



Sustainability & Climate Change Update - December 2023

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There is a lot happening in the Climate Change and Sustainability space - for this final update for 2023 we provide a selection of topics below:

- *Environmental Defence Society releases Final Working Paper identifying options for new Climate Adaptation Act*
- *NZ's first greenwashing case - Z Energy's sustainability claims challenged under the Fair Trading Act*
- *Commerce Commission issues Collaboration and Sustainability Guidelines*

- *MFE's Atmosphere and Climate 2023 Report highlights the pressure being put on our environment*
- *Climate Change Commission releases advice on NZ's second Emissions Reduction Plan.*
- *EDS releases Final Working Paper identifying options for new Climate Adaptation Act*

The Environmental Defence Society (EDS) has released its 3rd and Final Working Paper identifying options for reform. It indicates that its Final Report, due in the first quarter of 2024, will contain concrete recommendations for the design of a Climate Adaptation Bill.

You can read more about the EDS's 1st Paper which dealt with potential principles and funding of managed retreat here:

<https://www.cooneyleesmorgan.co.nz/making-moves-on-managed-retreat>

Its 2nd Working Paper looked at the adequacy of our current law to deal with managed retreat issues and identified a number of weaknesses and gaps in the current system, including the fact that there is already a legal framework for undertaking *national* climate risk assessments, but no similar requirement at a regional or local level; and that our current legal framework is not well configured to stop development in high hazard areas. These are undoubtedly significant gaps in the current framework.

The purpose of the 3rd Working Paper is to draw on lessons learnt from national and international case studies to combine options into two models for a potential reform package. You can find the EDS paper here: https://eds.org.nz/wp-content/uploads/2023/12/EDS_Climate-Adaptation-Working-Paper-3.pdf

The Paper notes that since the 1st and 2nd Working Papers were released there have been a number of developments on the climate adaptation and related fronts; including the release of the Final Report on the Future of Local Government Review; the release of the Expert Working Group's report on Managed Retreat; the Environment Select Committee launching an Inquiry into Climate Adaptation and

the release of a proposed National Policy Statement on Natural Hazard Decision-Making. You can read about those later documents here: https://www.cooneyleesmorgan.co.nz/sustainability_and_climate_change_update_Sep_2023

In addition, the change of Government means that the newly legislated Natural and Built Environment Act 2023 (NBEA) and Spatial Planning Act 2023 (SPA) will shortly be repealed; meaning that (at least for now), any Climate Adaptation Bill would need to sit alongside the RMA. Buy-out processes have also commenced for homes severely impacted by Cyclone Gabrielle and the Anniversary Weekend floods.

What are the 2 proposed models?

Model 1 is essentially a government-led model titled “*comprehensive nationally-driven approach*” to address managed relocation by creating a new agency (National Adaptation Agency) and a specialist branch to provide support to Māori communities.

Model 2 is a *decentralised community-led approach* mainly led by councils, with an emphasis on risk identification and communication. The paper identifies the ‘phases’ of adaptation processes and then uses the two models to demonstrate what the systems might look like. The phases include:

- Identifying, assessing and communicating risk by considering geographic focus, methodology, process, communication, timing and frequency, responsible agency and funding, and legislative home.
- Preventing development in risk prone areas by encompassing different iterations of national direction, requirements for the content of regional spatial plans, and requirements and incentives for territorial authorities.
- Undertaking adaptation planning such as Māori adaptation planning, adaptation planning framework, initiation, governance and plan-making body, technical support, resourcing and plan status.
- Acquiring properties in terms of three categories: voluntary acquisition, compulsory acquisition, and compensation.
- Relocation and developing new settlements based on removal of properties and infrastructure, development of new settlements in low risk areas, and

management.

- Post relocation land management with vacated land status based on the Reserves Act, Climate Adaptation Reserve and / or Māori reservation, while governance / management can occur through iwi and hapū, Department of Conservation, local councils and co-governance.

