

INTERNATIONAL ENVIRONMENTAL LAW

I. INTRODUCTION

In 2014, New Zealand participated in the twentieth Conference of the Parties (COP-20) to the United Nations Framework Convention on Climate Change (UNFCCC)¹ and the tenth Meeting of the Parties (MOP-10) to the Kyoto Protocol,² in Lima, Peru. Among other things New Zealand was questioned about its emissions targets under the new multilateral assessment process and made a pledge towards the Green Climate Fund. New Zealand attended the 45th Pacific Islands Forum, which had the theme: “The Ocean: Life & Future”, with a focus on the issue of commercial fishing and on climate change and rising sea levels in the Pacific Ocean. New Zealand attended the third United Nations Conference on Small Islands Developing States (SIDS) held in Samoa. New Zealand also took action on a number of renewable energy projects, especially in the Pacific. The International Whaling Commission Scientific Committee (IWC SC) once again reiterated its “extreme concern” about the survival of Maui’s dolphin and noted that the measures taken to address this within New Zealand fell significantly short. Nationally, the government announced it was ahead of international deadlines to phase out imports of hydrochlorofluorocarbons (HCFCs), released figures on its greenhouse gas emissions, made some amendments to the New Zealand Emissions Trading Scheme (NZETS), and took action to classify exploratory drilling for oil and gas as a non-notifiable activity (ie not publicly notified and not open to public submissions or public hearings). 2014 also saw case law relating to refugee and/or protected person status due to sea level rise associated with climate change by a citizen of Kiribati, creation of a number of marine reserves, potential threats to the Maui’s dolphin, the introduction of a Bill which would require regular reporting on New Zealand’s environment and further case law about the precautionary principle. In addition, there were a number of national and international developments connected with fisheries, the marine environment, and Antarctica, which are not addressed here because they are covered in the reviews of Joanna Mossop “Law of the Sea and Fisheries” and Alan Hemmings “The Antarctic Treaty System” (this issue).³ Reference to those reviews is necessary for a full account of New Zealand’s activities relating to international environmental law in 2014.

1 United Nations Framework Convention on Climate Change (opened for signature 9 May 1992, entered into force 21 March 1994).

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 Omitted international developments include: New Zealand ratifying three international maritime conventions, as well as ratifying the 2009 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (on both see Joanna Mossop “Law of the Sea and Fisheries” (2014) 12 NZYIL (this volume)); New Zealand’s contributions to the 37th ATCM (see Alan Hemmings “The Antarctic Treaty System” (2014)

II. INTERNATIONAL DEVELOPMENTS

A. Climate Change

In November, New Zealand pledged NZ\$3 million (US\$2.6 million) to the Green Climate Fund. This represents approximately US\$0.60 (ie 60 US cents) per capita, which is decidedly less than the pledges of a number of other countries including Australia (US\$7.90 per capita), Japan (US\$11.80 per capita), United Kingdom (US\$19.10 per capita), Norway (US\$50.60 per capita) and Sweden (US\$60.50 per capita).⁴

In December, New Zealand participated in COP-20 to the UNFCCC and MOP-10 to the Kyoto Protocol, which led to the *Lima Call for Climate Action*. Nations elaborated the elements of the new agreement which is scheduled to be agreed in Paris in late 2015, as well as agreeing the ground rules on how all countries can submit contributions to the new agreement during the first quarter of 2015. Other outcomes are summarised on the UNFCC website.⁵ New Zealand was among the countries questioned about their emissions targets under the new multilateral assessment process. Earlier in 2014, prior to COP-20, New Zealand had provided answers to questions posed online by various states including the United States, Japan, Brazil, Saudi Arabia, Egypt, China and the European Union. The questions and answers are recorded in a compilation report.⁶ The subsequent first multilateral assessment of New Zealand took place at a working group session during SBI 41 on 8 December 2014. A brief summary report is available,⁷ but the full assessment can be watched online.⁸ New Zealand faced probing questions, including from South Africa, Fiji, Sweden and the EU, about, among other things, whether New Zealand's targets were consistent with the IPCC 4th assessment report;

12 NZYIL (this volume)); New Zealand signing a headquarters agreement with SPRFMO and signing the *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* (on both see Mossop, cited above); New Zealand's contributions to the 33rd Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (see Hemmings, cited above); the International Court of Justice decision in the *Case Concerning Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (see Mossop, cited above); and New Zealand hosting the 21st meeting of the Convention on the Conservation of Southern Bluefin Tuna Commission (see Mossop, cited above). Omitted national developments include the passing of legislation for the reflagging of foreign charter fishing vessels (see Mossop, cited above), a ban on shark finning taking effect (see Mossop, cited above); and the Resource Management (Marine Pollution) Amendment Regulations 2014 (see Mossop, cited above).

