# "A Priceless Trust": The Prospects for Atmospheric Trust Litigation in New Zealand

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*Worldwide, people have grown frustrated with the indifferent and halting governmental response to the threat climate change poses to our way of life. In response, a group of lawyers are developing novel strategies to challenge government inaction or indifference. Atmospheric trust litigation is one strategy that is proving effective across a variety of jurisdictions around the world. This article discusses the strategy, and then the prospects of its successful adoption in New Zealand in a "nuts and bolts" fashion. First, consideration is given to the development of atmospheric trust litigation, and the article places New Zealand in context. Examples from overseas jurisdictions are analysed, and then three possible avenues for pursuing the strategy are discussed, including the Waitangi Tribunal, an avenue which is unique to New Zealand.*

## 1. INTRODUCTION

The purpose of this article is to conduct a "nuts and bolts" survey of the prospects of an atmospheric trust litigation strategy being successfully adopted in New Zealand. Due to the unique attributes of some avenues for litigation in New Zealand a focus will be on "lifting the hood" to determine the practical pros and cons in pursuing that strategy — hence the reference to "nuts and bolts".

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First, the development of the concept of an atmospheric trust litigation strategy and its constituent parts is reviewed. The question of why the strategy might be suitable for use in a New Zealand context will be addressed, and examples of parties seeking to rely on the strategy internationally will be examined to mine any relevant details for a New Zealand approach.

Examples of attempts to bring atmospheric trust litigation to date in New Zealand will be reviewed, followed by an analysis of whether further litigation is likely to be effective, what might be unique about the New Zealand context, and particularly whether there is a case for a distinct form of atmospheric trust founded in Māori culture.

## 2. THE DEVELOPMENT OF ATMOSPHERIC TRUST LITIGATION

### 2.1 Background

Climate change "is real, it is happening, and human beings are largely responsible for it".[1] It has the potential to cause rises in sea levels, droughts and other extreme weather events, damage to ecosystems globally, and risks to human health, livelihoods, food security, water supply, human security and economic growth.[2] If things continue on their current track, our world will not be fit to live in.[3]

Some serious social problems have been dubbed "wicked problems".[4] Examples of these wicked problems include the AIDS pandemic, the provision of healthcare, and terrorism. These examples are wicked in that they all defy "resolution because of the enormous interdependencies, uncertainties,

1 Daniel Bodansky, Jutta Brunnee and Lavanya Rajamani *International Climate Change Law* (1st ed, Oxford University Press, Oxford, 2017) at 1.

2 Intergovernmental Panel on Climate Change [IPCC] *Global Warming of 1.5 °C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC, 2018) "Summary for Policymakers" at 9–13.

3 Mary Wood *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2014) at xvii.

4 See Horst Rittel and Melvin Webber "Dilemmas in a General Theory of Planning" (1973) 4 Policy Sciences 155 at 160: "We use the term 'wicked' in a meaning akin to that of 'malignant' (in contrast to 'benign') or 'vicious' (like a circle) or 'tricky' (like a leprechaun) or 'aggressive' (like a lion, in contrast to the docility of a lamb)."

circularities, and conflicting stakeholders implicated by any effort to develop a solution".[5]

Climate change goes beyond the categorisation of wicked. It has been dubbed a "super wicked" problem.[6] It is super wicked as it is a global problem, those in the best position to address the issue are those with the least incentive to do so, current policies reflect short time horizons, and there is a limited window of time in which to act.[7]

Climate change is also complicated by the fact that while not all parties contribute equally to the problem "the responsibility for GHG emissions is common, given that such emissions are generally completely mixed in the atmosphere within two weeks, regardless of where they were emitted".[8] If one state fails to act, the resulting "'orphan share' of pollution … creates a fatal deficit in the overall necessary reduction".[9] All parties will feel the effects of climate change, yet not all bear the same responsibility for causing the problem.

The super wicked problem of climate change therefore requires careful thinking about how it should be addressed. There is no "magic bullet" here.

There has been some encouraging movement on climate change to date through such developments as the Paris Agreement, REDD+ and the implementation of emissions trading schemes and carbon taxes. While this has been encouraging, further collective effort will be required to limit warming to levels that will not bring about the most harmful of outcomes.[10] How to ensure that this effort is undertaken is the big question.

### 2.2 Atmospheric Trust Litigation: Nature's Trust

Professor Mary Wood has argued that a new paradigm or strategy is needed to fill the gap in the legal world where "the legal dysfunction driving environmental law portends danger for all citizens".[11] A strategy of atmospheric trust litigation may fill that gap.

Atmospheric trust litigation is focused on the "simple recognition that we are the living beneficiaries of a public trust — a priceless trust. This trust holds

5 See Richard Lazarus "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94 Cornell L Rev 1153 at 1160.

6 Kelly Levin, Benjamin Cashore, Steven Bernstein and Graeme Auld "Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change" (2012) 45 Policy Sci 123 at 127.

7 At 126–129. See also Lazarus, above n 5, at 1160–1161.

8 Friedrich Soltau "Common Concern of Mankind" in Cinnamon Carlarne, Kevin Gray and Richard Tarasofsky (eds) *The Oxford Handbook of International Climate Change Law* (1st ed, Oxford University Press, Oxford, 2016) at 209.

9 Wood, above n 3, at 223.

10 IPCC, above n 2, at 7 and generally.

11 Wood, above n 3, at 17.

the waters, the air, the wildlife, the forests, the soils, and all that encompasses the web of life. Our ancestors drew their life from this trust, and so must our descendants."[12] In Wood's view, the people are the beneficiaries of this public trust; the state is the trustee. The public trust doctrine therefore ultimately sets a limit on what resources a government can allow to be exploited.[13]

This intuitively makes sense, as "the waters, the air, the wildlife, the forests, the soils" and the like are not generally suited to ownership in a private sense. Put another way, "the mobile, flowing character of what are such resources for humanity as water, air, game, and the biomass make them hard to appropriate to an individuated property concept".[14]

The thinking that led to the proliferation of an atmospheric trust litigation strategy can be traced back to the late 1960s. As Professor Joseph Sax argued in a "watershed"[15] paper concerning the public trust doctrine: "courts have an important and fruitful role to play in helping to promote rational management of our natural resources".[16]

Under the public trust doctrine the state must protect, in the public interest, land and resources over which it has title or control.[17] The doctrine stems from common law, and has its roots as far back as the Romans.[18] There is a pleasing circularity in looking to the common law established far in the past to craft legal frameworks for the present.[19]

It is a big idea — the public trust doctrine can be viewed as one of the preconditions for the public allowing themselves to be governed. Aligning with John Locke's theory of social contract,[20] it is one of the "pre-existing principles upon which the legitimacy of the state was constructed".[21] As Wood puts it:[22]

12 At 322.

13 At 323.

14 Earl Finnbar Murphy *Nature, Bureaucracy and the Rules of Property* (North Holland Publishing Company, The Netherlands, 1977) at 174.

15 Gerald Torres "Translating Climate Change" (2015) 13 NZJPIL 137 at 148.

16 Joseph Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich L Rev 471 at 565.

17 David Grinlinton "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62 McGill L J 633 at 675–679.

18 At 675.

19 Some authors hold that the common law "seeks to vindicate the values of society", while the administrative state "seek(s) to 'improve' or 'reform' society through the coercive power of the state". See David Schoenbrod "Protecting the Environment in the Spirit of the Common Law" in Roger Meiners and Andrew Morriss (eds) *The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law* (Rowman & Littlefield Publishers Inc, Oxford, 2000) at 6.

20 See Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 154.

21 Torres, above n 15, at 148.

22 Wood, above n 3, at 323.

> This trust principle comes twin-born with democracy itself. This trust is so basic that it is found in states throughout this country, and in many nations throughout the world. Charles Wilkinson famously wrote several years back, "The real headwaters of the public trust doctrine … arise in rivulets from all reaches of the basin that holds the societies of the world." This principle is, as Professor Gerald Torres writes, "the law's DNA".

