

## INTERNATIONAL ENVIRONMENTAL LAW

### I. INTRODUCTION

New Zealand's international environmental law actions in 2009 included climate change activities and progress on Agreements on Environmental Cooperation (ECA). The most significant developments were in the area of climate change. A new centre-right National Party government was elected in 2008 to succeed the previous centre-left Labour government. As is the case in most countries, climate change presents particularly difficult policy challenges and the new government quickly signalled a shift from the previous government's aspirations to be a "world leader" in combating climate change to doing only its "fair share".<sup>1</sup> For example, with respect to post-Kyoto<sup>2</sup> negotiations in Copenhagen in December 2009, the new government was initially sceptical; the Prime Minister dismissed them as a "photo opportunity"<sup>3</sup> whilst the Minister for Climate Change Issues labelled the pursuit of a "full and certifiable international agreement for the second commitment period" as "Noddyland stuff."<sup>4</sup> In the event, New Zealand's Copenhagen Accord commitments were modest and subject to stringent conditions with respect to action by other states. New Zealand is also lagging substantially behind its Kyoto target of maintaining 1990 greenhouse gas levels, notwithstanding substantial offsets from forest sinks.

Significant national developments in 2009 included Resource Management Act 1991 amendments (which included establishing an Environmental Protection Authority) and the amendment of the New Zealand Emissions Trading Scheme (NZ ETS) by the new government. The revised NZ ETS attempts to lessen the impact of the scheme on the economy, but has been criticised particularly for being too sympathetic to industry.<sup>5</sup> Other developments included a Bill to implement the Antarctic Liability Annex and adoption of an illegal logging and timber trade policy by Cabinet.

- 1 Hon Dr Nick Smith "Guardian criticism a reality check on climate change policy" (press release, 13 November 2009).
- 2 Kyoto Protocol to the United Nations Framework Convention on Climate Change (opened for signature 16 March 1998, entered into force 16 February 2005).
- 3 "Key dismisses Copenhagen as 'photo op'" *Sydney Morning Herald online* (Australia, 23 November 2009) <<http://news.smh.com.au/breaking-news-world/key-dismisses-copenhagen-as-photo-op-20091123-it4j.html>>.
- 4 Brian Fallow "Hopes of full climate agreement are 'Noddyland stuff'" *New Zealand Herald online* (New Zealand, 12 February 2009) <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=38&objectid=10556273](http://www.nzherald.co.nz/business/news/article.cfm?c_id=38&objectid=10556273)>.
- 5 See generally Parliamentary Commissioner for the Environment "Submission to the Finance and Expenditure Select Committee on the Climate Change Response (Moderated Emissions Trading) Bill" (13 October 2009).

## II. INTERNATIONAL DEVELOPMENTS

### *A. Climate Change*

New Zealand has elected to join the Copenhagen Accord on climate change,<sup>6</sup> submitting its conditional emissions reduction target range of ten per cent to 20 per cent below 1990 levels by 2020.<sup>7</sup> This is subject to a global agreement seeking to limit global temperature increase to two degrees centigrade, comparable efforts by other developed countries, actions by advanced nations fully commensurate with their respective capabilities, effective rules governing land use, land use changes and forestry, and a broad and efficient carbon market.<sup>8</sup> At Copenhagen, New Zealand was instrumental in establishing a Global Research Alliance with 20 other countries to deal with agricultural greenhouse gases,<sup>9</sup> which are of particular concern to New Zealand as they represent approximately half of its greenhouse gas emissions.<sup>10</sup>

On 23 December 2009, New Zealand submitted its Fifth National Communication under the United Nations Framework Convention on Climate Change to update New Zealand's progress towards its commitments under the Kyoto Protocol.<sup>11</sup> "With measures" projections in the Fifth National Communication indicate a 25 per cent increase in total emissions in 2010 over 1990 levels and 26 per cent in 2020. Net emissions (including the forestry sector) are expected to increase to 90 per cent above 1990 net emission levels in 2020 as the forestry sector becomes a net source of emissions with the harvesting of extensive forest areas planted in the 1990s.<sup>12</sup>

