# Climate Change and the RMA:

## Consideration of *Greenpeace New Zealand Incorporated v Genesis Power Ltd* and *West Coast Ent Inc v Buller Coal Ltd*

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# Climate Change Effects and the Resource Management Act 1991

## Consideration of Greenpeace and Buller Coal

**Annabel Burgess**

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# INTRODUCTION:

Sir Geoffrey Palmer, arguably New Zealand's (NZ) leading climate change law expert, proclaims, "Climate change is the most urgent and far-reaching threat we face".[1] He agrees that international law can provide some encouragement to address this imminent issue, however there are inherent difficulties with the global framework that signify it cannot be relied on for a complete solution.[2] Palmer reiterates, often governments "pay lip service to such agreements however whether real progress will occur remains dangerously uncertain".[3] The failure of the Kyoto Protocol, one of the most significant international agreements on climate change, is a clear example of the flaws of international law to effectively manage environmental issues.[4]

This dissertation therefore is an assessment of NZ's ***domestic*** legal response to the inevitable onset of climate change.[5] It analyses NZ's current legal position focusing on the role of the Resource Management Act 1991 (RMA) and case law decided under this statute.

Environmental legislation by nature is notoriously challenging to interpret and apply.[6] Climate change law in NZ is one such environmental concern that illustrates this inherent difficulty. NZ domestic law relating to climate change has been subject to decades of change and degradation through enactments of Parliament and subsequent statutory interpretation. The following research will be centred on the decisions in ***Greenpeace***[7] and ***Buller Coal.***[8] These two cases emphasise the court's struggle to

[1] Sir Geoffrey Palmer, QC "New Zealand's Defective Law on Climate Change" (paper presented to the Faculty of Law and Centre for Public Law Victoria University of Wellington, Wellington, 16 February 2015) at [7].
[2] Ibid. For an in-depth discussion of the weaknesses in International Environment Law see: Geoffrey Palmer "New Ways to Make International Environment Law" (1992) 86 American Journal of International Law 259.
[3] Ibid.
[4] Richard N. Cooper " The Kyoto Protocol: A Flawed Concept" (Harvard University , FEEM Working Paper No 52.2001, July 2001).
[5] For an in-depth discussion of New Zealand's legal response to international obligations see: Sarah Baillie (LLB(Hons) Dissertation, University of Otago, October 2012).
[6] Edward Willis "The Interpretation of Environmental Law in New Zealand" (2010) 14 N.Z.J.Envtl.L. 135 at 135.
[7] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* [2008] NZSC 112; [2009] 1 NZLR 730.
[8] *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87; [2014] 1 NZLR 32.

grapple with the task of interpreting ambiguous and broad drafting whilst balancing complex legislative purposes and policies about the environment, especially climate change. This dissertation takes the stance that climate change law in NZ, as it stands, is defective in facilitating reductions in greenhouse gas (GHG) emissions and therefore NZ has limited ability to make effective contribution to mitigating climate change.

One might opine that as a relatively small country, that contributes a mere 0.4% to net global GHGs[9], NZ is not in a position to influence change nor make any measurable difference. Current global demand for coal is unlikely to reduce simply due to the actions and legal position of NZ. Furthermore, any actual reductions in GHGs domestically would not make significant influence to overall global emissions.[10] However, NZ on a per capita basis is the fourth largest emitter of GHGs among developed countries.[11] According to ***Climate Change Action Europe***, NZ is ranked 43rd which is one place above the United States and categorised as "very poor".[12] Even under the guidance of The Kyoto Protocol, NZ's emissions have in fact increased some 25 per cent.[13] These statistics highlight the gap between NZ's image as an "environmentally conscious world leader and it's actual performance… to reduce greenhouse gases".[14] NZ's domestic law is neither as effective at facilitating a reduction in emissions, nor as environmentally pro-active as people would like to believe[15].

It would be naive to suppose that NZ can continue at current levels of emissions, defer responsibility to other nations and international law without there being consequences on the climate. Continual pollution the global commons with GHGs, and leaving the issue to other countries, would be validating Hardin's Tragedy of the Commons.[16] Furthermore, waiting for the adversity of climate change to set in would make

[9] Dana Rachelle Peterson *The greenhouse effect and climate change: A resource document for New Zealand MP's* (Parliamentary Library, Background Paper No24, September 2001) at 29.
[10] Ibid at 2.
[11] Jan Burck, Franziska Marten and Christopher Bais *Climate Change Performance Index Results 2015* (German Watch, December 2015) at 9.
[12] Ibid at 27.
[13] Alon Tal "Tried and True: Reducing Greenhouse Gas Emissions in New Zealand Through Conventional Environmental Legislative Modalities" (2009) 12(1) Otago LR 149 at 149.
[14] Ibid.
[15] Cath Wallace "The 'clean green' delusion: Behind the Myths" (1997) New Zealand Studies 22 at 29.
[16] Garrett Hardin "The Tragedy of the Commons" (1968) 162 *Science* 1243. "This principle denotes a situation where individuals acting independently and rationally according to each persons own self interest, behave contrary to the best interests of the group as a whole by depleting some common interest".

transitioning the law "much more painful" when it becomes essential to do so.[17] NZ is in a prime position to ratify effective climate change law due to its reputation as environmentally progressive and its access to an abundance of renewable energy, which has the ability to inform policy.[18] Economist Paul Krugman stated in regards to confronting climate change, "We'll find it cheaper and easier than anyone imagines[19], all that stands in the way of saving the planet is a combination of ignorance, prejudice and vested interests".[20]

This dissertation will focus on the role of the leading environmental statute in NZ, the RMA. Although other legislation will be mentioned, the RMA seems the most removed from the issue and so worthy of attention. Of key concern is the stark difference in outcome and statutory technique used by the majority compared to the Chief Justice of the Supreme Court in two leading cases on climate change under the RMA (***Greenpeace***[21] and ***Buller Coal***[22]). It seems illogical and unusual that the highest Court in NZ would have such contrasting techniques, outcomes and such high debate surrounding the topic.[23] Due to the unsatisfactory results in both cases, this research focuses on why the majority reached its conclusion, if they were correct and if there are any other ways that climate change issues could be resolved by the courts.

Chapter One assesses the two statutes that govern GHG emissions and climate change in NZ – the RMA[24] and Climate Change Responses Act 2002 (CCRA).[25] For the purposes of this dissertation, the CCRA is relevant to mention in order to establish the national framework but will not be core part of the discussion. This chapter will additionally highlight some of the gaps and insufficiencies in the legislation.

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[17] Sir Geoffrey Palmer, above n 1, at [7].
[18] Alec Dawson (ed) *The Big Ask: One Key Step for Real Climate Change* (Generation Zero, July 2014) at 4.
[19] Paul Krugman "Errors and Emissions-Could fighting Global warming be cheap and free?" (2014) The New York Times < http://www.nytimes.com/2014/09/19/opinion/paul-krugman-could-fighting-global-warming-be-cheap-and-free.html>.
[20] Paul Krugman "Salvation Gets Cheap" (2014) The New York Times < http://www.nytimes.com/2014/04/18/opinion/krugman-salvation-gets-cheap.html?_r=0>.
[21] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[22] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[23] Ed Steane and Teresa Weeks "Climate Change and the RMA: implications of *Greenpeace New Zealand Inc v Genesis Power Ltd*" (2009) RMJ 1 at 3.
[24] The Resource Management Act 1991.
[25] The Climate Change Response Act 2002.

Chapter Two provides a discussion of the traditional approaches to statutory interpretation adopted by NZ in general, the orthodox approach to making decisions under the RMA and an analysis of why environmental law is fundamentally difficult to interpret. This analysis is essential to set the scene for considering the outcomes and statutory interpretation adopted by the judges in the leading and controversial cases on climate change.

Chapter Three is a close analysis of the ***Greenpeace***[26] lines of cases and Chapter Four is an analysis of ***Buller Coal.***[27] Both chapters outline the statutory interpretation techniques adopted by the minority and majority judges and provide critique of the chosen positions. The author suggests an opinion as to what outcomes should have been preferred and reasons for this. Nevertheless the chapters conclude that the highest judicial authority in NZ has upheld the decisions and so unless Parliament makes further amendments to the statute the law will remain as it stands.

The final chapter analyses the policy surrounding these decisions and what the role of the RMA should be in dealing with climate change. Both cases relied on the supposed purpose of the Act that Parliament intended for climate change to be dealt with at a national rather than regional or local level. The chapter outlines why this is a fundamental policy flaw in the current law and that pure national response should not be endorsed by Parliament. Alternatively, if the law is to be guided nationally then the mechanisms to do this need to be in place before removing the consideration of climate change from local authorities under the RMA.

Overall the law relating to climate change in NZ is effectively unfit for purpose.[28] There are significant gaps and a lack of consideration of GHG emissions in NZ. There are limited incentives, economic or legal, to reduce emissions and therefore NZ is left severely defective in addressing climate change.

[26] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[27] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[28] Sir Geoffrey Palmer, above n 1, at [7].

# CHAPTER ONE:

# Climate Change Law in New Zealand:

This chapter outlines the legislative response and regulatory framework that the NZ Government has taken to address climate change. Two primary statutes govern climate change law in NZ, the RMA[29] and the CCRA.[30] The operation and function of these statutes will be examined below and how they attempt to facilitate the reduction of GHG emissions in NZ. The main focus of the chapter is on the role of the RMA, however it is worth mentioning the CCRA for some contextual reference. Some initial suggestions will be discussed as to gaps in the legislation, which provides the background for subsequent case law that arose.

## I. The Climate Change Response Act 2002:

The Kyoto Protocol concluded in 1997 and although NZ has not continued to undertake obligations under this international agreement[31] it was the catalyst for real debate surrounding climate change in NZ.[32] The CCRA was enacted one month prior to NZ becoming a party to the Kyoto Protocol in December 2002. The CCRA is NZ's nationally guided legislative response to regulate GHG emissions and reach targets set out in Kyoto. The Act additionally sets out the registry to issue, trade and retire international and domestic carbon credits and since 2008 establishes the NZ Emissions Trading Scheme (ETS) as the specific means to meet Kyoto targets.[33]

In operation the ETS is a nationally lead, market-based tool that seeks to internalise the "cost" of emissions to those participating in the scheme. Emitters must "surrender"

[29] The Resource Management Act 1991.
[30] The Climate Change Response Act 2002.
[31] WWF "NZ Government's climate target 'a failure' (2013) WWF <http://www.wwf.org.nz/?11042/NZ-Governments-climate-target-a-failure>.
[32] Vernon Rive "International Framework" Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 49 at [61].
[33] Vernon Rive "New Zealand Climate Change Regulation" Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 165 at [186].

carbon credits ("NZU'S") that are bought from or gifted by the government and those who reduce emissions through the development of carbon sinks such as forests will gain NZU's from the government. These NZU's can be traded on the carbon market where those who reduce emissions profit, and those who create them will pay. Historically society was left to face the negative externality of GHGs, but under this new scheme emitters are forced to bear the burden of their own actions. Theoretically this provides economic incentives to reduce GHGs in order to reduce the costs of development.

