ICLG

The International Comparative Legal Guide to:

Environment & Climate Change Law 2016

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A practical cross-border insight into environment and climate change law

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New Zealand

Karen Price

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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in your jurisdiction and which agencies/bodies administer and enforce environmental law?

The Resource Management Act 1991 ("RMA") is New Zealand's primary environmental statute and has an overarching purpose of promoting "*the sustainable management of natural and physical resources*". Other statutes are relevant to environmental issues such as hazardous substances and new organisms, biosecurity, mining, wildlife, marine protection, and regulation of activities in the marine exclusive economic zone ("EEZ").

The RMA introduced a hierarchy of governing documents that regulate and provide policy direction for natural resources. At the top are central government national policy statements and national environmental standards, which flow down to regional policy statements produced by regional councils, then regional plans (which primarily regulate discharges to air, land and water), and lastly district plans which regulate land-use activities and are produced by territorial authorities.

At a national level, the Ministry for the Environment ("MFE") is the principal government department responsible for drafting policy documents. The RMA also devolves much to local government bodies that promulgate policies and rules within their respective regions/districts. Councils are generally responsible for the enforcement of environmental laws under their respective plans and the RMA.

The Environmental Protection Authority ("EPA") was created in 2009 and is now the primary regulatory body managing consent applications for 'matters of national significance' under the RMA. If a consent application is lodged with the EPA, it must provide recommendations to the Minister for the Environment on processing. The Minister may then direct the matter to be referred to a Board of Inquiry or to the Environment Court for determination, provided that a matter of national importance is concerned, or the Minister can leave the matter to local authority determination.

The EPA also plays a key role in the management, regulation and enforcement of both hazardous substances and activities in the EEZ.

The Department of Conservation ("DOC") is the government agency responsible for conservation of natural and historic heritage. DOC plays a key role in conservation of New Zealand's conservation land and waters.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The RMA and other environmental legislation impose a strict liability regime and essentially contain three tiers of enforcement:

- administrative enforcement – matters dealt with at local government level, including abatement notices (cease action orders), excessive noise directions, and infringement offence provisions;
- civil enforcement – through court-imposed enforcement orders; and
- criminal enforcement – including monetary penalties and imprisonment, also dealt with by the courts.

Local authorities and the Environment Court are primarily responsible for enforcement of the RMA. The Environment Court has jurisdiction over appeals from local authority decisions. The District Court has jurisdiction over criminal offences.

In the EEZ, the EPA has the primary regulation and enforcement role.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

One of the principles of the RMA is to provide for a level of public involvement in resource management processes. In addition to requirements under environmental laws, provisions of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 provide for a presumption of public access to official information. Generally, applications for resource consent and hearing processes are accessible to the public, and specific reasons must be provided if information is withheld.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Environmental permits ('resource consents') authorise an activity which is otherwise restricted by operation of the RMA, secondary legislation or relevant district or regional plans. Consent authorities (usually territorial or regional councils) grant resource consents based on rules within relevant district or regional plans, and in accordance with the purpose of the RMA.

Broadly, resource consents fall into five categories authorising:

- land use activities;
- subdivision of land;
- coastal marine area activities;
- use, take and discharge of water; and
- discharges of contaminants to land, water and air.

Approvals may be required from both regional and district councils and also from the Minister of Conservation.

Transferring resource consents is restricted by the type of consent and the rules of the relevant plan. Land use and subdivision consents attach to land and can be enjoyed by successive owners/occupiers of the land, unless the consent expressly provides otherwise. Discharge, coastal, and water permits may be transferred, provided the relevant plan allows, and the authority that granted the permit is formally notified.

For EEZ activities, unless the activity is specified as permitted, operators need apply to the EPA for marine consent. The EPA then appoints a decision-making committee to assess and determine the application for marine consent (for example for petroleum exploration or mining activities). EEZ marine consents can be transferred in whole or part, to another person, upon notice to the EPA.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

The RMA provides for a right of appeal of the initial decision of the consent authority to the Environment Court. An appellant, or in certain circumstances, third parties, can appeal the decision to grant, or not to grant, resource consent. (In the case of a resource consent granted after lodgement with the EPA and referral to a Board of Inquiry/Environment Court, parties can only appeal on a point of law to the High Court.)

Appeals from the Environment Court to the High Court are restricted to points of law. Appeals to the High Court may continue (with leave) through New Zealand's appellate courts to the Court of Appeal, and/or the Supreme Court.