6 Hon Dr Nick Smith and Hon Tim Groser "NZ joins Copenhagen Accord on climate change" (press release, 1 February 2010).

7 Hon Dr Nick Smith and Hon Tim Groser "2020 target balances economy & environment" (press release, 10 August 2009).

8 *Copenhagen Accord* FCCC/CP/2009/L.7 (2009) at Appendix 1 <<http://unfccc.int/home/items/5264.php>>. See also Letter from Hon Dr Nick Smith to Mr Yvo de Boer (United Nations Framework Convention on Climate Change) regarding New Zealand's quantified economy-wide emissions targets for 2020 (31 January 2010) at 2. Available at <[http://unfccc.int/files/meetings/application/pdf/newzealandcphaccord\\_app1.pdf](http://unfccc.int/files/meetings/application/pdf/newzealandcphaccord_app1.pdf)>.

9 Hon David Carter and Hon Tim Groser "\$45 million for Global Research Alliance" (press release, 17 December 2009).

10 National Institute of Water and Atmospheric Research "Agricultural Emissions of Greenhouse Gases" (2008) <<http://www.niwa.co.nz/our-science/atmosphere/research-projects/all2/agricultural-emissions-of-greenhouse-gases#null>>.

11 New Zealand Government "Greenhouse Gas reports" Climate Change Information (2010) <<http://www.climatechange.govt.nz/carbon-reports/index.html#greenhousegas>>.

12 Ministry for the Environment *New Zealand's Fifth National Communication under the United Nations Framework Convention on Climate Change* (Ministry for the Environment, Wellington, 2009) 7.

### B. *Bilateral Agreements on Environmental Cooperation (ECA)*

The ECA between New Zealand and the Philippines, to “encourage and promote sound environment policies and practices and improve the capacities and capabilities of the Parties”,<sup>13</sup> came into force in 2009. In addition, in October New Zealand signed the New Zealand-Malaysia Agreement on Environmental Cooperation to “improve the capacities and capabilities of New Zealand and Malaysia to deal with environmental issues and establish a framework for cooperation, as part of the New Zealand-Malaysia Free Trade Agreement.”<sup>14</sup> Negotiations on an ECA were also concluded with Hong Kong in 2009.<sup>15</sup> In September the first meeting of the Parties under the New Zealand-China Environment Cooperation Agreement<sup>16</sup> took place.<sup>17</sup> Activity has continued to increase under ECAs with the governments of Thailand, Singapore, Brunei and Chile. Negotiations on an ECA with the Gulf Cooperation Council were unsuccessful but negotiations with Bahrain, Oman and South Korea continue.<sup>18</sup>

## III. REGIONAL DEVELOPMENTS

### A. *Climate Change*

In early March 2009 the Prime Ministers of New Zealand and Australia agreed on the “desirability of harmonising to the greatest extent possible the emissions reduction regimes in both countries.”<sup>19</sup> This is in keeping with the spirit of cooperation established through the 2003 Australia-New Zealand Bilateral Climate Change Partnership. Subsequently, the Australian Minister for Climate Change and Water and the New Zealand Minister for Climate Change Issues met and agreed on terms of reference to explore harmonising the design of the NZ ETS and the Australian Carbon Pollution Reduction

13 Memorandum of Agreement on Environmental Cooperation between the Government of New Zealand and the Government of the Republic of the Philippines (signed 4 November 2008, entered into force 13 August 2009) art 1(a).

14 Foreign Affairs, Defence and Trade Committee *International treaty examination of the New Zealand-Malaysia Agreement on Environmental Cooperation* (2010). For the text of the New Zealand-Malaysia Agreement on Environmental Cooperation see <<http://www.mfat.govt.nz/downloads/trade-agreement/malaysia/mnzfta-environment-agreement.pdf>>.

15 New Zealand - Hong Kong, China Environment Cooperation Agreement (signed 29 March 2010). Negotiations on the Agreement on Environmental Cooperation concluded 9-10 November 2009.

16 Environment Cooperation Agreement between the Government of New Zealand and the Government of the People's Republic of China (signed 4 April 2008, entered into force 26 September 2008).

17 Ministry for the Environment “Info 466” in *Trade Links* (5th issue, Ministry for the Environment, Wellington, 2009) <<http://www.mfe.govt.nz/publications/about/trade-links/trade-links-issue5.html>>.

18 Ibid.

19 Rt Hon John Key “Key & Rudd - Joint Statement On Strengthened Trans-Tasman Cooperation” (press release, 2 March 2009).

