

In the High Court of New Zealand
Wellington Registry

CIV 2021-

I Te Kōti Matua O Aotearoa
Te Whanganui-a-Tara Rohe

Under the Judicial Review Procedure Act
2016 and part 30 of the High Court
Rules 2016

In the matter of an application for judicial review

Between **Lawyers for Climate Action NZ
Incorporated**, a duly incorporated
society having its registered office at
Level 13, 70 Shortland Street,
Auckland
Applicant

And **The Climate Change Commission**,
a Crown entity established under s
5A of the Climate Change Response
Act 2002
First respondent

And **Minister for Climate Change**,
Parliament Buildings, Wellington
Second respondent

STATEMENT OF CLAIM

Dated: 1 July 2021

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STATEMENT OF CLAIM

May it please the Court:

Parties

1. The Applicant is an incorporated society of over 300 lawyers who seek to ensure more effective action in Aotearoa New Zealand against climate change.
2. The Applicant has no private interest in the issues at stake in this proceeding. This proceeding is brought in the public interest, having regard to the serious threat that the climate crisis poses to all New Zealanders.
3. The first respondent is the Climate Change Commission (**Commission**), a Crown entity established under s 5A of the Climate Change Response Act 2002 (**Act**) to:
 - a. provide independent, expert advice to the Government on mitigating climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change; and
 - b. monitor and review the Government's progress towards its emissions reduction and adaptation goals.
4. The second respondent is the Minister for Climate Change, a Minister of the Crown having responsibility for:
 - a. various powers, duties and functions under the Act, including setting emissions budgets under s 5X of the Act; and
 - b. determining Aotearoa New Zealand's nationally determined contribution(s) under the Paris Agreement.

The climate crisis and required action to limit the average global temperature increase to 1.5°C

5. The Intergovernmental Panel on Climate Change (**IPCC**) is the United Nations body tasked with assessing the science related to climate change.
6. In October 2018, the IPCC published a special report, Global Warming of 1.5°C (**2018 Special Report**).
7. The 2018 Special Report synthesises the findings of more than 6,000 published articles relating to climate change impacts, risks and

responses and provides the most comprehensive and authoritative statement of the current scientific consensus on climate change. The facts under this heading are taken from the Special Report and the Applicant relies on the Special Report as if pleaded in full.

8. By 2017 the global average surface temperature had increased by approximately 1.0°C above pre-industrial levels.
9. There is overwhelming scientific consensus that this increase is caused by increasing concentrations of greenhouse gases in the atmosphere resulting from human activity.
10. This increase in temperature has had adverse consequences around the world including extreme weather patterns leading to droughts and flooding, sea level rises and loss of biodiversity.
11. These adverse consequences will continue to worsen over the coming decades if average temperatures continue to increase.
12. There is a significant difference between an increase of 1.5°C and an increase of 2°C (or higher). The global outcome will be significantly worse if average temperatures increase by 2°C instead of 1.5°C. In particular, it is projected that, compared with an increase of 1.5°C, an increase of 2°C is likely to mean that:
 - a. there will be greater increases in average temperatures and more extreme weather in most land and ocean regions;
 - b. the global average sea level will rise a further 0.1m by 2100, exposing an estimated 10 million more people to related risks (including those on small islands);
 - c. impacts on biodiversity and ecosystems will be more severe - the global land area at risk of transformation of ecosystems is projected to be approximately 50% lower at 1.5°C than at 2°C;
 - d. there will be greater increases in ocean temperature and acidity, and greater decreases in ocean oxygen levels; and
 - e. climate-related risks to health, livelihoods, food security, water supply, human security and economic growth will be greater - depending on future socio-economic conditions, limiting warming to 1.5°C rather than 2°C may reduce the proportion of the world's population exposed to climate induced water stress by up to 50%.

