2012 NZLJ 380

Judicial review of scientific findings

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considers the judicial review of NIWA's publication of data

The High Court decision in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research* [2012] NZHC 2297 is a rare example of judicial examination of scientific research undertaken by publicly-owned bodies, but also represents a potentially worrying precedent.

The plaintiff, the New Zealand Climate Science Education Trust, is closely associated with the New Zealand Climate Science Coalition, a group interested in both science behind — and the politics surrounding — the issue of climate change. Both the Trust and the Coalition took issue with findings published by the National Institute of Water and Atmospheric Research. The Coalition publicly criticised the validity of those findings, and the Trust sought to challenge the findings by way of judicial review.

At issue was the release by NIWA of findings on New Zealand's temperature record, and three of its decisions in particular:

- the release of the 'Seven Station Temperature Series' (the '7SS') detailing surface temperature trends derived from data collected at seven weather stations around the country from 1909 to 2009;
- the release of the 'Eleven Station Temperature Series' (the '11SS'): a set of unadjusted data from a range of weather stations; and
- a review of the data that made up the 7SS (the 'review').

Each of the 7SS, the 11SS and the review all indicated that New Zealand's temperature record experienced a warming trend in the past century. That trend has the potential to give evidential basis for policy decisions upon climate change in New Zealand. The Trust argued for various reasons that the data underlying NIWA's findings — and thus any conclusions drawn from the data — were invalid. Since NIWA is a statutory body, such flaws warranted the Court's examination and intervention.

Specifically, the Trust argued that in breach of its statutory duty, NIWA ignored recognised scientific opinion when compiling the 7SS, selectively used the 11SS data to justify the 7SS, and then repeated the same errors in the review. These alleged errors led to the Trust arguing that each of the decisions were invalid. NIWA responded to the allegations first by arguing that they were not amenable to review and second, that they were unfounded.

THE DECISION

Although the Trust was successful in arguing that NIWA's decisions were potentially amenable to review, the Court did not accept its arguments that the decisions were invalid. Whilst the focus of this paper is on Venning J's ruling on amenability, the reasons why he rejected the substantive claims of the Trust are easily stated.

First, Venning J held that NIWA's statutory duty under s 5(1)(b) of the Crown Research Institutes Act 1992 to "pursue excellence in all its activities" was aspirational but nevertheless "important and enforceable"(at [77]). However, the breach of such a duty "would need to be clear" and in these circumstances, the Trust's evidence did not prove that NIWA did not apply recognised scientific opinion when compiling the 7SS. The Trust's arguments that NIWA had committed a mistake of fact and had acted unreasonably regarding the conclusions it came to based on the 7SS data were also rejected. Venning J held instead that "such mistake that there is on this issue has, in my view, been made by the Trust and its deponents" (at [114)]).

Second, the Court held that the decision by NIWA to release the 11SS data — in response to criticism by the Coalition of the 7SS findings — was valid. There simply was not enough evidence before the Court to substantiate the Trust's criticism that the data was selective and did not adequately corroborate the 7SS findings, and the Judge preferred NIWA's evidence to the contrary (at [137]).

Finally, the Court rejected the argument by the Trust that the review was invalid. This criticism by the Trust focused upon the methodology used by NIWA to review the 7SS, which the Trust argued was not reasonably open to it. The Court accepted the evidence of NIWA that its approach to the review was not a departure from recognised scientific opinion.

At several points in his judgment, Venning J highlighted the limits of the Court's ability to resolve the substantive disagreements between NIWA and the Trust. The disagreements were based on conflicting evidence, indicating "a scientific debate which this Court is not in a position to determine one way or the other" (at [173]). Venning J deftly sidestepped this issue, holding that the Court did not need to resolve that debate, but instead simply needed to determine whether the approach taken by NIWA was "tenable". Yet that approach assumes that there is not one true "best-practice" scientific methodology — that there are a range of approaches about which reasonable scientists could disagree — and thus in taking such an approach, Venning J nevertheless determined an issue of scientific debate. This highlights the almost unavoidable danger that the Court puts itself in when choosing to embark on judicial review of such specialised decision-making, and thus why Venning J's decision that the decisions of NIWA were amenable to review is worthy of critique.

PUBLICLY-OWNED BODIES

In making his determination on whether NIWA and its processes were amenable to judicial review, Venning J recited orthodox principles. NIWA is a Crown Research Institute and therefore a "Crown Entity Company", defined as a registered company wholly owned by the Crown per the Crown Entities Act 2004, s 7(1)(b) and Sch 2. As Venning J summarised, NIWA is a public body, it carries out research

functions for the benefit of the country (at [27]). However, another attribute of NIWA that Venning J did not emphasise in his summary is that it operates at arm's length from government. Ministers are shareholders, but its decision-making and corporate governance is controlled by independent directors.

Of course, publicly-owned organisations that operate at arm's length from government are not immune from judicial review, as established by *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385. In that decision, the Privy Council declined to intervene in the contracting decision of a State Owned Enterprise (SOE). The test for whether intervention was appropriate in the commercial decision-making of an SOE was when it was tainted by fraud, corruption or bad faith (at 391).

