mechanism can be contrasted with art 5 and non-art 5 countries, both international and domestic levels.

New Zealand ozone protection law is flowing parallel with the Montreal Protocol on methyl bromide usage which grants the same exceptional practices. Countries have more power and practical ability to work on feasible alternatives and replacements to reduce the amount of methyl bromide usage in domestic corpus. Hence, New Zealand law needs to contemplate beyond “recapture technologies”, which are still socially and legally argued in this field. The Country requires to work towards a ban of methyl bromide for QPS purposes, as it is a hazardous and ozone depleting substance. However, the limited exemptional uses need to be subject to the limited permits grant by the EPA after a reasonable examination. This is a possible process for New Zealand to contribute to the further protection for the ozone layer. This mechanism may adversely affect economic aspects, but it would be a long-term profit for the environment and the life on earth.

The countries of the world have a talent of collectively working to achieve global success. This talent needs to be expanded to prevent the current ozone depleting trends while strengthening the legal bindings. Accordingly, the global use of methyl bromide needs to minimise by further legal provisions in domestic and international levels to provide further protection for the stratospheric ozone layer.

TEFLON'S TOXIC LEGACY: PER- AND POLYFLUOROALKYL SUBSTANCES (PFASs) CONTAMINATION AND WHY FURTHER REGULATION IS URGENTLY REQUIRED

BY DEBBIE CRAWFORD*

I. INTRODUCTION

Per and polyfluoroalkyl substances (PFASs) are a large group of synthetic chemicals that are widely used in numerous technologies, industrial processes and everyday applications.¹ A 2015 survey by the Swedish Chemicals Agency was able to identify 2060 PFASs on the global market, but estimated that more than 4000 types of PFASs have been synthesised.² This was confirmed by the Organisation for Economic Cooperation and Development (OECD) in 2018, when it identified a total of 4730 PFAS-related chemicals on the global market.³

Since the discovery of polytetrafluoroethylene (PTFE) in 1938, PFASs, both polymeric and non-polymeric, have been used extensively as ingredients or intermediates of surfactants and surface protectors for assorted industrial and consumer applications.⁴ The distinguishing characteristic of PFAS compounds is a chain of carbon atoms bonded to fluorine atoms, resulting in toxic chemicals that have extremely poor environmental biodegradability (persistent), and accumulate in living organisms (bioaccumulating).⁵ PFASs and other synthetic organic chemicals with these properties are generally referred to as persistent organic pollutants.⁶ Many PFASs have

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1 Organisation for Economic Co-operation and Development (OECD) *PFASs and Alternatives in Food Packaging (Paper and Paperboard) Report on the Commercial Availability and Current Uses* (OECD Environment, Health and Safety Division, Environment Directorate, OECD Series on Risk Management No 58, 2020) at 11.

2 KEMI Swedish Chemicals Agency *Occurrence and Use of Highly Fluorinated Substances and Alternatives* (KEMI, Report 7/15, 2015) at 27–32.

3 OECD *Toward a New Comprehensive Global Database of Per- and Polyfluoroalkyl Substances (PFASs): Summary Report on Updating the OECD 2007 List of Per- and Polyfluoroalkyl Substances (PFASs)* (OECD Environment, Health and Safety Division, Environment Directorate, OECD Series on Risk Management No 39, 4 May 2018) at 6.

4 OECD *PFASs and Alternatives in Food Packaging*, above n 1, at 11.

5 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)* (OECD Environment, Health and Safety Division, Environment Directorate, 2013) at 4.

6 Frederick Pontius “Regulation of Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS) in Drinking Water: A Comprehensive Review” (2019) 11 *Water* 1 at 1.

been detected globally in the environment,⁷ biota,⁸ humans,⁹ and food items,¹⁰ including in remote regions far from sources.¹¹ PFASs have therefore been recognised as global contaminants of high concern.¹²

Concerns about undesired adverse effects on humans and the environment have led to efforts toward the development of risk reduction approaches to reduce the global impact of these chemicals.¹³ In many developed countries, the risk reduction approach for PFASs has been to restrict and/or eliminate their manufacture and use through regulatory measures.¹⁴ This research paper will examine how PFASs are regulated internationally, in the European Union (EU) and in New Zealand. It will consider the efficacy of that regulation, and why further regulatory measures are urgently needed to prevent other PFASs from accumulating in the environment. As long as they continue to be released into the environment, humans and other species will be exposed to ever increasing concentrations of PFASs.¹⁵ Due to the large number of PFAS chemicals, the current substance-by-substance risk assessment and management approach is not adequate to efficiently prevent risk to the environment and human health.¹⁶ Precautionary risk management actions, such as regulating or prohibiting the entire class of PFASs, are therefore required.¹⁷ Until such regulation or prohibition is achieved, experts advise that people should minimise their use of and exposure to products containing PFASs.¹⁸ Consumer information on how to find PFAS-free alternatives will therefore play a significant role in helping to reduce exposure.¹⁹

7 See, for example, A Gawor and others “Neutral Polyfluoroalkyl Substances in the Global Atmosphere” (2014) 16 *Environ Sci Process Impacts* 404; H A Kaboré and others “Worldwide Drinking Water Occurrence and Levels of Newly-identified Perfluoroalkyl and Polyfluoroalkyl Substances” (2017) 10 *Sci Total Environ* 1016; and K Rankin and others “A North American and Global Survey of Perfluoroalkyl Substances in Surface Soils: Distribution Patterns and Mode of Occurrence” (2016) 161 *Chemosphere* 333.

8 See, for example J P Giesy and K Kannan “Perfluorochemical Surfactants in the Environment” (2002) 36 *Environ Sci Technol* 146A; M Houde and others “Monitoring of Perfluorinated Compounds in Aquatic Biota: An Updated Review” (2011) 45 *Environ Sci Technol* 7962; and L Ahrens and M Bundschuh “Fate and Effects of Poly- and Perfluoroalkyl Substances in the Aquatic Environment: A Review” (2014) 33 *Environ Toxicol Chem* 1921.

9 See for example, R Vestergren and I T Cousins “Tracking the Pathways of Human Exposure to Perfluorocarboxylates” (2009) 43 *Environ Sci Technol* 5565.

10 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)*, above n 5, at 4. See also KEMI Swedish Chemicals Agency, above n 2, at 10.

11 C J Young and others “Perfluorinated Acids in Arctic Snow: New Evidence for Atmospheric Formation” (2007) 41 *Environ Sci Technol* 3455.

12 OECD *Toward a New Comprehensive Global Database*, above n 3, at 8.

13 At 8.

14 At 13–14.

15 Frederick A. McDonald “Omnipresent Chemicals: TSCA Preemption in the Wake of PFAS Contamination” (2019) 37 *Pace Environ L Rev* 139 at 143–144.

16 European Environment Agency (EEA) *Emerging chemical risks in Europe – “PFAS”* (European Environment Agency, Briefing No 12/2019, 2019) at 1.

17 At 1–2.

18 At 5.

19 At 1–2.

II. PROPERTIES AND USES OF PFASs

PFASs are a large group of man-made chemicals containing more than 4700 individual substances.²⁰ PFASs consist of a fully (per) or partly (poly) fluorinated carbon chain connected to different functional groups.²¹ These very stable carbon-fluorine bonds are what makes PFASs resistant to degradation and therefore highly persistent in the environment.²² Based on the length of the fluorinated carbon chain, short and long chain PFASs can be distinguished:²³

- perfluorocarboxylic acids (PFCAs) with carbon chain lengths C8 and higher, such as PFOA;
- perfluoroalkane sulfonic acids (PFSAAs) with carbon chain lengths C6 and higher, such as PFOS; and
- precursors of these substances that may be produced or present in products.

PFASs were first created over 70 years ago. Polytetrafluoroethylene (PTFE) – a fluoropolymer or polymeric PFAS – was accidentally discovered in 1938 and was later introduced under DuPont's 'Teflon' brand in 1949.²⁴ Teflon has most commonly been used in pans and other cookware because of its non-stick coating capabilities, but is also used in household cleaning products and beauty items.²⁵

For more than 50 years, PFASs have been used in a wide variety of consumer products and industrial applications because of their unique chemical and physical properties, including oil and water repellence, temperature and chemical resistance, and surfactant properties.²⁶ The two most well-known PFASs are perfluorooctanoic acid (PFOA), used to create Teflon and a by-product of many other processes, and perfluorooctane sulfonic acid (PFOS), used in Scotchguard, firefighting foam, and semiconductor devices.²⁷ Other major industry sectors using PFASs include:²⁸

- aviation, aerospace and defence (e.g. additives in aviation hydraulic fluids, insulators, solder sleeves);
- biocides (e.g. active ingredient in ant baits);
- cable and wiring (e.g. coating for weathering);
- construction products (e.g. additives in paints and coatings);
- electronics (e.g. flame retardants, insulators);
- energy (film to cover solar collectors due to weatherability);
- fire-fighting (e.g. film formers in aqueous film-forming foams, raw materials for fire-fighting equipment, including protective clothing);

20 Heads of EPAs Australia and New Zealand (HEPA) *PFAS National Environmental Management Plan Version 2.0* (HEPA, 2020) at 8.

21 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)*, above n 5, at 4.

22 OECD *Toward a New Comprehensive Global Database*, above n 3, at 8.

23 R C Buck and others "Perfluoroalkyl and polyfluoroalkyl substances in the environment: Terminology, classification, and origins" (2011) 7 *Integr Environ Assess Manag* 513 at 513–541.

24 McDonald, above n 15, at 142.

25 At 142.

26 EEA, above n 16, at 2; and HEPA, above n 20, at 8.

27 HEPA, above n 20, at 8; and McDonald, above n 15, at 142–143.

28 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)*, above n 5, at 12–13.

- household products (e.g. wetting agent or surfactant in products such as floor polishes and cleaning agents, non-stick coating);
- medical articles (e.g. surgical patches, cardiovascular grafts, stain- and water-repellents for surgical drapes and gowns)
- metal plating (e.g. wetting agent);
- oil and mining production (e.g. surfactants in oil well stimulation);
- paper and packaging (e.g. oil and grease repellent);
- polymerisation (e.g. polymerisation, or emulsion, processing aids);
- semiconductors (e.g. working fluids in mechanical vacuum pumps);
- textiles, leather and apparel (e.g. raw materials for highly porous fabrics, oil and water repellents and stain release).

III. WHAT ARE THE CONCERNS?

A. PFAS and the Environment

PFASs have been detected in the natural environment since the early 2000s because of their widespread use and their extreme chemical stability.²⁹ These substances are ubiquitously present in the air, soil, and water, and while the chemical breakdown is quicker in the air, PFASs do not break down at all once they enter the water and soil.³⁰ The high water-solubility of PFASs mean that they readily leach from soil to surface water and groundwater, and ultimately enter creeks, rivers, lakes and oceans.³¹ The distribution of PFAS in aqueous media is also of concern when the long-range transport potential of the substance is examined.³² For example, findings of PFASs in remote areas like the Arctic or Antarctica give evidence for the long-range transport potential, because PFASs are not known to be used or produced in these regions.³³

Another topic of concern is the bioaccumulation potential of PFASs, which has been linked to adverse impacts on some plants and animals.³⁴ Information that PFAS bioaccumulates can be drawn from biomagnification factors (BMFs) and trophic magnification factors (TMFs), which are both related to concentrations in predator/prey relationships.³⁵ The BMF expresses the extent to which a chemical's concentration increases (or biomagnifies) from one level of a trophic chain

29 Anja Duffek and others "Per- and polyfluoroalkyl substances in blood plasma – Results of the German Environmental Survey for children and adolescents 2014-2017 (GerES V)" (2020) 228 *International Journal of Hygiene and Environmental Health* 113549 at 113549.