However, the ETS as established by the 5th Labour government was short-lived. With the changeover to a National Government in 2008[34] the ETS was significantly scaled back. The Commissioner for the Environment, Dr Jan Wright, dubbed these changes to the ETS as "a farce".[35] There is strong research outlining that the ETS is a flawed carbon market[36], notably due to the exclusion of agriculture, NZ's largest GHG emitting sector.[37] An even more important problem with the ETS is that the price on NZU's has almost completely crashed. The NZ Government has failed to limit foreign offsets, which has resulted in over supply bringing the price of NZU's down.[38] Offset units, as of 2011 were 20c per tonne, which means the price of offsetting emissions is incredibly cheap.[39]

The forestry sector was incredibly devastated due to the lack of demand and competition for carbon offsets.[40] This has played a significant role in the failure of the scheme in general. For the purposes of this dissertation it is not essential to further inquire in detail into the scope of these nuances. However, it will be accepted that there are significant gaps in the national policy in its current form and that it does not provide strong incentives to reduce emissions but instead protects the economic interests of NZ's largest emitters.[41]

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[34] Ibid at [188].
[35] Parliamentary Commissioner for the Environment "Submission on the Climate Change Response (Emissions Trading and Other Matters) Amendment Bill 2012".
[36] Jessika Luth and Lizzie Chambers "Reflections and Outlook for the New Zealand ETS – must uncertain times mean uncertain measures?" (2014) 10(2) Policy Quarterly 57.
[37] Paul Young (ed) *A Challenge to our Leaders: Why New Zealand needs a Clean Energy Plan* (Generation Zero, May 2014) at 30.
[38] Jessika Luth and Lizzie Chambers above n 36.
[39] Paul Young above n 37 at 30.
[40] Dana Rachelle Peterson above n 9 at 41.
[41] Geoff Bertram and Simon Terry *The Carbon Challenge: Response, Responsibility and the Emissions Trading Scheme* (Wellington, Bridget Williams Books, 2010), at iii.

What is notable is that the NZ ETS only covers emissions created within NZ. This means that only emissions from fossil fuel activities themselves and by-products of direct extraction are subject to the scheme. This will become relevant in consideration of Parliaments intention to nationalise NZ's climate change management in subsequent cases. The ETS and the subsequent cases under the RMA mean that emissions that derive from combustion of exported products that were originally mined in NZ are not accounted for under the ETS, or anywhere in NZ's climate change law.

## II. The Resource Management Act 1991:

The RMA is the primary environmental legislation in NZ. Part II of the Act outlines the purpose and principles to be weighed and balanced by decision makers when considering consent applications and making regional or local plans. Section 5 outlines the main purpose of the RMA as "sustainable management of natural and physical resources".[42] To achieve "sustainable management" decision makers under the RMA must "recognise and provide for matters of national importance",[43] have "particular regard to other matters"[44] and "take into account the principles of the Treaty of Waitangi"[45]. The combined sections under Part II create the foundations of the RMA that provides core guidance to decision making, Randerson J highlighted the fundamental importance of this Part in ***Auckland City Council v John Woolley Trust***:[46]

> "Part II is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part II is clearly excluded or limited in application by other specific provisions of the RMA."

In most instances decisions under the RMA are made at a local and regional level.[47] This is based in the principle that those closely related to the resources affected are most apt

[42] The Resource Management Act 1991, section 5.
[43] The Resource Management Act 1991, section 6.
[44] The Resource Management Act 1991, section 7.
[45] The Resource Management Act 1991, section 8.
[46] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
[47] Allison Arthur Young and Jess Riddell "Climate Change and the RMA" (2014) NZLJ 82 at 82.

to carry out decision making.[48] Section 17 of the RMA provides a wide duty to "avoid, remedy or mitigate any adverse effects on the environment".[49] The definition of "effect" includes "any cumulative effects which arise over time or in combination with other effects…" and also potential effects that have a "high probability" or a "high potential impact".[50] The term "environment" is also broad and includes "ecosystems and the constituent parts" as well as both "natural and physical" resources.[51]

On "first blush", due to the wide scope of considerations for local and regional councils and specific mention of climate change in s7 of the RMA, the management and consideration of GHGs and consequently climate change in decision-making would seem to be encompassed by the RMA.[52] However, through amendments of the Act and statutory interpretation, the law has significantly narrowed the scope for local and regional councils to consider GHGs in decision-making. Therefore the role of the RMA to effectively address climate change in NZ is decidedly restrained.[53]

## III. Role of the RMA in addressing Climate Change pre-2004

The RMA was enacted prior to climate change being recognised as a global issue[54]. This meant climate change was not directly acknowledged in 1991 law. Leading up to 2004 the Government and Courts made attempts to recognise the RMA as an important regulatory tool to regulate GHG emissions, albeit a varied approach was adopted.

One landmark case was the ***Environmental Defence Society v Taranaki Regional Council*** where a 'call-in' was made to a board of enquiry.[55] The board assessed the Stratford Power Station consent application and recommended that a condition be imposed on the consent to require the company to make and maintain carbon sinks to

[48] Ibid.
[49] The Resource Management Act 1991, section 17.
[50] The Resource Management Act 1991, section 3.
[51] The Resource Management Act 1991, section 3.
[52] Allison Arthur Young and Jess Riddell above n 47 at 82.
[53] Sir Geoffrey Palmer, QC above n 1 at [7].
[54] Oliver Houck "Tales from a Troubled Marriage: Science and Law in Environmental Policy" (2003) 302 Science 1926 at 1926.
[55] *Environmental Defence Society v Taranaki Regional Council* NZEnvC A 184/2002.

offset the GHG emissions produced[56]. The Minister for the Environment instead included a reduced condition that the consent holder "take such steps … to avoid, remedy or mitigate the effects of the additional amounts of carbon…"[57]. Although this was a lesser condition, that gave no specific tool to reduce the emissions, the recognition that some condition ought to be imposed, emphasised the Governments view that the RMA was a tool to be used to regulate GHG emissions.

Other cases at that time were less convinced the RMA should be used in such a regulatory way. Decisions such as ***Environmental Defence Society v Auckland Regional Council***[58] stressed the significance of climate change as a global and highly important issue. Despite this acknowledgment the case did not require a condition on the requested consent. The cases suggested that the RMA ought not to have such an "ad hoc" approach to addressing climate change mitigation through imposing conditions on individual applications but rather a unified national approach should be favoured.[59]

The role of the RMA and the authority of local councils to address climate change at a local level was controversial and at a point that required clarification. In 2003 a Bill[60] was introduced to resolve the uncertainties and disputes surrounding the role of the RMA in considering climate change in decision-making. This was ratified in 2004 as the Resource Management (Energy and Climate Change) Act 2004[61], and sought a nationally guided approach.

## IV. The 2004 Amendments

The following sections of the Resource Management (Energy and Climate Change) Amendment Act 2004 are relevant.

[56] Board of Inquiry Proposed Taranaki Power Station Air Discharge Effects (Report and Recommendation of the Board of Enquiry Pursuant to Section 148 of the Resource Management Act 1991, 1995.)
[57] *Environmental Defence Society v Taranaki Regional Council* above n 55.
[58] *Environmental Defence Society v Auckland Regional Council* [2002] NZRMA 429.
[59] Ibid at [511].
[60] Resource Management (Energy and Climate Change) Amendment Bill 2003.
[61] Resource Management (Energy and Climate Change) Amendment Act 2004.

Section 3 outlines the purpose of this Act to:

(a) Make explicit provision for all persons exercising functions and powers under this Act to have particular regard to (i) the efficient and end use of energy; (ii) the effects of climate change; and (iii) the benefits to be derived from the use and development of renewable energy.
(b) To require local authorities to (i) plan for the effects of climate change; but (ii) not to consider the effects on climate change of discharges to air of greenhouse gases

To achieve this purpose three new principles were included in Section 7 to be considered by those exercising functions under the Act:

(ba) The efficiency of the end use of energy
(i) the effects of climate change
(j) the benefits to be derived from the use and development of renewable energy

In addition to these principles the Amendment added three new sections:

Section 70B that allows Regional Councils to consider effects on climate change of the discharge of Greenhouse Gases, so long as it is no more restrictive than regulations made under s43.

Section 104E that prohibits a consent authority from having regard to the effects on climate change of greenhouse gases when considering applications for discharge to air or coastal permits, except to the extent that the use and development of renewable energy enables a reduction in absolute or relative terms.

Section 104F that relates to the prospective implementation of national environment standards providing for the consideration of climate change in discharge to air and coastal permits.

### a) Initial Consequences of the Amendments:

The effect of the above sections is briefly summarised in ***Todd Energy Limited v Taranaki Regional Council and Fonterra Co-operative Group Limited***.[62] At the time of

[62] *Todd Energy Limited v Taranaki Regional Council and Fonterra Co-operative Group Limited* Decision No. W101/2005.

that case the provisions had not been formally ratified; however, the case states that the Amendments were effectively a change in the law (rather than simply restating it).[63] It identified that the Amendments significantly reduced the ability of local authorities to consider GHGs in making rules in regional plans and when granting consents for discharges to air and coastal permits.

The language of the legislation seemed to clearly prohibit the consideration of climate change when making regional plans and granting consents for two of the five types of consents (discharges to air and coastal permits). However, the Select Committee expressed concern that there was a lack of clarity in the provisions.[64] Despite this concern the final form of the law was left ambiguous and confusing.[65] This has resulted in expensive and lengthy litigation to determine the scope of the RMA in addressing climate change, especially in cases relating to non-renewable energy development.[66]

**b) Decisions relating to renewable energy:**

It is worthy to note that applications relating to renewable energy have not suffered the same interpretation confusion as non-renewable sources.[67] Case law emphasises that the climate change provisions in s7 are powerful factors in granting consents for renewable energy projects. Justice Whiting in ***Genesis Power and anor v Franklin District Council***[68] held that Parliament intended for climate change and the development of renewable energy to be a factor in considering proposals. The benefits derived from the renewable energy project was considered a weighty factor when balancing the principles under s104 and Part II of the Act. Despite the adverse effects on the visual environment, natural character and Maori Cultural affiliation to the coastal environment the consent was still granted.[69] Similarly in ***Unison Networks Limited and ors v Hastings District***

[63] *Ibid*.
[64] Resource Management (Energy and Climate Change) Amendment Bill, as reported from the Local Government and Environment Select Committee at 6-7.
[65] Vernon Rive above n 33 at [183].
[66] Sir Geoffrey Palmer, QC above n 1 at [15].
[67] Justice Laurie Newhook, Judge of the Environment Court "Climate Change and the RMA" (conference paper, 26 September 2008) at [11].
[68] *Genesis Power and anor v Franklin District Council* [2005] NZRMA 541 (Decision No. A148/2005.
[69] Justice Laurie Newhook above n 67 at [12].

***Council***[70] the Court held that it would be appropriate to allow the proposal for a renewable energy wind farm to proceed despite the effects it had on an outstanding natural landscape and Maori Cultural concerns.

The new climate change considerations in s7 are no "silver bullet" to granting resource consents because the other principles in that provision can be weighed and balanced against them.[71] However, the decisions and balancing process discussed above suggest otherwise. Whether or not one agrees with the balancing process of the s7 principles used by the courts in these cases, proposals under the new law, which relate to infrastructure based on renewable resources, clearly intend for climate change to at least be a mandatory consideration in decision making.