Scheme.<sup>20</sup> New Zealand was also a founding member of the Global Carbon Capture and Storage Institute, along with Australia.<sup>21</sup> The institute was formally launched in April 2009.<sup>22</sup>

#### IV. NATIONAL DEVELOPMENTS

##### *A. Climate Change*

##### 1. Emissions Targets

The Minister for Climate Change Issues has suggested the 2020 target tabled at Copenhagen is to be met “through a mixture of domestic emission reductions, the storage of carbon in forests, and the purchase of emission reductions from other countries.”<sup>23</sup> In addition to this 2020 target, the government has set a long-term target of a 50 per cent reduction in net greenhouse gases from 1990 levels by 2050.<sup>24</sup>

In April 2009, the Ministry for the Environment’s Net Position Report 2009 provided projections of New Zealand’s progress towards meeting its Kyoto Protocol commitments. The report indicates that over the First Commitment Period there is expected to be a surplus of 9.6 million emission units.<sup>25</sup> This is a result of lower emissions from agriculture, due to a drought in 2007-8, and new information suggesting higher than expected net removals from forestry.<sup>26</sup> With regard to the projected surplus for the First Commitment Period, the Minister for Climate Change Issues acknowledged that “these figures do not signal any progress in abating New Zealand’s gross greenhouse gas emissions ... [w]e are just fortunate that more than 600,000 hectares of new forests were planted in the 1990s that are growing strongly and offsetting our continued growth in energy and transport emissions.”<sup>27</sup>

##### 2. The New Zealand Emissions Trading Scheme (NZ ETS)

The previous Labour Government originally passed legislation creating the NZ ETS in September 2008. Their Climate Change Response (Emissions Trading) Amendment Act 2008 proposed coverage of all sectors and the six

20 Hon Dr Nick Smith “Australia and New Zealand Strengthen Climate Change Cooperation” (press release, 19 March 2009).

21 A Deuchrass “Australian govt-backed fund offers \$A50m for carbon capture, storage” *The National Business Review* (New Zealand, 7 December 2009).

22 Global Carbon Capture and Storage Institute “About the Institute” (2010) <[http://www.globalccsinstitute.com/about\\_gccsi/about\\_us.html](http://www.globalccsinstitute.com/about_gccsi/about_us.html)>.

23 Ibid.

24 Hon Dr Nick Smith and Hon Tim Groser, above n 7.

25 Ministry for the Environment *Net Position Report 2009: New Zealand’s Projected Balance of Kyoto Protocol Units During the First Commitment Period* (Ministry for the Environment, Wellington, 2009) at v (executive summary) <<http://www.mfe.govt.nz/publications/climate/net-position-report-2009/net-position-report.pdf>>.

26 Ibid.

27 Hon Dr Nick Smith “Government cautious over NZ’s Kyoto surplus” (press release, 15 April 2009).

greenhouse gases in the Kyoto Protocol when fully implemented. Forestry was to be the first sector to enter the scheme, entering retrospectively on 1 January 2008. Other sectors (Liquid Fossil Fuels, Stationary Energy, Industrial Processes, Agriculture and Waste) were to be phased in by 2013. In general, defined “participants” were to report on and monitor emissions, and surrender one emission unit to the Government for every tonne of greenhouse gas they emitted. The scheme proposed free emission units be allocated to trade-exposed industries and then phased out gradually over time.

A review of the NZ ETS by a Parliamentary Select Committee followed the change of government. In the interim, the Climate Change (Emissions Trading Forestry Sector) Amendment Act 2009 amended the Climate Change Response Act 2002 so as to essentially delay certain requirements applicable to the Forestry sector. In August 2009 the Emissions Trading Scheme Review Committee reported back with a number of recommendations but no consensus on key design features.<sup>28</sup> The majority supported continuation of a NZ ETS with a number of refinements. Following the review, the Government introduced the Climate Change Response (Moderated Emissions Trading) Amendment Bill. This passed into law on 25 November 2009.