13. It is still technically possible to limit the average temperature increase to 1.5°C. However, early and extensive changes to energy policy, land use, infrastructure and industrial systems is needed to limit global warming to 1.5°C with no or limited overshoot.
14. In the 2018 Special Report, the IPCC determined the percentages by which anthropogenic emissions of the various greenhouse gases must be reduced in order to limit global warming to 1.5°C.
15. The reductions that are required relative to 2010 levels in order to have a 50-66% chance of limiting warming to 1.5°C by 2100 with no or limited overshoot are:
 - a. for net carbon dioxide, 40% to 58% by 2030 and 94% to 107% by 2050; and
 - b. for agricultural methane, 11% to 30% by 2030 and 24% to 47% by 2050.
16. Each range set out in paragraph 15 above is an interquartile range. This means that it represents the middle 50% of modelled reductions.
17. Net carbon dioxide emissions are: (a) gross carbon dioxide emissions from activities such as transport, manufacturing and electricity generation from gas and coal; *minus* (b) carbon dioxide removals from activities such as forestry.
18. The 40% to 58% range for the reduction of net carbon dioxide by 2030 relative to 2010 is referred to below as the **2030 Net Carbon Dioxide Interquartile Range**.

United Nations Framework Convention on Climate Change

19. Aotearoa New Zealand is a party to the United Nations Framework Convention on Climate Change (**UNFCCC**).
20. Aotearoa New Zealand signed the UNFCCC on 4 June 1992 and ratified it on 16 September 1993.
21. The objective of the UNFCCC is to “achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (Article 2).
22. In order to achieve this objective, the UNFCCC provides that parties should “take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects”.

23. Aotearoa New Zealand is listed as an Annex I (developed) country under the UNFCCC.
24. Article 4 of the UNFCCC requires Annex I countries to “take the lead” to reverse the long-term trends in anthropogenic emissions.
25. More than 190 countries are parties to the UNFCCC.

Paris Agreement

26. The Paris Agreement is an international agreement under the UNFCCC (**Paris Agreement**).
27. The parties to the UNFCCC passed a resolution to adopt the Paris Agreement at the 21st Conference of the Parties to the UNFCCC held in Paris on 30 November to 13 December 2015 (**Decision to Adopt the Paris Agreement**).
28. Aotearoa New Zealand signed the Paris Agreement on 22 April 2016 and ratified it on 4 October 2016.
29. The Paris Agreement entered into force on 4 November 2016.
30. The central aim of the Paris Agreement is to strengthen the global response to the threat of climate change including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and by pursuing efforts to limit the temperature increase to 1.5°C (Article 2).
31. In order to achieve that long-term temperature goal, the parties to the Paris Agreement have agreed to reach global peaking of greenhouse gas emissions as soon as possible, and to undertake rapid reductions thereafter (Article 4(1)).
32. The Paris Agreement requires each party to establish successive national climate action plans known as nationally determined contributions (**NDCs**) and submit them to the UNFCCC secretariat. Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives of their NDCs (Article 4(2)).
33. The Parties’ first NDCs were due in 2020 and the parties must submit further NDCs every five years following that (Article 4(9)). Each successive NDC for a party must represent a progression beyond the current NDC and reflect that party’s “highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (Article 4(3)).

Aotearoa New Zealand's net emissions

34. New Zealand's Greenhouse Gas Inventory (**GHGI**) is the official annual report of all anthropogenic emissions and removals of greenhouse gases in New Zealand.
35. The GHGI is prepared by the Ministry for the Environment.
36. The GHGI is used to discharge Aotearoa New Zealand's reporting obligations under the UNFCCC and the Paris Agreement.
37. The GHGI provides annual estimates of Aotearoa New Zealand's gross anthropogenic emissions and removals of greenhouse gases.
38. As reported in the GHGI, Aotearoa New Zealand's net emissions for each of the three previous decades measured in megatonnes of carbon dioxide equivalent (CO₂-e) have been:
 - a. 448 Mt CO₂-e for 1991-2000;
 - b. 537 Mt CO₂-e for 2001-2010; and
 - c. 543 Mt CO₂-e for 2011-2020.¹
39. The figures above are derived from the April 2021 GHGI report of net emissions by year.
40. Carbon dioxide equivalent is a measure used to compare or aggregate emissions from different greenhouse gases by converting each gas into an equivalent amount of carbon dioxide in terms of global warming potential.
41. New Zealand's net emissions have increased during each of the three previous decades.

Declaration of a climate emergency by Parliament

42. On 2 December 2020, the Aotearoa New Zealand Parliament passed a motion to declare a climate emergency.
43. The 2018 Special Report was cited in the Government motion to declare a climate emergency.