**c) Gaps in the legislation:**

Although the consideration of the positive benefits of renewable energy projects was clearly mandated by the Amendment Act, the consideration of climate change in other areas was left ambiguous. Deciding on proposals for non-renewable activities, for other land use and other types of consents and for the end use of by-products that were exported overseas, were not expressly excluded from considering climate change but have been subject to expensive and lengthy litigation. On two occasions appeals have been heard as far as the Supreme Court in ***Greenpeace***[72] (which analysed the consideration of emissions of non-renewable energy projects) and ***Buller Coal***[73] (which looked at the ability to consider emissions in ancillary consents and for offshore combustion of coal that was produced in NZ). The unclear language of the statute and the inherent conflicts in environmental management are reasons for these controversial cases. These cases will be later discussed in chapter three.

[70] *Unison Networks Limited and ors v Hastings District Council* Decision No. W058/2006.
[71] Vernon Rive above n 33 at [185].
[72] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[73] *West Coast Ent Inc v Buller Coal Ltd* above n 8.

# CHAPTER TWO:

# The Traditional Approach to Statutory Interpretation in New Zealand and the bias in the law:

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There are inherent difficulties in the interpretation of environmental law because "environmental statutes are not like other statutes".[74] Therefore before analysing the controversial cases that restrict climate change law, it is relevant to discuss the traditional approach to statutory interpretation in NZ, the general approach to construing the RMA and the inherent difficulties that surround environmental law. This chapter will look at these elements in turn. The judges in both ***Greenpeace***[75] and ***Buller Coal***[76] applied varying statutory tools and reasoning, which lead to their contrasting outcomes. Gaining an understanding of the orthodox interpretation tools used in NZ and the underlying bias embedded in environmental law will help to justify the judge's positions and guide an assessment of the appropriateness of their rulings.

## I. The traditional approach to statutory interpretation in New Zealand

The fundamental object of the courts is to ascertain the meaning of the words Parliament has used.[77] Historically, a more literal approach to interpreting the meaning of a statute was favoured by the NZ Courts. Justice Stephen in ***Vallance v Falle*** stated in 1884 "the best way of finding out the meaning of a statute is to read it and see what it means".[78] This emphasises that the plain dictionary meaning of a word was seen as the most accurate way to read a section.

However, this was widely critiqued because "neither systems or people can anticipate all the situations to which legislation will be applied" and "words are not precise

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[74] Edward Willis "The Interpretation of Environmental Law in New Zealand" (2010) 14 N.Z.J.Envtl.L. 135 at 135.
[75] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[76] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[77] J J McGrath "Reading Legislation and Ivor Richardson" (2002) 53 VUWLR 1017 at 1018.
[78] *Vallance v Falle* (1884) 13 QBD 109, 112 (QB).

instruments for conveying ideas".[79] Literal interpretation can be blind to the wider purpose of a provision and thus lead to anomalous outcomes in a case.[80] To avoid such results there has been a clear shift over time, which has mandated the purposive approach as dominant in NZ courtrooms.[81]

Guidance for statutory interpretation in NZ is currently governed by the Interpretation Act 1999.[82] Section 5 outlines the overarching rules for the Courts, as to how they should ascertain the meaning of a provision:

> Notably, Section 5(1) specifies,
>
> "The meaning of an enactment must be ascertained from its *text and in light of its purpose*"

***R v Kahu*** described s5 as a statutory mandate to the courts to adopt a purposive approach when construing a provision.[83] Sir Ivor Richardson additionally endorses on a number of occasions that scheme and purpose are the "twin pillars of modern interpretation".[84] Under this approach wider considerations influence interpretation, for example in ***Commerce Commission v Myriad Marketing Ltd*** a sweet jar that resembled a baby's bottle came within the definition of "toy" for the purposes of the Act.[85] This is clearly not the natural and ordinary meaning of "toy", however it would be contrary to the overall purpose of the legislation to hold otherwise.

One key limit is worth noting to the general purpose-approach in NZ and on the Interpretation Act 1991; the Courts must be careful not to "stretch" the words of a provision to rewriting text.[86] Section 5(1) should be considered in "harmony"[87] so that

[79] J J McGrath above n 77 at 1018.
[80] John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981 at 983.
[81] J J McGrath above n 77 at 1025.
[82] Interpretation Act 1999, Section 5.
[83] *R v Kahu* [1995] 2 NZLR 3 (CA).
[84] J J McGrath above n 77 at 985.
[85] *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103, 404 (HC).
[86] JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2009) at 225.
[87] Ibid at 140.

the balance is achieved between literal meaning and wider purpose. If the words are clear but infringe on a wider purpose the judges cannot override the clear words.

Notwithstanding this limit, the purpose of an enactment is still core to decision-making in NZ. Drafters of NZ statutes have this in mind when constructing law, which is evident by specific purpose sections included at the start of most pieces of legislation.[88] Although adopting a purpose approach appears to be the trend of the NZ judiciary, there will always be exceptions to the general rule[89] and this must be kept in mind for the purposes of this dissertation.

## II. The general approach to making decisions under the RMA:

The RMA on face value warrants a purpose approach to interpretation due to the nature of the legislation itself and the clear shift towards purposive interpretation of the NZ courts in general. Environmental statutes such as the RMA are set within a broader policy context; it is therefore natural that issues of interpretation are resolved in light of this context.[90] As Sir Ivor Richardson has advocated "you cannot read an Act like that in a vacuum".[91] A central strength of the RMA is that decisions are made in a "cohesive integrated" manner.[92] As such, decisions avoiding reference to the purpose or context of the legislation undermines this key strength of the RMA as a whole. Limiting interpretation of environmental law, which is driven by "value-laden" concepts, to one single literal definition, is overly restrictive and it is difficult to see how taking this sort of construction would resolve conflicts.[93] Although some nations interpret environmental law in a purely textual or literal way, this is not the general approach accepted in NZ.[94]

[88] Law Comission *The Structure of Legislation* (NZLC R35, 1996) at 35.
[89] John Burrows above n 80 at 981.
[90] Edward Willis above n 74 at 147.
[91] Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 51/52.
[92] Ulrich Klein "Integrated Resource Management in New Zealand – A judicial Analysis of Policy, Plan and Rule-Making Under the RMA" (2001) 5 NZJEL 1.
[93] Bradford Mank "Is a Texualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decision-making Is Better than Judicial Literalism" (1996) 53 Wash. & Lee L.Rev. 1231 at 1233.
[94] Ibid.

Part II of the RMA, as already mentioned, defines its overall purpose as "sustainable management". Countless amounts of case law reiterates that this is at the heart of decision-making under the RMA and that interpretation should not be in a strictly literal way, but in line with the orthodox purpose approach that NZ courts favour.

***New Zealand Rail Ltd v Marlborough District Council*** outlines, "there is a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of policy in a general and broad way".[95] The application of the "overall judgement approach" which was first affirmed in ***North Shore City Council v Auckland Regional Council***[96] additionally reiterates that the purpose provisions of the RMA are core to all decision-making. The case clarified that Part II has no hierarchy in the provisions and "allows for the comparison of conflicting considerations and the ***scale or degree*** of them, and their relative significance or proportion in the final outcome".[97]

Overall Part II should not be interpreted in a strict or literal sense but a more fluid purpose approach be favoured. ***Genesis Power Ltd v Franklin District Council*** stated that courts must recognise all the Part II principles but "notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act"[98] again highlighting the fundamental purpose approach to interpreting the statute. ***King Salmon***[99] changed the status of Part II in plan making outlining that National Policy Statements would set environmental bottom lines, however, the case reiterated that s5 was broad and the "overall broad judgement approach" would still apply in cases where a clear National Policy Statement was not in place.[100] Purpose is still central to interpreting provisions under the Act and therefore the outcome in a case must in all instances meet the "sustainable management" standard.

[95] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
[96] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (NZEnvC).
[97] Ibid.
[98] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 514 (NZEnvC).
[99] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 [2014] NZRMA 195.
[100] Ibid.

## III. Inherent bias in assessing environmental legislation

This part is a crude acknowledgment of the inherent ideology present in environmental law. It is not possible to cover the entire scope of environmental jurisprudence, however it is worthy to mention. The recognition that certain epistemologies operate in the background of environmental law is useful to help provide some context to the outcomes in the climate change cases in NZ.

Environmental law and policy is notoriously complex and highly contested throughout all levels of society. Critical to the dispute is how much scope and priority protection of the environment should be given over interference with individual private property rights. NZ and the RMA are no exception. The legislature and the courts are continually balancing competing private and public goals. This tension is highlighted in ***Falkner v Gisborne District Council*** where Justice Barker outlined, [it] "seems safe to question whether… such a right could be asserted in direct opposition to a bona fide policy of management of the coastline, implemented in the general interests of the public".[101] Although the law purports to achieve equality in balancing these values there is theoretical discussion that the law does not meet these goals.

Critical jurisprudential writers claim that when determining meaning of legislation, the legal text's clear meanings come from a shared background of ideas and values.[102] Therefore how the law is interpreted will be determined and influenced by these underlying background values. If a legal text's clear meaning comes from a shared background of ideas and values (interpretive community) then it is claimed that some of these ideas will create unjust domination of certain groups in society. Critical jurisprudence sees classical liberalism, which focuses on individual rights, individualism and private property, as one of the main sources of this bias in the law.

In terms of environmental law and the RMA one can determine these background ideas to see how the law is acting ideologically and benefiting a dominant group (developers)

[101] *Falkner v Gisborne District Council* [1995] NZRMA 462 (HC).
[102] Stanley Fish "There is no Textualist Position" (2005) 42 San Diego L.Rev. 629 at 633.

in society. Despite attempting to maintain environmental goals, outcomes in environmental law are notoriously in favour of economics, individualism and private property.

On the surface of the RMA, the broad drafting, that purports to provide for equal balancing of values, in fact facilitates bias in the law. Environmental law is made up of broad, discretionary, strategic statutory rules, which first provide the mechanism for future decision-making and undertaking activities,[103] and second to respond to evolving science in relation to environmental concerns.[104] Drafting attempts to describe the relationships between economic, social and environmental values, which increases the challenges faced by decision-makers to "straddle a myriad of disciplines".[105] The RMA in particular attempts to do this in NZ. The principles in s7 are wide and have no hierarchy or guidance as to how to weigh and balance them. Environmental interests are often drafted with ambitious goals, which can easily be placated by economic interests that are construed with more restrictive language in the legislation's implementing provisions or legislative history.[106]

Not only this but the ideological underpinnings of the RMA are wide ranging and conflicting. The RMA was first enacted to facilitate development, streamline the multitude of environmental legislation at the times and take the place of the economically driven Town and Country Planning Act.[107] It was enacted with the newfound acknowledgement of the right of the community to impose restrictions on landowners in the wider public interest. However at that time a number of other ideologies were present. Liberal views tended towards upholding the rights of individuals in property or compensating for the loss of property. Thus law that facilitated incursion on recognised property interests was a sensitive and difficult issue. Therefore "there is little wonder that the principles in Part II are framed in general language and

[103] Douglas Fisher "The Structure, form and language of statutory rules" Douglas Fisher (ed) *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar Publishing, Cheltenham, UK, 2013) 327 at [348].
[104] Justice Laurie Newhook, above n 67 at 1.
[105] Ceri Warnock and Abby Suszko Butterworths Student Companion: Resource Management (LexisNexis, Wellington, 2013) at [xi]
[106] Bradford Mank above n 93 at 1251.
[107] Town and Country Planning Act 1977.

that multiple views of the Act's implications for future governance were possible" so as to appease all parties.[108]

Additionally the RMA has been subject to vast change (there have been _ amendments to the RMA). The social reformist – albeit a neo-liberal influenced - Labour government that developed the RMA was replaced by the conservative National and National coalition governments.[109] Under that governance the RMA has languished.[110] There has been significant influence and change towards a more individual and market based system. The role of the RMA was significantly scaled back from these reforms especially with the introduction of market tools such as the ETS to regulate environmental concerns. Therefore the RMA as a whole is riddled with historical bias and confusion. In its final form the RMA embodies conflicting political agendas, which can underpin a lot of the interpretational confusion.[111]

The claim that the RMA principles result in fair, equal and just balancing of all values can been disputed. Buhrs and Bartlett claim that the RMA despite its socialist reform represents another shift towards the further privileging of business interests in the planning process.[112] They suggest three ways that the Act alters the balance and achieves bias. First there is a strong presumption in favouring property rights with respect to land use. Second, the discouragement of predictive anticipatory policy. And third, the requirement for assessment of cost and benefits of policies. This bias can be displaced through the development of National Policy Statements and national guidance. However NZ is severely lacking in this guidance, environmental debate and interpretation is circumscribed by the pervasivness of market language and tools such as the ETS.