Model 1 relies heavily on central government direction and involvement; and could include the creation of a new National Adaptation Agency with a broad role in supporting risk assessment and adaptation planning and overseeing the mechanics of property acquisition and relocation of people. It draws on a number of matters explored in the 1st Working Paper, including compensation for residential properties being based on full market value with a maximum cap; and funding sources including general taxation and revenue from the Climate Emergency Response Fund. It includes further thoughts on relocation including new land for marae and papakainga being purchased by the Crown and the possible involvement of Kainga Ora in creating new communities under the Urban Development Act.

Model 2 provides for a mainly council-led process, with central government playing a supporting role. Emphasis would be placed on risk identification and communication of information – for example through notations on LIMs; and potential liability for council in tort for making negligent decisions that ignore hazard information. Councils would fund a greater proportion of compensation (50%); with no provision for prefunding (e.g. through an adaptation fund).

Part Two of the Paper investigates six international case studies to supplement the models and notes key themes to achieving success here in NZ:

- Nature-based solutions undertaken alongside managed relocation can reduce hazard risks, create more room for nature, and improve community amenity.
- There may be room to upscale the programmes.
- Successful managed relocation was dependant on:
 - Access to a strong and predictable funding source such as central government and sometimes local councils;
 - Incorporation of multi-level governance structures; and
 - Stakeholder and community engagement in managed relocation efforts.

Z Energy's sustainability claims challenged under the Fair Trading Act

Consumer NZ, the Environmental Law Initiative and Lawyers for Climate Action (Plaintiffs) have recently filed High Court proceedings, relating to claims made by fuel retailer Z Energy (Z) which the Plaintiffs allege breached the Fair Trading Act 1986 (FTA).

The statement of claim alleges that four separate claims made by Z through social media, traditional and digital advertising amounted to misleading and/or deceptive representations.

The statement of claim challenges claims made by Z in relation to representations made about its emissions reductions; that it was 'Getting Out' of fossil fuels; its electric vehicle charging stations infrastructure; and its operational emissions. It seeks declarations that the representations amount to breaches of s9 of the FTA (misleading or deceptive conduct); mandatory injunctions directing Z to publish corrective advertising in a similar manner and with the same prominence as the original advertising; and orders preventing Z from making similar representations.

As far as we are aware, this is New Zealand's first 'greenwashing' case and follows hot on the heels of similar cases being brought in Australia and other jurisdictions.

Commerce Commission issues Collaboration and Sustainability Guidelines

The Commerce Commission (ComCom) released their Collaboration and Sustainability Guidelines in November this year. You can find a copy of the Guidelines

here: https://comcom.govt.nz/__data/assets/pdf_file/0033/335985/Collaboration-and-Sustainability-Guidelines-30-November-2023.pdf

They explain when collaboration for sustainability objectives is more or less likely to harm competition and how NZ's competition laws can accommodate collaboration between businesses even when it may harm competition. The Guidelines do not address businesses' obligations when making environmental claims. All businesses need to ensure their sustainability claims are substantiated, truthful and not misleading to avoid breaching the FTA. You can find further ComCom guidance on environmental claims here:

https://comcom.govt.nz/__data/assets/pdf_file/0017/220247/Environmental-claims-guidance-July-2020.pdf

The Guidelines cover topics such as collaborative sustainability initiatives that are unlikely to affect competition and those which may impact competition, cartel conduct, including expectations and clearances, collaborative activities and joint buying, and factors to consider when assessing effects of substantially lessening competition in a market. There are a number of examples provided where ComCom authorised collaboration which involved cartel conduct, would lessen competition, or had public benefits which outweighed the detriment resulting from the loss of competition (including sustainability). These include Refrigerant License Trust Board, Nelson City Council and Tasman District Council's authorisation to create a Regional Landfill Business Unit, Australia's Competition and Consumer Commission's (equivalent to our ComCom) interim authorisation to allow major supermarket retailers to form part of a Soft Plastics Taskforce to deal with soft plastic recycling, and a proposal for a Zero-energy housing pilot project.

The Guidelines provide a brief process for businesses to follow when considering collaboration which we have included in full:

1. Read these Guidelines carefully to better understand the potential effects of the collaboration on competition.
2. Consider the objectives of your proposed collaboration, and to what extent collaboration is necessary to achieve those objectives.
 - Consider whether the collaboration affects competition.
 - Will the collaboration involve actual or potential competitors?
 - Will the collaboration affect the competitive process
 - Will the collaboration be between competitors who collectively hold a significant share of the market?
 - Will the collaboration restrict the ability for businesses, or other entities, in the relevant industry to enter, exit, or expand in the market?
 - Will any competitively sensitive information be shared between competitors? the wider circulation and use of that information?
 - Will the collaboration take place over an extended or unlimited time?