4 Green Climate Fund "Status of Pledges and Contributions made to the Green Climate Fund" (28 May 2015).

5 UNFCCC "Lima Call for Climate Action Puts World on Track to Paris 2015" (press release, 14 December 2014).

6 UNFCCC "Session SBI41 (2014): A compilation of questions to – and answers by – New Zealand" (2014).

7 UNFCCC *Summary report on the multilateral assessment of New Zealand at the forty-first session of the Subsidiary Body for Implementation: Note by the secretariat* FCCC/WEB/MA/NZL/2014 (2015).

8 Webcast <www.unfccc6.meta-fusion.com>.

whether New Zealand had considered its small island neighbours in allowing its domestic emissions to increase; the exclusion of agricultural biological emissions from surrender obligations under the NZETS; and the changes made to the NZETS in 2012 to slow implementation of the scheme. During COP-20, New Zealand also co-chaired a contact group on Methodologies for Reporting of Financial Information by Annex I Parties, led informal consultations on work of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (CGE) and led informal consultations on reporting from and review of Annex I parties.⁹ New Zealand also moderated a joint Friends of Fossil-Fuel Subsidy Reform and Global Subsidies Initiative event on 10 December on “Maximizing Contributions to Emissions Mitigation from Fossil-Fuel Subsidy Reform.”¹⁰ Finally, a report released at Lima by German Watch and the Climate Action Network Europe ranked New Zealand as “Poor” and “in the lower third of poor performers” in the Climate Change Performance Index 2015.¹¹

New Zealand was also involved in a number of climate and renewable energy related activities within the Pacific region in 2014, which are discussed under the next heading.

B. The Pacific

New Zealand is a member of the Pacific Islands Forum, and the New Zealand Minister of Foreign Affairs attended the 45th Forum which took place in July in Palau. The forum had the theme: “The Ocean: Life & Future”, with a focus on the issue of commercial fishing and on climate change and effect of rising sea levels on islands in the Pacific Ocean. In regards to climate change, the Pacific Islands are said to be on the frontline of climate change, with a number of islands sitting less than a few feet above sea level. The previous 44th forum in 2013 had produced the *Majuro Declaration for Climate Leadership*,¹² which was presented to UN Secretary General Ban Ki-moon in September 2013. The Majuro Declaration had inter alia underlined the need for urgent action on climate change “to ensure the survival and viability of all Pacific small island development states, in particular low-lying atoll States”; contained a commitment of members to be “climate leaders”; called for phase down of GHG emissions; promoted an energy revolution; and listed countries specific commitments at the end of the declaration.¹³ New Zealand was

9 International Institute for Sustainable Development “Summary of the Lima Climate Change Conference” (2014) 12 Earth Negotiations Bulletin 619.

10 Lauran Merrill “Maximizing Contributions to Emissions Mitigation from Fossil Fuel Subsidy Reform” (5 December 2014) International Institute for Sustainable Development <www.iisd.org>.

11 Jan Burck, Franziska Marten and Christoph Bals *The Climate Change Performance Index: Results 2015* (German Watch & Climate Action Network Europe, 2015) at 8-9 and 10.

12 Available online <www.majurodeclaration.org>.

13 *Majuro Declaration for Climate Leadership*, adopted at the 44th Pacific Islands Forum (Majuro, September 2013) at [4], [5], [6], [8], [10] and [12].

among the countries to list its commitments in 2013 and some other countries continued to list their commitments in 2014.¹⁴ The 45th Forum saw further climate related developments, with the *Palau Declaration on “The Ocean: Life & Future”: Charting a Course to Sustainability*.¹⁵ Leaders also created a register of members’ ocean-related initiatives associated with the Palau Declaration. New Zealand listed initiatives.¹⁶ The Palau Declaration notes that the Pacific Ocean is one of the greatest natural endowments in the world and is crucial to global climatic and environmental stability and that “global carbon dioxide (CO₂) emissions are contributing to ocean warming, more frequent and extreme weather events, sea level rise and acidification and potential loss of territories” which presents “the greatest threat to the livelihoods, security and well-being of the peoples of the Pacific”.¹⁷ Among other things, it calls “for strengthened regional efforts to fix baselines and maritime boundaries to ensure that the impact of climate change and sea level rise does not result in reduced jurisdiction.”¹⁸ The declaration emphasises the importance of having a comprehensive stand-alone Sustainable Development Goal on Oceans and comprehensive national, regional and international commitments and action as a key part of the post-2015 sustainable development agenda.¹⁹ Leaders agreed that the Palau Declaration “will provide impetus to, and should be actively promoted at, the SIDS Conference, UNSG 2014 Climate Summit, UNGA 69 and in the Post-2015 Development Agenda/SDGs to highlight the importance of the Pacific Ocean to economies, societies, culture and environmental integrity”.²⁰ The Palau Declaration also addresses other oceans issues and IUU fishing.²¹

2014 was the United Nations International Year of SIDS. In September, New Zealand attended the third United Nations conference on SIDS held in Apia, Samoa, and played a supporting role for the conference at Samoa’s request.²² In the lead up to the Conference, New Zealand also co-hosted a renewable energy forum, co-sponsored a pre-conference ocean acidification workshop and organised a side event on regional approaches to fisheries management.²³ The theme of the Conference was “the sustainable development of SIDS through genuine and durable partnerships.” The Conference outcome

14 Available online <www.majurodeclaration.org>.

15 *Palau Declaration on “The Ocean: Life and Future”: Charting a course to Sustainability*, adopted at the 45th Pacific Islands Forum (Palau, July 2014), Annex B.