30 McDonald, above n 15, at 144.

31 HEPA, above n 20, at 8.

32 Lena Vierke and others "Perfluorooctanoic acid (PFOA) – main concerns and regulatory developments in Europe from an environmental point of view" (2012) 24(16) *Environmental Sciences Europe* 1 at 4.

33 At 4.

34 Pattle Delamore Partners Ltd (PDP) *RNZAF Base Woodbourne PFAS Investigation: Comprehensive Site Investigation Report* (17 December 2019) at 2.

35 Vierke and others, above n 32, at 6.

to the next higher level.³⁶ In other words, it is the ratio of the concentration of the chemical in a predator (or consumer) organism to that in its prey (or diet).³⁷ TMFs represent an average BMF over several trophic levels, or even over a whole food chain.³⁸ Generally, factors higher than one indicate accumulation.³⁹ Studies have shown that PFASs bioaccumulate in food chains, and findings in top predators have been reported.⁴⁰ For example, studies on dolphins⁴¹ and caribou⁴² clearly show that PFASs are bioaccumulative. The occurrence of PFASs in endangered species and in vulnerable populations are also indicative of their bioaccumulative properties.⁴³ Detection of PFASs in biota of remote regions where no direct PFAS source is known, such as the detection of PFOA in polar bears, indicates uptake from the surrounding environment.⁴⁴

B. *Effects of PFAS on Human Health*

PFAS have become pervasive contaminants in both the environment and in humans. Numerous studies have documented the presence of PFASs in virtually all environmental media, wildlife, and in human blood samples worldwide.⁴⁵ Currently, PFAS are detectable in nearly all humans, with exposures beginning during foetal development; once taken up by the human body, PFASs will bind to blood proteins and bioaccumulate.⁴⁶ Toxicology and epidemiology studies have increasingly documented human health effects of exposure to PFASs, even at low doses, including testicular, kidney and liver cancer, ulcerative colitis, neurotoxicity, endocrine disruption, developmental toxicity and impairment of the immune response shown as decreased antibody responses to

36 James Franklin “How reliable are field-derived biomagnification factors and trophic magnification factors as indicators of bioaccumulation potential? Conclusions from a case study on per- and polyfluoroalkyl substances” (2016) 12(1) *Integrated Environmental Assessment and Management* 6 at 8.

37 At 8.

38 At 9.

39 Vierke and others, above n 32, at 4.

40 See, for example, M Houde and others “Biological monitoring of polyfluoroalkyl substances: A review” (2006) 40 *Environ Sci Technol* 3463.

41 B C Kelly and others “Perfluoroalkyl contaminants in an Arctic marine food web: trophic magnification and wildlife exposure” (2009) 43 *Environ Sci Technol* 4037; and M Houde and other “Biomagnification of perfluoroalkyl compounds in the bottlenose dolphin (*Tursiops truncatus*) food web” (2006) 40 *Environ Sci Technol* 4138.

42 C E Muller and others “Biomagnification of perfluoroalkyl compounds in a remote terrestrial food chain: Lichen-Caribou-Wolf” (2011) 45 *Environ Sci Technol* 8665.

43 Vierke and others, above n 32, at 6.

44 C M Butt “Levels and trends of poly- and perfluorinated compounds in the arctic environment” (2010) 408 *Sci Total Environ* 2936; and Vierke and others, above n 32, at 6.

45 K J Hansen and others “Compound-specific, quantitative characterization of organic fluorochemicals in biological matrices” (2001) 35 *Environ Sci Technol* 766; Centers for Disease Control and Prevention (CDC) *Fourth national report on human exposure to environmental chemicals* (CDC, 2009); Houde and others, above n 40; K Harada and A Kolzumi “Environmental and biological monitoring of persistent fluorinated compounds in Japan and their toxicities” (2009) 14 *Environ Health Prev Med* 7 at 7–19; and C Lau and others “Perfluoroalkyl acids: A review of monitoring and toxicological findings” (2007) 99 *Toxicol Sci* 366 at 366–394.

46 Alexis M. Temkin and others “Application of the Key Characteristics of Carcinogens to Per and Polyfluoroalkyl Substances” (2020) 17 *Int J Environ Res Public Health* 1668 at 1668; W Cheng and C A Ng “Predicting relative protein affinity of novel per- and polyfluoroalkyl substances (PFASs) by an efficient molecular dynamics approach” (2018) 52 *Environ Sci Technol* 7972; and C A Ng and K Hungerbuhler “Bioaccumulation of perfluorinated alkyl acids: Observations and Models (2014) 48 *Environ Sci Technol* 4637 at 4639.

vaccines.⁴⁷ Links have also been identified between PFAS exposure and thyroid disorders, changes in the lipid metabolism like increases in serum lipid levels, particularly total cholesterol and LDL cholesterol, increased risk of decreased fertility determined as prolonged time to pregnancy, as well as pregnancy-induced hypertension and/or pre-eclampsia.⁴⁸

IV. MAIN SOURCES OF ENVIRONMENTAL PFAS POLLUTION

Production and use of PFASs, such as from the manufacture of fluoropolymers, installations and the use of PFAS-containing fire-fighting foams have been the main sources of PFAS contamination.⁴⁹ Other sources include PFASs produced and applied to textiles and paper and painting/printing facilities.⁵⁰ Potential releases of PFASs from other applications, such as oil extraction and mining,⁵¹ and the manufacture of medical devices, pharmaceuticals and pesticides,⁵² are less understood.

PFASs in consumer products, such as furniture, textiles, polishing and cleaning agents and creams, can contaminate dust and air, whereas food contact materials have been found to leach

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- 47 Temkin, above n 46, at 1668-1669; Elicia Mayuri Cousins and others “Risky Business? Manufacturer and Retailer Action to Remove Per- and Polyfluorinated Chemicals From Consumer Products” (2019) 29(2) *New Solutions: A Journal of Environment and Occupational Health Policy* 242 at 244–245; Duffek and others, above n 29, at 2; S J Frisbee and others “The C8 health project: design, methods, and participants” (2009) 117 *Environ Health Perspect* 1873 at 1873–1882; M J Lopez-Espinosa and others “Association of Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS) with age of puberty among children living near a chemical plant” (2011) 45 *Environ Sci Technol* 8160 at 8160–8166; K Steenland, T Fletcher and D A Savitz “Epidemiologic evidence on the health effects of perfluorooctanoic acid (PFOA)” (2010) 118 *Environ Health Perspect* 1100 at 1100–1108; D J Watkins and others “Exposure to Perfluoroalkyl Acids and Markers of Kidney Function Among Children and Adolescents Living Near a Chemical Plant” (2013) 121 *Environ Health Perspect* 625 at 625–630; V Gallo and others “Serum perfluorooctanoate (PFOA) and perfluorooctane sulfonate (PFOS) concentrations and liver function biomarkers in a population with elevated PFOA exposure” (2012) 120 *Environ Health Perspect* 655 at 655–660; and M J Lopez-Espinosa and others “Comparison between free serum thyroxine levels, measured by analog and dialysis methods, in the presence of perfluorooctane sulfonate and perfluorooctanoate” (2012) 33 *Reprod Toxicol* 552 at 552–555.
- 48 Temkin, above n 46, at 1668–1670; Cousins and others, above n 47, at 245; Duffek and others, above n 29, at 2–3; S S Knox and others “Perfluorocarbon exposure, gender and thyroid function in the C8 Health Project” (2011) 36 *J Toxicol Sci* 403 at 403–410; Frisbee and others, above n 47, at 1873–1882; S J Frisbee and others “Perfluorooctanoic acid, perfluorooctane sulfonate, and serum lipids in children and adolescents: results from the C8 Health Project” (2010) 164 *Arch Pediatr Adolesc Med* 860 at 860–869; Javins B Hobbs and others “Circulating maternal perfluoroalkyl substances during pregnancy in the C8 Health Study” (2013) 47 *Environ Sci Technol* 1606 at 1606–1613; and D A Savitz and others “Relationship of perfluorooctanoic acid exposure to pregnancy outcome based on birth records in the mid-Ohio Valley” (2012) 120 *Environ Health Perspect* 1201 at 1201–1207.
- 49 Z Wang and others “Global emission inventories for C4-C14 perfluoroalkyl carboxylic acid (PFCA) homologues from 1951 to 2030, Part I: production and emissions from quantifiable sources” (2014) 70 *Environment International* 62 at 62–75; Z Wang and others “Global emission inventories for C4-C14 perfluoroalkyl carboxylic acid (PFCA) homologues from 1951 to 2030, Part II: The remaining pieces of the puzzle” (2014) 69 *Environment International* 166 at 166–176; and C X Hu and others “Detection of Poly- and Perfluoroalkyl Substances (PFASs) in U.S. Drinking Water Linked to Industrial Sites, Military Fire Training Areas, and Wastewater Treatment Plants” (2016) 3(10) *Environmental Science & Technology Letters* 344 at 345–350.
- 50 Danish EPA *Screeningsundersøgelse af udvalgte PFASforbindelser som jord- og grundvandsforurening i forbindelse med punktkilder* (Danish EPA, Miljøprojekt nr. 1600, 2014).
- 51 E Kissa *Fluorinated Surfactants and Repellents: Second Edition, Revised and Expanded Surfactant Science Series* (Marcel Dekker, New York, 2001) at 616.
- 52 M P Krafft and J G Riess “Per- and polyfluorinated substances (PFASs): Environmental challenges” (2015) 20(3) *Current Opinion in Colloid & Interface Science* 192 at 192–212.

into food.⁵³ Personal care products that contain PFASs have also been found to cause contamination after they enter into sewerage and wastewater treatment plants.⁵⁴

Conventional wastewater treatment is not effective in removing PFASs from waste streams.⁵⁵ Industrial and urban wastewater treatment facilities are therefore major point sources for PFAS contamination of the aquatic environment.⁵⁶ Industrial production sites are also a major source of PFAS contamination of the air, soil and water bodies.⁵⁷ The reuse of contaminated sewage sludge as fertiliser has led to PFAS pollution of soil⁵⁸ and water in Austria, Germany, Switzerland and the United States of America (US).⁵⁹

In Europe, PFASs are ubiquitous in the aquatic environment and organisms, and have been detected in air, soil, plants and biota.⁶⁰ Areas surrounding industrial production, manufacturing and application sites have been found to be highly polluted by PFASs.⁶¹ This has resulted in contaminated surface, ground, and drinking water around factories in Belgium, Italy and the Netherlands, and around airports and military bases in Germany, Sweden and the United Kingdom.⁶² PFAS water pollution has also been identified in countries outside the EU.⁶³

In New Zealand, PFAS contamination resulting from the use of firefighting foams containing PFASs has been identified in a number of sites.⁶⁴ Over time, the chemicals have worked their way across and through the soil to contaminate surface and ground water, and have migrated into adjoining land areas.⁶⁵ PFASs have also been found to be present in sources of drinking water, waste streams, including at landfills and wastewater treatment facilities.⁶⁶

Along with air, contaminated drinking water and consumer products containing PFASs, diet is considered another major exposure source in humans.⁶⁷ So too is occupational exposure, where

53 Nordic Council of Ministers *The Cost of Inaction: A socioeconomic analysis of environmental and health impacts linked to exposure to PFAS* (Nordic Council of Ministers Publication Unit, TemaNord No 516, 2019) at 73–81.