¹ The April 2021 GHGI report only reports up to 2019. The figure for 2011-2020 has been calculated by taking the total for 2011-2019 and multiplying by 10/9.

Review of New Zealand's 2030 NDC

44. On 7 July 2015, the Aotearoa New Zealand Government submitted an intended NDC to reduce greenhouse gas emissions to 30% below 2005 levels by 2030.
45. The intended NDC became Aotearoa New Zealand's first NDC following ratification of the Paris Agreement (**NDC**).
46. By a communication to the UNFCCC dated 25 November 2015, Aotearoa New Zealand issued an 'addendum' to the NDC which set out "assumptions and methodologies" relating to accounting for forestry under the NDC.
47. While not express on its face, the Commission interprets the NDC as being a commitment to reduce *net* emissions to 30% below 2005 *gross* emissions levels by 2030 (Advice p350, p359).
48. On this interpretation, when expressed as a comparison of net emissions, the NDC is a commitment to *increase* net emissions by no more than 1% above 2005 levels by 2030:
 - a. in 2005, Aotearoa New Zealand's gross emissions were 82.49 Mt CO₂-e and its net emissions were 57.1 Mt CO₂-e;
 - b. 70% of 82.49 Mt CO₂-e is 57.74 Mt CO₂-e; and
 - c. 57.74 Mt CO₂-e is 0.57 Mt CO₂-e (or 1%) above the level of net emissions in 2005.
49. On 22 April 2020 the Aotearoa New Zealand Government submitted to the UNFCCC an update on its NDC pursuant to clauses 24 and 25 of the Decision to Adopt the Paris Agreement which stated that:

the Minister for Climate Change has requested the Climate Change Commission to provide advice and recommendations to the Government on whether the NDC should change to make it consistent with the global 1.5°C temperature goal and, if so, how. The Climate Change Commission will be providing its advice in early 2021.
50. In April 2020, pursuant to s 5K of the Act, the Minister asked the Commission to provide a report on the NDC including:
 - a. advice on whether the NDC is compatible with contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels; and

- b. recommendations on any changes to the NDC required to ensure it is compatible with global efforts under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels.

2050 Target

- 51. The Climate Change Response (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**) came into force on 13 November 2019.
- 52. The Zero Carbon Act amended the Act to set a target for Aotearoa New Zealand to (s 5Q) (known as the **2050 Target**):
 - a. reduce net accounting emissions of all greenhouse gases (except biogenic methane) to zero by 2050; and
 - b. reduce emissions of biogenic methane to 24-47 per cent below 2017 levels by 2050, including to 10 per cent below 2017 levels by 2030.
- 53. “Net accounting emissions” is defined in s 4 of the Act as:
 - ... the total of gross emissions and emissions from land use, land-use change, and forestry (as reported in the New Zealand Greenhouse Gas Inventory), less—
 - (a) removals, including from land use, land-use change, and forestry (as reported in the New Zealand Greenhouse Gas Inventory); and
 - (b) offshore mitigation.
- 54. “Offshore mitigation” is defined in s 4 of the Act as:
 - ... emissions reductions and removals, or allowances from emissions trading schemes,—
 - (a) that originate from outside New Zealand; and
 - (b) that are expressed as a quantity of carbon dioxide equivalent; and
 - (c) that are robustly accounted for to ensure that, among other things, double counting is avoided; and
 - (d) that either—
 - (i) represent an actual additional, measurable, and verifiable reduction or removal of an amount of carbon dioxide equivalent; or
 - (ii) are an emissions trading scheme allowance that triggers the reduction of carbon dioxide equivalent