16 *Register of Pacific Forum Members’ Ocean-Related Initiatives Associated with the Palau Ocean Declaration on Ocean: Life and Future* (July 2014), at 5-7.

17 *Palau Declaration on “The Ocean: Life and Future”: Charting a course to Sustainability*, adopted at the 45th Pacific Islands Forum (Palau, July 2014), at [1] and [3].

18 At [10].

19 At [5].

20 Forty-Fifth Pacific Islands Forum *Forum Communiqué* Koror, Republic of Palau, 29-31 July 2014, at [15].

21 See Joanna Mossop “Law of the Sea and Fisheries” (2014) 12 NZYIL (this volume).

22 New Zealand Ministry of Foreign Affairs and Trade *Annual Report 2014-15* (2015) at 23.

23 At 23.

document: the *Small Island Developing States Accelerated Modalities of Action (Samoa Pathway)* reaffirmed the commitment to the sustainable development of SIDS and that SIDS remain a special case.²⁴ The text covers a range of issues, including climate change, disaster risk reduction, and sustainable energy, economic growth and use of marine resources. New partnerships between governments, businesses, civil society and UN entities were also registered, among them, a partnership between the Comoros, New Zealand and the United Nations Development Programme for the development of renewable energy.²⁵

During 2014, New Zealand also took action on a number of renewable energy projects it committed to at the 2013 Pacific Energy Summit (see previous review). In April, the New Zealand Foreign Affairs Minister and the European Commissioner for Development undertook a joint renewable energy mission to four Pacific states,²⁶ and New Zealand supported the largest solar array in the Pacific in Samoa, commissioned as part of the European Union – New Zealand Energy Access Partnership launched at the Pacific Energy Summit in 2013.²⁷ In June, construction began on renewable energy projects worth more than \$30 million in the Cook Islands and Tuvalu.²⁸ In August, New Zealand announced that it had exceeded its commitment to Pacific renewable energy of \$65 million over three years for more than 18 projects in seven countries and announced it now plans to spend more than \$80 million on 25 renewable energy projects around the Pacific.²⁹

C. Biodiversity

Maui's dolphins (*Cephalorhynchus hectori maui*) are an International Union for the Conservation of Nature (IUCN) red list critically endangered subspecies of Hector's dolphins (*Cephalorhynchus hectori*). Maui's are the smallest and rarest marine dolphins in the world, and are found only on the West Coast of the North Island of New Zealand. 2013 estimates suggested only fifty-five dolphins over one year old remained, with the population declining each year. 2014 saw new research to suggest potential extinction by 2031.³⁰ Fishing is the greatest known human threat to Hector's and Maui's

24 *Samoa Pathway*, adopted at the third International Conference on Small Island Developing States (September 2014), see especially [1] and [5].

25 New Zealand Ministry of Foreign Affairs and Trade "New Zealand extends geothermal energy support to Africa and the Caribbean" (2015) New Zealand Aid Programme <www.aid.govt.nz>.

26 Hon Murray McCully "EU/NZ renewable energy Mission to the Pacific" (press release, 22 April 2014).

27 Hon Murray McCully "NZ support for largest solar array in the Pacific" (press release, 23 April 2014).

28 Hon Murray McCully "Construction starts on major Pacific solar projects" (press release, 5 June 2014).

29 Hon Murray McCully "NZ exceeds commitment to Pacific renewable energy" (press release, 1 August 2014).

30 NABU International Foundation for Nature "International Whaling Commission to consider imminent extinction of Maui's dolphins" (press release, 15 May 2014).

dolphins, in particular set nets which dolphins get tangled in and drown, and fishing is responsible for about 75 per cent of reported deaths with a known cause.³¹ Other human threats include marine tourism, construction, coastal pollution, vessels, mining, oil spills, plastic bags, sedimentation, marine farming and climate change.³² In June, the IWC SC once again reiterated its “extreme concern” about the survival of Maui’s dolphin.³³ The New Zealand government had introduced some management measures in 2013 (see previous review), and whilst the IWC SC commended the New Zealand government “for maintaining initial and interim protection measures for Maui’s dolphin, and adding an additional 350km² set net restriction”, it emphasised “that these measures fall significantly short of those previously recommended.”³⁴ The IWC SC reiterated “its extreme concern about the continued decline of such a small population” and reiterated that it is of “highest priority to take immediate management actions that will eliminate bycatch of Maui’s dolphins. This includes full closures of any fisheries within the range of Maui’s dolphins that are known to pose a risk of bycatch of small cetaceans (ie set net and trawl fisheries).”³⁵ The Committee re-emphasised “that the critically endangered status of Maui’s dolphin and the inherent and irresolvable uncertainty surrounding information on small populations, require the implementation of precautionary measures”.³⁶ See also the national developments section below for national activity relevant to dolphin survival occurring in 2014, such as opening up Maui’s dolphin habitat for oil and gas drilling.