Decisions by the EPA under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act") can also only be appealed to the High Court on a point of law.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

All industries and projects that use natural and physical resources follow the same process as other applicants when applying for resource consent. Applications for resource consent must include an Assessment of Environmental Effects ("AEE") as set out in the RMA Fourth Schedule. Where an application has significant potential effects, the AEE requires detail to satisfy the decision-maker that the environmental effects are acceptable.

The EEZ Act also requires applicants for marine consent to provide information on a range of potential environmental effects.

Pursuant to both RMA and EEZ processes, additional information can be specifically requested from applicants by the regulatory authority determining the application, if considered necessary.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Enforcement powers of environmental regulators under the RMA are:

- Administrative powers – abatement notices, infringement notices and excessive noise orders are issued from the local authority. Abatement/infringement notices are usually used for small-scale offences. An abatement notice can require a person to cease or begin an activity to ensure compliance with the RMA, relevant plan, or resource consent. Infringement notices impose infringement fees.
- Civil enforcement – a court enforcement order can either require a person to cease or begin an activity.
- Offence provisions – dealt with through the courts. As mentioned, the RMA imposes strict liability and the District Court has jurisdiction over criminal offences. A person who commits an offence is liable for up to two years' imprisonment or a fine up to $300,000, and a corporation which commits an offence is liable for a fine up to $600,000. If the offence is a continuing one, offenders can be subject to an additional fine up to $10,000 for every day.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Waste is defined in the RMA extremely broadly as "*materials and substances of any kind, form, or description*". The Waste Minimisation Act 2008 contains a similarly wide definition.

The responsibility for dealing with waste lies principally with local government. District councils are responsible for dealing with solid waste, and regional councils are responsible for liquid, trade, and gaseous wastes.

Where the Minister for the Environment considers a product will or may cause significant environmental harm when it becomes waste, or that there are significant benefits from the reduction, reuse, recycling, recovery, or treatment of the product, the product may be declared a 'priority product', subject to an accredited product stewardship scheme (industry-led programmes where some or all of the environmental costs from a product (such as inefficient resource use or disposal costs) are included in the price). In 2014, MFE sought and considered public submissions regarding further regulation of certain waste streams. This reform process is ongoing. MFE also administers a Waste Minimisation Fund available to a variety of private and public waste minimisation projects.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The ability of a producer to store and/or dispose of waste at a site is controlled by the district and/or regional plan rules applicable at the site, resource consent requirements, and/or trade waste permit conditions in a regional plan or trade waste permit.

Section 15(1) of the RMA specifically prohibits the discharge of contaminants by industrial or trade premises into land, water or air, unless expressly allowed by resource consent, regulations, or rules in a regional plan. 'Contaminants' is very widely defined in the RMA (s2), and is likely to include many types of waste.

The Hazardous Substances and New Organisms Act 1996 also includes comprehensive controls relating to hazardous substances.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/ disappears)?

Where an offence is committed by anyone acting as an agent, employee or contractor of a person or company, the person or company is deemed to have committed the offence (s340 RMA). This means that where a producer transfers waste to a contractor for disposal, the producer may remain liable for any offence by the contractor.

It is, however, a defence to a charge if it can be shown that the person or company did not know, nor could be reasonably expected to have known, that the offence was committed, or took all reasonable steps to prevent the offence taking place.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

In addition to question 3.1 above, there are a number of voluntary product stewardship programmes in place, and further regulation is being considered by MFE.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Offences under the RMA are criminal in nature. Breaches are strict liability offences and only limited statutory defences apply. These include where a person has acted reasonably in an emergency situation or where the Act was breached due to unforeseeable events beyond the defendant's control (i.e. natural disaster). In both cases, remedial action must follow the offence.

A successful prosecution under the RMA may result in a fine or a term of imprisonment as outlined in question 2.4 above. Common law claims in tort for negligence, nuisance or trespass may also be brought.

In October 2011, in a high-profile incident, a container ship (the *Rena*) was grounded, spilling oil and hazardous waste into Tauranga harbour. Costs associated with the environmental clean-up were recoverable from the vessel's owner under the Maritime Transport Act 1994 ("MTA"), but liability in such cases is statutorily limited. Following this incident, maximum liability has been increased via legislative amendment.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Liability for discharges of contaminants is limited to circumstances where the discharge is not otherwise allowed by resource consent, meaning enforcement action cannot be brought against a person if:

- they act in accordance with a resource consent; and
- the adverse effects of contamination were expressly recognised when resource consent was granted.

