
THE BIG PICTURE: CLIMATE CHANGE

What lies ahead in 2020?

February 2020



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More response is a reality

Climate change response will become a reality for many New Zealand businesses in 2020, as an array of legislative changes continue to shed light on what a lower-carbon economy will mean for their own operations.

Globally, concern around climate change is gathering momentum, with an increasing impetus to understand and report on climate risk and adaptation plans, and growing focus on what might be needed to transition economies. In New Zealand, the passing of the Zero Carbon Bill in November laid the foundation for a transformation of New Zealand's climate change landscape. It provides greater certainty for policy and investment decision-makers alike, with cross-party support to achieve net zero emissions by 2050.

Achieving net zero by 2050 requires economy-wide action. The government's challenge will be in how it determines and implements cohesive and coordinated regulatory and policy settings across a number of sectors in time to give business sufficient certainty for investment and transformation planning.

The challenge is not a small one, with a number of constraints to be navigated. But the drive to decarbonise, while maintaining economic productivity, also presents significant commercial opportunities.



What's coming this year



Overhauling the Climate Change Response Act

Last year was a momentous year for climate change response in New Zealand, culminating in the passing of the Climate Change Response (Zero Carbon) Amendment Act (CCRA) in November. Over time these changes will drive economy-wide transformation and ensure central and local government, and those responsible for life-line utilities and core national and community infrastructure, understand the pending risks of the changing climate and have appropriate

adaptation plans in place and underway.

In 2020 we expect an amended form of the Climate Change Response (Emissions Trading Reform) Amendment Bill (the ETS Bill) to pass with cross-party support. It is currently before Parliament's Environment Select Committee. Much of the consultation discussion will likely be focused on:

- the auctioning mechanism;

- the ability to restrict the amount of NZUs in the market;
- the mandatory phase-down of industrial allocations from 2021;
- the substantial proposed forestry changes (including the introduction of averaging accounting for forests registered from 1 January 2019);
- the proposed changes to the penalties regime; and

- agriculture remaining outside of the Emissions Trading Scheme (ETS) until 2025.

Work is under way to consider what an alternative farm-level pricing mechanism to the ETS could look like — the sector has until 2022 to work with the Minister of Climate Change and Minister of Agriculture on what this might entail. This is a space to watch with interest.

Consultations closing

Reforming the New Zealand Emissions Trading Scheme: proposed settings

The government is currently consulting on proposed regulatory settings underpinning the reform of the ETS. The regulatory settings will be crucial to drive abatement activity through provisional emissions budgets, limits on emissions, NZU annual auction volumes, auction and NZU-related price settings, while the Climate Change Commission completes the first National Climate Risk Assessment and gets its analysis underway to make its independent recommendations in February 2021. See our summary of the proposed settings: [Submission dates loom for ETS and energy transition consultations](#).

Consultation closes on the government's proposed ETS reform settings on 28 February 2020, with the final settings expected to apply around the middle of 2020. These provisional settings are expected to be updated by following recommendations from the Climate Change Commission, in February 2021, for application in 2022.

Accelerating renewable energy and energy efficiency

At the same time the government is seeking submissions on the issues raised in its discussion paper *Accelerating Renewable Energy and Energy Efficiency*, which it released in December 2019. It recognises “the world is going through one of the most significant energy transitions in history”, which will “see a complete rewiring of global energy systems in response to the threat of climate change, and the economic and environmental opportunities low emissions energy sources are creating”.

The discussion paper identifies to meet the government's ambitious climate change goals there will need to be greater energy efficient processes and practices adopted, a transition to renewable fuels in industry and increasing renewable electricity generation. A range of options to encourage energy efficiency and the uptake of renewable fuels in industry, as well as options to accelerate renewable electricity generation and infrastructure are outlined in the discussion paper (also canvassed in our summary of the policy settings). Consultation closes on 28 February 2020 on the sequencing and optimal package of policies from those outlined in the discussion paper.



Other regulatory and policy change needed

Changes in the CCRA alone will not be sufficient to ensure New Zealand achieves its emissions budgets and targets. There will be wider regulatory and policy change – some of which is already underway. Cohesive regulatory and policy settings will be required to achieve the pan-economic change required to meet the 2050 target. Major decisions made by the government will now also be considered under a climate change lens as a standard part of Cabinet's decision-making, using a tool developed by Ministry for the Environment (MfE) to estimate emissions impacts.