54 At 80.

55 A Adler and J Van der Voet “Occurrence and point source characterization of perfluoroalkyl acids in sewage sludge” (2015) 129 *Chemosphere* 62 at 64.

56 Nordic Council of Ministers, above n 53, at 80.

57 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 4.

58 R Ghisi and others “Accumulation of perfluorinated alkyl substances (PFAS) in agricultural plants: A review” (2019) 169 *Environmental Research* 326 at 326–341.

59 Nordic Council of Ministers, above n 53, at 80.

60 S Valsecchi and others “Determination of perfluorinated compounds in aquatic organisms: a review” (2013) 405(1) *Analytical and Bioanalytical Chemistry* 143; and Houde and others, above n 40.

61 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 4.

62 IPEN *Fluorine-free firefighting foams (3F) – Viable alternatives to fluorinated aqueous film forming foams (AFFF)* (IPEN, POPRC-14, White Paper, 2018); Hu and others, above n 49.

63 F Xiao “Emerging poly- and perfluoroalkyl substances in the aquatic environment: A review of current literature” (2017) 124 *Water Research* 482 at 483–495.

64 McDonald, above n 15; PDP *RNZAF Base Woodbourne*, above n 34; PDP *RNZAF Base Ohakea*; PDP *New Zealand Defence Force PFAS Investigation: Waitemata Harbour* (24 June 2019).

65 HEPA, above n 20, at 8.

66 McDonald, above n 15; PDP *RNZAF Base Woodbourne*, above n 34; PDP *RNZAF Base Ohakea*, above n 64; PDP *New Zealand Defence Force*, above n 64.

67 Duffek and others, above n 29, at 113549.

individuals are exposed to high quantities of PFASs through their occupation (for example, workers in factories producing PFASs or PFAS-treated products).⁶⁸

V. PFAS REGULATION – INTERNATIONAL LAW

The Stockholm Convention on Persistent Organic Pollutants (hereafter the Stockholm Convention, or the Convention) is an international treaty to protect human health and the environment from persistent organic pollutants (POPs) by restricting and ultimately eliminating their production, use, trade, release and storage.⁶⁹ It was adopted in 2001 and entered into force in 2004.⁷⁰ POPs are organic compounds that are resistant to environmental degradation through chemical, biological and photolytic processes.⁷¹ POPs persist in the environment for long periods, become distributed geographically, bioaccumulate in human and animal tissue, and have harmful impacts on human health or on the environment.⁷²

Two of the most extensively used PFASs are already globally regulated: PFOS and PFOA were listed as POPs under the Stockholm Convention in 2009 and 2019, respectively.⁷³ The listing of PFOS and PFOA includes their respective salts and related compounds.⁷⁴ PFOS is listed under Annex B (Restriction), whereby Parties to the Convention must take measures to restrict the production and use of the chemical “in light of any applicable acceptable purposes and/or specific exemptions listed in the Annex.”⁷⁵ PFOA is listed under Annex A (Elimination), whereby Parties must take measures to eliminate the production and use of the chemical.⁷⁶ Specific exemptions for use or production are listed in the Annex and apply only to Parties that register for them for a specific period of time.⁷⁷ This is to enable Parties to the Convention to take measures to reduce or eliminate releases of POPs from intentional production and use, for which alternatives do not exist yet or are not readily available.⁷⁸ Examples of exempted uses for PFOS include metal plating and fire-fighting foam.⁷⁹ Exempted uses for PFOA include semiconductors, photographic coating, textile for protection and medical devices.⁸⁰

68 Nordic Council of Ministers, above n 53, at 95.

69 Stockholm Convention Secretariat *The 16 New POPs: An introduction to the chemicals added to the Stockholm Convention as Persistent Organic Pollutants by the Conference of the Parties* (UN Environment, June 2017) at 4.

70 At 4.

71 At 4.

72 At 4.

73 HEPA, above n 20, at 10.

74 At 10.

75 Stockholm Convention Secretariat, above n 69, at 7.

76 At 7.

77 At 6–7.

78 At 6.

79 Stockholm Convention on Persistent Organic Pollutants 2256 UNTS 119 (opened for signature 23 May 2001, entered into force 17 May 2004) at Annex B.

80 Stockholm Convention on Persistent Organic Pollutants, Conference of the Parties *Decision SC-92-12: Listing of perfluorooctanoic acid (PFOA), its salts and PFOA-related compounds* (2019).

VI. PFAS REGULATION – EUROPEAN UNION (EU)

The EU has taken a regulatory approach to reduce risks to certain PFASs.⁸¹ Within the European Economic Area (EEA), member countries are subject to the provisions of the EU Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation, as well as to the regulation implementing the Stockholm Convention on POPs.⁸²

PFOS has been prohibited/restricted in its use, production, import, and export under EU Commission Regulation No 757/2010 of 24 August 2010, “a regulation that complements provisions of international agreements on POPs.”⁸³ In 2014, Norway and Germany joined in submitting a proposal for the EU to restrict PFOA, which led to the adoption of Commission Regulation (EU) 2017/1000 of 13 June 2017 amending Annex XVII to REACH.⁸⁴

In March 2017, Sweden and Germany proposed to consider another PFAS, perfluorohexane sulfonic acid (PFHxS), a substance of very high concern.⁸⁵ This was adopted by the European Chemicals Agency (ECHA) later the same year, and the substance is now on the Candidate List.⁸⁶ Norway has registered an intention to submit a restriction proposal for PFHxS under REACH.⁸⁷

Sweden and Germany also jointly proposed in 2017 to restrict the manufacturing and placing on the market of six other PFASs.⁸⁸ The aim in restricting these PFASs is to prevent industry from switching to them once the restriction of PFOA goes into effect in 2020.⁸⁹ Both the Risk Assessment Committee (RAC) and the Committee for Socio-economic Analysis (SEAC) have agreed to the restriction proposal.⁹⁰

Across Europe, a number of countries have been involved in the monitoring of PFAS in environmental media as well as in humans and consumer goods.⁹¹ Some countries have set national limit values for water and soil (Denmark, Germany, the Netherlands and Sweden), textiles (Norway) and food contact materials (Denmark).⁹² Several EU Member States have defined drinking water limits for various PFAS and PFAS categories, and Denmark declared a ban on food contact materials treated with PFAS in June 2019, to enter into force in 2020.⁹³

81 OECD *Risk Reduction Approaches for PFASs – A Cross-Country Analysis* (OECD Environment, Health and Safety Division, Environment Directorate, OECD Series on Risk Management No 29, 2015) at 30.

82 Nordic Council of Ministers, above n 53, at 31.

83 OECD *Risk Reduction*, above n 81, at 30.

84 Nordic Council of Ministers, above n 53, at 31.

85 At 31.

86 At 31.

87 At 31.

88 At 31.

89 At 31.

90 At 31.

91 At 45.

92 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 10.

93 At 10.

VII. PFAS REGULATION – NEW ZEALAND

Following the introduction of the Hazardous Substances and New Organisms (HSNO) Act in 1996, regulation of hazardous substances was the responsibility of the Environmental Risk Management Authority (ERMA) until it became the Environmental Protection Agency (EPA) in 2011.⁹⁴ The first New Zealand specific controls on PFAS use actually predate the addition of PFOS to the Stockholm Convention.⁹⁵ In 2006, ERMA revised the Fire Fighting Chemicals Group Standard to exclude any substance that is or contains PFOS or PFOA, which reflected voluntary restrictions imposed in Europe and the US at the same time.⁹⁶

New Zealand is a signatory to the Stockholm Convention and ratified it in 2004.⁹⁷ The Ministry for the Environment (MfE) leads New Zealand's participation in the Convention and coordinates the Convention's implementation across government.⁹⁸ Article 7 of the Convention requires each party to develop an National Implementation Plan (NIP), which outlines how a country will address its obligations under the convention.⁹⁹ New Zealand submitted its first NIP in 2006 (NIP1), followed by an Addendum in 2014.¹⁰⁰ New Zealand submitted its second NIP in 2018 (NIP2), which outlines its implementation measures in relation to the chemicals listed since NIP1, including PFOS.¹⁰¹

The HSNO Act 1996 is the primary legislation that implements New Zealand's principal obligations under the Convention.¹⁰² The Act's purpose is to protect the environment and health and safety of people and communities by preventing or managing the adverse effects of hazardous substances and new organisms.¹⁰³ Schedule 2A (POPs) prohibits any POP, or product containing a POP, from being imported into, manufactured or used in New Zealand (subject to limited exceptions,¹⁰⁴ such as the use of listed POPs in research and development within a contained laboratory).¹⁰⁵ Schedule 2A lists all POPs added to the Convention between 2001 and 2017, including PFOS.¹⁰⁶ All uses of PFOS are prohibited, and no exemptions are provided.¹⁰⁷

In 2017, three PFASs (PFOS, PFOS and PFHxS) emerged as contaminants of concern in New Zealand.¹⁰⁸ That same year, Food Standards Australia and New Zealand proposed health

94 Tonkin & Taylor Ltd *Scoping Study: Non fire-fighting foam sources of PFAS contamination in New Zealand* (July 2018) at 6.

95 At 6.

96 At 6–7.

97 Secretariat of the Stockholm Convention "Status of Ratification" <<http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatoires/tabid/4500/Default.aspx>>.

98 Ministry for the Environment *New Zealand's updated National Implementation Plan under the Stockholm Convention on Persistent Organic Pollutants* (ME 1392, 2018) at 11.

99 At 11.

100 At 11.

101 At 12.

102 At 19.

103 Hazardous Substances and New Organisms (HSNO) Act 1996, s 4.

104 Hazardous Substances and New Organisms Act, s 30.

105 Ministry for the Environment *New Zealand's updated National Implementation Plan*, above n 98, at 19.

106 At 19; and Hazardous Substances and New Organisms Act, sch 2A.

107 Hazardous Substances and New Organisms Act, sch 2A.

108 Tonkin & Taylor Ltd *Scoping Study*, above n 94, at 72.

based guidance values for those PFASs.¹⁰⁹ The Australian drinking water quality guidelines for these chemicals was subsequently accepted by the New Zealand Ministry of Health, however these guidelines do not directly regulate use.¹¹⁰ PFOS remains the only comprehensively regulated PFAS in New Zealand, and so New Zealanders may still be exposed to PFASs through imported consumer products as well as existing contamination.¹¹¹

VIII. THE EFFICACY OF PFAS REGULATION

Although effective regulation has been achieved for PFOS and PFOA, many PFASs remain largely understudied and weakly regulated.¹¹² In response to the regulation of long-chain PFASs, such as PFOS and PFOA, there has been a shift from the use of long chain to short chain PFASs, which are not currently regulated.¹¹³

European authorities are increasingly concerned about the risks for health and the environment exhibited by short chain PFASs.¹¹⁴ These concerns are due to their persistence, high mobility in water and soil and potential toxic properties.¹¹⁵ Short-chain PFASs have already been identified as ubiquitously present in the environment, even in remote areas.¹¹⁶ The higher water solubility of some short chain PFASs compared to long chain PFASs means that they enter drinking water reservoirs faster and tend to accumulate in water-rich edible plant tissues like leaves and fruits.¹¹⁷ Removal from water cannot be performed effectively due to the low adsorption potential of short chain PFASs, even with modern expensive technologies, such as nano-filtration or using granular activated carbon.¹¹⁸

Short chain PFASs have also been found to have similar adverse effects on human health to those associated with long chain PFAS exposure. For example, GenX, a short-chain alternative to PFOA, has been associated with elevated risk of cancer in human populations.¹¹⁹

It is clear that PFASs have unique properties which make them useful, such as dielectric properties, resistance to heat and chemical degradation, and low friction properties.¹²⁰ This had led to their continued use in a vast range of consumer products and industrial applications.¹²¹ PFASs

109 At 7.

110 At 7.

111 At 8.

112 Cousins and others, above n 47, at 242.

113 Cousins and others, above n 47, at 246.

114 United Nations Environment Programme (UNEP) *Report of the Persistent Organic Pollutants Review Committee on the work of its thirteenth meeting: Addendum – Risk management evaluation on pentadecafluorooctanoic acid (CAS No: 335-67-1, PFOA, perfluorooctanoic acid), its salts and PFOA-related compounds (UNEP/POPS/POPRC.13/7/Add.2, 16 November 2017)* at 36.