Notwithstanding the above, the operator could still be held liable if a tortious action was brought.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Where a body corporate is held liable for an offence, then any director or person in a managerial position may be held personally liable for the offence. It must be shown that the offence took place with that person's authority, or that they knew, or could reasonably be expected to have known, that the offence was to be committed, and failed to take all reasonable steps to prevent it.

The Companies Act 1993 specifically excludes indemnities for criminal liability.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

In a share sale, the purchaser acquires all environmental liabilities of the company concerned. In an asset purchase, because it is the assets of the company, rather than the company itself, which are being traded, the purchaser does not automatically inherit any of the previous owner's environmental liability. Ideally, the sale and purchase agreement will set out which party bears the liability for historic environmental breaches.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Lenders are generally not liable for environmental wrongdoing and/or remediation costs, as compliance obligations remain with the person actually undertaking the activity. However, a lender with security over assets, exercising its right to that security (e.g. mortgagee takes possession in the event of default), takes on the associated liabilities.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The RMA imposes strict liability on owners, occupiers and polluters of contaminated sites, regardless of who caused the contamination. However, where contamination has occurred prior to 1 October 1991 (when the RMA came into force), and there are no ongoing adverse effects resulting from the contamination, case law provides that no action can be brought under the RMA to require remediation.

For contamination after 1991, liability for remediation attaches to a person or organisation. Enforcement action can require an owner, occupier or person responsible for causing contamination to do something to avoid, remedy or mitigate any adverse effects on the environment. Breach of that enforcement action is an offence, which can be subject to criminal prosecution. Polluters can also be prosecuted directly with respect to discharges leading to contamination for breaching duties contained in the RMA.

Since 2012, the National Environmental Standard on Assessing and Managing Contaminants in Soil to Protect Human Health ("NES") requires contaminated, or potentially contaminated, land to be appropriately identified and assessed prior to development or change in land use in order to ensure the land is safe for human

use. Landowners and/or developers are required to undertake site investigations on land identified as potentially contaminated and to report to the relevant local authority. Where the land is found to exceed relevant contaminant values, the activity will require resource consent and the landowner/developer will need to provide a remediation plan and a management plan as a basis for consent conditions.

Most local authorities maintain a register of known contaminated sites; however, this information is mostly piecemeal and based on historical uses/reports or any new reports available under the NES.

5.2 How is liability allocated where more than one person is responsible for the contamination?

The RMA does not establish a hierarchy of potential liability between the owner, occupier or polluter, nor does it contain a mechanism for apportioning such liability. Rather, the body bringing the enforcement action determines this on a case-by-case basis. Any party served with enforcement proceedings could seek to join any previous owner or occupier or it could apply for an enforcement order against another responsible party.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Environmental remediation can be implemented through the resource consent process, such as through a condition of consent. That condition could be subject to review at a later stage; in some cases (where the resource consent application is notified) third parties can make submissions challenging the consent or any conditions. The RMA allows the issue of an enforcement order or abatement notice in respect of a site that has already been the subject of a voluntary or compulsory remediation agreement.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

The extent to which the owner or occupier would be able to seek a contribution from a third party, or transfer the risk to a purchaser, depends on the specific provisions included in the relevant land transactions – particularly, any specified warranties and/or indemnities.

Liability under contract and tort runs concurrently with the RMA. Accordingly, an owner or occupier can seek enforcement via contractual obligations that required environmental remediation, or pursue civil law remedies through negligence, nuisance or under the rule of *Rylands v Fletcher*. A limited number of civil cases address site contamination issues. However, each has encountered difficulties in establishing causation and faced limitation issues.

Importantly, as mentioned in Section 8 below, contractual rights will not allow a party to avoid prosecution under environmental law. The party benefiting from an indemnity/warranty can still be prosecuted for an offence; however may then seek to recover costs through contractual remedies.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

If a person is successfully prosecuted for breaching the duties contained in the RMA (including those duties and restrictions in relation to the coastal marine area, the beds of certain rivers and lakes, water and the discharge of contaminants), monetary penalties are available. This includes recovering any costs associated with remedying or mitigating action undertaken by a consent authority in respect of the pollution. However, this will only cover "aesthetic harms" to the extent it is considered an adverse effect on the environment.