Focusing on the United States of America in the 1960s, Sax noted that while the historical scope of the public trust was narrow, the courts were using the public trust to, in effect, hold a supervisory role over state bodies.[23] Sax considered that the fundamental function of courts in the public trust area was one of democratisation.[24] This theme now runs through the atmospheric trust litigation strategy — where citizens have no, or limited, ability to influence government decision-making by other means the public trust continues to enhance democratisation.[25]

Most litigation strategies concerning climate change focus on issues at the micro level — seeking to address climate change in a piecemeal fashion within the established legal regime. Continuing from the ideas set out by Sax,[26] Wood propagated the "litigation campaign and strategy" to focus on the macro.[27] The strategy seeks to incorporate the common law public trust doctrine to define government responsibility in the specific context of climate change.[28]

Atmospheric trust litigation is predicated on the public trust doctrine. However, it necessarily overlaps with the issues of sustainability and intergenerational equity. By way of example, the Pennsylvania Supreme Court recently relied on the doctrine to hold a law promoting fracking to violate a state constitutional right to a healthy environment. The majority held that under the state constitution public natural resources are owned in common by the people, including future generations — incorporating the concept of intergenerational equity. Because the state is the trustee of these resources, it has a fiduciary duty to conserve and maintain them.[29]

23 Sax, above n 16, at 558.

24 At 561.

25 Note that there is considerable opposition from some academics to this expansion of the public trust doctrine. See, for example, James Huffman "Why Liberating the Public Trust Doctrine is bad for the Public" (2015) 45 Envtl L 337. It is not our purpose here to argue for the liberation of the public trust doctrine in the United States, rather the focus is specific to climate change litigation in New Zealand.

26 In addition to Sax, above n 16, see Joseph Sax "Liberating the Public Trust Doctrine from its Historical Shackles" (1980–1981) 14 UC Davis L Rev 185.

27 Wood, above n 3, at 322.

28 Mary Wood "Atmospheric Trust Litigation" <https://law.uoregon.edu/images/uploads/entries/atmo.pdf> at 4.

29 *Robinson Township v Commonwealth* 83 A 3d 901 (Pa 2013).

### 2.3 Intergenerational Equity and Sustainable Development

Reflecting the macro nature of the strategy, atmospheric trust litigation incorporates the principles of intergenerational equity and sustainable development.

Natural resources are held in trust for both present and future generations.[30] In order to protect those future generations, resources must be used sustainably in the present. Sustainable development needs to take the needs of future generations into account — indeed, some argue that sustainability is primarily an issue of intergenerational equity.[31]

The principle of intergenerational equity arises from the consideration that because climate change is a long-term issue the bulk of negative impacts will be borne by future generations, rather than those alive today.[32] This concept is captured in art 3 of the United Nations Framework Convention on Climate Change: "The Parties should protect the climate system for the benefit of present and future generations of humankind …". Likewise, the concept can be found in the Paris Agreement:[33]

> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

While the concept is well established within international and domestic law, there are few legal mechanisms to pursue it.[34] Yet as Weiss stated: "we must recognize that there is a planetary trust by which we are all bound, which gives us certain planetary rights and obligations. We need to translate these

30 Edith Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers Inc, New York, 1989) at 21.

31 Richard Norgaard "Sustainability as Intergenerational Equity: The Challenge to Economic Thought and Practice" (World Bank Report No IDP 97, 1991).

32 Bodansky and others, above n 1, at 9.

33 United Nations Framework Convention on Climate Change *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015* UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) Decision 1/CP.21, Annex [Paris Agreement] at 21 (emphasis in original).

34 Stephen Turner *A Substantive Environmental Right* (Kluwer Law International, Alphen aan den Rijn, 2009) at 63.

into enforceable norms locally, nationally, and internationally, so that we may achieve intergenerational equity."[35]

As will be seen below, intergenerational equity has been leveraged by groups of young people to claim standing to bring litigation under the public trust doctrine. Atmospheric trust litigation therefore provides one such mechanism.

### 2.4 New Zealand in Context

Some argue that the concept of public trust has failed to develop in New Zealand to date, stating that it is likely because the government has incorporated the law relating to the res communes into one Act — the Resource Management Act 1991 (RMA).[36] Below an argument is presented that this is not so clear-cut. In any event, there does appear to be space for development in the future, as addressed more fully throughout the remainder of this article.

In addressing climate change, a key strategy of the current government is passing the Climate Change Response (Zero Carbon) Bill (Zero Carbon Bill or Bill) into law,[37] which is discussed further below. The stated goal of the government is to be net carbon neutral by 2050.[38]

New Zealand is also a party to the Paris Agreement. Under art 4.2 of the Paris Agreement each party shall prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. The government communicated its NDC, setting a target out to 2030. The goal under that NDC is to reduce net emissions by 30 per cent from 2005 levels by 2030.[39]

The United Nations Environment Programme's *Emissions Gap Report 2018*[40] concluded that "assuming that climate action continues consistently throughout the 21st century, implementing the unconditional NDCs would lead

35 Weiss, above n 30, at 291.

36 David Grinlinton "The Role of the Common Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 162.

37 Ministry for the Environment "15,000 submissions on Zero Carbon Bill consultation publicly released" (media release, 4 October 2018) <www.mfe.govt.nz/news-events/15000-submissions-zero-carbon-bill-consultation-publicly-released>. [See now Climate Change Response (Zero Carbon) Amendment Act 2019 (in force 14 November 2019).]

38 Ministry for the Environment "Our Climate Your Say" (June 2012) <https://www.mfe.govt.nz/sites/default/files/media/Climate%20Change/Final-ZCB%20Summary%20document.pdf > at 4.

39 Ministry for the Environment "About New Zealand's Emissions Reduction Targets: 2030 Target" (April 2019) <http://www.mfe.govt.nz/climate-change/what-government-doing/emissions-reduction-targets/about-our-emissions-reduction#2030>.

40 United Nations Environment Programme *Emissions Gap Report* (UNEP, November 2018).

to a mean global temperature of around 3.2°C".[41] This is well above the 1.5 degrees Celsius aspiration under the Paris Agreement.[42] The current NDCs, and indeed the current ambition of all parties, will need to be enhanced if the target is to be reached.

Yet the Minster for Climate Change has given no specific commitment to enhance the NDC. In a recent Cabinet Paper the Minister stated: "the Government's focus on achieving New Zealand's NDC primarily through domestic action already represents enhanced ambition and our proposed zero carbon legislation will facilitate more ambitious targets in the long-term".[43]

If New Zealand citizens want further action, then a new approach is needed. Forcing further action in New Zealand may, however, be difficult. Finn, writing about Australia in the 1990s, considered that: "people are the forgotten first cause of our systems of government … today. That the people are sovereign, that government and its institutions exist for them and to their ends, are ideas that exert only muted influence on the constitutional and political imagination."[44]

The constitutional arrangement in New Zealand reflects this "forgetfulness" in many respects. Uniquely among jurisdictions, New Zealand has no formal written constitution, a unicameral system of Parliament, and no entrenched Bill of Rights. The courts in New Zealand do not have the power to strike down legislation, and must therefore "engineer social change within a narrower, more incremental compass".[45] Due to this, there is limited ability for citizens to hold the government of the day to account if they consider that it is acting against its citizens' interests.

New Zealanders therefore have few options outside of democratic means to force the pace of change by government when it comes to climate change.[46] As Ceri Warnock states:[47]

> There are no direct legal routes for the public to challenge central government decisions impacting upon climate change and there are no substantive standards in domestic law that limit the emissions of greenhouse gases in New Zealand.

41 At 21.

42 Paris Agreement, art 2(1)(a).

43 Minister for Climate Change "International climate change negotiations: New Zealand's approach to COP24" <https://www.mfat.govt.nz/assets/Uploads/Cabinet-paper-international-climate-change-negotations.pdf > at 12.

44 P Finn "Public Trust and Public Accountability" (1994) 3 GLR 224 at 225.

45 Joseph, above n 20, at 19.

46 Ceri Warnock "Human Rights and the Environment" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (1st ed, Thomson Reuters, Wellington, 2017) at 922–926.