115 At 36.

116 Z Zhao and others “Distribution and long-range transport of polyfluoroalkyl substances in the Arctic, Atlantic Ocean, and Antarctic coast” (2012) 170 *Environmental Pollution* 71 at 71–77.

117 UNEP, above n 114, at 36.

118 At 36.

119 Temkin and others, above n 46, at 1668.

120 Tonkin & Taylor Ltd *Scoping Study*, above n 94, at 5.

121 At 5.

continue to be manufactured globally. For example, as recently as 2016, PFOS was still being manufactured in Germany, Italy and China.¹²² There is also reason to believe that overall production of PFASs has continued to increase,¹²³ particularly in China and Southeast Asia.¹²⁴

IX. LOOKING AHEAD

PFASs are persistent, bioaccumulative and toxic to animals and humans.¹²⁵ Their widespread occurrence leading to significant adverse human health and/or environmental effects warrants global action.¹²⁶ However, with over 4700 known PFASs, undertaking substance-by-substance risk assessments and comprehensive environmental monitoring to understand exposure would be an extremely lengthy and resource-intensive process.¹²⁷ As a result, complementary and precautionary approaches to managing PFASs are being explored in the EU. This includes the regulation of PFASs as a class, or as subgroups, based on toxicity or chemical similarities, and restricting PFAS use to only essential uses.¹²⁸

A. *Elimination of Entire Class of PFASs*

The proposal to eliminate the entire class of PFASs is consistent with sustainable development plans that seek to reduce emissions of toxic chemicals and several of the 2015 globally adopted Sustainable Development Goals (SDGs).¹²⁹ The 2030 Agenda for Sustainable Development and its 17 SDGs were adopted by the General Assembly of the United Nations in September 2015.¹³⁰ The objective of the SDGs is to meet the dual challenge of overcoming poverty and protecting the planet. They illustrate a comprehensive vision that embraces economic, social and environmental dimensions for sustainable growth.¹³¹

Sound management of chemicals and waste is a specific target under SDG 12 on Sustainable Consumption and Production.¹³² Chemicals, waste and air quality are also referred to under SDG 3 on Good Health and Well-being, SDG 6 on Clean Water and Sanitation, SDG 7 on Affordable and Clean Energy, SDG 11 on Sustainable Cities and Communities and SDG 14 on Life Below Water.¹³³

122 At 6.

123 Z Wang and others “A never-ending story of per- and polyfluoroalkyl substances (PFASs)?” (2017) 51 *Environ Sci Technol* 2508 at 2508–2518.

124 J S Bowman “Fluorotechnology is critical to modern life: the fluorocouncil counterpoint to the Madrid statement” (2015) 123 *Environ Health Perspect* A112.

125 UNEP, above n 114, at 43.

126 At 43.

127 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 10.

128 At 10.

129 UNEP, above n 114, at 41.

130 UNEP “The Strategic Approach to International Chemicals Management and the 2030 Agenda for Sustainable Development” <www.saicm.org>.

131 UNEP, above n 130.

132 UNEP, above n 130.

133 UNEP, above n 130.

The Strategic Approach to International Chemicals Management (SAICM) is a policy framework to promote chemical safety around the world and provides the essential link between chemical safety and the SDGs.¹³⁴ SAICM aims to achieve, by 2020, the sound management of chemicals throughout their life cycle so that chemicals that pose an unreasonable and otherwise unmanageable risk to human health and the environment are no longer produced or used.¹³⁵ SAICM's Global Plan of Action contains guidance on measures to support risk reduction that includes prioritising safe and effective alternatives for persistent, bioaccumulative, and toxic substances.¹³⁶

B. Elimination of All Non-essential Uses of PFASs

In June 2019, the European Council of Ministers highlighted the widespread occurrence of PFASs in the environment, products and people, and called for an action plan to eliminate all non-essential uses of PFASs, such as use in food containers and cosmetics.¹³⁷ The first step to adopting such an approach would be to distinguish between essential and non-essential uses. Essential uses are likely those applications that are critical for health and proper functioning of society, such as medical devices and safety equipment, and for which there are neither fluorine-free alternatives nor alternative methods.¹³⁸ This is possibly due to the unique properties of PFASs, and are thus known to be irreplaceable in many applications.¹³⁹ One question that can be raised is whether these properties are really essential for all applications.¹⁴⁰ For example, PFAS use in textiles could be restricted to clothing for occupational and protective purposes, given that there are a number water-repelling substances that can be applied instead of PFASs.¹⁴¹ Paper and food packaging is another sector where non-fluorine containing alternatives can be used. At least one manufacturer in Norway has developed a fluorine-free alternative using a high-density paper, which prevents the passage of grease.¹⁴² The Norwegian paper producer Nordic Paper is using mechanical processes to produce, without using any persistent chemical, extra-dense paper that inhibits leakage of grease through the paper.¹⁴³

C. Consumer Information

Until regulation or prohibition of the entire class of PFASs is achieved, experts advise that people should minimise their use of and exposure to products containing PFASs.¹⁴⁴ Exposure can be reduced by avoiding direct contact with PFAS-containing products, and using PFAS-free personal

134 UNEP, above n 114, at 41.

135 UNEP, above n 114, at 41; and UNEP, above n 129.

136 UNEP, above n 114, at 41.

137 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 10.

138 KEMI Swedish Chemicals Agency, above n 2, at 69.

139 At 69.

140 At 69.

141 UNEP, above n 114, at 31.

142 KEMI Swedish Chemicals Agency, above n 2, at 63.

143 KEMI Swedish Chemicals Agency, above n 2, at 63; and UNEP, above n 114, at 34.

144 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 5.

care products and cooking materials.¹⁴⁵ This will require consumers “to change their mindset and understand which products contain PFASs and what their risks are.”¹⁴⁶ Consumer information on how to find PFAS-free alternatives will therefore play a significant role in helping to reduce exposure.¹⁴⁷

Information about PFAS-free products in the US is available on the PFAS Central website.¹⁴⁸ PFAS Central provides current and curated information about PFAS, including press releases, peer-reviewed scientific articles, and consumer information.¹⁴⁹ Content is provided by a partnership between the Green Science Policy Institute and the Social Science Environmental Health Research Institute (SSEHRI) at Northeastern University.¹⁵⁰ The Green Science Policy Institute aims to facilitate responsible use of chemicals to protect human and ecological health.¹⁵¹ To achieve this, the Institute provides unbiased scientific data for informed decision-making, motivates and participates in scientific research that serves the public interest, and promotes policy and purchasing decisions that reduce the use of classes of harmful chemicals.¹⁵² The SSEHRI PFAS Project works on a variety of environmental health, social science, and public policy aspects of PFASs.¹⁵³

For residents of the EU and the United Kingdom (UK), information on PFAS-free products can be obtained from the PFAS Free website.¹⁵⁴ The PFAS Free project is run by Fidra, “an environmental charity working to reduce chemical and plastic pollution in our seas, on our beaches and in the wider environment.”¹⁵⁵ Fidra uses the best available science to identify and understand environmental issues, and works with the public, industry, and governments to deliver solutions which support sustainable societies and healthy ecosystems.¹⁵⁶ General and specific guidance to consumers and business on how to find PFAS-free alternatives is also provided by some national institutions, such as the Danish Environmental Protection Agency, the German Environmental Protection Agency and Swedish Chemicals Agency.¹⁵⁷

Unfortunately, there is no equivalent source of information on PFAS free products for consumers based in New Zealand.

145 At 8.

146 European Chemicals Agency (ECHA) “PFAS – convenience but at what cost?” *ECHA Newsletter* (online edition, European Union, 28 May 2020).

147 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 1–2.

148 PFAS Central: A Project of Green Science Policy “PFAS-Free Products” <www.pfascentral.org>.

149 PFAS Central: A Project of Green Science Policy “About Us – What We Do” <www.pfascentral.org>.

150 PFAS Central, above n 149.

151 Green Science Policy Institute “Who We Are” <www.greensciencepolicy.org>.

152 Green Science Policy Institute, above n 151.

153 Social Science Environmental Health Research Institute (SSEHRI), Northeastern University “About SSEHRI” <www.northeastern.edu>.

154 PFAS Free “PFAS free products” <www.pfasfree.org.uk>.

155 PFAS Free “About us” <www.pfasfree.org.uk>.

156 PFAS Free, above n 155.

157 EEA *Emerging chemical risks in Europe – “PFAS”*, above n 16, at 8.

X. CONCLUSION

Like many inventions, the discovery of Teflon happened by accident.¹⁵⁸ In 1938, chemists from DuPont (now Chemours) unintentionally created a chemical compound, PTFE, that was extremely stable, noncorrosive and highly resistant to heat.¹⁵⁹ This compound was marketed under DuPont's "Teflon" brand, and in 1954, the revolutionary non-stick frying-pan was introduced.¹⁶⁰ Since then, an entire class of man-made chemicals has evolved: per- and polyfluoroalkyl substances (PFASs). Despite major environmental and human health concerns, there are more than 4700 of these chemicals on the market today.¹⁶¹

PFASs are in everything from pizza boxes to polar bears.¹⁶² They are persistent, bioaccumulative, and toxic to animals and humans.¹⁶³ PFASs have been detected globally in the environment, biota, and humans.¹⁶⁴ They have been found in clothing, plastic, food packaging, electronics, personal care products, firefighting foams, medical devices and numerous other products.¹⁶⁵

Numerous studies have documented adverse human health effects of exposure to PFASs, including cancer, liver damage, decreased fertility and thyroid disease.¹⁶⁶ Researchers have also documented that PFAS exposure reduces the effectiveness of vaccines,¹⁶⁷ which is particularly concerning amid the COVID-19 pandemic.

PFASs have become so ubiquitous in the environment that health experts say it is virtually impossible to completely avoid exposure.¹⁶⁸ For example, new laboratory tests commissioned by the Environmental Working Group indicate that PFASs are likely detectable in all major water supplies in the US, and more than 110 million Americans could be drinking PFAS-contaminated water.¹⁶⁹ Even with the most sophisticated treatment processes, it is extremely difficult and costly to remove these chemicals from drinking water.¹⁷⁰ And it is impossible to remove PFASs entirely from lakes, rivers and oceans.¹⁷¹ The costs involved in the remediation of land contaminated with PFASs is also high, and in many cases, the total remediation cost is not yet known.¹⁷²

The reality is that, as a global community, we are facing a tipping point from which we may struggle to recover. PFASs are persistent organic pollutants, otherwise known as forever

158 McDonald, above n 15, at 142.

159 At 142.

160 At 142.

161 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)*, above n 5, at 4.