III. NATIONAL DEVELOPMENTS

A. Climate Change & Ozone

Under the Montreal Protocol³⁷ HCFCs are the last controlled ozone-depleting substance for New Zealand to phase out. In April, a report tabled in Parliament indicated that New Zealand will have phased out bulk imports of ozone-depleting HCFCs by the end of 2014, ahead of the 2030 deadline.³⁸

31 Ministry for Primary Industries “Maui’s and Hector’s Dolphins” (19 October 2015) <www.fish.govt.nz>.

32 Above n 31.

33 *Report of the Scientific Committee of the IWC*, SC/65b (12-24 May 2014) (2015) *Journal of Cetacean Research and Management* 16, at 51.

34 At 51.

35 At 51.

36 At 51.

37 Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3 (opened for signature 16 September 1987, entered into force 1 January 1989).

38 Hon Amy Adams “NZ on track to phase out imports of ozone-depleting substances” (press release, 16 April 2014).

Last year's review referred to *AF (Kiribati)*;³⁹ and on appeal: *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*.⁴⁰ This was a case about refugee and/or protected person status due to climate change related sea level rise in Kiribati; indeed, Teitiota was dubbed by the media as making a bid to be the world's first climate change refugee.⁴¹ Kiribati is a group of islands no more than three metres above sea level in the Pacific Ocean. Salt water intrusion onto the land has made it difficult to grow crops, sea walls are regularly breached during storms, coastal erosion is occurring during high tides and some islands are submerged three or four times a month making them uninhabitable. While this factual information about the status of Kiribati was accepted, the applicant was unsuccessful, inter alia, because the effects of environmental degradation were faced by the population of Kiribati indiscriminately and the risk of a violation of a human right was not sufficiently imminent. In 2013 the Immigration and Protection Tribunal (IPT) dismissed Teitiota's case. Mr Teitiota applied to the High Court for leave to appeal the IPT's decision on points of law. Leave to appeal was refused; the High Court judge essentially agreed with the IPT's findings. In 2014, the case went to the Court of Appeal.⁴² Again, the Court ruled against the applicant. The Court held that the IPT's reasoning had not been erroneous in law. The Court noted that "the effects of climate change on Mr Teitiota, and indeed on the population of Kiribati generally, do not bring him within the [Refugee] Convention."⁴³ That is the position even if the most sympathetic, ambulatory approach permissible to interpreting the Convention is taken."⁴⁴ The Court cited the previous High Court judge as to why: "[t]he appellant raised an argument that the international community itself was tantamount to the "persecutor" for the purposes of the Refugee Convention. This completely reverses the traditional refugee paradigm. Traditionally a refugee is fleeing his own government or a non-state actor from whom the government is unwilling or unable to protect him. Thus the claimant is seeking refuge within the very countries that are allegedly "persecuting" him."⁴⁵ The Court of Appeal concluded by stating "[n]o-one should read this judgment as downplaying the importance of climate change.

39 *AF (Kiribati)* [2013] NZIPT 80041.

40 *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125.

41 "World's first climate change refugee fights to stay in NZ" *New Zealand Herald* (17 October 2013) and "Pacific Islander Ioane Teitiota fails in bid to be first climate change refugee" *ABC News* (27 November 2013).

42 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

43 Convention Relating to the Status of Refugees (opened for signature 18 July 1951, entered into force 22 April 1954).

44 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 42, at [21].

45 *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*, above n 40, at [55] cited in *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 42, at [40].

It is a major and growing concern for the international community. The point ... is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention."⁴⁶ The court declined to grant leave to appeal.

New Zealand's Greenhouse Gas Inventory 1990-2012 was released in April 2014.⁴⁷ A key point of the report is that New Zealand's total greenhouse gas emissions are rising; "[i]n 2012, New Zealand's total greenhouse gas emissions were 76.0 million tonnes of carbon dioxide equivalent (Mt CO₂-e), which means total emissions are now 15.4 Mt CO₂-e higher than the 1990 level of 60.6 Mt CO₂-e, a 25 per cent increase."⁴⁸ The report found that the agriculture and energy sectors were the two largest contributors to New Zealand's emissions profile in 2012, together contributing 90 per cent of total emissions. Agriculture was the largest contributing sector, comprising 46.1 per cent of total emissions. As the net amount of carbon dioxide removed from the atmosphere (net removals) through forestry under the Kyoto Protocol was 15.0 Mt CO₂-e, New Zealand's net emissions (301.2 Mt CO₂-e) over the first commitment period (2008-2012) are less than the New Zealand target (309.6 Mt CO₂-e), so the report anticipates that New Zealand will meet its obligations for the first commitment period.⁴⁹ In December 2014 an updated *Net Position* projected a 127.7 million unit surplus.⁵⁰ Given the fall in carbon price to NZ\$0.03 the worth of this surplus at this time sat at only NZ \$3.8 million. The actual surplus or deficit of emissions units will be confirmed once the true-up process has been completed, likely to occur in 2015 or 2016.

