



# A CHALLENGING ENVIRONMENT

In this article, we consider two recent challenges to framework climate change laws, and the tensions that exist when such important laws are put into place.

As the realities of climate change become apparent, more and more countries are enacting framework climate change laws to mount a domestic response to the global challenge. The sufficiency of these laws, and the effectiveness of their implementation, are being tested through litigation. UK law firm Beale & Co and New Zealand's Hesketh Henry join together to discuss.

In this article, we consider two recent challenges to framework climate change laws: Friends of the Earth, ClientEarth and Good Law Project v Secretary of State for Business, Energy and Industrial Strategy in the UK<sup>1</sup> and LCANZ v New Zealand Climate Change Commission in NZ.<sup>2</sup> These cases demonstrate the tensions that exist even when (or perhaps necessarily when) such important laws are put into place.

## WHAT ARE FRAMEWORK CLIMATE CHANGE LAWS?

Framework climate change laws adopt an 'entire-economy' approach to the domestic mitigation of carbon emissions. Some incorporate provisions for adaptation to climate change risk, others are exclusively preoccupied with reducing greenhouse gases.<sup>3</sup>

The UK was at the forefront of framework climate change law when it established the Climate

Change Act 2008 ('UK Act'). Many other jurisdictions have since followed. In 2019, NZ amended its Climate Change Response Act 2002 ('NZ Act') to upgrade that legislation to the framework model.

### The Net Zero Target

Both the UK Act and the NZ Act record each country's ambition to achieve net zero for greenhouse gas emissions<sup>4</sup> by 2050 (the 'Target'). Net zero is reached when the amount of gas added to the atmosphere is no more than the amount that is removed from it.

In order to deliver this, they adopt a system of emissions budgets to carve out the pathway to the Target ('Budgets'). Each budget commits to a specific reduction of emissions across a pre-determined timespan. The idea is that Budgets break down the pathway to the Target to manage and monitor progress towards its achievement.

Both the Target and Budgets are common features of framework climate change laws, with minor deviation across jurisdictions. For example, Sweden's framework law enshrines a net zero Target of 2045 instead of 2050.

### Expert Advisory Bodies

Most framework climate change laws establish an independent scientific advisory body to guide policymaking. Both the UK's Climate Change Committee (the 'Committee') and NZ's Climate Change Commission (the 'Commission') consist of scientists with significant climate expertise. This is necessary - climate change is a highly technical and rapidly evolving area of science.

In NZ, the Commission is tasked with providing "independent expert advice to the Government on mitigating climate change"<sup>5</sup> and "must monitor and review the government's progress towards its emissions reduction".<sup>6</sup> In the UK,

the Committee must advise the Secretary of State for Business, Energy and Industrial Strategy ('Secretary of State') on the level set for each Budget, the respective contributions of sectors, and must also monitor and review progress towards the Target.<sup>7</sup>

Not all analogous expert bodies in other jurisdictions advise the government. The Finnish equivalent, for example, merely collects and itemises research data and does not advise in relation to policy.

#### Economic Considerations

Both the UK and NZ Acts provide for certain factors outside of emissions reduction to be considered by the relevant minister and climate change advisor. The UK Act requires both the Secretary of State and the Committee to consider sectoral opportunities for significant emissions reductions, or in other words, the 'low-hanging fruit' of the economy - where emission reduction will be easiest.<sup>8</sup> The NZ Act goes a step further, setting out specific considerations that must be held by the Commission when carrying out its duties, including "social, cultural... circumstances" and "likely economic effects".<sup>9</sup>

Both mechanisms, in effect, introduce an economic check and balance. This speaks to

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the central question of climate change policymaking: at what point does the pathway to net zero become so steep as to cause unacceptable harm to current or future prosperity? Mitigation pathways can be thought of as a sliding scale of options, each representing a variety of trade-offs that the policymaker must consider. Generally, this is not an appetising menu. Pathways that are steeper later, i.e., cut the most emissions post-2035/40, are the most expensive options, both economically and ecologically.

#### JUDICIAL REVIEW OF FRAMEWORK LAWS

In a judicial review proceeding, a court is asked to assess whether an action or decision made under a legal power was made in accordance with the law. The following two judgments, both delivered in 2022, review the exercise of functions under the UK Act and the NZ Act respectively.

#### FOE judgment

A coalition of NGOs in the UK filed a claim against the Secretary of State for failures under the UK Act. Specifically, the applicants asserted that (a) the UK's Net Zero Strategy was not a policy that would enable Budgets under the Act to be met and (b) that the Secretary of State's report on the latest Budget to Parliament was incomplete and/or misleading.

The Court found in favour of the NGOs, finding that not only did the Secretary of State lack the information required to execute the Net Zero Strategy properly, but his subsequent report did not explain its implications or its implementation. As a result, the public and Parliament were unable

to scrutinise the Net Zero Strategy and the government was ordered to produce a compliant report by March 2023. The government has confirmed that it will not be seeking to appeal.