162 Nordic Council of Ministers, above n 53, at 73-81; Butt, above n 44; and Vierke and others, above n 32 at 6.

163 UNEP, above n 114, at 31.

164 Gawor and others, above n 7; Giesy and Kannan, above n 8; and Vestergren and Cousins, above n 9.

165 OECD *Synthesis Paper on Per- and Polyfluorinated Chemicals (PFCs)*, above n 5.

166 Temkin, above n 46, at 1668-1669; Duffek and others, above n 29, at 2; Steenland, Fletcher and Savitz, above n 47, at 1100-1108.

167 Temkin, above n 46, at 1668-1669.

168 EEA *Emerging chemical risks in Europe – "PFAS"*, above n 16, at 1-2.

169 Sydney Evans and others "PFAS Contamination of Drinking Water Far More Prevalent Than Previously Reported" (22 January 2020) Environmental Working Group <www.ewg.org>.

170 UNEP, above n 114, at 36.

171 At 36.

172 At 39.

chemicals.¹⁷³ The magnitude and extent of the risks of many types of PFAS cannot be quantified.¹⁷⁴ What we do know, however, is that most of the widespread contamination resulting from their manufacture and use will never be remediated. Continuing to produce and use PFASs at our current rate is simply a risk too great to accept.¹⁷⁵

Further regulation eliminating all non-essential uses and restricting or prohibiting the entire class of PFASs is therefore urgently required. Doing so would positively impact human health and the environment including biota “by decreasing emissions and subsequently reducing human and environmental exposure.”¹⁷⁶ This would also provide benefits for agriculture by decreasing the adverse effects of PFASs on agricultural crops.¹⁷⁷ Until such regulation is achieved, consumer information on where and how to source PFAS-free products will help people to reduce their risk of exposure and associated harm.¹⁷⁸ This will require a significant change in the mindset of consumers.¹⁷⁹ PFASs and PFAS-containing products have continued to be used because they offer comfort and convenience; without them, the non-stick frying pan would not be possible. Consumers must therefore ask themselves: convenience – but at what cost?

173 At 46.

174 At 46.

175 PFAS Free “What are PFAS?” <www.pfasfree.org.uk>.

176 UNEP, above n 114, at 46.

177 At 46.

178 EEA *Emerging chemical risks in Europe – ‘PFAS’*, above n 16, at 8.

179 At 1–2.

THE CHALLENGE OF THE TREATY FOR LAWYERS AND JUDGES: 25 YEARS ON

BY HON JUSTICE MARK O'REGAN*

E ngā mana, e ngā waka, e ngā reo, tēnā koutou, tēnā koutou, tēnā koutou katoa.

Thank you for inviting me to speak to you tonight. I particularly want to thank the two institutions responsible for the lecture series of which this is the 2019 instalment: the partners of Norris Ward McKinnon not only for their support of the lecture series but also for their generous hospitality to me and Te Piringa, Faculty of Law, University of Waikato, for its support and for hosting the event tonight. I acknowledge the presence of the Dean, Associate Professor Rumbles, of Professor Margaret Wilson who, among her many distinguished roles, was a Minister in Charge of Treaty of Waitangi Negotiations, and of my judicial colleagues.

It is nice to be back in the Waikato. I spent quite a lot of time here in 1994–1995, during the negotiation of the Waikato-Tainui treaty settlement and again in the early 2000s when I was a High Court Judge based in Auckland. But it has been a long time between drinks as they say.

As the title of my lecture foreshadows, I am going to talk about some of the significant events relating to the Treaty of Waitangi in the last 25 years. My focus will be Treaty settlements and cases dealing with Treaty settlements.

“Why the last 25 years?” I hear you ask. There are two reasons. The flyer for this lecture probably sets them out, but for those who haven't seen it, let me tell you.

The first reason is that two important Treaty of Waitangi-related events happened in the Waikato in 1994, almost exactly 25 years ago. These two events provide a natural starting point for what I want to say.

The first was that the 1994 Harkness Henry lecture (the forerunner of tonight's lecture) was given by Sir Robin Cooke on the topic “The Challenge of Treaty of Waitangi Jurisprudence”.¹ Sir Robin was, of course, the President of the Court of Appeal at the time. He later sat in the House of Lords as Lord Cooke of Thorndon. I will call him Sir Robin, because that is what he was when he gave the lecture. In that lecture, Sir Robin reviewed Treaty jurisprudence going back to *R v Symonds* in 1847.² He covered the leading but perhaps infamous cases of *Wi Parata v Bishop of Wellington*,³ and *Te Heuheu Tukino v Aotea District Maori Land Board*.⁴ In the *Wi Parata* case, Prendergast CJ infamously observed that the Treaty was a “simple nullity”.⁵ In *Te Heuheu Tukino*, the Judicial Committee of the Privy Council observed that rights purporting to be conferred by a treaty of cession, as it considered the Treaty of Waitangi to be, could not be enforced in the courts,

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1 Robin Cooke “The Challenge of Treaty of Waitangi Jurisprudence” (1994) 2 Waikato L Rev 1.

2 *R v Symonds* (1847) NZPCC 387 (SC).

3 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

4 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

5 *Wi Parata*, above n 3, at 78.

except in so far as they have been incorporated into municipal law.⁶ According to the Appeal Cases report, the successful counsel in that case was one AT Denning KC. He later became Lord Denning, every law student's favourite English judge. (The NZLR report refers to him as "Dunning", but that appears to be an error).

A very young Kenneth Keith, later a colleague of Sir Robin on the Court of Appeal, then a judge of the Supreme Court and later a Judge of the International Court of Justice, put forward an alternative view about the place of the Treaty in the courts in an article written in the 1960s.⁷ It may be that the practical significance of *Te Heuheu Tukino* has decreased because the principles of the Treaty have, in fact, been incorporated into "municipal law", as their Lordships called it, on a number of occasions in recent years.⁸

Sir Robin then spoke of the Treaty cases he had dealt with at the bar. There was none of any significance, perhaps reflecting the forgotten status of the Treaty in the 1950s and 1960s. He then referred to those recent cases that had been dealt with in the Courts, in most of which he had had personal involvement. This was a much more fruitful field for him, recalling the great cases of the 1980s, particularly the famous *Lands*⁹ and *Forests*¹⁰ cases and what he described as "the great *Tainui* case of 1989".¹¹ They are very important cases all right, but they are outside my 25-year timeframe. I cannot describe them better than Sir Robin did, so I will leave you to read his lecture in volume 2 of the Waikato Law Review / Taumauri if you are interested.¹²

Sir Robin's lecture covered the field, but much of it was also about his personal experience both in practice and as a Judge. I am going to use the same model. That means this is not an academic paper but a recounting of personal experience and observations of developments in what is now an important element of New Zealand's legal history.

The second event of 1994 in the Waikato was the signing on 21 December 1994 of the heads of agreement between the Crown and Waikato-Tainui relating to the Raupatu claim. That was the prelude to the signing of the deed of settlement in May 1995, which settled the Raupatu claim and was the first major tribal settlement. I will come back to that in a minute.

So those are the two events that happened here or hereabouts 25 years ago.

And what is the second reason for choosing this 25-year timeframe? It is because my own involvement in the Treaty settlement process began with my participation on the Crown side of the negotiations leading up to the signing of the heads of agreement I have just referred to. I am going to limit myself to the last 25 years, because that is the time span of my involvement in Treaty settlement matters and because this is, in effect, an update from Sir Robin's lecture. And I will focus on the settlement process, because that reflects my own experience and is perhaps the area of greatest change in the Treaty environment since the time of Sir Robin's lecture.

6 *Te Heuheu Tukino*, above n 4, at 596–597.

7 KJ Keith "International Law and New Zealand Municipal Law" in JF Northey (ed) *The A G Davis Essays in Law* (Butterworths, London, 1965) 130 at 146–148.

8 There are now over 40 Acts that require consideration of the principles of the Treaty in exercising statutory powers of decision: Ministry for Culture and Heritage "Treaty events since 1950" (26 August 2019) New Zealand History <nzhistory.govt.nz>.

9 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case].

10 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests* case].

11 Cooke, above n 1, at 7, referring to *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA).

12 Cooke, above n 1.

In those 25 years, I have seen the Treaty settlement process from two perspectives: from that of a practitioner involved in the negotiation and documentation of Treaty settlements on the one hand and that of a Judge dealing with litigation arising out of Treaty settlements on the other.

These are personal perspectives and, in the case of my experience of the negotiation of settlements, they reflect experiences of events that occurred more than twenty years ago. So, there are some caveats.

First, I am relying on memory, which may affect precise description. However, I am talking about events that stood out as unique experiences in my career as a lawyer, so my memory of them is, I think, pretty accurate.

Second, my experience was of the process as it was in its infancy and may not (indeed, almost certainly does not) reflect the reality of the process today.

Third, the settlements I was involved with – in particular, those of Waikato-Tainui and Ngāi Tahu – were very significant claims. I think they remain among the largest settled claims.

When I was in practice, I was a commercial lawyer, not a litigator. It was this background as a commercial lawyer that led to my being asked to become a part of the Crown legal team in relation to the Waikato-Tainui settlement in 1994. It was recognition of the fact that the settlement would be, in addition to the resolution of a longheld grievance, a large commercial transaction that would require detailed negotiation. I had no experience of Treaty law or tikanga. In fact, in my studies for my law degree at Victoria University of Wellington in the 1970s, I do not recall any reference to the Treaty at all, even in the constitutional law class. That may be a failure of memory, but I don't think so.¹³ I am sure that would not now be the experience of any law student at a New Zealand law school.

I led a team from Chapman Tripp in relation to the commercial and property law aspects of the Waikato-Tainui settlement. All the Treaty law aspects of the settlement were handled by a Crown Law team led by Ellen France, then the team leader of the Crown Law Treaty team and now a fellow Judge of the Supreme Court. I was asked to undertake the role by John McGrath, who was then the Solicitor General, and who was also later a judicial colleague on both the Court of Appeal and the Supreme Court.

My role involved being part of the Crown negotiating team, being responsible for the drafting of the deed of settlement and, later, assisting with the drafting of the legislation to give effect to the settlement. I will come back to this a bit later.

The legal background to the early Treaty settlement negotiations also needs to be understood.

The Treaty of Waitangi Act was passed in 1975 and created the Waitangi Tribunal. But at that stage, its jurisdiction was limited only to claims alleging contemporary breaches. An amendment in 1985 changed this, giving jurisdiction to the Tribunal to investigate claims relating to events from the date of the Treaty itself.¹⁴

The Ngāi Tahu claim, which I will discuss later, was subject to the process of investigation envisaged by the Treaty of Waitangi Act. Its claim was filed in 1986 and the Tribunal issued the Ngāi Tahu Land Claims Report in 1991.¹⁵ After that, negotiations began between the Crown and

13 Judge Carrie Wainwright made a similar observation about her studies at Victoria University of Wellington Law School, which would have been 8 or 9 years after mine: Carrie Wainwright: "Māori Representation Issues and the Courts" (2002) 33 VUWLR 179 at 179.

14 Treaty of Waitangi Amendment Act 1985, s 3.

15 Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991).