Mercury Energy received close examination by the Court of Appeal in *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, which opted for a more contextual approach to the amenability of publicly-owned bodies to judicial review ([56]–[60]). This result was described by Hammond J, in a separate but concurring judgment, as accepting the test in *Mercury Energy* as not exhaustive but subject to incremental change (at [404]). Importantly, the Court of Appeal rejected expanding the test to include "any other material departure from accepted public sector ethical standards which requires judicial intervention" a test described by counsel for the unsuccessful second respondent as requiring "good hygiene in public decision-making" (at [343]). The Court rejected that test because it "overstates the courts' role in this context" and potentially gives rise to "indeterminate scope for intervention by the courts" (at [343]–[344]). In that case, a contracting decision by a district health board about the provision of community laboratory services was a dispute "not well suited to being dealt with in judicial review proceedings" with "factual and other subtleties […] too great to be dealt with in what is supposed to be "a relatively simple, untechnical and prompt procedure"" (at [342]).

Turning to the *NIWA* decision, *Lab Tests* and the concerns of the Court of Appeal did not factor in Venning J's decision about the theoretical amenability of NIWA and its decisions to judicial review. Instead, his Honour focused on *Mercury Energy*, establishing two critical differences between the facts of that case and the proceedings before him. First, CRIs such as NIWA have a primary purpose that is public rather than commercial (at [33]). Second, whilst there are remedies available in private law for those affected by commercial decisions of SOEs, no counterpart remedies exist with regards to CRIs: judicial review is the only recourse: "[a]lthough private individuals and corporate bodies could be affected by NIWA's decisions, in the absence of judicial review, such parties could be left without redress" (at [34]).

Venning J instead invoked *Lab Tests* when considering the appropriate "intensity" of review; a peculiarity since the word "intensity" does not feature in *Lab Tests*. The Court should be "cautious" about intervening in decisions made by specialist bodies and reluctant to adjudicate on matters of scientific debate (at [45]–[47]). Accordingly, while NIWA's decisions were theoretically amenable to review, only a low-intensity review was appropriate. Unless its decisions were so "clearly wrong in principle and law", the Court would not intervene (at [48]).

PROBLEMS WITH THE APPROACH

It is questionable whether the level of intensity chosen by Venning J was of any real consequence. "Clearly wrong" means "a decision outside the permissible boundaries to the exercise of a [decision-maker's] discretion" (*Te Wini v R* [2011] NZCA 617 at [16]). Such a standard is no more exacting a standard than normal. Thus, any moderating influence provided by setting the standard of review to "low intensity" was redundant, and raises the question as to whether a better valve was the inquiry of whether the decisions were amenable to review at all.

Venning J's decision on amenability of review appeared to be driven by the maxim "that every wrong should have a remedy", a worthy watchword given that "[n]o defect in the constitution of a state deserves greater reproach than the giving licence to do wrong without affording redress". (Dawn Oliver, "Public law procedures and remedies — do we need them?" [2002] PL 91, 104). However, it is difficult to locate the precise "wrong" here. NIWA argued that the Trust overstated the extent to which NIWA's activities have direct public consequences (at [40]), yet this is an understatement: it is difficult to see how the compilation, release and review of scientific data have any direct public consequences. As acknowledged by the Court, the data could be used in the formulation of climate change policy by government. However, until that policy is formulated the data has no innate value or consequences; neither the Trust nor any other person is directly affected by the data.

If government made decisions that affected the Trust based on the data then there is nothing stopping the Trust arguing that the decisions are invalid due to the poor quality of the data. This argument, after all, was accepted by Cooke P when he attempted to establish mistake of fact as a ground of review in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA): an immigration decision was invalid because it was based on a factually incorrect expert report. At no point in that case was it ever suggested that the expert was amenable to review, and nor should NIWA's decisions be amenable to review. Without more, NIWA's decisions, lacking the potential to directly affect others, are not properly classified as "wrongs"; the Trust was not properly owed a remedy.

The entry point for Venning J was the statutory context surrounding NIWA and the connection it has to government. In that sense, all decisions by NIWA and other Crown Entities have a public character. This, however, is not the watchword in judicial review: it is the nature of the particular decision — and not the decision-maker — that is the focus of the inquiry, and if the decision involves determinations on scientific debate, they should not be amenable to review.

NIWA has had its fair share of litigation recently, specifically its decision to dismiss Dr Jim Salinger (whose work was at the core of the present proceedings). That litigation, however, took place in the Employment Relations Authority. Where NIWA makes decisions leading to commercial or employment wrongs, there are remedies in the private law. When NIWA makes public decisions that have actual adverse effects, then those wronged should have a remedy in judicial review. This is not what happened here, however, and to mischaracterise all NIWA's decisions as theoretically being amenable to judicial review is to set a dangerous precedent, potential leading to inappropriate interference with independent Crown entities and to the High Court being faced with issues of scientific debate that it has no ability to resolve. ❐