47 At 926.

> Within New Zealand law, anything approaching a right to a healthy and safe climatic system remains elusive.

It is for this reason that this article now turns to whether an atmospheric trust litigation strategy, created to tackle climate issues at a macro level, might prove an effective approach in New Zealand.

## 3. REVIEW OF ATMOSPHERIC TRUST LITIGATION INTERNATIONALLY

Our Children's Trust, a non-profit organisation based in the United States, has been instrumental in developing and filing a series of applications across the United States at state level and at federal level.[48] While "thus far, the PTD [public trust doctrine] plaintiffs have generally not fared well" there have been some exceptions worldwide.[49]

There are also other intangible benefits to bringing an application, including generation of media coverage, raising the profile of the issues,[50] and in the example of younger people bringing applications, empowerment and involvement.

### 3.1 *Urgenda*

One of the cases that has attracted attention in recent years is the *Urgenda* decision.[51] This was the first time that a court has ordered a state to reduce its emissions due to climate change concerns — the District Court of The Hague ordered the State of the Netherlands to reduce its emissions to at least 25 per cent of the 1990 level by the year 2020.[52]

Due to the difference between the laws in the Netherlands and New Zealand it is unlikely that this case will hold any strict precedential value in this

48 See Our Children's Trust "Global Legal Actions" <https://www.ourchildrenstrust.org/global-legal-actions/>.

49 Emily Hammond and David Markell "Civil Remedies" in Michael Gerrard and Jody Freeman (eds) *Global Climate Change and US Law* (2nd ed, American Bar Association, United States of America, 2014) 239 at 246.

50 As in the *Ocean Island* case, where the publicity gained was sufficient to secure the object of the litigation. See Andrew Harding "Do Public Interest Environmental Law and the Common Law Have a Future Together?" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Chancery Law Publishing Ltd, Chichester, 1995) 217 at 223.

51 *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] Case C/09/456689/HA ZA 13-1396.

52 At 5.1.

jurisdiction.[53] The case is notable for the purposes of this article, however, as the Court found that Urgenda did have standing to bring a claim on behalf of future generations, contrary to the argument of the state:[54]

> In view of the fact that Urgenda also promotes the interests of persons living on this territory now and in the future, the court has arrived at the opinion that the breached security standard — exercising due care in combating climate change — also extends to combating possible damages incurred by Urgenda as a result of this, thereby meeting the so-called relativity requirement.

The decision was confirmed on appeal in October 2018.[55]

### 3.2 *Juliana v United States*

Perhaps the most widely known example of public trust litigation is the *Juliana v United States*.[56] *Juliana* is one of a series of cases filed by youth plaintiffs worldwide against governments asserting that they are in breach of the public trust doctrine.[57] The plaintiffs in this case — 21 people between the ages of 11 and 22 — claim that the United States federal government has violated their constitutional rights and the public trust doctrine in failing to take effective action on climate change.[58] While the merits of the case have yet to be heard, the publicity that it has generated has had political effect worldwide.

## 4. PATHWAYS FOR ATMOSPHERIC TRUST LITIGATION IN NEW ZEALAND

This article now moves on to considering the forums through which cases may raise atmospheric trust in New Zealand, the cases to date, and the scope for future legal action.

53 Charles Owen "Climate Change in New Zealand: Constitutional Limitations on Potential Government Liability" (LLB (Hons) Dissertation, University of Otago, 2016) at 10.

54 *Urgenda*, above n 51, at 4.91.

55 *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* [2018] Case 200.178.245/01.

56 *Kelsey Cascade Rose Juliana; et al., v The United States of America; et al*. [2016] Case 6:15-cv-01517-TC.

57 Michael Blumm and Mary Wood "No 'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine (2017) 67(1) Am U L Rev 1 at 57.

58 Julia Olson and Philip Gregory "Youth Plaintiffs File Response with Supreme Court Pointing to the Government's Serious Mischaracterization of *Juliana v. United States*" (22 October 2018) Our Children's Trust <https://www.ourchildrenstrust.org/s/181022-Press-Release-on-Response.pdf >.

As above, some have argued that the concept of the public trust has failed to make its way into New Zealand law.[59] It is not as clear-cut as that. As Hulley states: "the concept has, until now, received almost no attention in this country. It need not, however, necessarily follow that the public trust doctrine is therefore absent from New Zealand law".[60] The concept of the state acting as fiduciary is established law in New Zealand. The fiduciary duty owed by local councils to ratepayers is one example analogous to the kind of duty owed under the public trust doctrine.

In *Mackenzie District Council v Electricity Corporation of New Zealand* the Court stated that a local authority has a fiduciary duty to the ratepayers to have regard to their interests.[61] A later case that applied *Mackenzie District Council* was *Waitakere City Council v Lovelock*.[62] While this was a case focused on the levying of rates rather than touching on climate change, in reaching its decision the Court stated:[63]

> The notion of an underlying trust cannot be dismissed as an historical anachronism. The perception of a trust persists in modern democratic theory today and has been extended to central government. It has been invoked in support of a public trust doctrine imposing a trustee or trustee-like obligation on elected representatives who derive their power from the people they serve. The constitutional basis for the notion is not untenable. It rests on the sovereignty of the people. Under a democracy, Parliament is "supreme" in the sense that term is used in the phrase "parliamentary supremacy", but the people remain sovereign and enjoy the ultimate power which that sovereignty confers. Of necessity, they delegate the machinery of government to their elected representatives together with such powers as are necessary to carry it out. But as sovereignty remains with the people the elected government remains answerable to them in the exercise of their delegated power.

Further the Court stated:[64]

> Failure to comply with a fiduciary obligation must mean that a local authority has acted unreasonably. The fiduciary duty is integral to the principle of

59 Owen, above n 53, at 28.

60 Nicola Hulley "The Public Trust Doctrine in New Zealand" (2015) 31 RMJ 31 at 32.

61 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 at 47. It is likely pushing the analogy too far, but it is tempting to contrast the statement at 47 that "the local authority must seek to balance fairly the respective interests of the different categories of ratepayers and not cast an inordinate burden on the new ratepayer" with the duties of the state to future generations under the public trust doctrine.

62 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385.

63 At 410.

64 At 387–388.

unreasonableness and to the obligation of the local authority to act fairly and reasonably.

While little further action has been taken, clearly the Court does not consider the incorporation of the public trust doctrine into New Zealand law to be untenable. The question that remains unanswered is whether the courts will accept that the doctrine can influence Parliament concerning climate change.[65] Examples of how this might occur are examined below.

### 4.1 Resource Management Act 1991

At first blush the RMA ought to be amenable to action involving atmospheric trust. Described as a "comprehensive and integrated approach to environmental management",[66] the RMA governs all land, air, and water in New Zealand. However, the RMA is designed to encourage decentralised decision-making, focusing on the regional and local body level.

Why does the RMA appear to be conducive to outcomes in line with the atmospheric trust litigation strategy? The RMA acknowledges the fact of climate change,[67] the purpose of the RMA is to promote the sustainable management of natural and physical resources,[68] and intergenerational equity is a part of that purpose:[69]

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, *sustainable management* means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations.

65 See Finn, above n 44, at 232.

66 Grant Hewison "The Resource Management Act 1991" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 66.

67 Resource Management Act 1991, s 2 defines climate change as "a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods".

68 Section 5(1).

69 Section 5.

In achieving that purpose, decision-makers under the RMA must have regard to a range of factors which, again, seem in line with the purposes of the atmospheric trust strategy, including: kaitiakitanga;[70] the ethic of stewardship; the efficient use and development of natural and physical resources; the efficiency of the end use of energy; the maintenance and enhancement of amenity values; the intrinsic values of ecosystems; maintenance and enhancement of the quality of the environment; any finite characteristics of natural and physical resources; the protection of the habitat of trout and salmon; the effects of climate change; and the benefits to be derived from the use and development of renewable energy.