The Resource Management Act 1991 and a number of associated National Policy Statements are under review or reform. Changes to the Act and several national policy statements will be crucial to support the reduction in NZ Inc.'s carbon footprint needed to meet emissions budgets and targets, and sustain a climate-resilient economy.

Proposed regulatory and policy change is also expected in 2020 targeting transition of the transport, energy, and industrial process heat sectors to a lower-carbon future. The need for climate-resilience will also bring greater scrutiny of biosecurity and water issues.

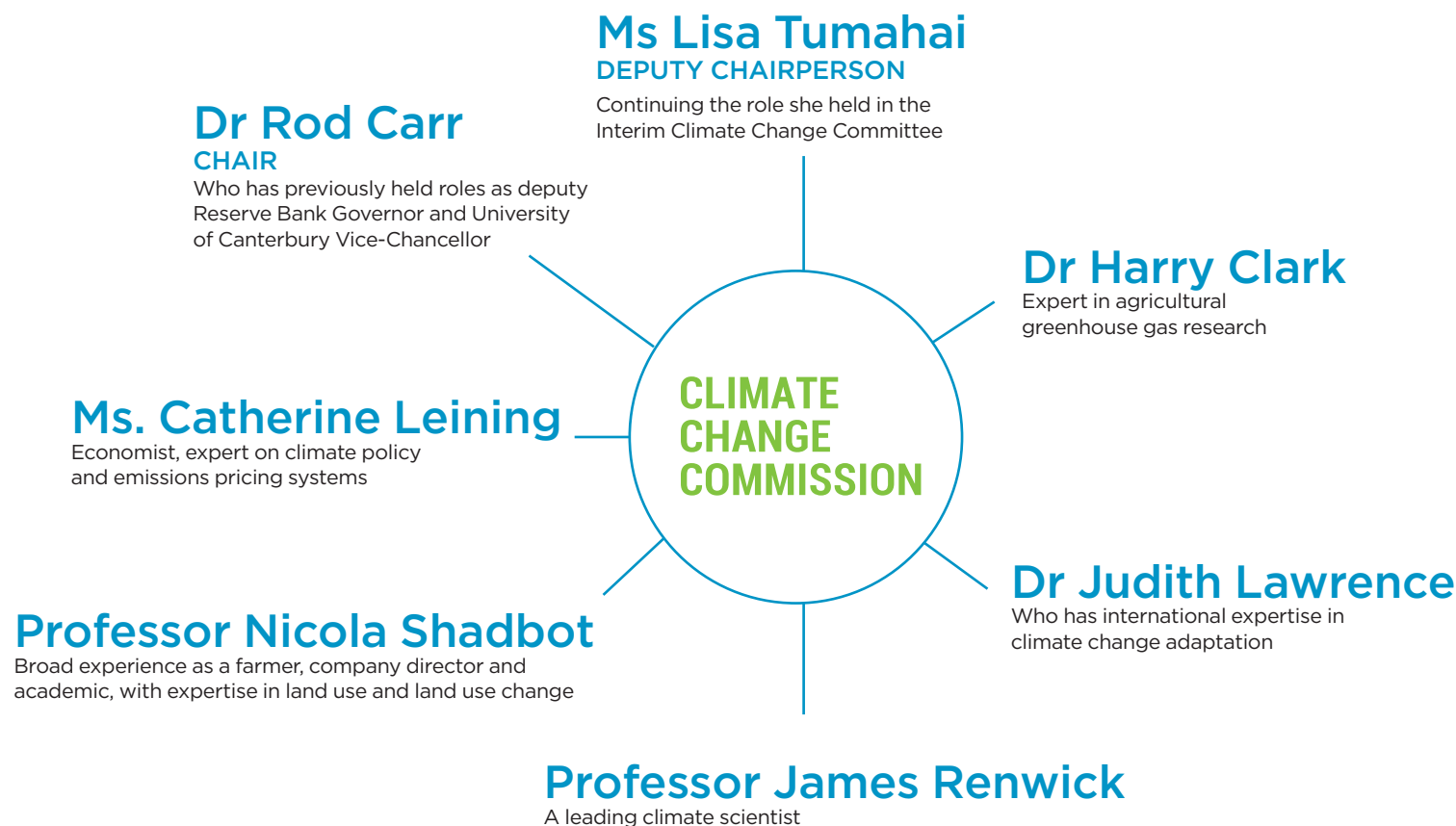


Emissions-budget focus for new commission

Seven commissioners were appointed to the Climate Change Commission (CCC) by December 2019, including Chair Dr Rod Carr who was named earlier, in October. The CCC has some independence as a Crown entity, and is focused on providing independent advice to government from experts on achieving targets set in the Zero Carbon Act, as well as monitoring them.

