SMITH V FONTERRA AND ORS – LEGISLATION

1 This note explains the rationale for proceeding with the introduction of legislation to prevent private litigation seeking to impose liability for climate change, including current litigation brought by Mr Michael John Smith against Fonterra, Genesis, Z Energy, New Zealand Steel, Dairy Holdings and BT Mining (CIV-2019-404-1730).

2 In 2019 Mr Smith commenced this litigation claiming that these companies are liable in tort to Mr Smith for damage caused to him by climate change. Mr Smith claims that greenhouse gas (**GHG**) emissions associated with these businesses are a 'public nuisance', that they breach the companies' duties in negligence, and that they also breach an entirely new alleged climate change damage tort.[1] Mr Smith has also separately brought a claim against the Attorney-General (currently awaiting judgment before the Court of Appeal).

3 Mr Smith's claim asks the High Court to impose specific GHG emission reduction targets on all of the defendants (requiring ongoing supervision by the Court), or to order the defendants to immediately cease emitting or contributing to net GHG emissions, thereby requiring them to stop operating entirely.

4 In February this year the Supreme Court allowed Mr Smith's claim to proceed by way of full High Court trial. The Supreme Court was careful not to indicate that Mr Smith's claim would succeed or had legal validity, but held that, given that Parliament had not expressly excluded a common law response to harm caused by GHG emissions the policy issues raised by the claim should not be determined without the benefit of evidence at a full trial. Mr Smith's counsel has estimated that the trial will last at least three months, likely in 2026 – 2027. Appeals are inevitable irrespective of the result, extending the period of uncertainty and cost for at least 2 – 4 years.

5 In summary, this note:

5.1 explains why legislative intervention is necessary and appropriate, including to avoid distortion of the legislative mechanisms in the Climate Change Response Act 2002 (**CCRA**), and to avoid the potential for significant damage to New Zealand's critical supply chains, economy, trading relationships and ability to attract international investment;

5.2 proposes a two-sentence legislative amendment to the CCRA that will resolve the uncertainty and risks posed by private law claims like Mr Smith's; and

5.3 explains why this legislative amendment meets the Legislative Design and Advisory Committee Guidelines for legislation that applies to pending court proceedings (here., Mr Smith's proceeding).

Intervention by the Government is appropriate and necessary

6 Parliament is sovereign. The sovereignty of Parliament extends to decisions about New Zealand's response to the climate crisis, and the extent to which judge-made, common law claims should be permitted under New Zealand's response. The Supreme Court decision expressly acknowledges that it is for Parliament to say whether the CCRA covers the field in this critical area of law.

---

[1] Mr Smith has recently discontinued his claim against one of the defendants, Channel Infrastructure NZ Ltd.

7 The defendants in the Smith proceedings recognise and acknowledge the danger of climate change and the importance of appropriate domestic and international responses to it. However, private law claims are not the appropriate vehicle for such a response. Allowing the claim to proceed in parallel to the CCRA will not avoid the effects of climate change and will only lead to a drawn-out legal process which will either:

7.1 result in no change; or

7.2 involve the courts unilaterally imposing and supervising a second emissions reduction regime, parallel to that established by Parliament, causing significant uncertainty, additional cost for NZ businesses and undermining the integrity of the CCRA.

8 Legislative intervention is critical. Mr Smith's claim is in the nature of a representative action extending to all businesses in New Zealand. It is brought on the basis that (a) the defendants emit as part of commercial profit-making enterprises and (b) the defendants' emissions are significantly greater than the emissions of an ordinary New Zealand citizen.[2] Although Mr Smith has named six (originally seven) defendants, his statement of claim anticipates that it will "*cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions*".[3] It is therefore a claim that is intended to, and if successful could in principle, apply to the emissions of the entire productive New Zealand economy. Indeed, one of the issues that will be determined at an early stage of the proceeding is an application as to whether the defendants are merely representative of all New Zealand businesses such that the proceeding should bind them also.

9 Mr Smith's claim should not succeed, for the reasons articulated by the Court of Appeal on strike out, and will be vigorously defended. However, if Mr Smith's claim were to succeed:

9.1 it would distort the legislative mechanisms in the CCRA to achieve a just transition to a low carbon economy (i.e., the ETS) by imposing a parallel Court-ordered and supervised emissions reduction regime;

9.2 it would impose disproportionate legal responsibility on New Zealand businesses for the global climate crisis, far beyond New Zealand's contribution to global GHG emissions (New Zealand contributes 0.17% of global emissions); and

9.3 his claimed injunctive relief, in particular his proposed injunction requiring the defendants to immediately cease emitting or contributing to net GHG emissions, has the potential to significantly harm New Zealand's economy, including by

(a) threatening security of New Zealand's electricity supply and/or increasing the cost of electricity;

(b) interrupting dairy farming and milk supply in New Zealand and our dairy exports;

---

[2] Statement of Claim at [95].

[3] Statement of Claim at [89].

(c) threatening the security of supply of other critical products such as transport fuels and steel construction materials;

(d) potentially causing significant job losses and threatening the viability of key sectors of the economy; and

(e) impacting New Zealand's balance of trade, and undermining our export relationships and New Zealand's standing in the global trade community.

10 The uncertainty created by Mr Smith's proceeding itself has material adverse effects. It:

10.1 creates material sovereign risk. The international investment community will rationally elect to invest in jurisdictions where businesses do not face the significant risks created by the Supreme Court's decision. This is particularly important given New Zealand is seeking investment to reduce its infrastructure deficit and transition to a strong and resilient economy; and

10.2 could have a significant impact for New Zealand businesses in terms of their funding and insurance arrangements, including access to capital, and lender/insurer notification requirements.