Emissions budgets

55. The Act requires the Minister to set emissions budgets which must state the total emissions that will be permitted for the relevant emissions budget period, expressed as a net quantity of carbon dioxide equivalent (ss 5X and 5Y).
56. Emissions budgets are set with a view to meeting the 2050 Target and contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels (s 5W).
57. From 31 December 2021, there must be 3 consecutive emissions budgets, 1 current and 2 prospective, in place at any one time. The Minister must set emissions budgets for (s 5X):
 - a. the period 2022 to 2025, by 31 December 2021;
 - b. the period 2026 to 2030, by 31 December 2021;
 - c. the period 2031 to 2035, by 31 December 2021; and
 - d. subsequent periods as set out in the Act.
58. The Minister must ensure that net accounting emissions do not exceed the emissions budget for each emissions budget period (s 5X(4)).
59. Before the Minister sets an emissions budget, the Commission must advise the Minister on the following matters (s 5ZA):
 - a. the recommended quantity of emissions that will be permitted in each emissions budget period;
 - b. the rules that will apply to measure progress towards meeting emissions budgets and the 2050 Target;
 - c. how the emissions budgets, and ultimately the 2050 Target, may realistically be met, including by pricing and policy methods;
 - d. the proportions of an emissions budget that will be met by domestic emissions reductions and domestic removals, and the amount by which emissions of each greenhouse gas should be reduced to meet the relevant emissions budget and the 2050 Target; and
 - e. the appropriate limit on offshore mitigation that may be used to meet an emissions budget, and an explanation of the circumstances that justify the use of offshore mitigation.

60. The Act requires the Commission to provide its advice to the Minister in the case of the first 3 budgets no later than 1 February 2021 or, if the Commission requests an extension, any date on or before 1 August 2021 specified by the Minister by notice in the *Gazette* (s 5ZA).
61. On 14 July 2020, the Minister extended the deadline for the Commission to provide its advice on the first 3 budgets to 31 May 2021.

The Advice

62. The Commission published its draft advice on 31 January 2021 and sought comments in accordance with s 5ZA(3) of the Act (**Draft Advice**).
63. The Commission provided its final advice to the Minister on 31 May 2021 and published that advice on 9 June 2021 (**Advice**).

Emissions budgets

64. In the Advice, the Commission proposed the following emissions budgets for net emissions:²
 - a. Emissions budget 1 (2022-2025): 290 Mt CO₂-e; and
 - b. Emissions budget 2 (2026-2030): 312 Mt CO₂-e.
 - c. Emissions budget 3 (2031-2035): 253 Mt CO₂-e.
65. The emissions budget for the period 2022-30 totals 602 Mt CO₂-e. The Advice notes that when forecast emissions for 2021 are included, total expected net emissions over the period 2021-30 are 648 Mt CO₂-e.³

Modified activity-based accounting

66. In the Advice, the Commission adopted a “modified activity-based” approach to accounting for net emissions, rather than the GHGI accounting measure.
67. The modified activity-based measure differs from GHGI accounting because:
 - a. GHGI accounting aims to record emissions and removals from forestry when they occur.
 - b. The modified activity-based measure averages out the removal-emission cycles from plantation forests by disregarding CO₂

² Advice, p 74.

³ Advice, p 363.

removals that will become CO₂ emissions when the forest is harvested. This is referred to as “averaging”.

- c. GHGI accounting gives a more accurate representation of “what the atmosphere sees”.
68. As a result of switching to the modified activity-based measure of emissions, the Commission has recalculated Aotearoa New Zealand’s historic net emissions.
69. While the actual level of historic net emissions has not changed, the figures calculated by the Commission for each of the three previous decades using the modified activity-based approach are significantly higher than the actual level of net emissions as reported in the GHGI:
- a. 682 Mt CO₂-e for 1991-2000 (*cf* 448 Mt CO₂-e);
 - b. 701 Mt CO₂-e for 2001-2010 (*cf* 537 Mt CO₂-e); and
 - c. 652 Mt CO₂-e for 2011-2020 (*cf* 543 Mt CO₂-e).
70. Figure 5.3 of the Advice uses the new figures. This diagram purports to show that expected net emissions over 2021-2030 under the proposed budgets would decrease compared with the three previous decades.
71. This presentation is misleading as Aotearoa New Zealand’s actual net emissions have been increasing for each of the three previous decades and will continue to increase in 2021-30 under the proposed budgets.