Through 2020 the CCC will be gathering and analysing evidence to update recommendations around the first three five-yearly emissions budgets out to 2035. The Chair of the CCC has signalled “consumer preferences will have to change and the economy will have to be reorganised over time to reach low emissions”¹.

The CCC is also tasked with delivering national climate change risk assessments every six years, with the first assessment underway and expected to be released in early- to mid-2020. The first assessment will provide an overview of how New Zealand may be affected by climate change, and will be used to prioritise action to reduce risks or take advantage of opportunities through a national adaptation plan. It is also likely to inform individual organisations’ climate change risk reporting and adaptation planning.



¹ *Morning Report* interview with Rod Carr on 18 December 2019.

Investment to drive emission reductions

Regulation changes alone will not necessarily drive timely investment decisions, given much of the capital investment required to reduce industrial and commercial emissions would arise when existing assets (such as coal boilers) reach end-of-life. To help catalyse investment, the government established Green Investment Finance Limited (GIF), which has a NZ\$100 million green fund. GIF is currently seeking investment opportunities. The government also announced a major new capital investment package in December 2019, NZ\$200 million of which is set aside to accelerate reduction of the public sector's carbon footprint. This includes replacing coal-boilers in schools, hospitals and other public institutions. The challenge will be realising investments to drive change, with an associated benefit of increasing wider consultancy knowledge and expertise around lower-carbon or decarbonised technology alternatives.

Policy change – such as the proposed levy on coal – will likely be used to support regulation both to strengthen the economic case for lower-carbon investment options, and bring forward such investment decisions.

The government signalled leadership in decarbonising process heat in its recent discussion paper *Accelerating Renewable Energy and Energy Efficiency*, and on 29 January 2020 followed up with its announcement that up to NZ\$10 million of its upcoming spend on infrastructure would be for projects to decarbonise state-run hospitals and schools. The infrastructure package also included almost NZ\$1 billion in funding for Auckland rail projects, which includes extension of the rail electrification network

Reporting requirement

Beyond the national climate change risk assessment and adaption planning, the MfE & Ministry of Business, Innovation & Employment's discussion document on *Climate-related financial disclosures – Understanding your business risks and opportunities related to climate change* signals the possible introduction of a mandatory (comply-or-explain) climate-

related financial disclosure system. The purpose of a climate-related financial reporting regime would be to ensure markets have the information they need, in a form useful for investors, lenders and other users of annual reports, to allocate funds that would speed the transition to a low-emissions, climate-resilient economy – and in doing so, potentially redirect existing investment away from businesses with climate risk that they are not adequately managing.

As we have previously discussed, this would be a significant change and one which would require organisations to identify and understand climate-related risks and opportunities, and the impact on their

activities and bottom-line of physical and wider policy/economic changes associated with the changing climate and drive for decarbonisation. Consultation on the discussion document closed in December 2019 and with the pace at which the government is currently moving on climate-related matters, we expect to see proposed regulatory change introduced on this subject in 2020.



Growth in climate lawsuits

Frustrated at the lack of progress in responding to climate change and worried about local impacts, both internationally and domestically we see a growing number of individuals and communities filing lawsuits in a bid to provoke faster climate action. The acceleration of climate litigation globally is evident from the United States having seen around 650 climate change litigation cases in the period to 2017, with that number more than doubling in the following two year period ending 2019.

International lawsuits in 2019 included:

- Claims being filed against fossil fuel-related businesses alleging a failure to act with enough speed to reduce their contribution to climate change or to disclose sufficient information about climate-related risks to investors.
- Human rights-related lawsuits seeking protection from climate change, with a landmark ruling from the Dutch Supreme Court in December last year determining that the government in

the Netherlands has a human rights-based duty to protect its citizens from climate change and must reduce the country's emissions.