Due to the wide scope, diversity of interests and ideologies, and the broad language used to convey these rules, there is increasing susceptibility to judicial analysis.[113] Ascertaining

[108] Robin Connor and Stephen Dovers "Approaching institutional change and policy learning" Robin Connor and Stephen Dovers (eds) *Institutional Change for Sustainable Development* (Edgar Elgar Publishing, Cheltenham, 2004) at [106].
[109] Ibid at [107].
[110] Ibid.
[111] Ibid at [104].
[112] T Buhrs and R V Bartlett (eds.) "Environmental Policy in New Zealand: The Politics of Clean and Green?" (1995) 47(2) Political Science 297 at 298.
[113] Douglas Fisher above n 103 at [337].

a single meaning amongst a range of polycentric considerations can be difficult for decision-makers, thus determining the "correct" outcome of a case can be complex.[114] Reconciling more than one accurate or at least justified interpretation is at the heart of the disputes that occurred in NZ climate change law and with the inherent bias present, the outcomes more often than not favour the developing parties to maintain individual freedom.

For the purposes of this dissertation it is not relevant to provide further discussion of the ideological bias in the RMA. What is worthy to mention is that there is high contention around the RMA and its operation. This conflict is between individual rights and the protection of the public good and how much scope regulatory tools like the RMA should have to inhibit these private rights. This sets the scene for the difficulties that exist for Courts to interpret the law. With these wide considerations and underlying ideologies, it is easy to see why there is such wide conflict in environmental and climate change law as high as the Supreme Court.

## IV. Conclusions

The complexities in environmental law that arise from drafting and the nature of the background ideologies that this type of law operates within, sets the scene for the difficulties in assessing climate change under the RMA. One would assume that judges would take a purpose approach, given the nature of the RMA and the orthodox approach to statutory interpretation in NZ, however ***Greenpeace***[115] suggests this can be departed from. ***Buller Coal***[116] on the other hand, is an example conflict can still arise despite the use of traditional interpretation tools. Underlying ideologies sometimes conflict to create to opposing purposes within the same enactment. Justifications of the outcomes in these cases are also outlined.

[114] Douglas Fisher "Legal Reasoning in Environmental Law" Douglas Fisher (ed) *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar Publishing, Cheltenham, UK, 2013) 425 at [432].
[115] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[116] *West Coast Ent Inc v Buller Coal Ltd* above n 8.

Important to realise is that "legal outcomes are not constrained by legal reasoning, because legal reasoning can virtually always justify contradictory results in a given case".[117] This statement underlies the contrasting results in the subsequent cases. No matter what approach that is taken, the outcome can be explained and the bias that is inherent in the law will influence decisions no matter what statutory tools are favoured.

As Douglas Fisher outlined, "the complexity of legal reasoning is matched only by the complexity of the evolving structures for environmental governance".[118] This should be kept in mind through the following analysis. Perhaps the issues that arise in climate change law can be attributed to more substantive policy and underlying ideological issues rather than interpretation concerns.

[117] Richard Fischl "Some Realism about Critical Legal Studies" (1987) 41 University of Miami L.Rev. 527 at 529.
[118] Douglas Fisher "Law, Language and Reasoning" Douglas Fisher (ed) *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar Publishing, Cheltenham, UK, 2013) 3 at [3].

# CHAPTER THREE:

# Manifestation of Interpretation Issues in Climate Change Law

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Chapter Three is broken down into three parts. Two case examples (***Greenpeace***[119] and ***Buller Coal***[120]) and an overall conclusion to how these cases link to the underlying issues in environmental law, policy and statutory interpretation outlined in chapter two. ***Greenpeace*** is a manifestation of two conflicting approaches to interpreting a statute. ***Buller Coal*** on the other hand attempts to deal with two conflicting purposes in the same enactment. The contrasting techniques by the judges in these cases reflect the conflicting ideologies inherent in environmental law and are a clear expression of the dominant economic ideas prevailing over environmental concerns.

## PART A:

## Greenpeace and the meaning of Section 104E

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Part A looks at one of the first cases that emphasised the struggle faced by the Courts in interpreting the RMA and the ambiguous new provisions, notably s104E. The decisions mentioned in chapter one relating to renewable energy suggest the new climate change provisions could weigh heavily in the balancing of decisions under the RMA. However, consideration of climate change under the provisions in proposals that involve non-renewable energy sources have proven much more controversial. The contention first came to a head in ***Greenpeace New Zealand Inc v Northland Regional Council and Mighty River Power Limited***.[121] This case rested on the statutory interpretation of the words of the provision, which is the focus of this Part. The majority engaged in a textual

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[119] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
[120] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[121] *Greenpeace New Zealand Inc v Northland Regional Council and Mighty River Power Limited* ENC Auckland A094/06, 11 July 2006.

approach, which can be explained and justified. However, the minority outlined that a purposive approach to interpretation should have been favoured and the author agrees.

## I. Background to the case

Greenpeace advanced an appeal opposing the granting of resource consent under s15 of the RMA to refurbish a coal-fired power station of the "Marsden B" facility in Northland by Mighty River Power (MRP). Justice Newhook outlined the essence of the controversy in regards to non-renewable energy as follows:[122]

> "Can …in the absence as yet of a national environment standard on the issue, a consent authority consider the effects of a discharge of greenhouse gases on climate change, if an application will result in an increase of emissions (in either absolute or relative terms), or relates to the development of non-renewable energy, or both?"

Essentially the question was whether or not s104E could be interpreted to require consent authorities to consider the comparative benefits of renewable energy when considering specific proposals involving fossil fuels or only in applications for renewable sources.[123]

Initially the Environment Court struck out Greenpeace's appeal stating that the 2004 Amendment Act prohibited the consideration of climate change.[124] The High Court overturned this decision claiming that s104E of the RMA gave the consent authority power to balance a proposal including the comparative benefits of renewable energy.[125] MRP obtained leave to appeal to the Court of Appeal but abandoned the case pursuant to a decision to abandon the development. Genesis applied for declaratory relief to continue the issue, which was subsequently granted, and the proceedings were removed to the Court of Appeal.[126]

[122] Justice Laurie Newhook, above n 67 at [12].
[123] *Greenpeace New Zealand Inc v Northland Regional Council and Mighty River Power Limited* above n 117.
[124] Ibid.
[125] Ibid at [57].
[126] *Genesis Power Ltd v Greenpeace New Zealand Incorporated* [2007] NZCA 569; [2008] NZRMA 125 at [46].

The Court of Appeal overturned the High Court decision stating that the relevant regional consent authority could not consider the adverse effects on climate change in determining applications for discharges to air. In summary the Court of Appeal held that ruling otherwise would be contrary to "the language used by the legislature and in the context of a clear legislative policy of nationalising New Zealand's approach to the emissions of GHGs".[127]

## II. The Supreme Court (SC) decision and dissent

The majority in the Supreme Court upheld the decision of the Court of Appeal claiming, "when s104E is interpreted with reference to its text and purpose… it applies only to applications involving the use and development of renewable energy".[128] The Supreme Court referred to ***Commerce Commission v Fonterra Co-operative Group Ltd***[129] that reminded the courts of s5 of the Interpretation Act 1999[130], which, as outlined earlier, mandates 'text and purpose as the key drivers of statutory interpretation'.[131] Initially it seems that the Court adopted a traditional approach to interpretation, however the following discussions suggests that this might not be the case.

In reference to text, the Court submitted that the language of the sections demonstrated "a clear implicit premise that the exception is confined" to the use and development of renewable energy.[132] They backed this interpretation with reference to the underlying policy of the Amendment Act, which was to address climate change on a national scale, whilst providing for regional and local councils to account for the positive effects of renewable energy in projects for renewable energy only.[133] Parliamentary materials were referred to in order to support this interpretation of s104E and s70A. The court maintained that the Explanatory note to the Bill and submissions by Ministers and the

[127] Ibid at [40].
[128] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7 at [65]
[129] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767.
[130] Interpretation Act 1999, section 5.
[131] *Commerce Commission v Fonterra Co-operative Group Ltd* above n [125].
[132] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* avove n 7 at [52].
[133] Ibid at [55].

Select Committee, provided justification that Parliament intended for the sections to limit regional and local councils ability to consider the effects on climate change.[134]

Chief Justice Elias, in the minority, wrote a strong dissenting opinion that emphasises the lack of clarity in the new provisions. The Chief Justice submitted that section 104E required a comparison between non-renewable and renewable energy to determine whether the project would achieve a reduction in GHG emissions, regardless of whether the application was for renewable or non-renewable energy.[135] She considered this in light of the wider statutory purpose of the RMA "sustainable management" and new s7 principles, stating, "such [limited] interpretation of s104E amounts to an unwarranted recasting of the terms of the provision… and is not consistent with the wider statutory context".[136] She referenced the statutory background and that s104E, needs to be reconciled with the overall Part II purpose notably, s7 (i) and (j).

Despite the strong minority opposition the upshot of the case is that climate change cannot be considered by local authorities when deciding whether to grant proposals that involve the use of fossil fuels, neither in consent applications for discharges to air or coastal permits, nor may rules be made in regional plans to such an effect.[137]

Essentially the benefits of renewable energy can be considered in applications relating to renewable energy, however the dis-benefits of non-renewable energy are not factors to be considered.[138] The majority in the Supreme Court endorsed the view that climate change should be dealt with at a national rather than local scale, through mechanisms such as the NZ Emissions Trading Scheme (ETS) or National Environmental Standards; to control the effects of GHGs on climate change.

## III. Discussion of Interpretation techniques

[134] Ibid at [62].
[135] Ibid at [11].
[136] Ibid.
[137] Vernon Rive above n 33 at [184].
[138] Teresa Weeks "Supreme Court dismisses Greenpeace climate change appeal" (2009) Chapman Tripp <http://www.chapmantripp.com/publications/Pages/Supreme-Court-dismisses-Greenpeace-climate-change-appeal.aspx>.