As noted in previous reviews, the NZETS was originally introduced by the (centre-left) Labour party-led government in 2008, and it was amended in 2009 by the incoming (centre-right) conservative National party-led government and then further amended in 2012 with a number of significant changes made in order to slow implementation of the scheme and make it "more business-friendly."⁵¹ In contrast to 2012, 2013 and 2014 were relatively quiet legislative years. Some obligations and exemptions came into force in 2014. For instance, from 1 January, using specified liquid hydrocarbons, and certain activities for the purpose of producing iron or steel, were exempted from coverage under the NZETS.⁵² In the Synthetic Greenhouse Gases (SGG) sector, in March 2014 those importing and manufacturing HFC and PFC in bulk and those using SF₆ were required to

46 At [41].

47 Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990-2012* (April 2014).

48 Ministry for the Environment *New Zealand's Greenhouse Gas Inventory & Net Position Report 1990-2012: Snapshot* (April 2014), at 1.

49 At 1.

50 Ministry for the Environment "Historic updates of the Kyoto Protocol financial information" <www.mfe.govt.nz>.

51 Hon Tim Groser "ETS Amendment Bill passes first reading" (press release, 23 August 2012). See also Josephine Toop "International Environmental Law" (2012) 10 NZYIL 225 at 229-230.

52 Climate Change (General Exemptions) Amendment Order (No 2) 2013 (entered into force 1 January 2014).

report on their emissions for the previous year. From May 2014, importers and manufacturers of SGG faced an obligation to surrender emissions for the 2013 calendar year. As regards waste, non-exempt landfill operators were required to submit their first emissions return in March 2014 (for the proceeding calendar year) and were required to surrender emission units for the first time by May 2014.

As previously reported, late in 2013 the government announced plans to restrict the use of Kyoto Protocol emission units within the NZETS. In 2014, the Climate Change (Unit Register) Amendment Regulations 2014 implemented this decision; from 1 June 2015 the surrender of certain Kyoto Protocol first-commitment period (CP1) Units (Certified Emissions Reduction Units (CERs)), Emissions Reduction Units (ERUs) and Removal Units (RMUs) will be prohibited. The Climate Change Response (Unit Restriction) Amendment Act 2014 also corrected an unintended consequence in the operation of the NZETS: arbitrage arising from a difference between the price of New Zealand units (NZUs) and the price of certain Kyoto units.⁵³ Now only NZUs, rather than Kyoto units, can be surrendered by forest owners when deregistering post-1989 forests under the NZETS. In addition, from April 2014 new functionality was introduced to the New Zealand Emission Unit Registry allowing the purpose for which NZUs were originally transferred from the Crown to be visible to the holders of those units. The idea is that account holders selling units will have an additional tool to market their units to buyers seeking units generated via a particular category.⁵⁴

There were also several regulations in 2014 which made adjustments to the NZETS. For instance, the default emission factor for automotive and marine diesel was increased from 2.670 tCO₂e/kl to 2.685 tCO₂e/kl;⁵⁵ the price of carbon was specified and the rates of levy for leviable motor vehicles and goods prescribed for 2015;⁵⁶ the default waste composition percentages for the food, garden, sewage sludge and other waste stream components was changed;⁵⁷ and certain geothermal fields were added, figures corrected in the formula for calculating emissions from producing aluminium, and default emission factors for geothermal fluid and for classes of mined or purchased natural gas were amended, among other things.⁵⁸

53 *Budget Measures (Miscellaneous Fiscal Matters) Bill 214-1*, explanatory note. See also Hon Tim Groser and Hon Jo Goodhew "Government amends Climate Change Response Act 2002 to change forestry surrender obligations" (press release, 16 May 2014).

54 New Zealand Government *The New Zealand Emissions Trading Scheme Factsheet: Additional New Zealand Unit (NZU) Information Introduced* (April 2014). See also Hon Tim Groser and Hon Jo Goodhew "More info on carbon units to help decide value" (press release, 28 February 2014).