Ngāi Tahu against a background of findings by the Tribunal of significant and numerous breaches of the Treaty, which the Tribunal said entitled Ngāi Tahu to “very substantial redress from the Crown”.¹⁶

The process contemplated under the Treaty of Waitangi Act was then augmented by amendments made to that Act as a result of the creation of state owned enterprises and the vesting of Crown owned assets, particularly land, in them. The concern by Māori that land vested in the state-owned enterprises would be beyond their reach in the event of successful Treaty claims was met by the inclusion in the State-Owned Enterprises Act 1986 of section 9. That section provided that nothing in the State-Owned Enterprises Act permitted the Crown to act in a manner that was inconsistent with the principles of the Treaty. That in turn led to the two landmark cases of the 1980s to which I have already referred, the *Lands* case and the *Forests* case. Sir Robin took a leading role in both. Those cases led to amendments to the Treaty of Waitangi Act to give powers to the Tribunal to make binding recommendations for the return of certain land to Māori. Although much forestry land has been vested in iwi as part of Treaty settlements, I am not aware of any land ultimately being returned to Māori pursuant to the binding recommendation regime. However, the existence of that regime and the potential for binding recommendations to be made provided leverage to Māori in negotiations with the Crown.

So the 1980s was a decade to remember for the Treaty – the conferral of jurisdiction on the Tribunal followed quickly by the State-owned Enterprises Act and the great cases that followed it. Sir Robin had plenty to talk about. There was also a significant development in the 1990s on the policy front, with the Crown developing proposals for the settlement of historical Treaty claims. It undertook a consultation process in which the policies were met with a hostile reception from Māori.¹⁷ Among many controversial policies, the one which had the greatest prominence was the decision to create the so-called fiscal envelope of \$1 billion to be set aside for the settlement of all historical Treaty claims – ie those relating to events predating 21 September 1992. That was intended to be spread over a period of 10 years, which implied the settlement of all claims would occur in that period. There have been a number of deadlines set since then, but none has been met.

The other important developments in the early 1990s were the appointment of a Minister in Charge of Treaty of Waitangi Negotiations (MICOTOWN) in 1993 and the establishment of the Office of Treaty Settlements (OTS) in 1995. The Office of Treaty Settlements has now become Te Kāhui Whakataū (Treaty Settlements), part of The Office for Crown Māori Relations – Te Arawhiti.

We have come a long way since the 1985 amendment to the Treaty of Waitangi Act. Since 1989, 75 Treaty settlements have been passed into law,¹⁸ and total government spending on Treaty

16 Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991) vol 3 at 1051.

17 For a description of the process leading to the development of these proposals from a Crown perspective, see chapter seven of Douglas Graham *Trick or Treaty?* (Institute of Policy Studies – Victoria University of Wellington, Wellington, 1997).

18 See Andy Fyers “The amount allocated to Treaty of Waitangi settlements is tiny, compared with other Government spending” *Stuff* (online ed, Wellington, 3 August 2018). Fyers observed there had been 73 settlements as at August 2018 and there have been two further settlements since then. A detailed schedule of settlements is set out in Te Arawhiti – Te Kāhui Whakataū “12 Month Progress Report: 1 July 2018 – 30 June 2019” (30 June 2019) Te Kāhui Whakataū (Treaty Settlements) <www.govt.nz/organisations/te-kahui-whakatau-treaty-settlements> at 6–9.

settlements now exceeds \$2.3 billion.¹⁹ This is a significant sum, but as Andy Fyers pointed out in his article on the topic on in August 2018, it seems less so when compared to the projected government expenditure in the 2018 financial year of \$87 billion including \$14 billion on national superannuation. Fyers calculated that the total amount spent on Treaty settlements since 1989 was equivalent to about two months of superannuation payments.²⁰

The settlement process that was envisaged at the outset was that the first step was for the Tribunal to undertake its process of investigation and hearing from the parties. It would produce a report with recommendations to the Crown as to the substance of the claim and the need for redress. Then, a process of negotiating a settlement between the Crown and the iwi concerned would follow. However, the Waikato-Tainui claim negotiations did not follow from a report of the Tribunal: Waikato-Tainui decided to proceed directly to negotiations with the Crown, as have many claimant groups since that time.

In Waikato-Tainui's case, this was perhaps an unsurprising approach because the negotiations were limited to the Raupatu claim, that is the claim arising from the confiscation of Waikato-Tainui's lands pursuant to the New Zealand Settlements Act 1863. The confiscation was on the pretext that the Waikato-Tainui people had rebelled against the Crown, but, as recorded in the deed of settlement, the Crown of the 1990s accepted that the confiscations were both unjust and in breach of the Treaty. The fact that this claim arose from a confiscation carried out pursuant to an Act of Parliament meant that there was a historical record of the claim and the land to which it related and no dispute, except at the margins, that the correct claimant was WaikatoTainui.

As this was the first iwi claim to reach a negotiated settlement, there were a number of challenges in the drafting of the deed of settlement. In particular, the definition of the claim and of the excluded claims. As the settlement related only to the Raupatu land, other claims had to be excluded, including the claim to the Waikato River. The acknowledgements made by the Crown and the terms of the Crown's apology were also important to both sides. The acknowledgements by WaikatoTainui were also important from the Crown's point of view particularly the acknowledgment that the Crown had acted honourably and reasonably in relation to the settlement and that the settlement was final. Although drafted in the form of a deed having contractual effect, the deed of settlement was in fact conditional on the passing of the settlement legislation, and it was unable to be implemented unless the legislation was passed.

At the time, I was surprised that it was intended that not just the WaikatoTainui settlement, but every future settlement, would have its own Act of Parliament. I thought it would have been better to have a global Treaty Settlements Act, providing for a mechanism for approval of a settlement by a resolution of Parliament, after which the implementation could be done by subordinate legislation. But as I soon found out it would have been very difficult to make it work for the most claims. I say that because many of the grievances arose under legislation and could be resolved only by legislation and because much of the redress required amendments to existing legislation.

The challenges of settling disputes arising from events that occurred decades or in some cases more than a century ago are significant.

The historical nature of the claims and the myriad of changes that have occurred since the events leading to the claim mean the settlement process is a very inexact process. In practice, this

19 As at August 2018, total spending was \$2.2 billion: Fyers, above n 18. Since then there have been two further settlements for \$25 million and \$100 million respectively.

20 Fyers, above n 18.

has meant the redress is constrained by what is considered by the Government of the day to be within the boundaries of political acceptability. The negotiations are unlike the negotiation of an ordinary commercial transaction where there is equality of bargaining power and no real constraint on what the negotiating parties have to offer to each other than their assessment of the value of what the other party is offering. It is, as Sir Robin said for the Court of Appeal in the case dealing with the fisheries settlement in the early 1990s, the *Sealords* case, an inherently political process.²¹

The model for settlements involving separate legislation for every settled claim does make Treaty settlements an unusual hybrid of contract and statute, involving a combination of actions by the executive and legislative branches of government. As I will come to later, this has had a significant impact on the role of the judicial branch of government in litigation related to the Treaty settlement process.

From a commercial point of view there were reasonably complex provisions relating to the transfer of land to Waikato-Tainui, spread over a five-year period. Provision was made for Waikato-Tainui to choose particular properties and not others and with a right of first refusal over a number of other properties owned by the Crown or Crown entities in the Waikato area. Some of the properties transferred to Waikato-Tainui were transferred on the basis that the unimproved land would be transferred and leased back by the Crown agency occupying the land, which would continue to own the improvements. Many of these transfers were significant transactions on their own. The property lawyers on both sides (not me!) were kept busy on these over the five-year transfer period in documenting and settling these transfers. So were the property valuers.

The signing of the deed of settlement in May 1995 was a special day. The most memorable aspect of it was when the Korotangi was carried on to the marae at Tūrangawaewae and given back to Waikato-Tainui. This occurred just after the deed of settlement had been signed. The Korotangi is a bird made of serpentine stone which is a taonga to Waikato-Tainui. It was apparently found near Kāwhia in the 1870s and was eventually deposited in the Dominion Museum, but subject to some complex trust arrangement which did not make it easy to extract it from the museum and return it to Waikato-Tainui. The Minister came to an arrangement to accommodate the trust that involved possession of the Korotangi being entrusted to Waikato-Tainui, and it was a very emotional moment when it was handed over.

In the afternoon on the day before the deed of settlement was to be signed, I was told that the Minister of Finance and the Minister in Charge of Treaty of Waitangi Negotiations had agreed to include in the deed of settlement a relativity mechanism. This came as something of a surprise to me and the others in the legal team, because we had thought the deed was finalised. The background to the relativity mechanism was that the \$170 million redress figure set for the Waikato-Tainui settlement was 17 per cent of the \$1 billion fiscal envelope. The relativity mechanism was a commitment by the Crown that the Waikato-Tainui redress amount would be topped up if the total redress paid to claimants for historical breaches of the Treaty exceeded \$1 billion, so the Waikato-Tainui proportion remained at 17 per cent of the total. That is reasonably easy to explain but it was obviously necessary to make provision for the time value of money which required the provision to include a number of mathematical equations, using mathematical symbols I was not familiar with. It was like drafting a document in Japanese or Russian. The symbols were completely foreign to me and I had to rely on others in the Crown team to act as translators from maths to English. The

21 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308 [*Sealords*].

fact that we were still negotiating the drafting of the document in the early hours of the morning did not help.

After the signing of the deed of settlement, there was a party hosted by the Waikato-Tainui people to which the Crown team was invited. Two comments made to me during that party remain with me.

The first was by an elderly gentleman who said to me “You Crown people never really understood. All we wanted was an apology and to get the korotangi back”. I suspect he was a minority of one among those present, but, having just witnessed a Crown commitment to pay \$170 million, I had to ask him not to repeat that to any of the officials from the Treasury who were present.

The second comment was from Sir Robert Mahuta, Waikato-Tainui’s principal negotiator. He told me how much he liked the relativity clause. I didn’t find that surprising, because it clearly was going to be a significant benefit to Waikato-Tainui. He then continued: “I call it my Fairlane clause”. When I asked him why, he responded “Because it means the other O’Regan won’t overtake me”. He was, of course, referring to Ngāi Tahu’s chief negotiator, Sir Tipene O’Regan. As it turned out, a similar relativity clause was included in the Ngāi Tahu deed of settlement, so neither overtakes the other. But both have received substantial top-up payments of about \$250 million under the clause so both of them overtake, or rather go further ahead of, other iwi claimants.²²

The Ngāi Tahu settlement was very complex. Whereas the Waikato-Tainui settlement was essentially a land for land settlement, reflecting that it was limited to the Raupatu claim, the Ngāi Tahu settlement had numerous different components to it. By the time I became involved in it, there had been some years of negotiations which had effectively broken down and had been revived through the intervention of the then Prime Minister, the Right Honourable Jim Bolger.

The magnitude of the task of negotiating and documenting the settlement is illustrated by the size of the deed of settlement, which was well over 2,000 pages long, not including the large number of survey maps, which were appendices to the deed. I have somewhere a photo of the Crown representatives (the OTS negotiators and the lawyers) carrying the deed of settlement on to the Takahanga Marae at Kaikōura where the deed of settlement was signed. There are 11 people in the photo, and each of them is carrying two or three Eastlight folders of the deed itself or A3 folders of maps. We had to divide up the task of initialling every page of the deed among the teams from both sides so that nobody got writer’s cramp.