In New Zealand, most climate change-related litigation to date has revolved around the previous climate change target set under the CCRA and factors being considered in granting consents for both fossil fuel-related activities and renewable generation;² local government has been investigating litigation risks associated with climate change for some time now.³ In addition, in the first week of February 2020, a private law claim asserting duties of care against seven businesses, and seeking orders requiring those businesses to achieve net zero carbon emissions by 2030, was heard in the Auckland High Court. There is also parallel litigation under way against the Crown targeting net zero carbon emissions by 2030. Off the back of these developments, we expect to see greater consideration of climate change risks and increasing disclosure of adaptation plans from both local government and businesses.

Furthermore, a United Nations Human Rights Committee (UNHRC) decision released in January this year upheld the New Zealand Supreme Court's decision to deport Ioane Teitota back to the Republic of Kiribati and not accept his claims of being a 'climate change refugee'. Whilst the Supreme Court decision was upheld due to the mitigations being put in place in Kiribati to minimise the impacts of climate change in the next 15 years, the UNHRC made a landmark ruling in finding countries may not deport individuals who face climate change-induced conditions that violate the right to life – laying the foundation in due course for climate change refugees. We expect to see this ruling relied on in years to come.



² See Winkelmann CJ and Glazebrook and France JJ, "Climate Change and the Law", paper for the Asia Pacific Judicial Colloquium, held in Singapore 28-30 May 2019

³ J. Hodder QC, *Climate Change Litigation: Who's afraid of creative judges?*, March 2019: <https://www.lgnz.co.nz/assets/Uploads/f488365773/Climate-change-litigation-Whos-afraid-of-creative-judges.pdf>

Pressure for action and agreement

Push for agreement on how international carbon markets would work

At the 25th Conference of the Parties (COP 25) to the United Nations Framework Convention on Climate Change (UNFCCC) in December 2019, the UN parties sought to agree on Article 6 of the Paris Agreement around how future market rules would work. Agreement on article 6 could not be reached given the failure to agree on the most contentious issues such as the carry-over of Kyoto credits into the Paris Agreement and measures to avoid double counting. All eyes will be on COP 26, which is expected to take place in November in Glasgow, to see if agreement can be reached.

Neighbourhood watch

Trade-focused businesses will be paying close attention to their obligations relative to those of competitors in other markets – particularly across the Tasman. But while Australian competitors saw a carbon tax scheme repealed in 2014, there is growing public pressure for meaningful climate action in the wake of devastating fires in Australia. While it is too soon to judge whether that will lead to any change, it is certainly an area some businesses will be watching closely, particularly those major emitters in New Zealand receiving industrial allocations which

will reduce over time should the ETS Bill pass mid-year. An Australian decision to impose a cost on emissions would create a more even playing field for our major emitters competing against Australian businesses for export market share.



Bell Gully's climate change practice

Our firm has been at the forefront of climate change action in New Zealand for the last 20 years. We helped to develop core climate change legislation in New Zealand and have had long-standing involvement with New Zealand's emissions trading initiatives, including advising the New Zealand Government on the design of the New Zealand Emissions Trading Scheme. Internationally, we worked on the world's first carbon trade for avoided deforestation and on pioneering emissions trading activity.

We act for an array of individuals and organisations, ranging from leaders in the emissions trading market and global investment banks to regional governments or government groups in New Zealand and overseas. This has included some of the nations that will be among those most affected by climate change.

That consistency in providing market-leading climate change advice is recognised by international legal directories. Bell Gully's environment practice is ranked in the top tier for environmental law in New Zealand by the Legal 500 Asia Pacific 2019. Practice leader Simon Watt has also featured in the world-wide climate change rankings of the international legal directory Chambers Global since 2008 – the only New Zealand lawyer to be ranked in the last six years.

We can provide you with:

- Specialist advice on all areas of law involving the regulation and reduction of greenhouse gas emissions.
- Advice on the regulatory and commercial opportunities and barriers in all sectors (including energy, transport, forestry, agriculture, manufacturing, and mining) transitioning to meet New Zealand's net zero carbon target.

- Advice on the implications of climate change adaptation for your business or community.
- Identifying carbon risks, as well as advice on carbon pass-through and trading.
- Robust due diligence around the sale or acquisition of emissions-exposed businesses or assets.
- Advice on activity and the financing of activity to implement carbon reductions and addressing regulatory barriers to a lower-carbon operation.
- High-level interpretation of New Zealand's climate change legislation and the implications of international agreements including the Paris Agreement.
- Advice on governance, risk and reporting associated with climate change.
- Advice on potential climate change litigation, and acting on actual climate change litigation matters.

Bell Gully's climate change team

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