55 Climate Change (Liquid Fossil Fuels) Amendment Regulations 2014.

56 Climate Change (Synthetic Greenhouse Gas Levies) Amendment Regulations 2014.

57 Climate Change (Unique Emissions Factors) Amendment Regulations 2014.

58 Climate Change (Stationary Energy and Industrial Processes) Amendment Regulations 2014.

B. Biodiversity

Maui's dolphins are an IUCN red list critically endangered subspecies of Hector's dolphins found only in New Zealand. It will be recalled that in 2013, New Zealand took some steps toward Maui's dolphin protection.⁵⁹ As noted in the international developments section above, in 2014 the IWC SC found these steps insufficient; "the current management situation falls short of that required to reverse the Maui's dolphin decline".⁶⁰ 2014 saw new potential threats emerge. In April, more than 3000km² of a marine mammal sanctuary home to the Maui's dolphin was opened up for oil and gas drilling when the government signed off on a block offer.⁶¹ Later in the year, 15 new petroleum exploration permits were granted for Block Offer 2014. One of these included a 55km² overlap with the North Island West Coast Marine Mammal Sanctuary and a large part of known Maui's dolphin habitat.⁶² This met with criticism from NABU International Foundation for Nature and the World Wildlife Fund, among others. The New Zealand Green Party also noted a number of potential issues: "[e]xpert scientists say that seismic surveys, which are part of petroleum exploration, can harm dolphins' hearing and may push them into unprotected areas where they are more exposed to fishing nets", and further, that "exploratory drilling is the riskiest phase of oil production and an oil spill could wipe out the last 55 Maui's left".⁶³ WWF also launched the "the last 55" campaign in 2014,⁶⁴ and is calling for a ban on set-net and trawling fisheries and a moratorium on marine exploration and mining.⁶⁵

Also relevant to petroleum exploration, in 2014, the New Zealand government promulgated the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Nonnotified Activities) Regulations 2014, which came into force on 28 February. These regulations mean that certain activities involved in exploratory drilling for oil and gas in the exclusive economic zone or in or on the continental shelf are now classified as non-notifiable. Applications for a marine consent for these activities will not be publicly notified (and therefore there will be no public submissions and no public hearings), provided that the geographical area is covered by a permit under the Crown Minerals Act 1991 or authorised by an existing privilege under that Act. The Environmental Defence Society called this "behind closed doors" move "extraordinary in light of the high risks associated with deep-sea exploratory drilling", and has argued that it will prevent cross-examination

59 See Josephine Toop "International Environmental Law" (2012) 10 NZYIL 225 at 231.

60 *Report of the Scientific Committee of the IWC*, above n 33, at 51.

61 Brook Sabin "Govt opens Maui's dolphin area for oil drilling" 3 *News* (17 June 2014).

62 WWF "Govt 'reckless' in issuing oil drilling permit in Maui's Dolphin sanctuary" (9 December 2014) <www.wwf.org.nz>.

63 Green Party "Govt opening up Maui's dolphin habitat for petroleum exploration" (press release, 17 June 2014).

64 WWF "WWF Launches New Campaign to Highlight Maui's Dolphin Plight in Election Year" (19 May 2014) <www.wwf.org.nz>.

65 "Govt 'reckless' in issuing oil drilling permit in Maui's Dolphin sanctuary", above n 62.

of applicants on their track record, and mean that expert evidence cannot be bought to challenge the adequacy or otherwise of spill mitigation measures.⁶⁶ The government has cited the rationale for the change as reducing costs and timeframes for industry.⁶⁷

Biodiversity regulation in 2014 included new schedules to update the lists of endangered, threatened and exploited species in line with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁶⁸ The new schedules have amended terminology to reflect more accurately the CITES wording, and use a new layout so that fauna and flora are treated the same and classes of fauna are easier to identify.⁶⁹ The Department of Conservation also launched its largest ever species protection programme in 2014: “Battle for Our Birds”.⁷⁰ This targeted 30 South Island and 5 North Island forests. By way of background, from a biodiversity perspective, New Zealand is rather special. The level of endemism among native plants and animals is one of the highest in the world because it had the longest period of isolation of any non-polar landmass on earth.⁷¹ New Zealand has no native land mammals except bats, and thus no native predators, so native birds and plants evolved to be flightless ground-nesters. Rats, stoats and possums introduced by settlers have wiped out many species and continue to kill 25 million native birds a year. This includes the flightless kiwi (New Zealand’s national icon), which will not exist in the wild in future unless greater protection measures are undertaken. 2,700 species of New Zealand animals and plants are currently identified as at risk of extinction.⁷² Species protection was particularly urgent in 2014 because of a predicted large beech mast (flood of seed), leading to additional rats and stoats which would turn to endangered birds as a food source once the seeds germinate.⁷³

A number of marine reserves were created in 2014, in the Subantarctic, Akaroa Harbour, Kaikoura and on the West Coast, bringing the total to 44 reserves under the Marine Reserves Act 1971.⁷⁴ The Subantarctic Marine Reserves Act 2014 created 435,000 hectares of new marine reserves surrounding the Moutere Mahue/Antipodes, Moutere Hauriri/Bounty and Moutere Ihupuku/Campbell Islands. There can be no fishing, no mining, no petroleum exploration and no marine farming in these waters. The previous lack of marine protection was flagged by UNESCO when

66 “Green lobby cries foul on draft EEZ oil exploration rules” *National Business Review* (13 December 2013) <www.nbr.co.nz>.

67 Hon Amy Adams “New regulations for exploratory drilling” (press release, 27 February 2014).

68 Convention on International Trade in Endangered Species 993 UNTS 243 (opened for signature 3 March 1973, entered into force 1 July 1975).