The MFE has a "Contaminated Sites Remediation Fund", which upon application by councils can provide funding for the investigation and remediation of high-risk contaminated sites.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Local authorities are afforded extensive powers under the RMA to regulate and monitor to ensure that resource consents are complied with and environmental standards are maintained. Duly authorised officers may enter any place or structure, (except a dwelling house), at a reasonable time for the purpose of inspection or to take samples. A warrant to enter a dwelling house may be sought from the District Court.

A local authority may also require production of certain documents, take samples, conduct site inspections, interview certain people and enforce all regulatory measures under the Local Government Act 2002.

Pursuant to the NES for Assessing and Managing Contaminants in Soil, local authorities have an onus to provide up-to-date information about potentially contaminated land. Procedures for capturing, managing and communicating this information continue to be developed by local authorities.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

There is no general legal duty in New Zealand to notify regulatory authorities of pollution. There is also no statutory legal duty on a landowner to notify third parties of pollution on a property, even where that pollution is found to be migrating off-site.

However, any development or land use changes undertaken on potentially contaminated land will fall under the scope of the NES for Assessing and Managing Contaminants in Soil (see question 5.1), and will require investigation and reporting on contamination levels with results provided to the Council. Likewise, resource consent conditions can also require reporting on discharges of contaminants, and this may extend to advising councils on exceedances.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

There is also no general legal duty on a landowner to investigate land for contamination, except where the NES requires (as discussed under question 5.1).

Contractual obligations to investigate land for contamination may exist under leases and licences, and may extend to remediation prior to the expiry of the term. A resource consent condition may also impose obligations of investigation and remediation.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Warranties and/or indemnities as to the environmental status of a site, sometimes specifically covering the issue of contamination, are often included in the context of commercial transactions. The particular wording may protect the purchaser from unanticipated contamination or pollution issues, or may share liability between the parties (often on a sliding scale depending on when the pollution occurred and the length of time from the transaction date). Merger and acquisition contracts usually preclude the purchaser from seeking redress if all information, which could reasonably lead to a breach of terms of the contract, has been fairly disclosed. In the absence of a specific provision, the starting point for vendor disclosure is '*caveat emptor*', or 'let the buyer beware'.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

Environmental indemnities are regularly used in a range of agreements to limit exposure to liabilities. Indemnities relating to potentially contaminated sites are of particular importance in New Zealand as the statutory responsibility for remediation may fall on the polluter, the owner, or the occupier.

An indemnity will not protect, or provide a defence for, an indemnified party from prosecution under environmental law. The indemnified party may still be prosecuted for an offence, however, may then seek to recover costs from the indemnifying party.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Environmental laws do not generally require any specific environmental liabilities to be recorded on a company's balance sheet. The Environment Court has required offenders to include environmental performance as a matter to be disclosed to shareholders or a matter to be reported against in Annual Reports. In terms of requirements under law generally, the Financial Reporting Act 2013 requires companies that issue securities to the public to file financial statements that comply with "*generally accepted accounting practice*".

In normal circumstances, provided the company structure is legitimate, unlawful actions of the company will not generally be sufficient to justify courts looking beyond the company at fault. An exception to this may include directors or shareholders of a dissolved company remaining liable for environmental offences of the company if the actions or omissions that led to the liability occurred prior to dissolution.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Generally shareholders cannot be held responsible for the actions of companies in which they hold shares. There are certain relatively uncommon exceptions to this rule. Firstly, a shareholder may be liable for the acts or omissions of the company where the company's constitution provides that the company is an 'unlimited company'. Second, if the company's constitution expressly provides for the shareholders to be responsible for certain liability. Third, as noted in question 8.2 above, in limited situations the courts may 'pierce the corporate veil'. That generally occurs only when the company structure is deceptive or intended to conceal reality.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Legal protection for "whistle-blowers" is limited to employees disclosing matters relating to their employer or the employer's organisation. Under the Protected Disclosures Act 2000, employees who make "protected disclosures" are immune from civil or criminal proceedings or other disciplinary proceedings. To qualify as a "protected disclosure" the information provided by the employee must relate to "serious wrongdoing", which includes an act, omission, or course of conduct that constitutes a serious risk to the environment.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

It is possible to bring class actions under New Zealand's High Court Rules. Despite that, relatively few class actions have been brought.