#### LCANZ judgment

A group of climate-concerned lawyers issued proceedings challenging the Commission's advice to the Climate Change Minister regarding the Budgets to be set under the NZ Act and the level of reductions to which NZ should commit by 2030 as part of the global effort to limit global warming to 1.5°C above pre-industrial levels ('the global 1.5°C effort'). In essence, they asserted that the Commission (a) mistakenly applied modelling by the Intergovernmental Panel on Climate Change ('IPCC') to a gross-net rather than a net-net measure<sup>10</sup> (b) applied an incorrect accounting methodology and (c) prioritised an 'affordable' rather than expeditious pathway to net zero. The advice was not consistent with the level of reductions necessary to comply with the IPCC global pathway and was accordingly irrational, unreasonable and inconsistent with the purpose of the NZ Act.

The Court found that neither the Commission nor the Minister were operating under a mistake or error. The Commission deliberately chose to deviate from the IPCC modelling, it made this explicit to the Climate Change Minister, and it justified why the IPCC model was less useful when considering NZ's domestic profile. The Court was satisfied that the Commission had sufficient discretion under the NZ Act to adopt its preferred accounting methodology.



The Court confirmed that the Commission's advice would not put NZ on track to reduce its domestic net emissions by 2030 as per the IPCC global pathways, but held that this was not a requirement of the NZ Act. The advice would put NZ on track to meet the net zero target for carbon sooner than 2050 and the Commission's advice was not irrational or unreasonable.

## THEMES IN THE JUDGMENTS

### Reviewability

The judgments involved challenges to the advice of the expert advisory bodies set up under the framework legislation. As noted, both the Committee and the Commission have considerable influence in the setting of Budgets and general domestic climate policy. By expanding the 'reach' of such bodies to consider factors such as industry contribution, social circumstances, and economic impacts, their remit can also be said to veer from the scientific to the political. This is a key factor when considering the availability of judicial review.

In FOE, the issue of reviewability was surprisingly straightforward. The Secretary of State did not argue that his functions under the UK Act, nor those of the Committee, were non-justiciable via judicial review. The Court agreed, stating that "he was right not to do so".<sup>11</sup> The Court did not venture too deeply into questions of reviewability in FOE, but recent UK cases have shown that judicial review is not always available with such ease.<sup>12</sup>

In LKANZ, reviewability was a contested issue. The Commission argued that its advice to the Climate Change Minister was an expression

of opinion, rather than the exercise of a statutory power, and was not subject to review by the Court. The Court disagreed, finding that the public nature of the advice, the statutory framework within which it was given, and the importance of climate change generally meant the Commission's advice had public consequences that were separate from the Climate Change Minister's ultimate decision and which warranted the availability of judicial review.

### Standard of review

The Court in LKANZ also held that the significance of the Commission's advice, within the context of a climate emergency, justified a more exacting standard of review than would otherwise apply. This involved an assessment of whether the challenged decision (a) had been reached on sufficient evidence (b) had been fully justified and (c) was open to a reasonable decision maker in light of the legislative purpose (recognising that reasonable decision makers could reach different decisions). The Court did note there was a need for caution when intervening in the decisions of a specialist expert body tasked with advising on policy issues within a broad legislative framework.

NZ's strategy for achieving its Budgets includes using the public sector's buying power to help drive the transition to a low-emissions economy. Commercial decisions which have a substantial public interest component may be subject to judicial review.<sup>13</sup> The Court's willingness to apply a higher review standard when climate change issues are at stake may have wider significance beyond the LKANZ judgment (although the pivotal role of the Commission under the NZ

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Act was an important factor in that decision).

### Enforceability

A key criticism levelled against framework climate change laws is that the Target is often non-binding, reducing opportunities for judicial intervention. Climate activists argue that a good idea in theory will only be effective if enforceable in practice.

The NZ Act states that the Climate Change Minister has a duty to set Budgets and ensure that they are met.<sup>14</sup> The Budgets must be set with (among other things) a view to meeting the Target and contributing to the global 1.5°C effort.<sup>15</sup> If the Target or an emissions budget is not met, a court may make a declaration to that effect and award costs. Otherwise "no remedy or relief is available... and the 2050 target or an emissions budget are not enforceable in a court of law...".<sup>16</sup>

In the LKANZ judgment, the Court held that contribution to the global 1.5°C effort was an aspiration. While it was one factor to be considered by the Commission, it did not impose an independent obligation or duty. This decision might be thought strange given the emphasis on the Paris Agreement's temperature goal in the NZ Act. The Climate Change Minister has said he will review this aspect of the legislation.