NDC advice

72. The Advice addresses the Minister’s questions regarding the NDC, set out at paragraph 50 above.
73. The Commission calculated that the current NDC would permit net emissions of up to 596 Mt CO₂-e between 2021 and 2030.⁴
74. Applying the 2018 Special Report, the Commission calculated that net emissions between 2021 and 2030 should not exceed 568 Mt CO₂-e in order to be compatible with contributing to limiting warming to 1.5°C (and before taking into account Aotearoa New Zealand’s fair share of reductions).⁵
75. The Commission correctly concluded that the NDC is “not compatible with Aotearoa New Zealand making a contribution to global efforts

⁴ Advice, p 350.

⁵ Advice, p 357.

under the Paris Agreement to limit the increase in global average temperature to 1.5°C above pre-industrial levels”.⁶

76. The Commission also correctly recognised that the UNFCCC and the Paris Agreement require developed countries to take the lead. Accordingly, it correctly concluded that, to contribute to limiting the increase in global average temperature to 1.5°C, Aotearoa New Zealand needed to contribute more than the global average required.⁷
77. The Commission, however, made an error in the way it applied the approach set out in the 2018 Special Report. If the Commission had correctly applied that approach it would have determined a figure of 484 Mt CO₂-e rather than 568 Mt CO₂-e. Particulars of the error are pleaded in paragraphs 81 to 89 below.

Next steps to implement the Advice

78. The Minister must, by 31 December 2021, respond to the Advice in relation to the emissions budgets and set emissions budgets for the periods 2022 to 2025, 2026 to 2030, and 2031 to 2035.
79. Aotearoa New Zealand’s communication and update of its NDC on 22 April 2020 notified that the Commission’s advice had been sought on whether the NDC should change to make it consistent with the global 1.5°C goal.
80. Aotearoa New Zealand is at risk of damage to its international standing and reputation if it fails to amend the NDC to make it consistent with the global 1.5°C goal in advance of the 26th Conference of the Parties to the UNFCCC, scheduled to be held in Glasgow from 1-12 November 2021.

GROUND 1: LOGICAL ERROR IN APPLICATION OF 2018 SPECIAL REPORT (ERROR OF LAW AND IRRATIONALITY)

81. For the purpose of its advice on the NDC, the Commission calculated that net emissions between 2021 and 2030 should not exceed 568 Mt CO₂-e in order to be compatible with contributing to limiting warming to 1.5°C.
82. The Commission’s intention in deriving the 568 Mt CO₂-e figure was to calculate what was required in order to give effect to the 2018 Special Report’s conclusions on the required decreases in 2010 emissions by

⁶ Advice, p 358.

⁷ Advice, p 356.

2030 and before taking into account Aotearoa New Zealand's fair share of reductions.⁸

83. The Commission appropriately relied on the IPCC's modelling and conclusions in the 2018 Special Report.
84. However, in implementing this approach the Commission made a logical error as to the required reductions in net carbon dioxide.
85. In 2010:
 - a. the level of gross carbon dioxide emissions in Aotearoa New Zealand was 35.031 Mt; and
 - b. the level of net carbon dioxide emissions in Aotearoa New Zealand was 5.048 Mt.
86. The 2018 Special Report can be used to determine the maximum level of each greenhouse gas emitted in Aotearoa New Zealand that is compatible with contributing to limiting warming to 1.5°C.
87. For net carbon dioxide, this requires reducing the 2010 level of net carbon dioxide emissions by 40% to 58% by 2030 (that is, by applying the 2030 Net Carbon Dioxide Interquartile Range).
88. However, the Commission applied the 2030 Net Carbon Dioxide Interquartile Range to the 2010 level of *gross* carbon dioxide emissions. This resulted in:
 - a. a 2030 limit for net carbon dioxide of 14.713 to 21.019 Mt (with a midpoint of 17.866 Mt); and
 - b. a total limit for net emissions of all gasses between 2021 and 2030 of 568 Mt CO₂-e.
89. Accordingly, the Commission's conclusion that Aotearoa New Zealand should limit emissions in the period 2021-30 to less than 568 Mt CO₂-e to contribute to achieving the 1.5°C goal (and before taking in account its fair share under the Paris Agreement) is the result of a logical error.
90. If the Commission had correctly applied the 2030 Net Carbon Dioxide Interquartile Range to the 2010 level of *net* carbon dioxide emissions then it would have determined:

⁸ Advice, pp 353-358.