Where a decision is made under the RMA without regard for the above, there is the possibility of appeal. While this appears to promote outcomes in line with reducing the negative consequences of climate change, in reality the RMA has proved ineffective in forcing any effective change to date.

Following passage of the RMA in 1991, and until amendment in 2004, mitigation of the impact of climate change was taken into account by local decision-makers to some extent.[71] Now climate change is just one of many factors that must be taken into consideration when decisions are made, and in some cases cannot be considered at all.

Following amendments in 2004, s 70A was inserted:

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
>
> Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

The reason for this amendment was a preference on the part of central government for a central approach to combating climate change. The decentralised nature of decision-making under the RMA was not seen as being conducive to the unified approach that the government felt was required.[72]

70 Defined at s 2 as: "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".

71 Ceri Warnock "Global Atmosphere Pollution: Climate Change and Ozone" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 865–868.

72 At 868.

The rather perverse outcome of this amendment has been that, as the Supreme Court found in *Greenpeace New Zealand Inc v Genesis Power Ltd*,[73] local authorities are now not to take into account the effect of emissions of greenhouse gases when considering an application for a non-renewable energy project.[74] The ability of the RMA to influence climate change policy in New Zealand, despite the apparent suitability of the statutory regime, is therefore currently limited.

Recently a group called the International Climate-Safe Travel Institute (ICSTI) sought to challenge this position, by appealing a decision on a notice of requirement concerning the expansion of the Auckland International Airport.[75] ICSTI challenged the decision as, inter alia, "[t]here is overwhelming evidence that climate change is currently adversely impacting economic activity and that those impacts will increase dramatically over the next 30–50 years under BAU [business-as-usual] assumptions, including BAU emissions of greenhouse gases".[76] This will challenge the airport company's projected growth figures, raising questions about whether the runway expansion is needed. The fact of the appeal shows there is latent potential for atmospheric trust litigation in this area.

Finally, it is noted that the government announced on 24 July 2019 that it has launched a comprehensive overhaul of the RMA.[77] This may address the points above, but that remains to be seen at this time.

### 4.2 Judicial Review

In New Zealand there is no formal written constitution on which to base a legal application, unlike in *Juliana v United States* or *Urgenda*. In lieu of a written

73 *Greenpeace New Zealand Inc v Genesis Power Ltd* [2009] 1 NZLR 730.

74 At [65]. Also see the dissent of Elias CJ. Owen considers that the courts' dismissal of the "cogent purposive approach described by the Chief Justice Dame Sian Elias in her dissent indicates the courts' disposition to leave any decisions of positive climate change mitigation to Parliament as a consideration of policy". See Owen, above n 53, at 12. See also *West Coast ENT Inc v Buller Coal Ltd* [2014] 1 NZLR 32 at [172]–[173].

75 See *International Climate-Safe Travel Institute v Auckland International Airport Limited* Notice of Appeal of Notices of Requirement (6 March 2018) <https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/auckland-unitary-plan-modifications/notices-of-requirement-to-designate-land/nor7docs/international-climate-safe-travel-institute-auckland-international-airport-limited.pdf >.

76 At 1–2.

77 See Hon David Parker "Comprehensive overhaul of the RMA" (press release, 24 July 2019) Beehive.govt.nz <https://www.beehive.govt.nz/release/comprehensive-overhaul-rma>.

constitution, the primary vehicle for any application to the senior courts on this subject matter is an application for judicial review concerning climate change.[78]

Judicial review, in the New Zealand context, provides an applicant with an opportunity to ask the court to review, generally, the process undertaken to reach a decision made of a public nature. There is no opportunity to review the substance of the decision, just the basis on which it was reached. While there are no strict categories for judicial review, generally speaking a decision must be found to be outside of the legal powers of the decision-maker, or unreasonable.[79]

It is worth mentioning the nascent area of judicial review dubbed "constitutional review" by Professor Philip Joseph.[80] As Joseph states: "constitutional review invites courts to consult openly the full range of public law values that inform public decision making". In New Zealand, Joseph states, "these values are organised principally around the principles of the Treaty of Waitangi, international human rights instruments, and the New Zealand Bill of Rights Act 1990".[81]

While there are few cases that can be accurately described as strictly decided on the basis of constitutional review, in reality this ground bleeds into other grounds in making a decision on review.[82] It supports the argument, and widens the scope of any application. The fact of constitutional review adds another angle for review, particularly if the court accepts that the Paris Agreement, or other climate change-focused international instruments that incorporate the atmospheric trust doctrine, come under that heading.

While judicial review appears to be the best option to see atmospheric trust litigation precedent developed in New Zealand, there are several hurdles which must be overcome. The most obvious is that the New Zealand legislature is not bound by any legal restriction, and may legislate for any purpose. This includes creating laws that are in breach of the Bill of Rights Act 1990, or any other legislation. Traditionally, the courts will not intervene.[83]

There are also limited remedies available under judicial review. As has been recently noted in the High Court, judicial review is process oriented. The court

78 Note that judicial review does not depend on a decision being taken. See Joseph, above n 20, at 885–888.

79 For the authoritative description of judicial review in New Zealand see Matthew Smith *Judicial Review Handbook* (2nd ed, Thomson Reuters, New Zealand, 2016).

80 See Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 871–880 and Joseph, above n 20, at 920–927.

81 At 920.

82 *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 300 is an example where counsel described the application as being based on constitutional review.

83 See Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to do, Why it did not Succeed and How it can be Repaired" (2016) 14 NZJPIL 169 for discussion of the developing area of judicial declarations of inconsistency with the Bill of Rights Act.

is not concerned with the merits of the decision made,[84] nor does the court view judicial review as an opportunity for the court "to assume any authority given by Parliament to a government department to make a decision".[85]

In essence, the court will ask whether something has "gone wrong" in reaching the decision, not whether the decision itself is wrong on the merits.[86] The court will not change the outcome, but may order the decision to be remade using the correct process. A different outcome is not certain. For this reason, it is hard to envisage the court making an order in the form of *Urgenda*.

There is also an issue of process that hinders the effectiveness of review in New Zealand. That is the general rule that cross-examination is not permitted as of right in judicial review proceedings.[87] Evidence is generally provided by affidavit, not presented viva voce. For complex matters such as atmospheric trust litigation, this means that the court is likely to receive a large amount of evidence, and the court is left to make of it what it will.[88]

Some of the other hurdles identified by others, albeit in a slightly different context, include ensuring that there is a suitable applicant, finding legal representatives and experts available and able to assist, and the risk of an adverse costs decision.[89]

While standing is an issue in New Zealand, it is not insurmountable.[90] Nor, in a field that is relatively high profile and garners media coverage, should be finding legal representatives able to take on a case. The costs involved appear to be the biggest hurdle to further litigation, outside of justiciability and jurisdiction, which are discussed below.

Costs in litigation are prohibitive. In addition to filing fees, court daily recovery rates, the costs of counsel, briefing witnesses and other associated costs, there is also the possibility that security for costs may be sought prior to hearing. There is also the threat that a costs order may be awarded against an applicant if the application is unsuccessful. In New Zealand an unsuccessful

84 *Walsh & Ors v Pharmaceutical Management Agency & Anor* HC Wellington CIV-2007-485-1386, 3 April 2008 at [26].

85 *Ngai Tai ki Tamaki Tribal Trust*, above n 82, at [40].

86 See Joseph, above n 20, at 868–869.

87 At 932–934. In limited circumstances cross-examination will be allowed, but the bar is high.

88 In *Thomson*, below n 98, it was reported that 10,000 pages of scientific evidence were presented to the Court. Ged Cann "Waikato Law Student Sarah Thomson takes Government to Court over Climate Change" (26 June 2017) Stuff <https://www.stuff.co.nz/environment/climate-news/94079123/waikato-law-student-sarah-thomson-takes-government-to-court-over-climate-change>.

89 See, for example, Jacqueline Peel, Hari Osofsky and Anita Foerster "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2018) 41 MULR 793 at 831–832.