In the UK, the Target is binding on the relevant Secretary of State, who has a “duty...to ensure that the net carbon account for the year 2050” is in line with net zero.<sup>17</sup> However, this provision may not be as strong as it appears in practice. The FOE decision indicates that there is no duty to ensure the Budgets are capable of achieving the UK Act’s binding Target. Policies adopted pursuant to the UK Act need only be “‘effective’ or efficacious” for meeting emissions reductions.<sup>18</sup>

Those tasked with drafting future framework climate change laws may want to take note of this aspect of these judgments - if the intent is to impose binding duties on government, stronger and clearer language is required.

#### Methodology

The array of methodologies applicable to climate change data for the preparation of Budgets is extensive. Various efforts are being made to harmonise how we think about combating climate change, whether that be via economic activity (such as the EU taxonomy for sustainable activities); corporate social responsibility (note the ESG indexes that have cropped up in the past few years); or how we quantify emissions for the domestic context. This latter point was considered in LCANZ, highlighting the perils of data interpretation in such a complex and highly technical space.

In LCANZ, the plaintiff argued the NZ Act mandated the use of a particular accounting system. The Court disagreed, holding the language used in the Act allowed the Commission to advise on the methodology that should be used

for domestic carbon accounting.<sup>19</sup> The plaintiff was concerned that the accounting system recommended by the Commission overreported emissions reductions for the first few years, and the government might switch systems when it becomes advantageous to do so in later years. The Court declined to speculate on this issue.

In the FOE case, the question was less about deviation from a particular methodology and more about incompleteness of data. The applicants argued that the Secretary of State had failed to “prepare such proposals and policies” to enable the Budgets to be met,<sup>20</sup> as his policies only spoke to 95% of reductions, leaving a 5% shortfall. In doing so, the Minister failed in his continuing duty to put the Committee’s advice into practice. Whilst this particular challenge was not against the Committee, but against the Secretary of State, it reflects the technicality and vigilance with which emissions reductions are measured and interpreted into policy.

#### Transparency

Just as the line between science and politics occasionally blurs for expert climate bodies, the space between data and policy leaves much room for debate and challenge. This is evident in both the LCANZ and FOE judgments.

In LCANZ, the Commission excluded forestry from its assessment of emissions in the base year used to measure domestic emissions reductions, resulting in a gross-net comparison, rather than the IPCC’s net-net approach. The plaintiff alleged this decision distorted the data, underestimating the emissions

required by 2030 to achieve the Target. The Court accepted the Commission’s approach was reasonable taking into account NZ’s forestry profile, but noted the data had “the potential to mislead” readers and it “might have been more transparent” for the Commission to be more explicit about the implications of its decision to deviate from the IPCC methodology.<sup>21</sup>

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In FOE, the applicants argued that the Net Zero Strategy failed to include the information legally required to discharge the Secretary of State’s reporting obligations under the Act. In other words, the applicants stated that the Secretary of State had breached his duty to account to the public. The Court agreed. It was concluded that the failure to explain the contribution of each policy to the Target, alongside the failure to account for timescales and the 5% shortfall, was a breach of his duty to account to the public on climate change policy.

Both rulings make clear the significant public interest dimension to climate change law and policy. Even where the relevant party is not in breach, as was the case in LCANZ, the Court will still ‘call out’ governments and advisers for even the potential for misleading the public.

**THE FUTURE**

Both the FOE and LKANZ judgments illustrate the increasing focus and scrutiny of government policy and legislation in the race to achieve net zero. This focus will have an impact on the commercial sector, which must inevitably bear a large share of the responsibility for reducing emissions and meeting Budgets and Targets.

As the framework climate change laws continue to develop and governments are increasingly held to account, we can expect to see continued development of legislation and policies to assist governments in meeting their obligations. The implementation of these laws and policies is likely to remain a fertile ground for litigation.

**REFERENCES**

1. R (on the application of Friends of the Earth, ClientEarth and Good Law Project) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin) ('FOE')
2. LKANZ v New Zealand Climate Change Commission [2022] NZHC 3064 ('LKANZ')
3. The NZ Act is an example of the former, the UK Act is an example of the latter.
4. The NZ Act excludes biogenic methane, which has a lesser target than net zero.
5. NZ Act, s.5A
6. NZ Act, s.5B
7. UK Act, ss.32-38
8. UK Act, s.34
9. NZ Act, s.5M(c) and (d)
10. The IPCC's modelling in a 2018 report compares net emissions in a base year with net emissions in the target year to derive a percentage reduction in those emissions. The Commission recommended that carbon offsets from forestry be excluded from the calculation of emissions for the base year due to NZ's forestry profile.
11. FOE, para 192
12. See R (on the application of Plan B) v Secretary of State for Transport [2020] EWCA Civ 214
13. See Montcrief-Spittle v Regional Facilities Auckland Ltd [2022] NZSC 138
14. NZ Act, s.5X
15. NZ Act, s.5W
16. NZ Act, s.5ZM(1)
17. UK Act, s.1(1)
18. FOE, para 170
19. LKANZ, para 253
20. As per s.13 UK Act
21. LKANZ, para 115 and 127

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