69 Trade in Endangered Species Order 2014, explanatory note.

70 Hon Nick Smith “‘Battle for Our Birds’ launched to save native species” (press release, 29 January 2014).

71 New Zealand Biodiversity “Biodiversity in New Zealand” <www.biodiversity.govt.nz>.

72 Forest and Bird “Native Plants and Animals” <www.forestandbird.org.nz>.

73 Hon Nick Smith, above n 70.

74 Hon Nick Smith “New marine reserves on West Coast opened” (press release, 7 September 2014).

it approved World Heritage status for the islands in 1998.⁷⁵ The Minister of Conservation has stated that these three subantarctic marine reserves “expand the proportion of New Zealand’s territorial sea that is protected [i.e. no-take areas of protection] from 7.1 per cent to 9.5 per cent, and helps to achieve the target of 10 per cent as part of the United Nations Convention on Biological Diversity.”⁷⁶ This percentage however, does not include the EEZ. In July 2014, the Green party noted the fact that only 0.41 per cent of New Zealand’s waters (territorial sea plus EEZ) were, at that time, protected in marine reserves.⁷⁷ As regards Akaroa, a number of species including the endangered Hector’s Dolphin, Kekenō/NZ Fur Seal and the White Flipped Little Blue Penguin frequent Akaroa Harbour. Protection advocates have been calling for a marine reserve since the mid-1990s but this has been opposed by fishing lobbies.⁷⁸ The Akaroa Harbour Marine Protection Society made an application for a marine reserve in 1995. In 2010, the Minister of Conservation considered the application and refused to proceed further with it, based on interference with fishing.⁷⁹ In 2012, the High Court quashed the Minister’s decision due to a failure to have regard to the potentially relevant consideration of the wider public interest and directed a reconsideration.⁸⁰ Following reconsideration the application was approved.⁸¹ The Marine Reserve (Akaroa) Order 2014 creates a reserve covering a 475ha part of Akaroa Harbour, near the entrance. Critics, however, suggest “it’s just a drop in the ocean compared to the area that should be protected.”⁸² The Kaikōura (Te Tai o Marokura) Marine Management Act 2014 also established a marine reserve, a New Zealand fur seal sanctuary, a whale sanctuary, five customary fisheries areas, fishing regulations specific to the area, and an advisory committee named the Kaikōura Marine Guardians, with members appointed by the Minister of Conservation and Minister for Primary Industries, to provide advice regarding biosecurity, conservation and fisheries matters within the marine management area.⁸³ Reserves were also created on the West Coast;

75 Hon Nick Smith “New Subantarctic marine reserves established” (press release, 2 March 2014).

76 Hon Nick Smith “Subantarctic Marine Reserves Bill passed” (press release, 11 February 2014).

77 Kaikōura (Te Tai-o-Marokura) Marine Management Bill 194-2, explanatory note. This figure explicitly includes the new Hikurangi Trench (see Kaikōura (Te Tai o Marokura) Marine Management Act 2014) and Subantarctic Islands marine reserves. This figure does not, however, presumably include the reserves on the West Coast and in Akaroa, which were created later (in September).

78 Glenn Conway “Akaroa Harbour to be made marine reserve” *The Press* (New Zealand, 21 December 2013) and Suky Thompson “Lost opportunity for conservation” *The Press* (New Zealand, 3 September 2010).

79 *Akaroa Marine Protection Society Inc v Minister of Conservation* [2012] NZHC 933 at [17]–[18].

80 At [80]. See also “Minister’s Akaroa Marine Reserve decision quashed” *New Zealand Herald* (9 May 2012).

81 Department of Conservation “Decision made on Akaroa Marine Reserve” (press release, 15 April 2013).

82 “Marine reserve in Akaroa Harbour opened” *3 News* (8 June 2014).

83 Kaikōura (Te Tai o Marokura) Marine Management Bill 194-2, explanatory note.

in Hautai,⁸⁴ Kahurangi⁸⁵ and Tauparikākā⁸⁶ with exceptions that people may ride horses and quad bikes there so long as they do not provide more than minor disturbance to marine life and natural features, and stones, shell, driftwood, or pounamu (greenstone), can be removed subject to certain conditions. A reserve was created for Waiau Glacier Coast with the same exceptions and a further exception that existing gold mining may continue to operate.⁸⁷ A reserve was also created in Punakaiki with the same exceptions (including permitting gold mining) and a further exception relating to farming activity on the foreshore which permits sheep or cattle drive, use of dogs and motor vehicles for farming purposes providing they do not provide more than minor disturbance to marine life and natural features.⁸⁸ These five reserves are the first such reserves for the West Coast beyond Fiordland, and adjoin three National Parks and one World Heritage Area, Te Wāhipounamu – South West New Zealand.⁸⁹

C. Environmental Reporting

New Zealand does not currently require independent reporting on the state of the environment, in contrast to most OECD countries.⁹⁰ 2014 saw the introduction of the Environmental Reporting Bill 189-1, which proposes that every six months a report on one of five environmental domains: air, atmosphere and climate, freshwater, land, and marine, be produced, and a synthesis report providing an analysis of cross-domain trends and interactions be published once every three years.⁹¹ The topics would be set by regulations made by the Governor-General following joint recommendations of the Minister for the Environment and Minister of Statistics. This is one of the most contentious aspects of the bill, widely criticised in submissions in April. The Parliamentary Commissioner for the Environment has noted that “[t]his means that topics would not be chosen independently. Giving the selection of topics to the Government of the day creates the opportunity for political interference. For instance, it would be possible to avoid reporting on an environmental topic that is important but also controversial.”⁹² The main opposition party (the Labour Party) also felt unable to support the Bill at its first reading because of this,⁹³ but the Bill nonetheless passed its first reading and has been referred to the Local Government and Environment Committee, expected to report back in 2015.