The Ngāi Tahu settlement required the Crown to formulate new policy as the negotiations were proceeding. For a private sector lawyer, the exposure to this process of policy formulation was interesting. Because there were often differences of views between different departments, issues were often escalated to Cabinet committees, and while the Crown Law people were the major legal participants in these meetings, I sometimes attended too. In the Ngāi Tahu negotiations, the Government was the first MMP coalition government (National and New Zealand First) so it was interesting to see how these committees worked. As Minister in Charge of Treaty of Waitangi

22 The total settlement redress surpassed \$1 billion in 1994 present value dollars in October 2012. Waikato-Tainui received an additional \$70 million and Ngāi Tahu \$68.5 million: Lee Taylor “Historical Treaty settlements” in *Current issues for the 51st Parliament* (Parliamentary Library, Wellington, 2014) 21 at 21. In 2018, Waikato-Tainui and Ngāi Tahu received further payments of \$190 million and \$180 million respectively: Tony Wall and Carmen Parahi “Ngāi Tahu and Tainui receive \$370 million in Treaty payment top-ups, with more to come” *Stuff* (online ed, 21 January 2018). Both iwi received an additional \$1.2 million in 2019 following a long-running dispute over the 2012 payments: Andrew Little “Ngāi Tahu, Waikato-Tainui relativity adjustments” (press release, 28 June 2019).

Negotiations, Doug Graham was a very good advocate for the Treaty settlement cause. Once he had been convinced something was necessary, he was very good at persuading his Cabinet colleagues to agree.

Although both the Waikato-Tainui and Ngāi Tahu claims were very large claims and, in particular, the Ngāi Tahu one was a very complex claim, the inter-iwi issues that have arisen in later settlements (where more than one claimant lays claim to a particular site or other form of redress) did not loom large as they have in later settlement negotiations, or at least were not apparent to me. This, and the fact that my involvement was related to the commercial and property aspects of the settlement rather than the Treaty aspects, may mean that I had something of a rose-tinted view of the process.

The parliamentary process leading to the passing of the settlement legislation was unusual. The deeds of settlement were, in many ways, just precursors to the legislation, because, with a few exceptions, none of their provisions was legally enforceable without the passing of the legislation. Of course, the deeds of settlement were clear in their own terms that they were conditional upon the passing of the settlement legislation. Indeed, in the Waikato-Tainui case, the clause required the passing of the legislation by a majority that “is satisfactory to the Crown”. When I asked the Minister what that meant, he replied that he would tell me after the votes were in! As the then opposition supported the Bill, the issue never had to be addressed.

The fact that the settlement legislation had to give effect to the deed of settlement meant that there was a need to ensure that what had already been agreed did not get lost in translation between the contractual language of the deed of settlement and the statutory language of the legislation. The Settlement Acts were substantial documents in themselves: in the case of the Ngāi Tahu Claims Settlement Act 1998, there were nearly 500 sections and well over 100 schedules. In the case of the Waikato-Tainui settlement, by the time the legislation was drafted the recorded history to appear in the legislation referred to events which had not been mentioned in the historical account in the preamble to the deed of settlement. That led to concern among the lawyers on the Crown side that the historical account in the Bill dealt with events that had not been included within the definition of the claim to be settled in the deed of settlement, and left the Crown exposed to having acknowledged a wrong but not settled it. Eventually the deed of settlement had to be amended before the Bill was passed to align it with the Settlement Bill.

This need to maintain the agreed deal meant that the normal parliamentary processes were somewhat restricted. The drafting conventions and style adopted by the Parliamentary Counsel Office did not fit well with the essentially contractual subject matter. The Bill was scrutinised by a Select Committee, but on quite a restrictive basis. It was, of course, open to the Select Committee to propose amendments to the Settlement Bill. But any amendments which had the effect of changing the agreed deal ran the risk that they would lead to conditions in the deed of settlement not being satisfied and the settlement not proceeding.²³ That meant that, in reality, the Select Committee process did not offer much to those who were opposed to aspects of the Settlement Bill and who sought amendments to it. As I am about to come to, the court process didn't either.

So, that is what I want to say about my experience of Treaty settlements as a lawyer and negotiator.

²³ See, for example, the observations of the Māori Affairs Select Committee about this limitation of its role in Te Uri o Hau Claims Settlement Bill 2001 (156-2) (select committee report) at 1–2.

I have now been a judge for over 18 years and am quite out of touch with Treaty settlement negotiations. I am sure much has been learned since the time I was involved in the initial settlements and that the process is now better than it was then. The only perspective I now have is that of a judge, from the cases I have sat on and, more broadly, cases I have become aware of in the course of my work as a judge. This is quite a different perspective from the one I had as a negotiator. It focuses on areas of dispute as to how the Treaty negotiations process plays out, rather than how settlements are made.

Some further background to this discussion is required. The Crown's policy on negotiations does not have a statutory underpinning. The Treaty of Waitangi Act does not govern it. Rather, it is a statement of policy, contained in a publication by the Office of Treaty Settlements (now Te Kāhui Whakataua) that is universally referred to as "The Red Book".²⁴ There are two significant features of the Crown's policy that I note at the outset. The first is the stated preference for negotiating with "large natural groupings rather than individual whānau and hapū",²⁵ which carries with it various requirements as to how those negotiating for the large natural grouping obtain their mandate to do so.²⁶ That policy has attracted criticism from those who see hapū as the appropriate level for engagement, at least in some cases. There are practical reasons for the policy from the Crown's point of view however. Even when negotiations are with large groupings, there are inevitably overlaps in the claims made by different groupings that can mean settlement with one grouping impinges on the ability to settle later with another, leading to cross-claims or separate but overlapping claims. The second feature is the Crown's policy for dealing with these.²⁷

Many of the disputes about the settlement process concern these two features: mandating issues and overlapping claims. As mentioned earlier, overlapping claims did not loom large in my time as a lawyer/negotiator, though in Ngāi Tahu's case they arose later.

Parties to disputes about mandate or about overlapping claims that are unable to resolve the disputes themselves seek resolution from the courts, the Waitangi Tribunal and from the Select Committee considering the Settlement Bill. None has been particularly fruitful. I will focus on challenges in the courts. That is not to ignore the importance of the Tribunal, which has been significant. Rather, it reflects where my experience of these disputes has been. As mentioned earlier, the Select Committee process for Settlement Bills does not provide much scope for meaningful change to draft Settlement Bills and so has not been as productive a forum as it would at first blush appear to be.

I will start with cases about mandate.

The first important case actually falls outside my 25-year period, so I have my own problem of overlapping claims here. It is the 1992 decision of the Court of Appeal in the *Sealords* case, which Sir Robin spoke about in 1994 and which I mentioned earlier.²⁸ In that case, which involved a challenge to the Māori fisheries settlement by iwi opposed to the global settlement, Sir Robin

24 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna, Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2018) [The Red Book] <www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/>.

25 At 27, 29 and 39.

26 At 39–48.

27 At 53–55.

28 *Sealords*, above n 21.

observed that the deed of settlement was “a compact of a political kind, its subject so linked with contemplated parliamentary activity as to be inappropriate for contractual rights”.²⁹ He emphasised the nature of deeds of settlement, namely that they are essentially a precursor to legislation; many commitments by the Crown contained in them are, in essence, commitments to introduce legislation for consideration by Parliament, which leaves the final decision as to whether the settlement will proceed to Parliament. He said:³⁰

There is an established principle of noninterference by the courts in Parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. ... However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.

These words set the tone for the treatment of future challenges to Treaty settlements, whether in relation to mandate or to overlapping claims. In the *Sealords* case, the claim was for interim relief to restrain the Crown from introducing a Bill to give effect to the settlement. It was struck out on the basis it had no realistic prospect of success. As we will see, the political nature of the process has led the Courts to take a hands-off approach, following Sir Robin’s lead. This has attracted some adverse and some positive comment.³¹

An example of a challenge relating to mandate is a case that relates to the Waikato-Tainui Raupatu settlement itself, *Greensill v Tainui Maori Trust Board*.³² The plaintiffs were 12 individual members of Waikato-Tainui who challenged the mandate of the Tainui Maori Trust Board to enter into the deed of settlement. The claim was heard by Hammond J. He dismissed it on the basis that the plaintiffs had no cognisable right to be enforced, there were doubts about their standing and, in any event, the heads of agreement on which the deed of settlement was based was a purely political document and, as such, not justiciable. So, even when the claim was against the mandated entity, rather than the Crown, the political nature of the process, reflecting the view of Sir Robin in the *Sealords* case, was an important factor in the Court’s refusal to intervene. The case was decided a day or two before the deed of settlement was signed. I was only peripherally aware of it at the time because my focus was on finalising the deed for signing and I was probably trying to get my head around the relativity clause.

While I am talking about Hammond J, I just want to pay tribute to him. As you know he died earlier this year. He was a highly valued colleague of mine on the Court of Appeal and I know he was highly regarded in Hamilton when serving here as a resident High Court Judge.

There were two cases based on mandate issues in relation to the Ngāi Tahu claim as well.³³ Neither succeeded.

29 At 308.

30 At 307.

31 See Wainwright, above n 13; Jessica Andrew “Administrative Review of the Treaty of Settlement Process” (2008) 39 VUWLR 225; and John Dawson and Abby Suszko “Courts and Representation Disputes in the Treaty Settlement Process” [2012] NZ L Rev 35.

32 *Greensill v Tainui Maori Trust Board* HC Hamilton M117/95, 17 May 1995.

33 *Te Ngai Tuahuriri Runanga v Te Runanga o Ngai Tahu* HC Christchurch CP187/97, 13 May 1998 (Master Venning); and *Waitaha Taiwhenua o Waitaki Trust v Te Runanga o Ngai Tahu* HC Christchurch CP41/98, 17 June 1998 (Panckhurst J).

Perhaps the most important case on mandating issues is the claim by the Puketapu hapū challenging the mandate relating to Te Atiawa's Treaty claim.³⁴ The claim failed, with the Judge, Doogue J, observing that it was "yet another case where the Court has been asked to intervene in what is essentially a political process without any proper foundation of law being put before it."³⁵ Sir Robin's words again.

I am going to talk about two older cases that relate to overlapping claims and some more recent, and probably more significant ones.

The first is *Milroy v Attorney-General*.³⁶ The case arose in the context of the settlement of Ngāti Awa's Treaty claim, which involved a cross-claim by Tuhoe. Tuhoe was concerned that the return of certain forest land to Ngāti Awa would make the Crown unable to transfer forest land to Tuhoe in the event that the Waitangi Tribunal made a binding recommendation requiring that. Tuhoe commenced proceedings challenging the decisions of the Minister in Charge of Treaty of Waitangi Negotiations relating to the allocation of forest land to Ngāti Awa and also the advice she received from officials.

The claim was dismissed by Goddard J in the High Court.³⁷ Her decision was upheld by the Court of Appeal, which described the proceeding as an attempt to draw the court into an examination of the accuracy and completeness of advice of officials in the course of the formulation of government policy even though no rights are affected by the advice (because legislation was required before the Minister's decisions would have any effect on anyone). It reiterated the approach taken in *Sealords* that the formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review. It also reiterated a comment made by Goddard J that the Court could not help the plaintiffs. It noted the Crown's proposed legislative conduct could be within the jurisdiction of the Waitangi Tribunal or subject to representations to a Select Committee.