Although the majority and the minority engaged in opposing reasoning, it is not uncommon for higher appellate courts to utilise alternative approaches to statutory interpretation.[139] However, such a stark contrast in both reasoning and outcome of the Judges in the ***Greenpeace*** decision enunciates the ambiguities in the Amendment Act and the difficulties inherent in interpreting environmental legislation.[140] Interestingly, no matter which result one prefers, both the narrow approach of the majority and wider approach by the minority reflect orthodox statutory interpretation techniques.[141] What truly under pins the decision is the ideological viewpoints of the judges in the cases. One academic claims the majority reasoning was a "logical one in the light of the fairly clear statutory language and even clearer legislative intention".[142] However, it is contrarily expressed, and the author agrees, that the majority adopted an excessively textual interpretation of s104E.[143]

The Court engaged in a brief discussion, identifying a number of phrases in the section that in their view were a "clear implicit premise that the exception is confined" to renewable energy projects.[144] However, this was essentially a "stand-alone argument based almost exclusively on the text of s104E".[145] Only once the Court had reached its decision did they consider purpose, extrinsic parliamentary material and the wider context of the Act as a whole.[146] Whilst a valid approach to interpretation, this textual analysis seems contrary to the traditional New Zealand approach to statutory interpretation outlined in chapter one.

In contrast, Chief Justice Elias in the minority engaged in a more traditional approach to statutory interpretation.[147] Her focus was on the purpose of the RMA as a whole, notably s5 and s7(i) and (j) and reconciling the text of s104E in light of that purpose.[148] Given the statutory interpretation techniques prevalent in New Zealand courts and the nature

[139] Ed Steane and Teresa Weeks above n 23 at 3.
[140] Edward Willis above n 74 at 137.
[141] Ibid.
[142] Alon Tal above n 13.
[143] Edward Willis above n 74 at 140.
[144] *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7 at [52].
[145] Edward Willis above n 74 at 142.
[146] Ibid.
[147] Ibid at 143.
[148] Ibid at 143.

of environmental legislation itself[149] "on first blush" the approach adopted by the Chief Justice to interpreting the Amendment Act is one that would be expected.[150]

**a) Potential Justifications of the Majorities textual approach:**

Despite the strong traditional application of a purposive interpretation, the majority departed from this approach and adopted a textual interpretation of s104E. [151] International jurisdictions, notably the United States, endorse this approach to construing a provision.[152] It can be useful to analyse why such countries favour this approach as this may provide grounds for the majority's reasoning in Greenpeace, despite it not being the accepted approach in NZ.[153] As outlined in chapter two, there are always exceptions to the general rule to interpretation. It is a shame that the NZ Courts did not feel inclined to elaborate on the reasons for using this interpretation further.[154]

The textualist's claim is that "it is what is ***said*** not what is ***intended*** that is the ***object of inquiry***".[155] The approach is founded on the underlying idea that the words of a provision "represent the best evidence of legislative intent"[156] and that it would be improper for a judge to examine the purpose and legislative intent when the words of a provision have a plain meaning.[157] Although some textual theorists acknowledge that context can be important in understanding the words of a provision, the use of canons of construction and other statutory interpretation tools should be favoured to achieve a fixed "objective" meaning.[158]

Despite the majority not expressly endorsing a textual approach, given the characteristics of this approach, the majority reasoning in ***Greenpeace*** can fairly be said to fit this

[149] Discussed in Chapter One.
[150] Allison Arthur Young and Jess Riddell above n 47.
[151] Edward Willis above n 74 at 136.
[152] Ibid at 147.
[153] Ibid.
[154] Ibid at -.
[155] Antonin Scalia "Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution" Amy Gutmann (ed) *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) at [16].
[156] Edward Willis above n 74 at 147.
[157] Bradford Mank above n 93 at 1238.
[158] Ibid.

mould. Although the judges referred to purpose and legislative materials, this acknowledgement was simply to advocate the stance already reached by other means rather than being a wholly purposive approach that they claimed to be following.[159]

Whether or not the judges expressly followed this technique, there are advantages evident from following a textual approach.[160] Firstly the purposive approach is not always sufficient for interpretation, especially in environmental law realm. Standard theoretical objections of the purpose driven approach include the "epistemological objection"[161] (the idea that evidence of intention is often equivocal, incomplete or obscure), the "non-existence objection"[162] (the idea that individuals in a majority have different aims and intentions in mind) and the "indeterminacy objection"[163] (the idea that authors often have several intentions at the same time).

The RMA is a clear example of the inherent issues with using a purposive approach. The Part II principles require reconciliation, however, broad wording and no guidance to determine how to balance or prioritise competing values, makes these theoretical critiques of purpose driven interpretation substantial. Under the RMA decision makers must consider not only environmental concerns, but also economic and social issues. This means that applying a single purpose inquiry is far from straightforward. In the words of one critic "it may be unfair, therefore, to criticise the courts for resorting to textualism when there is simply no purposive guidance that can sensibly be applied".[164]

Furthermore, Courts often have a desire to defer decision making to another branch of government. When value judgements must be assessed, the judiciary may not be aptly positioned to determine such outcomes comparatively to other branches of government. Decisions in a small country like NZ can have significant consequences to various parties.

[159] Edward Willis above n 74 at 147.
[160] Edward Willis above n 74 at 148.
[161] Natalie Stoljar "Survey Article: Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law" (2003) 11 J.Pol.Phil 470 at 479.
[162] Ibid.
[163] Ibid.
[164] Edward Willis above n 74 at 152.

Engaging in a textualist approach to statutory interpretation allows the courts to assess an issue in a value neutral way.[165]

**b) The "Correct" Approach:**

Although the majority judgement can be reasoned and justified, the author maintains that the purposive approach of the Chief Justice should have been the preferred outcome. Academics maintain that a textualist approach to interpreting environmental law on average will result in more victories for environmentalists.[166] However in the NZ context this is especially unlikely and combined with the underlying issues with the textualist approach this should not have been favoured.

Textualism is based on the idea that one single objective meaning can be ascertained from the text of a provision, however textualism is actually much more nuanced.[167] Critical jurisprudential writers challenge the claim that the law can be deduced to one textual meaning, and outline that actually the law is not as objective, or neutral as the mainstream jurisprudential writers such as positivists claim it is.[168] For the judges to state the provisions in ***Greenpeace*** had a "clear implicit premise" in this authors view is simply too strict when there were clearly other interpretations available. At the very least the majority should have provided express justification for their textual construing of the provision rather than leaving others to make guesses as to why this was the case.

There are claims that adopting a textualist approach will lead drafters to be more diligent and precise in their construing of legislation.[169] However, as outlined in the previous chapters this is neither the dominant approach in NZ, nor the approach usually adopted under the RMA. Therefore it cannot be said that the RMA has been drafted as clearly and precisely as possible, with the idea that it will be interpreted in a literal manner. The RMA would have been written with the idea that the traditional purpose

[165] Ibid at 154.
[166] Bradford Mank above n 93 at 1290.
[167] Edward Willis above n 74 at 154.
[168] Robert Gordan "New Developments in Legal Theory" David Kairys (ed) The Politics of Law (Pantheon, 1982) at [284].
[169] Bradford Mank above n 93 at 1239.

driven approach will be endorsed and so by interpreting s104E literally could, and has lead to obscure outcomes.

The justification of using a textualist approach to defer decision making to other branches of government is valid. However, to date no change has been made in the law, nor has any National Environment Standard been implemented to facilitate this interpretation.[170] The case rested significantly on the premise that climate change should be dealt with at a national level. Yet in the absence of national guidance, it seems illogical that the courts could not consider the effects that GHGs have on climate change, especially given the ruling in ***King Salmon***.[171] Allowing climate change as a consideration in decision making for non-renewable energy sources still allows the court to weigh and balance this factor against other considerations in s7, which should be deemed appropriate until such time that a National Policy Statement is promulgated.

Additionally the majority did not purport to endorse the textual approach. One author suggests that this means the majority was not attempting to follow real statutory interpretation techniques but perhaps were driven by the practical outcomes such an analysis would provide.[172] Instead of focusing on the actual text in front of them, the judges focused on proceeding in the manner that would attain the most desirable outcome.[173] Fish suggests that the textual position does not even exist and that background ideas will always influence an outcome.[174] In this way perhaps the decision to exclude considerations on climate change was based on underlying economic ideas and development infiltrating into the ideology of the law. This inherent ideological bias is outlined in chapter two, is however purely an assumption of what influenced the decision in ***Greenpeace***.

Overall in the authors view purpose should have been the core consideration in determining the outcome. In this way the approach of the Chief Justice should have been

[170] Arla Marie Kerr "Untapped Potential: Administrative Law and International Environmental Obligations" (2008) 6 NZJPIL 81 at 90.
[171] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 [2014] NZRMA 195.
[172] Edward Willis above n 74 at 148.
[173] Stanley Fish above n 102 at 638.
[174] Ibid.

preferred to that of the majority to meet the criteria of “sustainable management”. By endorsing this approach the case would have held that it was not the intent of Parliament to remove the considerations of climate change in non-renewable projects altogether and that the Courts should have been able to take this into account when granting the consent for the power station.

# PART B:

# Buller Coal and the Interpretation of s104(1)(a):

Part B assesses the additional loopholes in the RMA Amendments, which have been subject to controversial interpretation by the Judges in the Supreme Court.

***Greenpeace*** did not consider whether:
a) The effects of climate change resulting from GHGs, could be a consideration for granting applications for other types of consents that were not expressly prohibited by the Amendment Act, notably activities that facilitate the generation of GHGs but are not direct contributors to emissions.
b) The fact that the extracted coal would ultimately be exported and combusted overseas could be a consideration under the RMA as an "actual and potential effect" on the environment.

These gaps in the legislation were at the heart of ***Buller Coal*** hearings and additional debates around environmental interpretation.[175] Where ***Greenpeace*** was focused on harmonising between two different approaches to statutory interpretation, the current case centres on resolving the conflict between two contrasting purposive interpretations of the same enactment. This part outlines these contrasting purposes and provides suggestions as to how to best reconcile them. Similar themes arise as to the underlying reasons for the interpretation adopted by the majority in ***Greenpeace***. The underlying ideologies that operate in environmental law played the same influence in that case as it does here.

[175] Vernon Rive "Coal Mines, climate change and test cases: initial thoughts on Buller Coal" (2012) Point Source < http://www.vernonrive.co.nz/PointSource/Coal_mines_climate_change_and_test_cases_initial_thoughts_o.aspx>.

## I. Background to the case

***Buller Coal v West Coast Ent. Inc.*** is another landmark case that addresses the ability of consent authorities to consider climate change when granting resource consents under s104(1)(a).[176] The mining companies were developing the William North Coal Mine on the Stockton plateau and the Escarpment Mine on the Denniston plateau.[177] The consents required were land-use consents for ancillary aspects of the mines: roading; piping; a processing plant and handling facility; the construction of an electrical substation; and the use, storage and handling of hazardous substances.[178]

The appellants, West Coast Environment Network (West Coast ENT) and Royal Forest and Bird Protection Society of New Zealand appealed the request of Buller Coal and Solid Energy to acquire a declaration that climate change was not a factor to be considered by the council in the granting of land-use and other associated consents.[179] Another central issue was that the proposed mines would produce approximately 4.3million tonnes and 4.1million tonnes of marketable coal respectively, that would be entirely exported (primarily to China, Japan, India, Brazil and South Africa).[180] This coal ultimately would be combusted and emit carbon dioxide, which is a contributor to climate change.