11 In short, the High Court would not be able to supervise any meaningful injunctive requirements over the range of productive economic activity targeted by Mr Smith. If legislative intervention is not effected now, it will certainly be required in the future to disentangle the *ad hoc* regulatory scheme Mr Smith is inviting the courts to create, a scheme which, as noted, could apply to the emissions of the entire productive New Zealand economy.

Proposed legislative amendment

12 Mr Smith's proceeding (and any other potential future tortious claims for climate change) can be appropriately resolved through decisive legislative intervention. Amending the CCRA would be a logical approach. A new section could be inserted as follows:

5AA No proceedings in equity or tort

(1) No person may bring proceedings against another person seeking a remedy or relief, including declaratory relief, in equity or tort, whether in negligence, for public or private nuisance or otherwise, in relation to the second person's direct or indirect emissions of greenhouse gases and their effects on climate change.

(2) Subsection (1) shall apply to any proceeding regardless of whether it was commenced before or after the commencement of this Act.

13 Subsection (1) has been framed to strike a balance and is accordingly:

13.1 limited to claims in equity and tort, excluding claims based on contract or statute;

13.2 restricted to claims regarding the contribution of GHG emissions to climate change, rather than GHG emissions per se; and

13.3 restricted to claims concerning a person's actual direct or indirect emissions. It will therefore not impact other claims that might arise in relation to climate change

decision-making: for example, claims against directors for decisions relating to their company's climate strategy.

Proposal is constitutionally appropriate

14 As noted above, under the New Zealand constitution, Parliament is sovereign. In particular, it is recognised that Parliament may legislate to change rights and obligations from the position at common law. This is effectively recognised by the Supreme Court in its judgment in *Smith*, which held that the CCRA had not expressly excluded the development of the common law in the way proposed by Mr Smith. The Supreme Court found that the current legislative framework 'left a pathway' for the common law to operate because the CCRA did not expressly record that it was intended to cover the field. However, it also recognised that Parliament was empowered to displace the law of torts in the realm of climate change (including via the CCRA). Implicit in this is an invitation for Parliament to amend the CCRA to expressly address the issue, if it considers that the CCRA is the appropriate mechanism for regulating New Zealand's response to climate change, rather than the common law. Doing so would be consistent with the original policy intention of the CCRA.

15 The Legislation Act 2019 includes two general presumptions: (1) that legislation will not have retrospective effect (s 12); and (2) that the amendment of legislation does not affect the completion of a proceeding commenced or in progress under the legislation (s 33(1)(c)). Parliament may override these general presumptions (s 9). The intent of section 5AA(b) is to rebut both presumptions.

16 The Legislation Design and Advisory Committee provides guidance for when it may be appropriate to override these general presumptions. This recognises that retrospective legislation may be appropriate to provide certainty as a result of litigation in some circumstances. It sets out three factors to consider:[4]

16.1 there should be good reasons to depart from the principle that legislation does not have retrospective effect, for example the consequences of a judgment might be contrary to an important public interest;

16.2 Parliamentary legislation should not interfere with the judicial process in particular cases before the courts, and accordingly even if a law is retrospective, it should not deprive a litigant of the "fruits of their victory"; but

16.3 in rare cases, there may be good reasons for a law to be both retrospective and apply to completed or pending cases, for example "*if the policy reasons for enacting retrospective legislation in the first place would be undermined by leaving intact the litigants' victory or potential victory*."

17 The circumstances of Mr Smith's proceedings justify the proposed amendment having retrospective effect, and applying to Mr Smith's own proceeding:

17.1 The relief sought by Mr Smith would undermine the policy intent of the CCRA regime which applies emissions budgets on an economy-wide basis and uses a market-based approach, in the form of the ETS, to drive economically efficient emissions reductions. In contrast, the relief sought by Mr Smith would distort the ETS market by requiring proportionate reductions by all New Zealand businesses, irrespective of which enterprises can reduce emissions most efficiently. It is therefore contrary to an important public interest.

[4] Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 12.2.

17.2 At this stage of the proceeding, Mr Smith does not have any established rights or "fruits of victory" to protect. He has avoided having his claim struck out for not disclosing a reasonably arguable cause of action. However, it is uncontroversial that Mr Smith is seeking a novel application of the law of nuisance and negligence and attempts to establish a novel duty in respect of climate change. The Supreme Court expressly records that its judgment should not be read as indicating that Mr Smith or the New Zealand public have the legal rights that he asserts.

17.3 Mr Smith's claim does not seek the recognition of alleged historic rights or seek financial or other redress for alleged historic damage. Instead, it is a forward-looking 'regulatory-style' claim that seeks to prevent alleged future harm to Mr Smith's interests by regulating the future conduct of the defendants (and others like them). Consequently, the presumption against retrospectivity is not engaged in the same was as it would be – for example – by a negligence claim seeking damages for an act that has already occurred.

17.4 As noted, Mr Smith's statement of claim is principle in the nature of a representative action extending to all businesses in New Zealand:

(a) Fonterra is preparing an application seeking representative defendant orders (i.e., an order that would recognise that the defendants are being sued as representative of the New Zealand economy, and accordingly that any outcome should bind all other members of the representative group); and

(b) Mr Smith's own statement of claim anticipates that it will "*cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions*".[5]

17.5 As such, the nature of Mr Smith's claim means that any legislative amendment which *excluded* Mr Smith's proceeding would undermine the effectiveness of that amendment and the public interest that it is designed to protect.

[5] Statement of Claim at [89].