3. If the answer is yes to any part of question 3, or you are unsure, consider seeking legal advice on how the Commerce Act may apply to any proposals.
4. Consider the benefits of collaboration and whether a collaborative activity clearance or authorisation might be appropriate.

MFE's Atmosphere and Climate 2023 Report highlights the pressure being put on our environment

The Ministry for the Environment and Statistics NZ have released their latest three-yearly Report about NZ's atmosphere and climate, with findings based on the Stats NZ indicator data. Greenhouse gas emissions from human activities are changing NZ's climate, impacting our environment, communities, and economy.

You can find a copy of the Report

here: <https://environment.govt.nz/news/new-report-highlights-pressures-on-aotearoa-a-new-zealands-climate/>

Pressures on NZ's atmosphere and climate and its impacts include:

- Increased gross greenhouse gas emissions between 1990 and 2021 leading to increased net emissions.
- Annual average temperature increased by 1.26°C between 1909 and 2022, with eight of the 10 warmest years on record in the last decade.
- Agriculture and horticulture growing seasons are lengthening, and frost days are declining in most places.
- Annual rainfall during the last 60 years has changed in most places, with the south becoming wetter and the north and east becoming drier.
- Extreme weather events are becoming more frequent and intense
- Annual mean coastal sea levels rose faster between 1961 and 2020 than between 1901 and 1960 at all four longer-term monitoring sites.
- Changing ocean currents and rising sea levels have led to a loss of nesting sites for various shorebirds and declining populations of tītī (muttonbird).
- Spatial mapping shows which sites are of significance to Māori are at risk of coastal erosion.

- The Māori economy is particularly vulnerable to climate change. A large part of agricultural production, which is severely at risk, is in Māori ownership.
- About 750,000 people and 500,000 building, are near rivers and in coastal areas already exposed to extreme flooding.
- The Treasury estimates the cost of repairing damage caused by Cyclone Gabrielle and the Auckland floods in 2023 to be between \$9-\$14.5 billion.

Climate Change Commission releases advice on NZ's second Emissions Reduction Plan.

In mid-December the Climate Change Commission (Commission) released its advice on NZ's Second Emissions Reduction Plan. It describes the direction of policy needed to achieve the second emissions budget and keep the country on track for the 2050 target. It focuses on how NZ is making big changes within the climate change area, but must continue to reach its domestic goals and Paris Agreement obligations. A copy of the Report can be found here: <https://www.climatecommission.govt.nz/public/Advice-to-govt-docs/ERP2/final-erp2/ERP2-Final-Advice-for-web.pdf>

The Report is divided into three parts: 1) setting the scene; 2) fundamentals for success; and 3) low emissions options for sectors and systems. Each part contains chapters focused on specific areas where Government action is needed to achieve emissions reduction outcomes, including the context and rationale for their recommendations.

Chapters cover a range of issues and topics including the task for the second emissions budget, a path to net zero, emissions pricing, investment and finance, research, science, innovation and technology. The Report explores options regarding whāia ngā tapuwae (Māori climate leadership), equitable transitioning, agriculture, our built environment, circular and bio economies, energy and industry, forests and carbon stocks, transport, and waste and fluorinated gases.

The Commission's report reflects government policy as at October 2023. As such, it does not reflect the new coalition Government's policy approach, and a number of the policies mentioned throughout the report are either likely to be scrapped or delayed.

The Executive Summary notes *“Each Government will have its own policy priorities and preferred approaches to action in relation to climate change.”* The advice from the Commission takes an “outcomes-focused” approach and notes: *“Our recommendations to the Government identify areas where there are critical gaps in action, or where efforts need to be strengthened or accelerated to meet the second emissions budget and Aotearoa New Zealand’s longer-term emissions reduction targets in a manner compliant with the Act.”*

If you have any questions, please contact Rachael Zame, Partner.

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