90 See also Christopher Stone *Should Trees Have Standing* (3rd ed, Oxford University Press, New York, 2010) in particular 33–77 for a discussion on whether the climate has standing.

party does not have to pay the actual costs of the successful party, but will be required to make a reasonable contribution to actual costs, rather than an attempt at closer restoration to a successful litigant.[91] Nevertheless, a reasonable contribution to litigation costs quickly adds up into sums well out of the reach of most potential litigants.[92]

In the *New Zealand Maori Council Case*[93] the Privy Council held that there should be no order for costs as "the appellants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga which is an important part of the heritage of New Zealand."[94]

While this might be able to be relied upon in the case of further litigation relating to climate change litigation, the Supreme Court has declined to draw a general distinction between public law and family cases and commercial litigation,[95] but noted that this "does not prevent application for costs to be awarded on a different basis where the circumstances make it just".[96] The position is uncertain. What is certain is that "the fact that a litigant may represent an aspect of the public interest and have no prospect of personal advantage in litigation is … not sufficient basis to exclude the general rule that costs follow the result".[97] Such costs awards would be beyond the ability of normal litigants to meet.

### *4.2.1 Thomson v Minister for Climate Change Issues*

In 2017, Sarah Thomson, at the time a law student, brought an application for judicial review against the then Minister for Climate Change Issues. The application was based on several causes of action concerning two decisions that the Minister made concerning New Zealand's targets for reducing emissions.[98] This application is of note as it was brought based on the consequences of the

91 *Prebble v Awatere Huata* [2005] 2 NZLR 467 (SC) at [10].

92 See Grinlinton, above n 36, at 162–167 for a useful discussion of costs as a barrier to litigation in New Zealand.

93 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

94 At 525.

95 *Prebble v Awatere Huata*, above n 91, at [11]–[12]. A "reasonable contribution to legal costs in a one-day case would be $12,500 for one counsel and $15,000 for two counsel, together with reasonable disbursements. Where an appeal is heard over more than one day, a daily rate of $2500 should be added for each counsel (to a maximum of two)."

96 At [11].

97 *Environmental Defence Society Incorporated v New Zealand King Salmon Company Ltd* BC201464119 SC 82/2013, SC 84/2013 at [12].

98 *Thomson v The Minister for Climate Change Issues* [2017] 2 NZLR 160.

alleged inadequacy of the government's response to climate change on future generations,[99] and was inspired by *Juliana* and *Urgenda*.[100]

While Ms Thomson advanced several causes of action, the application generally related to a concern at the government's response to climate change and the consequences of its alleged inadequacy on future generations.[101] Of particular note is the cause of action related to the government's decision-making concerning its 2030 target set in accordance with the Paris Agreement.

The Minister argued that as the government's decision setting the 2030 target was made pursuant to an international obligation that has not been incorporated into domestic law, its compliance with that obligation was a political matter which ought not to be reviewable.[102] This was relatively briefly dealt with by the Court stating that "it is not determinative that the international obligation has not been incorporated into domestic legislation".[103] This no longer seems to be a hurdle a potential litigant must face following *Thomson*.

Of more moment was the Minister's argument that the Court was not the appropriate body to review the Minister's decisions:[104]

> [T]he 2030 target decision involves questions of socio-economic and financial policy, requiring the balancing of many factors. This means it is not susceptible of determination by any legal yardstick and the assessment of the relevant factors is one that is appropriately made by those elected by the community.

This argument is based on the distinction between jurisdiction and justiciability. While the court may have the jurisdiction, or power, to hear an application it may not consider that it is appropriate to do so. This is reflected in justiciability.

Before making a determination the Court reviewed the justiciability of government action or inaction on climate change in other jurisdictions, while noting that each of the cases reviewed was different to the application advanced in *Thomson*.[105] Following review of the overseas decisions the Court noted that in all cases bar one the courts considered that it was appropriate for domestic courts (to differing degrees) to decide applications on climate change policy.[106]

The Court considered that the approach to be taken ought to align with the international cases surveyed, noting that the approaches taken have been

99 At 160.

100 See Sarah Thomson "Why I'm Taking the NZ Government to Court" (16 June 2017) The Spinoff <https://thespinoff.co.nz/society/16-06-2017/why-im-taking-the-nz-government-to-court/>.

101 *Thomson*, above n 98, at [1].

102 At [102](a).

103 At [103].

104 At [102](b) (citation omitted).

105 At [133].

106 At [133].

"consistent with the view that justiciability concerns depend on the ground for review rather than its subject matter. The subject matter may make a review ground more difficult to establish, but it should not rule out any review by the Court" and "[i]f a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing".[107]

The Court also recognised the importance of the subject matter to all citizens: "the matter for all and each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections",[108] and concluded that the application was justiciable.

Ultimately, and anticlimactically, the Court dismissed the application.[109] Rather than a dismissal strictly on the merits, the Court considered that the application had been overtaken by subsequent events — a change of government following the 2017 general election. As the new government had announced it intended to set a new 2050 target, the Court considered that court-ordered relief was unnecessary.[110]

While the Court noted that New Zealand's 2030 target is "somewhat less ambitious than its 2050 target and somewhat less ambitious than the EU's target" this did not mean that "a new Minister will take the same view about the appropriate level of ambition for New Zealand. As noted earlier, the new Government intends to amend the 2050 target. Amending the 2030 target may follow from this."[111] Accordingly: "The community has elected a new Government and it is for that new Government to weigh the competing factors and to reach a view about the appropriate targets going forward."[112]

While it was dismissed, *Thomson* does not count as a failure to advance the strategy of atmospheric trust litigation in New Zealand. Of note was the Court's awareness of the *Juliana* litigation, despite only preliminary arguments and determinations being made in that case.[113] The Court noted the position of the Oregon District Court in refusing to dismiss the claim:[114]

> As a constitutional challenge this case was squarely within the role of the Court. However the Court recognised that, if the plaintiffs prevailed on the

107 At [134].
108 At [134].
109 At [180].
110 At [178].
111 At [176].
112 At [179].
113 At [112]–[115].
114 At [115].

merits, "great care" would be required in crafting a remedy. The separation of powers doctrine might permit the Court to direct the defendants to ameliorate the plaintiffs' injuries, but limit its ability to specify precisely how to do so. In its concluding comments, the Court emphasised the role of the courts given the importance of the issues at stake.

We can conclude that the strategy for atmospheric trust litigation is proving successful, even to this limited extent. The act of filing proceedings in one country can have, and now has had, an effect on the deliberation of a court in a foreign jurisdiction.[115]

Notably for any future applications, the Court in *Thomson* declined to make an order as to costs.[116]

*4.2.2 What next?*

As above, the government's primary response has been the Zero Carbon Bill — introduced on 8 May 2019. Submissions to the Select Committee were due on 16 July, with the Committee due to report on 21 October 2019.[117]

While the Bill can be seen as a good step, it has been subject to criticism that it does not do enough to prevent the most serious impacts of climate change in its current form. There is also a real issue with enforceability — if the Bill is passed in its current form, the Act will include an ouster clause which will prevent review of any failure to meet the 2050 target, or an emissions budget. The only available remedy will be declaratory in nature (alongside costs).[118] This may make strategies like public trust litigation more appealing in the future — allowing litigants to "step outside" the Zero Carbon legislative regime.

The fact that the Bill is currently before Parliament may present an obstacle for any further challenge through the courts, as while the Bill is before Parliament the courts may not be willing to intervene due to comity concerns. In general, a court will be reluctant to review a matter that is before Parliament due to the concept of judicial deference. This could have repercussions for the urgency of any application filed as the Bill could be before Parliament for some time.

115 See Blumm and Wood, above n 57, at 62.

116 *Thomson*, above n 98, at [181].

117 New Zealand Parliament "Climate Change Response (Zero Carbon) Amendment Bill" <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_87861/climate-change-response-zero-carbon-amendment-bill>. [See now Climate Change Response (Zero Carbon) Amendment Act 2019 (in force 14 November 2019).]

118 Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1), cl 5ZJ.