The Amendment Act’s objectives included reducing competitiveness impacts of the NZ ETS, ensuring the NZ ETS is affordable, maximising the degree of harmonisation with the Australian Carbon Pollution Reduction Scheme, and providing a smoother transition for participants into the NZ ETS. The major impetus behind the amendments was to ease effects of the NZ ETS on the economy.<sup>29</sup>

A key feature of the Amendment Act is a requirement that participants (except Forestry) will now have to surrender only one emission unit for every two tonnes of greenhouse gas until the end of 2012 thus halving their obligations during this period. In addition, free emissions units will be allocated to trade-exposed industries and phased down over time. By 2015, all gases and sectors will be covered by the NZ ETS. The Amendment Act also provides that regulations can be made, including those for the setting of emissions reductions targets.<sup>30</sup>

The New Zealand Minister for Climate Change Issues has heralded the NZ ETS as the first emissions trading scheme outside Europe. He also declared that it will be the most comprehensive from 1 July 2010 by including transport, industrial, and energy emissions and that it will be the first to include forestry

28 Emissions Trading Scheme Review Committee “Review of the Emissions Trading Scheme and Related Matters” I.23A (2009). Available at <[http://www.parliament.nz/NR/rdonlyres/B5273AA3-753D-4EEB-AC81-843F1930EA40/107378/DBSCH\\_SCR\\_4485\\_ReviewoftheEmissionsTradingScheme.pdf](http://www.parliament.nz/NR/rdonlyres/B5273AA3-753D-4EEB-AC81-843F1930EA40/107378/DBSCH_SCR_4485_ReviewoftheEmissionsTradingScheme.pdf)>.

29 Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (85-1) (explanatory note) at 1. See also at 10 in relation to the economy.

30 For a good summary of the key changes the 2009 Amendment Act made to the Climate Change Response Act 2002 see D Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis, Wellington, 2008) at [17.20].

and agriculture.<sup>31</sup> Less optimistically, a number of concerns have been raised about the likely effectiveness of the revised NZ ETS. A key criticism is that it is too generous to industry and shifts costs to the taxpayer. The Parliamentary Commissioner for the Environment (an independent Officer of Parliament with various powers) was particularly anxious about the “extremely generous” free allocation of carbon credits to industry in submissions on the Bill, and recommended that they should only be granted where genuine reasons exist. The Commissioner said the lack of an allocation cap weakened “the incentive for industry to move to being less carbon-intensive,” which was likely to lead to significant emissions increases over time. The Commissioner also argued that the phase-out of carbon credits was far too slow.<sup>32</sup>

*(a) Industry, Energy and Transport*

The Amendment Act shifts the commencement of unit-surrender obligations for the Stationary Energy and Industrial Processes sectors (both formerly January 2010), and the Liquid Fossil Fuels sector (formerly January 2011). These sectors will now enter the NZ ETS from 1 July 2010. There will also be a fixed price option to pay a sum of \$25 per unit instead of surrendering units where required, in addition to the halving of obligations.

New Zealand units cannot be exported from the NZ ETS during the transitional phase (except for Forestry, see below). The Amendment Act also provides for free allocation of units, on an uncapped intensity basis to emissions-intensive, trade-exposed industries (who carry out an eligible industrial activity prescribed in regulations) over a longer period than originally proposed. Ostensibly, this is to avoid “carbon leakage,” (the movement of manufacturing offshore to countries imposing no emission obligations).<sup>33</sup> Highly emissions-intensive activities will receive a higher level of assistance than moderately emissions-intensive activities. Support to industry will phase out at a rate of 1.3 per cent a year beginning in 2013, down from 8 per cent. This is closely aligned to Australian proposals in order to reduce trans-Tasman competitiveness risks. Other sectors, such as pre-1990 forestry, fisheries and agriculture are also partially supported by free allocation of units.

*(b) Forestry, Fishing and Agriculture*

Commentators have noted that foreign treatment of forestry and agriculture emissions is of major concern to New Zealand. This is because New Zealand agricultural and forestry products exposed to emissions pricing through the

31 Hon Dr Nick Smith “Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009” (press release, 25 November 2009).

32 Parliamentary Commissioner for the Environment “Submission to the Finance and Expenditure Select Committee on the Climate Change Response (Moderated Emissions Trading) Bill” at 2-3 and 7.

33 Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (85-1) (explanatory note) at 28.