The approach taken in *Milroy* was applied in a later Court of Appeal case, *New Zealand Maori Council v Attorney-General*, known as the *Crown Forests Assets* case.³⁸ I was on the Court of Appeal panel for that case and wrote the judgment for the Court. The case concerned the proposed settlement with a number of iwi and hapū affiliated with Te Arawa. The New Zealand Māori Council and others instituted proceedings on behalf of cross-claimants to the forestry land that was to be transferred in the proposed settlement.

The Court of Appeal accepted the Māori Council's submission that the proposed arrangements set out in the settlement deed with the Te Arawa entities were not contemplated by the Crown Forests Assets Act 1989. But the Court said it was not appropriate to make the declaration sought, that a future Act of Parliament (the Act giving effect to the proposed settlement with the Te Arawa entities) would, if passed, override an earlier one (the Crown Forests Assets Act). The Court saw the declarations as predicated on the proposition that the Crown had bound itself to the transfer, when, in fact, the proposed settlement was conditional on the passing of legislation and the Crown's

34 *Kai Tohu o Puketapu Hapu Inc v Attorney-General* HC Wellington CP344/97, 5 February 1999, discussed in Wainwright, above n 13 at 189–190; and Dawson and Suszko above, n 31 at 47–49.

35 At 18.

36 *Milroy v Attorney-General* [2005] NZAR 562 (CA).

37 *Pouwhare v Attorney-General* HC Wellington CP78/02, 30 August 2002; and *Milroy v Attorney-General* HC Wellington CP77/02, 30 August 2002.

38 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

commitment was, in effect, a commitment to introduce a Bill to give effect to the settlement. So, the Court said the case fell within the same rubric as *Sealords* and *Milroy* and the question of whether the settlement deed should become unconditional was one for Parliament.

The theme of these cases was that some claims relating to Treaty settlements failed on the basis that the decisions subject to challenge were seen as decisions that would have no substantive effect unless legislation was passed, so they essentially amounted to decisions as to what would be proposed to Parliament, rather than decisions having their own practical impact on the legal rights of the claimants.

This reflects the unique interplay of the three branches of government in the Treaty settlement process, involving a negotiation conducted by the executive culminating in a deed of settlement followed by settlement legislation, calling for both parliamentary approval of the terms of the settlement and the legislative authorisation of the necessary action to give effect to the settlement.

That means that, as a general statement, at least some of the decisions made by the executive in relation to Treaty settlements will ultimately become legislative proposals, so that, as the courts have noted, such executive actions are preparatory to the introduction of legislation. In the cases I have mentioned so far, the Court of Appeal found that, if the decision in respect of which judicial review is sought is a decision to introduce legislation, then the Court will not intervene if that would be regarded as an interference in the processes of Parliament.

So, the upshot of this is that attempts to judicially review decisions made by the executive in relation to Treaty settlements largely foundered on the basis that the decisions relate to the introduction of legislation, and the court's role has therefore been limited.

However, the recent Supreme Court case in *Ngāti Whātua Ōrākei v Attorney-General* suggests that the principle of non-interference with parliamentary proceedings should not always be applied so widely in the Treaty settlement context.³⁹ The cases I have just referred to now need to be read in light of the Supreme Court's decision. Where there are live and ongoing issues as to rights and obligations, interpretation of settlement deeds or the exercise of statutory powers, the court's jurisdiction will not be ousted by the mere prospect of legislation.

A decision of Williams J in the High Court provides some background to the *Ngāti Whātua Ōrākei* decision. In that case, *Port Nicholson Block Settlement Trust v Attorney-General*, Williams J applied a more nuanced analysis to the declarations sought. He emphasised that the courts should be careful not to leave the Crown "as sole arbiter of its own justice".⁴⁰

The case concerned the proposed Treaty settlement between the Crown and Ngāti Toa. The Port Nicholson Block Settlement Trust, representing the Taranaki Whānui, argued the terms of the Ngāti Toa settlement were inconsistent with the deed of settlement and Settlement Act relating to the Crown's settlement of the Taranaki Whānui claim. By the time the proceeding came to a hearing the pleading had changed from an attempt to prevent the Crown from proceeding with the Ngāti Toa settlement to a prayer for a declaration that the redress proposed to be granted to Ngāti Toa would be inconsistent with the Crown's obligations to Taranaki Whānui under the settlement already reached with it.

39 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [*Ngāti Whātua* (SC)].

40 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63], citing *Wi Parata*, above n 3.

The approach taken by Williams J is summarised in these paragraphs from his judgment:

- [60] The declarations sought in this case ... focus on consistency only between the Taranaki Whānui Deed and Act and the Ngāti Toa Deed. Taranaki Whānui has stepped back from an attempt to have the court order the Crown to amend the Ngāti Toa Deed of Settlement to a less problematic process of construing the promises the Crown made to Taranaki Whānui in its Deed and comparing those to the promises made to Ngāti Toa in its Deed.
- [61] In my view, this relief, if justified on the merits, does not cross the line ascribed by the Court of Appeal in the *Milroy* and *Crown Forests Assets* cases. It does not attempt to intervene in the legislative process, leaving it to the executive to decide what, if anything, it should do with such declarations if made.
- [62] There are additional considerations. Unlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under their Settlement Deed and Act that are, or may be, justiciable. There is a satisfactory legal yardstick that a court can utilise in resolving the controversy.

(footnotes omitted)

He went on to consider the merits of Port Nicholson's claim but dismissed it.

Ngāti Whātua Ōrākei was a case which arose in the aftermath of the Ngāti Whātua Ōrākei settlement and the collective Ngā Mana Whenua o Tāmaki Makaurau settlement. Ngāti Whātua Ōrākei sought to challenge decisions made by the Minister for Treaty of Waitangi Negotiations to include certain land in central Auckland in settlements with Ngāti Paoa and Marutūāhu respectively. The land was land in respect of which Ngāti Whātua Ōrākei claimed mana whenua and ahi kā. Under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, it was land subject to a right of first refusal in favour of the Collective. However, the Act allowed the Minister to remove land from the scope of the right of first refusal where required for another Treaty settlement.

Ngāti Whātua Ōrākei asked the court for a number of declarations. The first was a declaration that it has ahi kā and mana whenua in relation to certain land in central Auckland. The second, third and fourth declarations all sought to clarify the Crown's obligations to Ngāti Whātua Ōrākei when applying its overlapping claims policy to land within Ngāti Whātua Ōrākei's area of interest, and in particular when making offers to include that land in settlements with iwi that do not have ahi kā in the area. The fifth and sixth pleadings sought declarations that the Crown had acted inconsistently with those obligations when making the two decisions at issue in the case.

The High Court struck out the claim on the basis that it was not justiciable because the proposed transfers would take effect only once authorising legislation was passed.⁴¹ The Court of Appeal upheld the decision.⁴²

The Supreme Court took a different approach. The majority's view was that the principle of noninterference with Parliament did not require the claim to be struck out in its entirety. It held that there was a live, ongoing issue in respect of Ngāti Whātua Ōrākei's rights according to customary law, the Treaty of Waitangi and its 2012 Settlement Act and that it must be open to Ngāti

41 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516.

42 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

Whātua Ōrākei to seek to clarify its status in the area.⁴³ The same applied to the challenge to the Crown's overlapping claims policy in the Red Book and the process which it argued the Crown must follow when making decisions to withdraw land from the statutory right of first refusal. The declarations sought by Ngāti Whātua Ōrākei were framed generally and would have application to future decisions. Further, the pleadings raised issues about the Minister's decision-making power under the Collective Redress Act, which it held can be reviewable independently of the particular decision triggering the proceeding.⁴⁴

However, the majority considered that the final two pleadings were problematic because they sought declarations that the particular decisions at issue were made in breach of the Crown's obligations. It saw this as a challenge to a decision to legislate, which would constitute interference with the parliamentary process.⁴⁵ It restored the claim, except for the final two paragraphs of the declarations sought by Ngāti Whātua Ōrākei. Elias CJ agreed but would have restored the claim in its entirety.⁴⁶

Although it was unnecessary to express a final view on the scope of the principle of noninterference with parliamentary processes, the majority made the following comment in the judgment delivered by Ellen France J:⁴⁷

It is, nonetheless, appropriate to sound a note of caution at the extent to which the principle of non-interference in parliamentary proceedings has been held to apply to decisions somewhat distant from, for example, the decision of a Minister to introduce a Bill to the House or from debate in the House. It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights.

This echoed a similar observation made by Arnold J, writing for the majority in an earlier case, *Ririnui v Landcorp Farming Ltd*.⁴⁸ He noted that decisions about Treaty settlements had been treated as inappropriate for judicial review but observed that this is not always the case. He said the fact that a decision subject to a judicial review application had a Treaty context did not preclude review where the decision under challenge breached a principle of public law.⁴⁹

The *Ngāti Whātua* decision means that the courts may in future play a greater role in Treaty settlement disputes. The balance struck by the Supreme Court in that case means that there is more scope for clarifying the rights and obligations of both disputing iwi and hapū and the Crown during settlement negotiations, without interference into parliamentary processes. That may give iwi and hapū a forum for grievances which arise during the settlement process itself, or a way to prevent such grievances from arising at all. Of course, the Waitangi Tribunal will remain an important forum, as will alternative dispute resolution mechanisms which have had some measure of success in the past.

43 *Ngāti Whātua* (SC), above n 39, at [53] and [59].

44 At [63].

45 At [65]–[66].

46 At [127].

47 At [46].

48 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 623, [2016] 1 NZLR 1056.

49 At [90].

The Supreme Court decision was a decision overruling the striking out of Ngāti Whātua Orākei's claim, which involved making a finding that the claim was not so untenable that it should not be allowed to proceed. It was not a decision that the claim succeeded. There is a lot of water to go under the bridge before the merits of the claim are determined.

In perhaps an appropriate bookend to my discussion of the cases, I want to refer to a recent High Court decision of Cooke J, who is, of course, Sir Robin's son. The case is *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations*.⁵⁰ It was an application for interim relief to restrain the signing of a deed of settlement with Moriori that would provide for the transfer of land to Moriori that Ngāti Mutunga also claimed. Cooke J discussed the *Ririnui* and *Ngāti Whātua* decisions and concluded that judicial review was available but only where there has been a breach of a principle of public law or a public law error that is properly corrected by the Court on judicial review.⁵¹

An important difference between *Milroy* and *Ngāti Whātua* was that in the former, counsel accepted that the officials' advice that was under challenge did not affect anyone's rights. In the latter, the Court found the decisions and policies under challenge did potentially affect rights.⁵²

In his lecture of 25 years ago, Sir Robin began his conclusion with a statement that seems surprisingly defensive now. It was: "I hope this excursion [referring to his discussion of the leading cases of the 1980s] may have helped to show that Māori claims to remedies are not totally unfounded".⁵³ For my part, I hope my recounting of the early settlements and the litigation relating to settlements shows that as a country we have tried to confront our past and recognise the claims are not only "not totally unfounded" but have been clearly made out. Ministers, officials and negotiators have confronted this, but their efforts are themselves often challenged. The challenge for the courts is to identify where and when decisions made in the settlement process should be subjected to the supervisory judicial review jurisdiction of the courts while respecting the parliamentary process. There are still many claims to be settled. And based on past experience, there will be many disputes about the settlement process that will need to be addressed by the courts. So this will be a developing area.

50 *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942.

51 At [25].

52 *Ngāti Whātua* (SC), above n 39, at [46].

53 Cooke, above n 1, at 11. It may be that this was a response to a claim to the contrary.