The ground of judicial deference has recently shifted following the Supreme Court's decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*.[119] While this case did not concern climate change issues, the Court addressed the issue of comity between the courts and the legislature and this case would likely apply should a party apply for review while the Zero Carbon Bill is before Parliament.

The majority considered the application concerned the rights Ngāti Whātua Ōrākei had in relation to the land in question, rather than, as the Court of Appeal had found, a challenge to legislative proposals. This distinction allowed the application to proceed. In a separate judgment, Elias CJ also allowed the appeal. Her Honour went further than the majority judgment. Some extracts from her judgment are set out in full due to the implication for climate change review applications while a Bill may be before Parliament:[120]

> Parliament speaks to the courts only through enacted legislation. Whether the enactment proposed will proceed and, if so, the form it will take is uncertain because it is a matter for Parliament. Just as the executive cannot bind itself by contract to introduce and pass legislation, it cannot properly give any assurance to the court that the legislation it proposes will be passed. … Provided that the court does not seek to preclude parliamentary consideration, I cannot see that any determination of present right of itself constitutes an interference with proceedings in Parliament. Indeed, in some cases it may provide information that Parliament may want to consider. That is not, in my view, interference with proceedings in Parliament. Parliament remains free to legislate to modify or abrogate any existing rights. It is free to legislate without inquiring into the existence of rights or waiting for court determination of them. The courts will do nothing to prevent Ministers from introducing legislation with that effect for Parliament's consideration. The freedom of debate and the freedom of speech in Parliament is not affected.

This may lower the bar to a successful application being made in the future. Careful pleading will be required to ensure that the application concerns rights, rather than seeking to force parliamentary action.

For completeness here it is noted that the government has shown a willingness to change the law to nullify a decision of the court in the past.[121] So even if an application is successful, there is no certainty that the result will stand.

One application is currently seeking to test the resolve of the court here. On 16 July 2019, Michael John Smith, the climate change spokesman for the Iwi

119 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84.

120 At [114]–[115] (citations omitted).

121 As was the case following *Attorney-General v Ngati Apa* [2003] 3 NZLR 643. See Richard Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 for background.

Chairs Forum, filed an application in the High Court alleging, primarily, that the Crown has breached a duty owed to Māori to protect "current and future generations of Māori from the adverse effects of climate change including without limitation, the loss of: life; health; culture; economic and social wellbeing; spirituality; lands; fisheries; forests; sites of cultural, customary, historical or spiritual significance; and taonga".[122] It remains to be seen how the Court will treat this application.

### *4.2.3 Bill of Rights Act 1990*

The Bill of Rights Act 1990 (BORA) is classed as secondary legislation in New Zealand. The courts cannot invalidate a law if it is inconsistent with the BORA.[123] For this reason, the BORA is neglected in thinking about climate change litigation in New Zealand. Despite the secondary status of the BORA, it ought not to be ignored. As further set out below, so-called "soft" laws can have powerful effects on the actions of the state.

Owen has traversed the possibility of a claim based on s 8 of the BORA. Another possibility for legal action is s 20, which concerns the rights of minorities:[124]

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

By failing to protect the environment from the effects of climate change, it may be argued that the government breaches that right.

By way of potential example, the Waitangi Tribunal has found that the population of eels, or tuna, is being affected by climate change: "global climate change is one factor that is considered significant in different parts of the world, because it has reduced the number of elvers coming into a catchment area from the sea".[125]

Tuna are a traditional food source for Māori peoples, and are considered sacred.[126] Climate change therefore has, and will continue to have, a prejudicial

122 *Michael John Smith v Attorney-General* Statement of Claim, 16 July 2019. [Ed. In *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, claims based on public nuisance and negligence against corporations, alleging greenhouse gas emissions harmful to Māori, were struck out. The Court left open a third claim based on an inchoate duty yet to be identified.]

123 Bill of Rights Act 1993, s 4.

124 Owen, above n 53, at 23–24.

125 Waitangi Tribunal *Te Urewera Part VI* (Wai 894, 2015) at 338.

126 NIWA "Tuna" <https://www.niwa.co.nz/our-science/freshwater/tools/kaitiaki_tools/species/tuna>.

impact on the ability of all Māori people, and future generations, to access their traditional fisheries and therefore their ability to enjoy their culture. Whether an application on these lines will be successful is another matter.

### 4.3 Waitangi Tribunal

In New Zealand there is the possibility of further, unique, legal action in the form of a claim being brought by a person of Māori descent in the Waitangi Tribunal.

Below, brief background is given on the Treaty of Waitangi and the Waitangi Tribunal. Following that, due to the uniqueness of the Tribunal internationally, a "nuts and bolts" approach is taken to explaining how an application might progress. Past Tribunal decisions will be analysed. The claims filed to date that have invoked atmospheric trust doctrine are surveyed, and comment is made on the chances of success for the claims.

#### *4.3.1 The Treaty of Waitangi / te Tiriti o Waitangi 1840*

The Treaty of Waitangi / te Tiriti o Waitangi is a foundational document of New Zealand,[127] and part of the unwritten constitution.[128]

There is not space here to do justice to a full review of this topic, so very simply put, the current view is that under Article I of the Treaty / te Tiriti, Māori agreed to share power and authority with Britain in the country.[129] In return for the concession of the British Governor having control, Article II guaranteed Māori the full chieftainship (rangatiratanga) of their lands, their villages and all their taonga (resources). This was qualified by the Crown being granted a right of pre-emption should Māori wish to transact their land. Article III gave Māori all of the rights and privileges of British subjects.

While there are two versions of the document, one in English and one in Māori, there are significant differences in the language used. Until recently, most believed that the agreement made through the Treaty / te Tiriti was accurately set out by the English text. As the Waitangi Tribunal recently concluded, more recent scholarship about the meaning and effect of the Treaty

127 Two versions of the Treaty were signed, one in English, one in Māori. As there are differences in the text this article will refer to the Treaty / te Tiriti to include both versions.

128 There is not room for a full introduction to the Treaty / te Tiriti in this article. For a thorough grounding see Joseph, above n 20.

129 Wood, above n 3, at 137 considers: "for many tribes, the urgency of ecosystem degradation now hastens the task of reclaiming environmental sovereignty". This accords with the current Māori drive to assert sovereignty. See Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014) generally, and Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims Parts I and II* (Wai 898, 2018) at 107–190.

takes "more account of the fact that the treaty existed in two languages and was made by peoples with entirely different cultural assumptions".[130]

In many respects the rights promised Māori under the Treaty / te Tiriti are analogous to the concept of an atmospheric trust. Under Article II for instance, Māori were granted full rangatiratanga over their taonga. Where the Crown takes action, or fails to act, to the prejudice of those taonga it is not going too far to argue that in some respects the Crown has breached a trust established by the Treaty / te Tiriti. This will be discussed more fully below.

### *4.3.2 The principle of active protection*

While the public trust doctrine has only had limited judicial recognition in New Zealand,[131] there have been developments that, by analogy, would allow expression of an atmospheric trust within the jurisprudence surrounding the Treaty / te Tiriti.

Wood describes, in an American context, "tribes as trustees again".[132] Under the public trust doctrine, Wood considers that "native nations take their rightful place as co-trustees of shared ecological assets along with the states and federal government".[133] While developments in New Zealand relating to Māori may seem to have limited application to non-Māori both in New Zealand and internationally, judicial attention to any trust duties the Crown owes to Māori will assist to inform our understanding of the general public trust doctrine applicable to atmospheric trust litigation. As Torres argues persuasively:[134]

> One of the lessons that can be learned from the evolving relationship between settler colonial states and indigenous populations … is that what seems to be a local problem really has global resonance.