NZ ETS may be at a competitive disadvantage internationally, since other countries are not currently regulating them. Agriculture in particular, has accordingly emerged as a key issue in international negotiations.<sup>34</sup>

For Forestry, the Amendment Act brings in a transitional phase running from 1 Jan 2008 to the end of December 2012 during which the \$25 fixed price option will be available for Forestry participants (though the discounted 50 per cent option will not). The ban on exporting New Zealand units does not apply for forestry-related units.

Fishing will benefit from the 50 per cent option during a transitional period starting 1 July 2010, and the free allocation of units to the Fishing sector will increase to 90 per cent of 2005 emissions levels (up from the former 50 per cent).

The entry date for agriculture has been pushed back to 1 January 2015 in order to develop technology and agricultural research into mitigation of emissions. In addition, the point of obligation for the agricultural sector has initially been set for the processor level, with the flexibility to move this to the farm level in future. There is also a free allocation of units on an intensity basis (formerly an absolute basis). This assistance will phase out at a rate of 1.3 per cent a year beginning in 2016.

### 3. Climate Change – Regulations

Those who carry out certain activities listed in the schedules to the Climate Change Response Act 2002 are obliged to monitor and report on emissions associated with those activities. The Climate Change (Stationary Energy and Industrial Processes) Regulations 2009 set out the data collection requirements in the Stationary Energy and Industrial Processes sectors, and the methods for participants in these sectors to calculate their emissions, including prescribed default emissions factors. The Climate Change (Liquid Fossil Fuels) Regulations 2008 set these out for the Liquid Fossil Fuel sector, and were amended in 2009 by the Climate Change (Liquid Fossil Fuels) Amendment Regulations 2009.

Other climate change regulations promulgated in 2009 include the Climate Change (General Exemptions) Order 2009, which exempt persons from being participants in respect of certain activities that do not exceed certain thresholds, the Climate Change (Unique Emissions Factors) Regulations 2009 and the Climate Change (Other Removal Activities) Regulations 2009.

#### *B. Resource Management Act Amendments*

In September 2009 the Resource Management (Simplifying and Streamlining) Amendment Act was passed by the new government to make processes “simpler, cheaper, quicker” by inter alia restricting the class

34 D Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis, Wellington, 2008) at [17.60].



of persons entitled to make submissions and join appeals, and reinstating security for costs. The Act also establishes a new Environmental Protection Authority for the administration of proposals of national significance.<sup>35</sup>

*C. Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty*<sup>36</sup>

The Antarctica (Environmental Protection: Liability Annex) Amendment Bill (2009) was introduced to Parliament in June 2009 to implement the Antarctic Liability Annex.<sup>37</sup>

*D. Illegal Logging and Timber Trade Policy*

In December 2009 Cabinet adopted a New Zealand policy on the legality and sustainability of timber trading in New Zealand. International, bilateral and domestic actions are targeted in the policy. In relation to international policy, it includes supporting efforts to have Kwila listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Flora and Fauna.<sup>38</sup> The policy also includes active participation in negotiations for a Reducing Emissions from Deforestation and Degradation mechanism, and developing a voluntary code of practice for industry regarding the verification of the legality of imported timber and timber products. Bilateral policy includes seeking a joint strategy with Australia.<sup>39</sup>

*E. Case Law*

In *Genesis Power Ltd v Greenpeace New Zealand* [2009] 1 NZLR 730 the Supreme Court held that under the amended Resource Management Act consent authorities may consider the effects of greenhouse gas emissions on climate change only when considering applications for use and development of renewable energy. Consent authorities cannot consider such effects in relation to non-renewable energy as the Government's intent was to deal with these under national strategies.

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35 Hon Dr Nick Smith "Bill to make RMA processes simpler, cheaper, quicker" (press release, 19 February 2009). See also Resource Management Act (Simplifying and Streamlining) Amendment Bill 2009 (18-2) (Commentary) at 1 onward.

36 Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising From Environmental Emergencies (adopted at the Antarctic Treaty Consultative Meeting June 2005, currently open for approval by Parties).

37 Ministry of Foreign Affairs and Trade "51. Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty" International Treaties List (2010) <<http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/International-Treaties-List/07-Environment-and-Science.php>>.

38 Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975).

39 Ministry of Agriculture and Forestry "New Zealand policy to address illegal logging and associated trade" at <<http://www.maf.govt.nz/forestry/illegal-logging/page-04.htm>>.