One argument of the appellants was that s7(j) provided that decision-makers must have "particular regard to the effects of climate change". However this was dismissed by the time it reached the Supreme Court on the basis that the provision should be interpreted as relating to adaptation (effects ***of*** climate change) not the mitigation (effects ***on*** climate change). This will not be discussed through this dissertation as the core interpretation issue lies on the interpretation of ss3, 70A and 104E of the Amendment Act.[181]

[176] *Re Buller Coal* [2012] NZEnvC 80.
[177] Ibid.
[178] Ibid at [104].
[179] Ibid.
[180] Simon Schofield "Indirect and Intangible? West Coast Ent Inc v Buller Coal Ltd [2013] NZSC 87" (2013) Climate Change Law http://www.climatechangelaw.co.nz/indirect-intangible-west-coast-ent-inc-v-buller-coal-ltd-2013-nzsc-87/>.
[181] Author Unknown "Case Comment: West Coast Ent v Buller Coal Ltd [2013] NZSC 86" Forthcoming in VUWLR at 6.

Section 104E, s70A and the ***Greenpeace*** cases, expressly removed the consideration of climate change for non-renewable projects for two of the five consent types: discharge to air and coastal permits. In contrast s104(1)(a) directs authorities, subject to Part II, to consider "the actual and potential effects on the environment of allowing the activity" when considering ***all*** types of consents. "Effect" includes both positive and adverse effects and cumulative effects regardless of scale, intensity, duration and frequency. It also includes potential effects of "high probability" and those of "low probability but with high impact".[182]

The appellants submitted that the 2004 Amendment Act and ***Greenpeace*** cases prohibited the consideration of climate change discharge of the consents mentioned exclusively. As this was an application for land-use, effects of climate change were relevant mandatory considerations, as s104E of the Amendment Act did not expressly prohibit these factors. The case rested on the definition of s104E and if the Amendment Act extended beyond these express exclusions to other types of consents. Additionally the Court considered if the end use of coal could fall under the definition of "cumulative effect".

Justice Newhook of the Environment Court held that there was no room to consider climate change under the RMA in the granting of any of the five types of consents, except in applications for renewable energy. His honour was persuaded that the ruling in the ***Greenpeace*** line of cases and the overall purpose of the 2004 Amendments was intended to extend to all consent types. His honour outlined the clear intention of Parliament was that climate change was being directed away from regional regulation and towards a national framework and that the clear purpose of the wording meant there was no "ambiguity, uncertainty, or room for discretion or choice".[183]

In the High Court Justice Whata upheld the Environment Court's decision and outlined five more reasons why climate change was not a consideration in granting consents

[182] Reasource Management Act 1991, section 3.
[183] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156 at [38].

under the RMA.[184] First, the express purpose of the Amendment Act was to exclude local authorities from considering climate change under the RMA. Second, S104(1)(a) is subject to the scheme of the RMA which was amended by the Amendment Act. Third, the burning of coal was not the "activity" that the consent was sought. Fourth, ongoing district level management of GHGs would disrupt the careful framework that Act uses to deal with air discharges. Finally, construing the provision in this way would not undermine comprehensive urban planning and transportation strategies. He surmised that it would be "intuitively attractive" to treat s104(1)(a) as conferring "a broad or unfettered discretion… to consider the effects of land-use activities, including the GHG effects of related secondary uses".[185]

His honour ultimately decided that as a matter of interpretation, effects on climate change should not be a consideration, unless a relevant National Environment Standard had been promulgated.[186] Additionally his honour acknowledged that overseas discharges were outside NZ's territorial boundary and the RMA did not confer jurisdiction to regulate international activities and thus did not fall under the definition of "cumulative effect".[187]

## II. The Supreme Court decision and dissent

The Supreme Court ultimately upheld the decision of the Environment and High Courts that GHGs resulting from combustion of coal, were not an "actual and potential effect on the environment" to be taken into account when granting other related consents.[188] Additionally the end use of coal overseas was not a "cumulative effect" to be factored. McGrath, William Young and Glazebrook JJ held that the 2004 Amendment Act and the scheme of the RMA could extend the exclusion of climate change considerations to all five types of consents, not only those expressly mentioned in the Amendment Act. They noted that s3 of the Amendment Act had been explicitly carried through to the operative

[184] Ibid.
[185] Ibid
[186] Ibid
[187] Ibid
[188] *West Coast Ent Inc v Buller Coal Ltd* above n 8.

provisions of the RMA and this purpose must be a factor in interpretation of the section.[189]

The majority rejected the narrow interpretation of the minority based on the idea that if this were favoured it would allow for "back-door" regulation via ancillary consents such as land-use consents.[190] The Court held that the purpose of the Amendments was to remove all consideration for all types of consents to avoid this absurd outcome.[191] Further more the Court held that in considering the purpose and scheme of the Amendment Act extending the "limitation is so obvious it goes without saying".[192]

This has further limited the role of the RMA in regulating climate change thus watering down NZ's primary environmental statute. Overall "the ***Buller*** decision effectively removes all consideration of GHGs, whether those gases are emitted directly, indirectly, diffusely or in fact reduced."[193] The following points were made by the majority to justify their result.[194]

First, the CCRA is the machinery for complying with international obligations and setting up the scheme for addressing climate change, this has "left little – to no - scope for useful involvement by local authorities" in all types of consents.

Second, the Court outlined remoteness of the downstream effects on climate change from the particular activities at issue, which suggested that they were so obviously covered by the exclusion that they were not worth mentioning. The Court did not consider the overseas combustion of coal, and simply accepted Whata J's conclusion that this was outside NZ's jurisdiction.

Third, the Court suggested that even before the Amendments climate change was not "tangible" enough to trigger s104(1)(a). Emphasis was placed on the idea that restricting

[189] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[190] Author Unknown above n 178.
[191] Author Unknown above n 178.
[192] *West Coast Ent Inc v Buller Coal Ltd* above n 8 at [172-173].
[193] Nathan Jon Ross "Case Comment: West Coast ENT Inc v Buller Coal Ltd" [2013] NZSC 86" (2014) Directed Individual Research, Faculty of Laws Victoria University of Wellington.
[194] *West Coast Ent Inc v Buller Coal Ltd* above n 8.

NZ's coal output would not have any impressionable effect on total global use of coal" as other suppliers in the market would provide access to such sources. They also suggested it was difficult to show that the burning of coal would have any perceptible difference on climate change and considered that in the alternative the definition of "cumulative effect" and "effect" did not involve the end use of coal.[195]

Fourth, the core goal of the Amendments was to uphold the policy of nationalising the regulation of climate change, by allowing the consideration of such effects by local authorities would undermine this policy.

Fifth, the Court assessed the legislative history including the regulatory impact and compliance cost statement[196], a statement by Jeanette Fitzsimmons[197], other land use applications such as transport and urban form[198], and finally referred to the Local Government and Environment Select Committee's report on the Bill.[199] In weighing these extrinsic aids, the Court held that the Parliamentary material was cryptic and provided mixed signals as to what the role of local authorities was in considering climate change.[200]

Finally, the Court set out six hypothetical scenarios that concluded literal interpretation of s104E would result in anomalous outcomes. They were persuaded on "plausibility and workability" that it was necessary to "construe the legislation to avoid these inconsistencies".[201] They found that a literal interpretation would create an absurdity that required the consent authority to take into account the effects of burning coal on climate change in an application to divert water or other activities associated with the proposed mine[202] which were indirect results of the mine that simply facilitated the discharge of the GHGs rather than causing such emissions directly. It would be inconsistent to consider climate change in that instance but not in the case of the mine

[195] Simon Schofield "Indirect and Intangible? West Coast Ent Inc v Buller Coal Ltd [2013] NZSC 87" (2013) Climate Change Law http://www.climatechangelaw.co.nz/indirect-intangible-west-coast-ent-inc-v-buller-coal-ltd-2013-nzsc-87/>.
[196] *West Coast Ent Inc v Buller Coal Ltd* above n 8.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid. (153 and 158).
[202] Ibid.

itself.[203] This would effectively be "backdoor regulation" and "would subvert the Scheme of the Act… and would thus deprive s104E with any practical effect".[204]

As in the ***Greenpeace*** reasoning, Chief Justice Elias provides a convincing dissent to the majority. She considered that the provisions of the Amendment Act ought to be applied narrowly because the wording was targeted and partial.[205] She outlined an alternative purposive approach which resulted in her conclusion that considering the effects of climate change was appropriate for land use and other associated consents and the end use of coal. These considerations were not excluded under the provisions of the RMA. She proposed the following reasons for her judgement.

First there was no express exclusion of the consents sought in the 2004 Amendment Act. Therefore s104E was not directly relevant to the present case and did not neutralise the effects of GHGs on other consent types.[206] Her honour noted that s7(i) was particularly relevant and could be a factor when considering "actual and potential effects on the environment" in the absence of express exclusion. She purported that reading in additional exclusions could only be justified if there was some anomaly suggesting error or a gap in the legislation.[207] She purported that none of these factors had been made out and therefore this interpretation should be favoured.

Furthermore, omitting considering the effects on climate change from the end-use of coal would be contrary to the purpose in section 5. The range of matters to be considered under Part II – especially the "purpose of sustainable management" - was unrestricted. Therefore the activities could not reasonably be seen as "ancillary" and decision-makers should not be blinkered from assessing the effects of end use.[208] That was precisely the type of "cumulative effect" that the Act was seeking to address. The effects of the end use of coal, in the Chief Justices opinion, were not too remote to be considered as an exception. Therefore the comparative benefits that arise from the use of

[203] Ibid.
[204] Ibid.
[205] Allison Arthur Young and Jess Riddell above n 47 at 83.
[206] Author Unknown above n 178 at 12.
[207] Allison Arthur Young and Jess Riddell above n 47 at 83.
[208] Author Unknown above n 178 at 12.

renewable energy that permits a reduction in the discharge of GHGs to air, could be considered in these other consents. Also her honour purported there was no issue of overseas jurisdiction because the activities that were being consented were within NZ.

Additionally the legislative history did not support a restrictive interpretation of s104(1)(a). It was not intended to be comprehensive in its exclusion of climate change considerations and thus should not be limited. She outlined that it is doubtful whether s3 of the Amendment Act could be treated as an operative part of the RMA. This was a separate purpose that would shed light on s104E and s70A but not prohibit considerations under Part II of the Principal Act's.

Overall "any adverse effect" did not result in a gap in the legislation that justified a reading in exclusion to all considerations of GHGs – doing so would be a "substantial gloss" on the RMA.[209]

## III. Discussion of the Conflicting Purposes

Despite some commentators noting that the outcome of the litigation is "not so surprising"[210] others have questioned, "Could it really have been the legislatures intention to remove from the internal workings of New Zealand's principal piece of environmental legislation virtually all opportunities, both negative and positive, to consider the one environmental issue that adversely affects all others?"[211] It has been outlined that the majority adopted a "scheme and purpose" approach to interpretation and that the Chief Justice in the minority adopted a "literal" approach.[212] However, her honour backed by other academics,[213] purported to use an alternative purposive approach.

[209] Ibid.
[210] Vernon Rive "Coal Mines, climate change and test cases: initial thoughts on Buller Coal" (2012) Point Source < http://www.vernonrive.co.nz/PointSource/Coal_mines_climate_change_and_test_cases_initial_thoughts_o.aspx>.
[211] Nathan Jon Ross above n 190.
[212] Allison Arthur Young and Jess Riddell above n 47 at 83.
[213] Author Unknown above n 178.