- a. a 2030 limit for net carbon dioxide of 2.120 to 3.029 Mt (with a midpoint of 2.574 Mt); and
- b. a total limit for net emissions of all gases between 2021 and 2030 of 484 Mt CO₂-e.

91. The Commission's explanation for its approach is that:⁹

Reductions of net carbon dioxide emissions have here been applied to gross carbon dioxide levels consistent with target accounting. This accounting recognises that land sector emissions need to be reduced, but land sector removals do not need to continue indefinitely.

92. The Commission further explains that:¹⁰

The IPCC 1.5°C pathways use a net-net approach, because this is the most appropriate approach at the global level (because globally, the forestry sector is a net source of emissions). Aotearoa uses a gross-net approach, because our forestry sector has been a net sink of emissions. Both these approaches are consistent with the international accounting guidance and appropriate to the circumstances they are being applied to.

93. The Commission's explanation conflates target accounting with the mathematical application of the 2018 Special Report findings to Aotearoa New Zealand's 2010 net carbon dioxide emissions to calculate an appropriate limit for 2030. This calculation can only be carried out by reference to 2010 *net* carbon dioxide emissions.

94. As a result of the logical error, the NDC advice is unlawful and irrational.

GROUND 2: MISINTERPRETATION OF THE STATUTORY PURPOSE IN SETTING PROPOSED EMISSIONS BUDGETS

95. In proposing emissions budgets under s 5ZA of the Act, the Commission is required to act consistently with the purpose of the Act, as set out in s 3, and with the purpose of subpart 3 of Part 1B of the Act, as set out in s 5W.

96. In proposing emissions budgets the Commission must also have regard to the matters set out in s 5ZC and, where relevant, the matters set out in s 5M.

97. The Act must be interpreted consistently with:

⁹ See Advice, Evidence Chapter 13, fn 6.

¹⁰ See Advice, Evidence Chapter 13, p 9.

- a. the UNFCCC and the Paris Agreement;
 - b. the right to life under the New Zealand Bill of Rights Act 1990, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights;
 - c. the principles of the Treaty of Waitangi and in particular the obligations of the Crown to actively protect Māori from inequitable levels of detriment and harm; and to recognise and adequately provide for the exercise of Rangatiratanga including Māori interests in protecting against harm to the natural environment;
 - d. tikanga Māori and in particular mana tangata and mana whenua which include the ability for Māori to uphold and protect the wellbeing of their communities and the natural environment.
98. Accordingly, the considerations set out in s 5ZC and s 5M do not outweigh or qualify the requirement for the Commission to recommend budgets for the purpose of:
- a. contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels (s 3(1)(aa), s 5W); and
 - b. enabling Aotearoa New Zealand to meet its international obligations, including under the Paris Agreement (s 3(1)(a)), which, among other things, requires Aotearoa New Zealand to pursue ambitious emissions reductions.
99. The Commission erred in law in relation to its advice on the emissions budgets because:
- a. It failed to prepare its advice in a manner that was consistent with the purpose of the Act and the purpose of subpart 3 of Part 1B of the Act. In particular, it failed to determine, first, what level of emissions reductions were required over the relevant periods to contribute to the global effort to limit the global average temperature increase to 1.5°C and to meet Aotearoa New Zealand's obligations under the Paris Agreement, and, second, how those reductions may realistically be met, having regard to the matters set out in s 5ZC and s 5M.
 - b. It incorrectly took the view that any emissions budgets consistent with the 2050 Target were deemed to be consistent with what is required to contribute to the global effort to limit the global

average temperature increase to 1.5°C and to meet Aotearoa New Zealand's obligations under the Paris Agreement.