The RMA provides a maximum liability regime for offences (see Section 4 above) and courts cannot award exemplary damages in addition. It is possible to seek exemplary damages in respect of common law claims such as negligence or nuisance; however, there are few known instances of this occurring.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There are various funding schemes available to certain parties to assist with the costs of litigation, such as MFE's 'Legal Assistance Fund'. However, public interest groups are still potentially liable for costs, as the RMA does not provide any exemption for liability from costs. Unlike the higher courts, costs in the Environment Court do not necessarily 'follow the event', but are reserved for instances where parties put others to increased costs unnecessarily.

Security for costs is also available under the RMA, in circumstances where the court is satisfied that there is reason to believe a party

will be unable to pay the costs of its opponent if it is unsuccessful, and if the court thinks it is fit in all the circumstances to make such an order.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in your jurisdiction and how is the emissions trading market developing there?

The Emissions Trading Scheme ("NZETS") was first enacted in 2008. Many major sectors of the New Zealand economy are now participants in the NZETS, including forestry, transport fuels, electricity production, industrial processes, synthetic gases and waste. Agriculture is yet to fully enter the NZETS, and has an emissions reporting obligation only (rather than having to surrender units).

In each compliance period, NZETS participants are required to monitor, record and report on their activities and surrender sufficient NZUs to match the amount of emissions associated with their activities. First commitment-period Kyoto Protocol units (except for Assigned Amount Units ("AAUs")) were restricted from surrender from 31 May 2015. During a transition phase (which does not have an end date in the legislation) participants can elect to pay a fixed fee of NZ $25 per unit to the government *in lieu* of surrendering NZUs. A temporary, free allocation of NZUs was provided to compensate participants in the forestry sector and continues to exist for industrial processes as well as other non-participant trade-exposed industries.

At present the NZETS is not a functioning and liquid trading market. Following the successful conclusion of the Paris Agreement, new domestic legislation is likely to be introduced that moves to a full surrender obligation by 2020.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

There are no other legislative requirements to monitor and report greenhouse gas emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Climate change is regulated at a national level through the NZETS. This captures all greenhouse gases and is intended to apply to all sectors of the economy. New Zealand has no binding emissions targets in the second commitment period under the Kyoto Protocol, so this has impacted the ability of New Zealand businesses, post June-2013, to access and utilise Kyoto Protocol units for NZETS surrender purposes.

10 Asbestos

10.1 Is your jurisdiction likely to follow the experience of the US in terms of asbestos litigation?

No. Litigation in relation to asbestos liability claims for personal injury is currently precluded by the Accident Compensation Corporation ("ACC") scheme, which is governed by the Accident Compensation Act 2001. The purpose of this scheme is generally to provide no-fault accident compensation to all New Zealand citizens, in return for precluding 'significant causation'-based common law actions.

Due to the 'no-fault' nature of the ACC scheme, employers cannot generally be directly sued by asbestos victims (in exceptional situations exemplary damages may be awarded) but may face civil/criminal penalties from Government departments such as Worksafe New Zealand, pursuant to the Health and Safety in Employment Act 1992 (soon to be replaced by the Health and Safety at Work Act 2016 – see Section 12 below).

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Occupational health and safety laws extensively regulate employers' and building occupiers' responsibilities in relation to asbestos.

Currently, the Health and Safety in Employment (Asbestos) Regulations 1998 establish strict guidelines for dealing with asbestos and specify particular tasks as 'restricted work', with certain requirements (from April 2016, the Health and Safety at Work Asbestos Regulations will introduce new rules for asbestos removal and work involving asbestos). Restricted work must be notified to WorkSafe NZ before work is commenced, and must be carried out by a qualified person.

Regulations/WorkSafe guidelines require that property owners (with the exception of owners of private homes) should take all practicable steps to identify asbestos products within their properties and establish a building record of the location and condition of any asbestos. Property owners should also inform tenants and contractors working on buildings of the presence of asbestos and of any measures to prevent harm. Employers must also consult with employees, and adopt sound practices to control exposure to asbestos.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in your jurisdiction?

The environmental risk insurance market is still developing. At present, insurance does not play a large role in New Zealand environmental law.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Environmental insurance claims in New Zealand are not particularly well documented primarily because of the relatively evolving nature of the market, the reluctance of insurance companies to release such information, and the inherently "long tail" nature of this coverage (meaning substantial claims may take some years to be processed).