Following development of a fiduciary duty, particularly in Canada, Māori sought to rely on a similar duty in New Zealand.[135]

In the landmark *Maori Lands Case* the Court of Appeal stated that the relationship between Māori and the Crown "creates responsibilities analogous to fiduciary duties … the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to

130 Waitangi Tribunal *He Whakaputanga me te Tiriti*, above n 129, at 412.
131 See Grinlinton, above n 36, at 162.
132 See Wood, above n 3, at 136.
133 At 136.
134 See Torres, above n 15, at 152.
135 See, for example, Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?" (2005) 13 Waikato L Rev 70.

the fullest extent practicable".[136] While the Court declined to recognise a fiduciary duty in New Zealand in that instance, the Supreme Court has recently recognised a limited fiduciary duty owed concerning Māori land.[137] Whether this duty will be expanded on by the Court in following cases is an open question.

The Waitangi Tribunal has since elaborated on the duty of active protection described in the *Maori Lands Case*. By way of example:[138]

> The Crown's duty to protect the just rights and interests of Maori arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure its acceptance, and the principles of partnership and reciprocity. … Active protection requires honourable conduct and fair processes from the Crown, and full consultation with — and, where appropriate, decision-making by — those whose interests are to be protected.

In many ways the concept of atmospheric trust litigation is analogous to the duty of active protection that the Crown owes Māori. Both place a positive obligation on the state to protect its citizens, or the property that it holds for them. The next question is whether the duty of active protection extends to protection of the climate in a manner analogous to the atmospheric trust doctrine.

The Waitangi Tribunal has found that the Crown has a duty in respect of the environment itself:[139]

> The fundamental relationship created by the Treaty means that the Crown has a duty to protect both the environment itself, and to protect Māori in their exercise of rangatiratanga over taonga.

The climate is fundamental to the environment, and the Tribunal ought to have no issue with identifying the climate as a taonga, as a broad interpretation has been adopted in the past. For instance, in *The Radio Spectrum Management and Development Final Report*, the majority of the Tribunal accepted "the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Maori and was a taonga".[140]

136 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 644.

137 See *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17.

138 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wai 785, 2007) at 6.

139 Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims* (Wai 2391 and Wai 2393, 2014) at 4.

140 Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 51.

The Waitangi Tribunal has also found that Māori have a unique relationship to the environment and environmental issues. As the Waitangi Tribunal found in its *Muriwhenua Fishing Report*, the following criteria govern Māori thinking:[141]

(i) A reverence for the total creation as one whole;
(ii) A sense of kinship with fellow beings;
(iii) A sacred regard for the whole of nature and it's [sic] resources as being gifts from the gods;
(iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;
(v) A distinctive economic ethic of reciprocity; and
(vi) A sense of commitment to safeguard all of nature[']s resources (taonga) for the future generations.

Further, the Tribunal has found:[142]

> … Māori relationships with taonga in the environment — with landforms, waterways, flora and fauna, and so on — are articulated using kinship concepts. Indeed, the first step in understanding the Māori relationship with the landscape (for example) is to understand that descent from it is an essential Māori belief. Māori attitudes towards the environment make sense if that is grasped.
>
> The second core value is kaitiakitanga. It is often translated as guardianship or stewardship. Generally speaking, this is a fair approximation, although it lacks the core spiritual dimension that animates the concept. In Māori tradition the "guardians" or "stewards" are, as often as not, supernatural beings. Kaitiakitanga is really a product of whanaungatanga — that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations.

A key concept here is therefore kaitiakitanga. As the Tribunal has stated, Māori "responsibilities included keeping a balance between the living, the spirit world, and the land, thereby ensuring the stability of the mauri of all three. They acknowledged the mauri of the land, the forest and its wāhi tapu, the rivers, and the atmosphere."[143]

141 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 179.
142 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) at 105.
143 Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 33.

This argument goes to the heart of the literature surrounding the public trust — what is public and what is private. As Epstein argued: "Locke's argument does not tell us how to think about property when there are no rights, and no grantor, in the state of nature."[144] For Māori there is no state of nature that exists without kaitiaki.

Where the environment is at the heart of a well-founded Tiriti breach the Tribunal is not afraid to recommend bold solutions or pathways forward, as shown most recently in *The Stage Two Report on the National Freshwater and Geothermal Resources Claim*:[145]

> Freshwater taonga are central to tribal identity and to the spiritual and cultural well-being of iwi and hapū, and traditionally played a crucial role in the economic life and survival of the tribe. The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint governance and management of freshwater taonga. The exception to co-governance and co-management is that, in some cases, the strength of the Māori interest in a particular freshwater taonga may be such that it requires Māori governance of that taonga. Our view was that the presence of other interests in New Zealand's water bodies will more often require a co-governance/co-management partnership between Māori and councils for the control and management of freshwater taonga; that is the Treaty standard for freshwater management.

The same could be said for the atmosphere, or the climate. A duty to protect the environment, and to protect Māori in their exercise of rangatiratanga over taonga, comes very close to the atmospheric trust doctrine. There is no jurisdictional bar to arguing that the duty to protect Māori in their exercise of rangatiratanga extends to future generations. In fact, this has been an acknowledged driver for claims in the Tribunal.[146]

Based on the above, it seems that an argument is available that the Crown has breached the Treaty / te Tiriti in failing to actively protect future generations in its climate change decision-making. Whether the Tribunal finds breach is of course another matter.[147] How a claim might be made to the Tribunal to pursue that outcome is set out below.

144 Richard Epstein "The Public Trust Doctrine" (1987) 7 Cato Journal 411 at 411.

145 Waitangi Tribunal *The Stage Two Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2019) at 526.

146 For example, Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 14.

147 For further context see Naomi Johnstone "Negotiating climate change: Māori, the Crown and New Zealand's Emission Trading Scheme" in Randall Abate and Elizabeth Kronk (eds)

*4.3.3 The Waitangi Tribunal as an institution*

In 1975 the New Zealand Government established a standing commission of inquiry known as the Waitangi Tribunal. Its purpose is to: "make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles".[148]

Under the Treaty of Waitangi Act 1975 any Māori or group of Māori may make a claim under the Act as long as the jurisdictional requirements are met.[149] There is no parallel court or tribunal for non-Māori in New Zealand.

Any Māori may bring a claim before the Waitangi Tribunal where they claim that they are, or are likely to be, prejudiced by Crown actions or omissions. The Tribunal hears the claims, and then following deliberation produces a report to the Crown.[150] If the Tribunal considers that there has been a breach of the Treaty / te Tiriti, it will include recommendations to remove that prejudice.[151]

There are other factors which make the Tribunal a forum uniquely suited to claims of this type. Unlike a judicial review proceeding, where evidence is supplied via affidavit and there is no opportunity for cross-examination, a Tribunal may conduct itself as it sees fit.[152]

The Tribunal has wide-ranging powers in conducting an inquiry. The Chairperson of the Waitangi Tribunal[153] may issue directions or conduct conferences; may issue summonses requiring the attendance of witnesses before the Tribunal, or the production of documents; or "may do any other act preliminary or incidental to the hearing of any matter by the Tribunal".[154]

The Tribunal may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would, apart from this section, be legally admissible

*Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Cheltenham, 2013) 508.

148 Treaty of Waitangi Act 1975, Preamble.

149 Section 6.

150 There is not a uniform definition of what constitutes the Crown in New Zealand law. Generally the definition provided in the Public Finance Act 1989, s 2 is adopted.

151 Treaty of Waitangi Act, s 6(3).

152 Schedule 2 cl 5(9).

153 Note sch 2 cl 8(2) "or any other person, being the presiding officer at a sitting of the Tribunal or a member of the Tribunal purporting to act by direction or with the authority of the Chairperson".

154 Schedule 2 cl 8.

evidence or not.[155] The Tribunal may either commission evidence or authorise a claimant to commission any person to investigate and report to the Tribunal.[156]

In terms of outcomes, the Waitangi Tribunal is not a court of law, and can only make non-binding recommendations.[157] However, this has not reduced the Tribunal's ability to influence the actions of the government of the day.

Therefore, while the Tribunal cannot (with limited statutory exceptions) make binding recommendations on the Crown, it does have factors in its favour for bringing claims concerning climate change. The first of which is a detailed and careful review of the evidence presented, with a focus on some of the most vulnerable in New Zealand society.