Consequently this unique affair is not a conflict in competing interpretations of a provision as it was in ***Greenpeace***, but instead two diametrically opposing purposes in the same enactment.[214] The principal Act's purpose of "sustainable management" competes with the Amendment Acts purpose that "require[s] local authorities… not to consider the effects on climate change of discharge to air of GHGs". Central to the discussion is how tools of interpretation can resolve this conflict.

***R v Pora***[215] outlines key interpretation factors to take into account when resolving conflicting purposes. That case outlined it is not a matter of choosing between the two purposes but the role of the interpreter is to reconcile them.[216] Elias J noted in that case that, "If the provisions can be reconciled, the meaning which makes them work must be preferred."[217] Thomas J expanded this rule by stating that conflicting provisions should be interpreted, rather than enforcing the purpose that arose later in time.[218]

These rules can provide useful guidance to reconcile the issues in the RMA between Part II of the Principal Act and s3 of the Amendment Act. The conflicts in purpose and the interpretation of the provisions emphasise the inherent difficulties in Environmental Law highlighted in chapter one.[219]

**a) The "Correct" Purpose Approach**

Academics in favour of the majority's purpose critiqued Elias J, claiming that she provided "convincing reasoning but fails to deliver the policy outcome".[220] Endorsing the s3 purpose can firstly be justified because it is "virtually impossible to assess the extent to which an applicant's activity contributes to climate change".[221] It is unclear how efficiently the coal would be burnt, how in a certain location it would effect Climate Change and how, even if this was determinable, a territorial authority would be able to

[214] Author Unknown above n 178.
[215] *R v Pora* [2001] 2 NZLR 37 CA.
[216] Ibid.
[217] Ibid at [4] per Elias J.
[218] Ibid at [127] per Thomas J.
[219] See discussion in chapter One.
[220] Allison Arthur Young and Jess Riddell above n 47 at 83.
[221] Ibid.

avoid remedy or mitigate it. Additionally it would surely not be Parliaments intent to insist that a mining company be responsible for the end use of coal that it does not itself burn. This would create an anomalous result and excessive liability.

Additionally, if the Government's true intent was to regulate the selling of coal overseas, it should do so through express legislation. There is precedent for this type of activity in the management of water where s21(1A) of the Water Soil and Conservation Act 1967[222] which places a prohibition of exporting of water obtained in NZ.[223] Furthermore the CCRA is aimed at regulation of climate change in NZ. The RMA should be used in a different way to this Act rather than allowing for "double regulation". The role of the RMA is to help councils plan for the effects of climate change such as flooding or erosion through National Policy Statements rather than facilitating "a backdoor" approach to mitigation. This would be contrary to the purpose of the RMA.

However, although the majority's purposive approach can be reasoned, the author endorses the view of Elias CJ. The majority expanded s3 to be read literally as an operative provision. But the only explanation they provided for this was reference to s23 of the Interpretation Act, which stipulates, "An amending enactment is part of the enactment it amends."[224]

A number of flaws can be identified in adopting this purpose, which results in the minority's approach being favoured. First, s3 is a purpose provision so its function is limited to shedding light on the meaning of a text. In this instance s104E and 70A of the Amendment Act and no further. No evidence in the legislative history suggested that Parliament intended to extend this provision to alter the RMA's overall "sustainable management" purpose.

If the majority wished to prioritise the s3 purpose, they should have identified this and reconciled it with s5. In fact s3 should have been interpreted in light of s5.[225] The

[222] The Water Soil and Conservation Act 1967, s21(1A).
[223] Allison Arthur Young and Jess Riddell above n 47 at 84.
[224] The Interpretation Act 1999, s23.
[225] Author Unknown above n 178 at 17.

previous chapters discuss the importance of s5 and it's centrality to interpreting the RMA.[226] The majority in ***Buller Coal*** however does not refer to s5 at all except to set out the scheme of the RMA. No attempt is made to reconcile the provisions despite the rules outlined in ***R v Pora*** to do this. Pure omission of reference to s5 is inconsistent with s5 of the Interpretation Act and the approach used in ***King Salmon*** in relation to the same provision, which reiterated the primacy of Part II.[227] The general rules of interpretation outline that the only reason to ignore the s5 purpose is if the literal meaning was clear, however, as already established above the plain words were not clear as per the hypothetical examples.

For the reasons outlined above relying on the s3 purpose so heavily was inappropriate. Therefore the author agrees with Elias J's interpretation of the provision. Section 3 should cast light on s104E and s70A but the principles in Part II remain unaffected. The only way to resolve the conflicts with s3 and s5 is to give s5 primacy and therefore read a narrow interpretation of the Amendment provisions in the light that s5 casts.[228] This would lead to an outcome that the effects of GHGs on climate change can be considered in other consents not expressly prohibited by the Amendment Act. Although this could result in "double regulation" Parliament should amend the CCRA or the RMA to address the issue. It is not a decision for the Supreme Court to make.[229]

Despite the likelihood of "double regulation" upon adopting the Chief Justice's approach, some authors have made attempts to interpret the legislation in a way so as to permit the consideration of the effects on climate change for the other types of consents, whilst avoiding ancillary regulation. It has been suggested that Elias J's approach can be adopted but with an additional limiting qualification that the consideration of GHGs should have been removed in relation to activities that are ancillary to those activities requiring discharge to air consents.[230]

[226] See discussion in chapter one.
[227] Author Unknown above n 178.
[228] Ibid at 19.
[229] Ibid at 42.
[230] Ibid at 2.

Elias J tried to make the claim that the activities were not ancillary to the mine and thus the consideration of climate change would be acceptable. However, this seems to be a stretched interpretation of "ancillary".[231] A proposed solution is outlined that avoids "throwing the champagne out with the cork"[232]

There are many opportunities currently for local authorities involvement in regulating GHGs. Councils could have rules to assess GHGs whilst avoiding the backdoor absurdity. This would involve a two-step process. First, the GHG emissions outcomes as part of identifying potential effects must be identified. Second, defining the 'development as a whole' would bring the "ancillary" activities under the exceptions of s70A and 104E. [233] This would also meet Integrated Management principles, which are dominant today. By defining the development as one whole proposal rather than individual segments means that back-door regulation would be avoided without completely excluding the consideration of climate change for other types of consents.[234]

[231] Ibid at 27.
[232] Ibid at 27.
[233] Ibid at 29 -33.
[234] For further discussion on this proposal see: Author Unknown "Case Comment: West Coast Ent v Buller Coal Ltd [2013] NZSC 86" Forthcoming in VUWLR.

# PART C:

# Conclusions:

The split decisions of the Supreme Court in both ***Greenpeace***[235] and ***Buller Coal***[236] are manifestations of contrasting ideological viewpoints on environmental management and climate change effects and mitigation.[237] However, the Supreme Court is the highest judicial authority in NZ and therefore the interpretation approaches adopted and outcome that eventuated are the "correct" decisions in NZ. If the decisions are to be overturned, a wider debate on environmental law in NZ and the role of the RMA will need to be engaged.

The author makes some crude conclusions that the basis of the decisions in ***Greenpeace*** and ***Buller Coal***, although justifiable, could have been influenced by the background assumptions and values that were highlighted in chapter two. Until such point that these background biases' can be challenged there is not much hope for climate change regulation in NZ. Ideally an interpretation that resulted in protection of the environment should have been favoured, however the liberal views of the judiciary, the background that the law was founded upon and the wide drafting of the RMA it is easy to see how the results were determined.

Once Parliament deems climate change an issue that requires urgent attention the law might be changed and future local bodies will be able to consider the effects of GHGs on the environment. As the law stands there is limited role for local councils and the RMA to manage emissions in this way.

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235 *Greenpeace New Zealand Incorporated v Genesis Power Ltd* above n 7.
236 *West Coast Ent Inc v Buller Coal Ltd* above n 8.
237 Edward Willis above n 74 at 158.

# CHAPTER FOUR:
# Policy Considerations

Regardless of the exact tools of interpretation used by the judges to construe the legislation, the policy and background ideologies that were critiqued in chapter two perhaps facilitate these interpretations in favour of economic development. Only with a policy change and shift in the ideological underpinnings of the RMA will climate change and the environment be effectively protected.[238] Only with increased encouragement from the state will environmental change occur. The following chapter outlines why and how policy changes could occur.

The stark contrast in approaches by the Supreme Court emphasise that there is considerable scope for future reform of climate change law in NZ. The issue is not only contentious at the highest level of judicial authority in NZ but also across the public sphere. Due to this high level of debate, the issue can easily be brought to the table.

Although classical liberal ideologies are inherent in the background law, as outlined in chapter two, modern ideologies that promote environmentalism, are on the rise. This change will facilitate change to these background influences that have played a role in the interpretation of cases to date. A hands-off approach by government will not be enough to cure the problem of climate change.[239] Only affirmative intervention and protection will preserve nature. Schemes like the ETS rely on individuals and as outlined above this scheme is failing. The role of the RMA in regulating climate change at a local level is paramount to encouraging reductions in GHGs.

[238] Robert Gordan "New Developments in Legal Theory" David Kairys (ed) The Politics of Law (Pantheon, 1982) at [291].
[239] Charles A. Reich "Beyond the New Property" An Ecological View of Due Process" (1990) 56 Brooklyn Law Review 731 at 744.

NZ is much like the UK where the relationship between central government and local authorities is governed by the legal principle of ***ultra vires.***[240] Local councils are only able to do what they are statutorily permitted to do. Their rights and competences are not general, but specific and in the absence of central government direction, specific 'Climate protection' strategies have historically been rare.[241] This is clearly the case in the NZ cases where the statute was interpreted to prohibit local authorities from engaging in climate change strategy.

The following Chapter is a critique of the underlying policy interpretation that led to the disengagement of local authorities from GHG and ultimately climate change management in NZ. The author disagrees that climate change should be dealt with at a national, rather than regional level and offers suggestions why regional councils are more than apt to deal with managing GHGs. Additionally the author critiques that if Parliament places such high importance on dealing with climate change at a national level, then effective national guidance should have been developed before removing it's regulation from the RMA altogether. This would aid in removing the economic bias in the RMA.

## I. National vs. Local management:

The underlying claim of the judges in the abovementioned cases was that climate change should be addressed in a nationally driven way. Some academics believe that due to the scope and speed that climate change is occurring it can only be effectively addressed at a high level, through national or international policy-making and large-scale financial investments in implementation and enforcement.[242]

The International Environmental Agency (OECD) 1997 Review of NZ's energy policy proposed key reasons why climate change should be a national, rather than local issue.[243]

[240] Harriet Bulkeley and Kristine Kern "Local Government and the Governing of Climate Change in the Germany and the UK" (2006) 43(12) Urban Studies 2237 at 2239.
[241] Ibid
[242] Joan Ross Frankson (ed) Commonwealth Secretariat Discussion Paper Number 2 October 2008 Local Governments and Climate Change. (Commonwealth Secretariat, London)
[243] The International Environmental Agency "Review of NZ's energy policy" (1997).

They highlighted that inconsistent regional based decisions might mean that companies will be encouraged to locate in different regions to take advantage of the regulatory rules in a given area creating disparities across the country.[244] The report was also concerned with the high cost of local authorities using individual economic instruments rather than the efficient implementation of one single national mechanism. They held that overall the RMA is not the most appropriate way to address carbon emissions.