84 Marine Reserve (Hautai) Order 2014.

85 Marine Reserve (Kahurangi) Order 2014.

86 Marine Reserve (Tauparikākā) Order 2014.

87 Marine Reserve (Waiau Glacier Coast) Order 2014.

88 Marine Reserve (Punakaiki) Order 2014.

89 Hon Nick Smith “New marine reserves on West Coast opened” (press release, 7 September, 2014).

90 Hon Amy Adams “Environmental Reporting Bill introduced” (press release 20 February 2014).

91 See Environment Reporting Bill 189-1, explanatory note.

92 Dr Jan Wright (PCE) *Submission on the Environmental Reporting Bill to the Local Government and Environment Committee* (April 2014).

93 Moana Mackey “Labour unable to support Environmental Reporting Bill” (5 March 2014).

D. Precautionary Principle

The case of *Environmental Defence Society Inc v New Zealand King Salmon*⁹⁴ will be recalled from last year's review. Further developments related to this case occurred in 2014. By way of brief background, King Salmon sought a plan change and to rezone several sites in the Marlborough Sounds so that marine farming in certain locations moved from a prohibited activity to a discretionary activity for which resource consents could be issued. As matters of national significance were concerned, the applications were referred to a Board of Inquiry for consideration. The Board determined it would grant the plan changes and four consents for salmon farms in Papatua, Ngamahau, Waitata and Richmond. In the High Court in 2013 the appellants; Sustain Our Sounds (SOS) and the Environmental Defence Society (EDS), argued, inter alia, that the plan change would have been rejected if a precautionary approach had been applied, and that where the precautionary approach required a decision maker to find against an application this could not be lessened by anticipating that the impact of scientific uncertainty could be managed by an adaptive management approach.⁹⁵ The EDS and SOS appeals were dismissed in the High Court. In 2014, EDS and SOS separately appealed to the Supreme Court. Leave to appeal was granted, and the appeals were heard together. The appeal by EDS regarding the Papatua site was allowed in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors*.⁹⁶ The SOS appeal covering the three remaining sites of Ngamahau, Waitata and Richmond was unsuccessful in *Sustain our Sounds Inc v The New Zealand King Salmon Co Ltd*.⁹⁷ These cases are of interest for their implications for the New Zealand resource management law framework and for their consideration of adaptive management and the precautionary principle.

In the SOS case, the Supreme Court considered the case law and the legal framework relating to the precautionary approach and adaptive management, including international commentary and case law from New Zealand, Australia and Canada.⁹⁸ The Court set out a threshold question as to whether an adaptive management regime can even be considered; that there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.⁹⁹ While the Board did not explicitly consider this question, the Court considered there was clearly an adequate foundation in this case. The Court then set out a secondary question; whether the precautionary approach requires an

94 *Environmental Defence Society Inc v New Zealand King Salmon* [2013] NZHC 1992.

95 At [76] and [77].

96 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38, [2014] 1 NZLR 593.

97 *Sustain our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

98 At [95]-[140].

99 At [125].

activity to be prohibited until further information is available, rather than an adaptive management or other approach, the answer to which will depend on an assessment of a combination of factors.¹⁰⁰ These factors are the extent of the environmental risk (including the gravity of the consequences if the risk is realised), the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment), the degree of uncertainty, and the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.¹⁰¹ As regards the latter, the Court considered that the answer will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, “a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach”.¹⁰² After considering the specifics of the case, the Court held that it was open to the Board to consider that the adaptive management regime it approved was consistent with a proper precautionary approach.¹⁰³ The Court unanimously dismissed the SOS appeal with regard to the Ngamahau, Waitata and Richmond sites.

In the EDS decision the Court considered the Board’s approach to the New Zealand Coastal Policy Statement (NZCPS), which has policies 13(1)(a) and 15(a) protecting coastal areas with outstanding natural landscapes from adverse effects of inappropriate subdivision, use and development. Despite these policies, the Board had considered it was required to give effect to the NZCPS as a whole, and to reach an overall judgment on the application in light of the principles contained in the Resource Management Act. The majority of the Supreme Court disagreed and held that by not giving effect to those specific policies the Board did not give effect to the NZCPS as it was required to do. The appeal was accordingly allowed.

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100 At [129].

101 At [129(a)]–[129(d)].

102 At [139].

103 At [140] and [158].