Secondly, while the Crown does not have to take the recommendations on board, it is obliged to act in good faith towards Māori. A report is the best way that the Crown can be informed as to what its obligation to Māori ought to be concerning climate change, and, for the purposes of this article, the obligations concerning atmospheric trust as it pertains to Māori.

Thirdly the media generated by any Waitangi Tribunal inquiry is likely to raise awareness of the issues. In a real sense this is a non-political process generating a political outcome.

Other factors in favour of the Waitangi Tribunal are that there is no ability to impose costs on claimants, even where they have been unsuccessful.[158] Legal aid is available to claimants to commission research or expert evidence, and to cover reasonable legal costs. Finally, here, unlike other civil aid, legal aid in the Waitangi Tribunal has no condition that it needs to be repaid.[159]

The Tribunal has developed its own practice for ordering the hearing of claims. There are four main forms of inquiry. These are district-based inquiries, remedies inquiries, kaupapa inquiries,[160] and urgent inquiries. Of relevance here are the latter two.

The Waitangi Tribunal will hear claims under urgency if a number of criteria have been met. The *Guide to the Practice and Procedure of the Waitangi Tribunal* states that in deciding whether to hear an application urgently the

155 Schedule 2 cl 6(1).

156 Schedule 2 cl 5A.

157 Except in limited circumstances concerning state-owned assets and Crown forest licensed lands, which are not relevant here. See Treaty of Waitangi Act 1975, s 8.

158 *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (Waitangi Tribunal, 2012) at 13.

159 At 13.

160 Kaupapa is defined as topic, policy, matter for discussion, plan, purpose, scheme, proposal, agenda, subject, programme, theme, issue, initiative. See Māori Dictionary <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=kaupapa>.

Tribunal will have regard to a number of factors. Of particular importance is whether:[161]

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- the claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other relevant factors that the Tribunal may consider include whether:[162]

- the claim or claims challenge an important current or pending Crown action or policy; … and
- any other grounds justifying urgency have been made out.

The Tribunal will only rarely grant urgency to claims. Urgent inquiries are targeted and normally heard over a short period. To speed hearings evidence is usually, although not always, taken as read (especially expert evidence or research). In many respects urgent inquiries resemble appeals in the senior courts, as leave will be required prior to an appeal being heard.

Kaupapa claims are those that are considered national in scope, and have not been suited to a district inquiry — for example, Māori veterans' issues, Māori health, and the Marine and Coastal Area (Takutai Moana) Act 2011.

As set out below, the Tribunal has ruled out the possibility of an urgent claim on climate change issues. The Tribunal has, however, determined to hold a kaupapa inquiry into all elements of natural resources and environmental management, which will include claims concerning the issue of climate change. No date has been set for this inquiry as yet.

### *4.3.4 Climate claims to date*

While several claims have been filed to date concerning climate change,[163] the focus of this section will be on a claim filed in 2017 by the Mataatua District Māori Council on behalf of all Māori. As claims are given an administrative

161 *Waitangi Tribunal Practice Note*, above n 158, at 5.

162 At 5.

163 For example, Statement of Claim, 10 January 2014, Wai 2860 Doc #1.1.1 and Statement of Claim, 21 November 2011, Wai 2347 Doc #1.1.1.

"Wai number" by the Tribunal, below this claim will be referred to as Wai 2607.[164]

It appears Wai 2607 was the first claim filed to make reference to an atmospheric trust, and to intergenerational equity.[165] For that reason this claim is focused on, and the chances that it might progress the public trust doctrine in New Zealand.

In sum, the claimants assert that the New Zealand Government's response to the threat of global climate change represents a breach of the Crown's Treaty of Waitangi obligations towards Māori and that Māori have suffered and will continue to suffer prejudice as a result.[166]

The prejudice identified invokes alleged breaches of Articles II and III of the Treaty / te Tiriti. These include (inter alia):[167]

> Māori coastal communities and their surrounding infrastructure are likely to be disproportionately affected by sea level changes because of their socio-economic characteristics and vulnerable physical location on exposed, erosion-prone coastal lands.
>
> These effects will also have an increasingly detrimental impact upon natural eco-systems, communities, agricultural and horticultural operations, forestry and fisheries involving Māori[.]
>
> …
>
> The well-being of natural ecosystems is of paramount importance to M[ā]ori particularly given the fundamental role of the natural environment in defining Māori culture and values.

The claimants sought an urgent inquiry as they understood that it would be well after 2020 until a kaupapa inquiry would be convened.[168] Having heard submissions on urgency the Tribunal declined to accord the claim an urgent hearing.

164 Statement of Claim, 30 May 2016, Wai 2607 Doc #1.1.1.

165 See Memorandum of Counsel for the Applicant in Support of Urgency Application (4 July 2017) at [69]–[73] Wai 2607 <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170704_WAI-2607_application-1.pdf>. Note that this document has not yet been given a document number by the Tribunal. This has been raised with the Waitangi Tribunal by the author.

166 Wai 2607 Doc #1.1.1, above n 164, at [3].

167 See Application by Claimants for an Urgent Inquiry Wai 2607 Doc #3.1.3 at 4.

168 At 2(l).

In his decision the Deputy Chairperson of the Tribunal stated:[169]

> While the substance of this claim raises important issues, it is evident that the Crown is still developing its domestic policy surrounding the implementation of the Paris Agreement. The Crown insists that there remains an opportunity for the applicants to participate in this process. As the prejudice alleged by the applicants does not yet appear to be irreversible and there is no imminent Crown action that would prevent Tribunal inquiry into the substantive claim in the future, an urgent Tribunal inquiry is not warranted.
>
> I also note that some claims are simply unsuitable for the urgency process. This claim cannot realistically be considered a claim brought solely by the Mataatua District Maori Council, although, it has been pleaded as such. By the time it reaches hearing, then, whether by way of additional claims or joinder of interested parties, there will be a very large cast of players indeed. If urgency were granted, the presentation of facts and opinion would consume a very considerable amount of time and energy. This indicates that these issues may best be considered in a kaupapa inquiry.

As outlined above, there is limited time in which to act on the super wicked problem of climate change. As the claimants have stated, this claim ought to at least move up the queue for a hearing in the near future.[170] This can be achieved through addressing the factors set out by the Chairperson of the Tribunal.[171] It seems likely that this would be the next step for the claimants. At a minimum the claim has given the issue ventilation in the media.[172]

## 5. CONCLUSION

A strategy of atmospheric trust litigation has already had some influence in New Zealand. Had the *Thomson* application not been overtaken by the general election, it may have received more notice by the Court. It remains to be seen whether the Waitangi Tribunal will embrace the concept in the upcoming hearings that will include climate change issues.

169 Decision on Application for an Urgent Hearing Wai 2607 Doc #2.5.4 at [47]–[48].

170 Memorandum of Counsel, above n 165, at [105].

171 Waitangi Tribunal, Memorandum of the Chairperson concerning the Kaupapa Inquiry Programme (1 April 2015) at [22]–[24].

172 See, for example, Ged Cann "Second Legal Action against Government Emission Targets" (30 June 2017) Stuff <https://www.stuff.co.nz/environment/climate-news/94223524/second-legal-action-against-government-emission-targets>.

In many respects we are at a point where we must wait and see as further applications progress. The public will appears to be present, but the will on the part of the state does not appear to mirror it.[173] It is up to litigants to ensure that the state generates the will.

While the courts may be reluctant to embrace the strategy, we have seen that a careful application may have a good chance of success, particularly in the Waitangi Tribunal with the assistance of the principle of active protection. In the absence of other avenues to push the government towards taking further action, the atmospheric trust litigation strategy may be a powerful lever to be pulled. Otherwise, all that may be left is to attempt to negotiate with the beetles.[174]

173 Mary Wood "The Politics of Abundance: Towards a Future of Tribal-State Relations" (2004) 83 Or L Rev 1331 at 1344.

174 Wood, above n 3, at 3. [Ed. In *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, claims based on public nuisance and negligence against corporations responsible for greenhouse gas emissions were struck out as too remote. The Court left open a third claim based on an inchoate duty yet to be identified.]