Other authors suggested concern with the impracticalities for the mining companies that arise from dealing with climate change locally.[245] Emphasis was placed on the unfairness on the mining parties to be responsible for the end-use of coal that they themselves don't burn. They have no control over their clients coal emitting practices, and it would be anomalous to attempt to regulate them locally rather than at the source of the emissions.

The author however maintains that not only should the Courts not have interpreted the climate change cases to restrict local authorities discretion[246] but also policy should not be emphasising that this is the best way to address climate change. The most unusual thing about removing local authorities ability to make plans to deal with climate change and consider the effects of such in the consent granting process, is that almost all other environmental effects under the RMA are dealt with at a local level with national guidance.[247] Local government has a history of leading local action on issues that have failed to be addressed nationally,[248] so an express exclusion of regional council's ability to consider climate change where the national Government is failing to do so, is unusual.

There are a variety of reasons why the RMA operates locally. First, while global and national commitment and co-operation is essential to facilitate action, sustained local initatives are necessary to directly and successfully address climate issues.[249] The express role of regional councils is to manage resources. They have a range of functions and

[244] Ibid
[245] Allison Arthur Young and Jess Riddell above n 47 at 83.
[246] See discussion in Chapter 3.
[247] Simon Schofield "A Reply to Climate Change and the RMA" Climate Change Law < http://www.climatechangelaw.co.nz/reply-climate-change-rma/> at 2.
[248] Dr Hayley Bennett, Public Health Medicine Specialist "How Should Local Government respond to Climate Change?" (Public Health Seminar, University of Otago, Wellington, February 2014).
[249] Joan Ross Frankson above n 239.

responsibilities that can directly and immediately impact and affect climate change. Local councils are in charge of decisions regarding land use, roading, refuse and recycling, buildings, civil defence, water management each that can contribute to increases or decreases in emissions.[250] This direct impact on infrastructure means local authorities can actively encourage reduction of local GHG emissions.[251] They facilitate this through long term, annual plans and reports that focus beyond just the term in power[252] and are driven by what is best for the community, not only their political agenda.

Furthermore, local councils are the level closest to citizens[253] and thus focus on local issues, services and the specific needs and priorities of a given area. This is vital to addressing the climate issues, as not all communities will be able to respond in the same manner.[254] Local governments are in a unique position to tackle the cause and effects of climate change. Being closest to the action local governments can provide effective leadership for their citizens because they have the opportunity to "catalyse and sustain the behavioural change at individual and community levels"[255] in "an integrated, systematic approach that considers local risks, vulnerabilities and priorities and secures maximum benefits for the local community".[256] Additionally smaller localities have the possibility to be revolutionary and to test cutting edge technologies and new approaches.[257]

Local governments are the most accessible authority when disaster strikes.[258] Given their proximity to the community, local governments have the advantage of responding faster and more effectively to local climate events than institutions and organisations at higher

[250] Dr Hayley Bennett above n 245.
[251] Dana Rachelle Peterson above n 9 at 109.
[252] Dr Hayley Bennett above n 245.
[253] Maryke van Staden and Francesco Musco "Introduction" Maryke van Staden and Francesco Musco (eds) *Local Governments and Climate Change: Sustainable Energy Planning and Implementation in Small and Medium Sized Communities* (Springer, New York, 2010) 1 at [4].
[254] Dr Hayley Bennett above n 245.
[255] Maryke van Staden and Francesco Musco above n 250 at [5].
[256] Joan Ross Frankson above n 239.
[257] Maryke van Staden and Francesco Musco above n 250 at [5].
[258] Paula Hunter, Zoe Burkett and Bruce Trangmar "Local government adapting to climate change: Managing infrastructure, protecting resources and supporting communities" Richard Nottage, David Wratt, Janet Bomman, and Keith Jones (eds) *Climate Change Adaptation in New Zealand: Future Scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, February 2010) 122 at 125.

levels of the governance structure. In their efforts to provide continuous and high level preparedness for and management of natural disasters, local governments play a critical role in monitoring the impact of climate change and are essential to managing climate risks and vulnerabilities. Local governments have up-to-date knowledge of the local environment, and the changing needs and capacities of the local community. In this context, they are a vital and influential source of information to the central government on largescale climate change interventions.[259] Using both indigenous and scientific knowledge generates community-wide ownership and commitment to the adaptation process, thus ensuring more robust climate responses.

Not only do they have power and influence in a community, local government is a major sector of the economy, they have an annual expenditure in excess of $7b, assets of S110b (which is approximately 4% of NZ's GDP) and 23,000 FTE staff.[260] These resources provide the mechanism to drive change through specific budgeting to suit certain areas issues. International examples provide useful emphasis of the success of addressing climate change locally. One such case example is Woking Borough Council in the UK, which makes regional plans and works locally to address climate change. In their plans they addressed certain aspects that were of specific issue in the Woking area.[261] In that area there is recorded success of reduction in emissions. PROOF

Overall the current law and policy has removed a central avenue to effectively address climate change in NZ. This should not have been the case and the law ought to facilitate RMA regulation of emissions.

## II. National Guidance:

National guidance is required, whether or not local councils have the ability to consider climate change. If they do have this ability a nationally co-ordinated approach is still essential, if however the law remains in its current state then there is even higher

[259] Joan Ross Frankson above n 239.
[260] Dr Hayley Bennett above n 245.
[261] Lara Curran "Climate Change Strategy: Thinking Globally, Acting Locally(Woking, United Kingdom)" Maryke van Staden and Francesco Musco (eds) *Local Governments and Climate Change: Sustainable Energy Planning and Implementation in Small and Medium Sized Communities* (Springer, New York, 2010) 257.

requirement for a NPS. Under the current law, without an NPS, there is no ability for councils to consider effects on climate change at all. As outlined in chapter two, ***King Salmon*** has endorsed the hierarchy of planning documents. If a NPS were in place this case emphasises that it must be followed and the cases looked at were decided on the basis of one being created. " The RMA envisages… a cascade of planning documents, each intended, ultimately, to give effect to s5."[262] The intention of Parliament was not to exclude local councils from considering climate change at all but to allow this to occur under an NPS. Therefore it is essential for NZ to develop one.[263]

Climate change activist groups such as Generation Zero have requested other proposals. They seek a co-ordinated national scheme to deal with climate change. Although some claim that the Emissions Trading Scheme is that mechanism, as per Chapter one there are a number of flaws in this scheme. Thus a new national policy is recommended.[264]

Generation Zero outlines that because society is heavily reliant on sources of energy (food, transport, shelter, comfort, entertainment, water, waste etc.)[265] addressing the limited management of climate change in NZ is urgent. NZ currently only has political commitments but it is essential that binding legal targets are established.[266] Legally binding targets are crucial because currently there is no plan to determine how emissions targets will be met.[267] Two countries (Denmark and the UK) have such mechanisms in place and Generation Zero suggests that NZ follows this design. NZ is in a prime position to do this with a smaller population and renewable energy projects already in place.[268]

The Danish Government established a plan ***Our Future Energy*** that aims to phase out fossil fuels for all energy by 2050.[269] Rather than expecting a silver bullet they are implementing a range of small, targeted policy responses that overall will have a significant impact. Alternatively, the UK Climate Change Act sets binding targets

[262] Ibid at [30].
[263] Sir Geoffrey Palmer, QC above n 1 at [17].
[264] Ibid at [18].
[265] Paul Young above n 37.
[266] Alec Dawson above n 18.
[267] Ibid.
[268] Ibid.
[269] Ibid at 8.

combined with practical ways to reach these targets.[270] NZ should be inspired to follow these models.

In 2007 the Prime Minister John Key stated, "New Zealand must take credible steps to reduce greenhouse gas emissions or risk becoming a trading pariah".[271] However under the current government's guidance, no such steps have been embarked upon. "Sustainable management is an objective to be met, not merely a guide to interpretation and so environmental bottom lines are legitimate"[272] however sustainable management of the climate does not appear to be met given the current position of the law.

[270] Ibid.
[271] Paul Young above n 37 at 26.
[272] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 [2014] NZRMA 195 at [24](a).

# CONCLUSION:

NZ's current domestic response to climate change is in turmoil. The current law leaves little scope for local authorities to regulate emissions and there are significant gaps for considering some types of emissions, notably by-products of NZ extracted goods, that are exported overseas. The background values and ideologies that influence the law could perhaps provide some justification why the legislation and subsequent interpretation have favoured economic and development outcomes over environmental concerns. The broad drafting of the legislation also facilitates interpretations in this way.

There is convincing reason for climate change to be a consideration for decision-making authorities under the RMA. Despite the underlying complexities of interpreting environmental law and that environmental law can be seen as ideological, it is absurd that one of the most threatening issues of our time cannot be contemplated under NZ's primary environmental statute. Interpreting the 2004 Amendment Act and s104(1)(a) of the Principal Act, in a way that excludes all climate change considerations perverts the overall purpose of "sustainable management".

Also alarming are the techniques of statutory interpretation used by the majority Supreme Court and the inconsistency in high profile cases such as ***Greenpeace*** and ***Buller Coal***. What this seems to suggest is that the judiciary is focused on attaining a desirable outcome in terms of their own ideologies rather than engaging with orthodox rules of interpretation. The Supreme Courts endorsement of a textualist approach in ***Greenpeace***, and their emphasis on the s3 of the Amendment Act in ***Buller Coal***, were flawed approaches to interpretation leading to anomalous results and disengagement of the RMA from dealing with climate change at all.

Providing local authorities with the power to consider climate change in NZ for other land use consents and for the end use of coal does not mean that climate change will take priority in decision making and automatically rule out any development of non-

renewable energy projects. As always, the factors in Part II will be weighed and balanced by decision makers giving appropriate weight to all principles. It is nonsensical that the benefits of renewable energy and effects on climate change are not a part of that balancing process.

The national framework for assessing climate change is another weakness of the regulatory scheme in NZ. The ETS purports to set up a scheme for encouraging reductions in NZ's emissions but as suggested in chapter two this has yet to show convincing results. The gaps in the ETS framework to consider large emitting sectors such as agriculture and off-shore combustion of NZ mined coal are significant flaws. This lack of national guidance should mean that the RMA and local authorities could step in to ensure that GHG emission reduction and "sustainable management" is achieved in NZ. However, the outcomes in ***Greenpeace*** and ***Buller Coal*** have ensured that this is not possible. In the absence of any other national guidance the acknowledgment of climate change as a serious issue in NZ is yet to be appreciated.

Climate change and how governments deal with the issues surrounding its management is one of the most contested controversies of this century. This is optimized by the inherent issues in interpreting environmental law and the underlying ideological aspects of environmental law. What is evident though is that climate change is imminent and will have a large impact on societies globally. Given the inherent issues with the law and the looming gravity of anticipated climatic events, the author is concerned that the Minister for the Environment's speech on the 20th January 2015 in regards to the proposed amendments to the RMA, made no mention of climate change.[273] There is currently a severe lack of significant ways to consider GHG emissions and climate change in NZ law so it is unusual that this is not being addressed at a national level.

[273] Hon Dr Nick Smith, Minister for the Environment and Minister of Housing and Building "Overhauling the Resource Management Act" (Annual speech to Nelson Rotary, 21 January 2015).

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