On the other hand, the natural disaster claims experience in New Zealand has advanced considerably since a series of earthquakes, most notably in February 2011 in Christchurch, caused significant damage and loss of life. New Zealand's Earthquake Commission (a government-owned Crown entity) will likely have its entire Natural Disaster Fund exhausted as a consequence of the earthquakes, meaning a Crown (government) guarantee may need to be activated to meet further claims.

Legislation on earthquake prone buildings also applies and older buildings (other than standalone, single level residential buildings) can be required to meet at least one third of the new building performance standards. Those older, more earthquake prone building owners may face greater insurance challenges and premiums.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in your jurisdiction.

RMA reform: The Resource Legislation Amendment Bill, introduced to Parliament in late 2015, represents the long-awaited second phase of the Government's resource management reforms, initiated in 2008. The Bill comprises more than 40 proposals aimed at overhauling the RMA and delivering "substantive, system-wide improvements to the resource management system". Many of the proposals are pro-business/development. In particular, numerous changes are proposed to the resource consenting (permitting) process and the resource management plan-making process, which aim to make systems simpler/less costly. The reforms may be passed into law by late 2016.

Auckland planning developments: In 2016, a new Auckland 'Unitary Plan' is continuing to be developed, to replace 13 former district and regional plans. The Unitary Plan is the single largest planning exercise ever undertaken in New Zealand, and will have significant implications for those with property interests in Auckland. Hearings are scheduled to finish in April 2016, with the Independent Hearings Panel required to make its recommendations to Auckland Council by July 2016. The Council has until August 2016 to issue its decisions. An appeals process will follow, which will likely extend well into 2017.

Health and safety reform: In April 2016, the Health and Safety at Work Act will replace the Health and Safety in Employment Act 1992. The new legislation will comprehensively reform New Zealand's health and safety system, and will be supported by new regulations.

The programme of reforms aims to reduce New Zealand's workplace injury and death toll, including by:

- reinforcing proportionality – what a business is required to do depends on its level of risk and what it can control;
- moving from hazard spotting to managing critical risks – focussing on actions that reduce workplace harm, as opposed to trivial hazards;
- introducing the "reasonably practicable" concept, based on what is reasonable for each business; and
- promoting worker engagement/participation.

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Karen Price has over 20 years' experience in integrated risk management, major infrastructure projects and climate change. She leads large project teams on major and contentious developments from their inception through to consent, providing legal advice and strategy to get projects over the line. Karen is experienced in the use of Alternative Dispute Resolution to achieve this. She is an accredited Hearings Commissioner and Chair. She is an EEZ Commissioner appointed by the Environmental Protection Authority, and a Chair of Auckland Council's District Licensing Committee. Karen is recognised as a leader in climate change issues. She negotiated the only two Negotiated Greenhouse Agreements with the New Zealand Government, and has facilitated securitisation and trading in carbon credits on international markets for a range of clients. Karen is listed as a leading environment and climate change lawyer in a number of international directories.

For Karen Price's full biography, please visit http://www.chancerygreen.com/karen-price/.

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Chris Simmons is experienced in a wide variety of resource management and planning areas, and has been actively involved in resource consent applications and appeals on a range of major development projects. He has made numerous appearances at Council hearings, in the Environment Court and the High Court in relation to resource consent applications and district plan provisions. Chris has particular expertise in residential, industrial, commercial and retail projects, having advised on significant projects in each of those areas. He has also assisted clients with issues related to designations, and compulsory acquisition of land. Chris is recognised as a leading resource management lawyer in the Chambers Asia Pacific Legal Guide.

For Chris Simmons' full biography, please visit http://www.chancerygreen.com/chris-simmons/.

ChanceryGreen
Environment Law and Strategy

ChanceryGreen is a specialist legal practice, advising on all aspects of environment, resource management and climate change law and strategy. We offer superior service through the combination of excellent legal analysis, strong commercial and corporate governance experience, and a commitment to providing personalised service. Our work encompasses energy, industrial, commercial, residential, retail, forestry, transport, aquaculture, mining, oil and gas, and infrastructure projects.

We understand the pressures of regulatory and policy change and work with both government and corporate clients dealing with such change. This includes: drafting new legislation; advising on statutory amendment proposals, newly released plans, policy statements and national environmental standards; appearing at Select Committee hearings; and assisting with Overseas Investment Act processes.

Our aim is to provide the best legal advice and integrate it wholly within the commercial and strategic interests of our clients.

Current titles in the ICLG series include:

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