- c. It based its advice on what was required to meet the 2050 Target and failed to consider what further domestic action was required over the period covered by the first three emissions budgets to contribute to the global effort to limit the global average temperature increase to 1.5°C and to meet Aotearoa New Zealand's obligations under the Paris Agreement.
- d. It misconstrued the mandatory considerations in s 5ZC and s 5M as matters that could or should be balanced against the purpose of the Act and of subpart 3 of Part 1B. In particular, it mistakenly assumed that practical inconvenience and/or the risk of economic detriment were matters that were permitted or required to be balanced against the purpose of the Act and of subpart 3 of Part 1B.
- e. The Commission correctly took the view that the gap between domestic emissions and what is required to contribute to the global effort to limit the global average temperature increase to 1.5°C and to meet Aotearoa New Zealand's obligations under the Paris Agreement would have to be met by using offshore mitigation. However, the Commission was required, but failed, to ask how reliance on offshore mitigation could be minimised in circumstances where:
 - i. the Paris Agreement requires parties to pursue domestic mitigation measures with the aim of achieving the objectives of their NDCs (Article 4(2));
 - ii. the Act requires emissions budgets to be set with a view to contributing to the global effort to limit the global average temperature increase to 1.5°C and in a way that allows them to be met domestically; and
 - iii. there are no reasonable grounds to believe that offshore mitigation will be available within the time frame and in the volume required, or that resorting to offshore mitigation rather than domestic mitigation is likely to be in the overall interests of Aotearoa New Zealand.
- f. The proposed emissions budgets do not contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C, instead representing an increase in Aotearoa New Zealand's net emissions on the net GHGI measure

and on any measure being well short of what is required based on the 2018 Special Report.

- g. The proposed emissions budgets do not meet Aotearoa New Zealand's obligations under the Paris Agreement as they do not constitute ambitious emissions reductions and do not aim to achieve the objectives of the NDC by domestic action.

GROUND 3: ERROR OF LAW IN ADOPTION OF MODIFIED ACTIVITY-BASED MEASURE OF EMISSIONS

- 100. The Commission adopted a "modified activity-based" approach to accounting for emissions to set emissions budgets and measure progress towards emissions budgets and the 2050 Target and the compatibility of the NDC.
- 101. The Act mandates use of the GHGI net emissions accounting approach for setting emissions budgets and measuring performance under s 5Q(1)(a) and s 5X(4).
- 102. The Commission has erred in law by adopting the modified activity-based approach rather than the mandated GHGI approach.
- 103. The two measures are materially different for the reasons pleaded at paragraphs 66 to 71 above.

GROUND 4: ERROR OF LAW IN RESPECT OF TREATMENT OF OFFSHORE MITIGATION

- 104. There is a gap between the Commission's proposed emissions budgets for the period 2021-30 (648 Mt CO₂-e) and the Commission's suggested NDC (which is less than 568 Mt CO₂-e).
- 105. The Commission justifies this gap on the basis that the Act requires the Minister to "set emissions budgets and plan to meet them entirely domestically",¹¹ whereas the Government can "use offshore mitigation to bridge the gap between emissions budgets and the NDC".¹²
- 106. However, emissions budgets are defined to be inclusive of any offshore mitigation that Aotearoa New Zealand proposes to use during the relevant time period.

¹¹ See Advice, p 370.

¹² See Advice, p 370.

Particulars

- a. The purpose of the emissions budgets is to cap net accounting emissions (s 5Q and s 5X(4)).
 - b. Net accounting emissions are defined as domestic emissions minus domestic removals and offshore mitigation.
 - c. The Act requires the Commission's advice to the Minister to include advice on the appropriate limit on offshore mitigation that may be used to meet the emissions budget, and an explanation of the circumstances that justify the use of offshore mitigation (s 5ZA(1)(e)).
107. As such, any offshore mitigation that is proposed for the purposes of the NDC must be accounted for as part of the emissions budgets.
108. Any offshore mitigation that is proposed for the purposes of the NDC must also comply with the Act's restrictions on the use of offshore mitigation. In particular, the Act requires the Commission to recommend emissions budgets to be met, as far as possible, through domestic emissions reductions and domestic removals (s 5Z(1)).
109. On a correct approach:
- a. emissions budgets should include gross emissions, domestic removals and offshore mitigation;
 - b. emissions budgets should be met, as far as possible, through domestic emissions reductions and domestic removals; and
 - c. emissions budgets should be set in a way that allows the domestic component to be met domestically (s 5W(b)).
110. The Commission erred in law in:
- a. failing to recommend emissions budgets that included projected offshore mitigation that formed part of its NDC analysis; and
 - b. failing to apply the Act's restrictions on the use of offshore mitigation.
111. As a result of the error the Commission:
- a. proposed emissions budgets which did not match its advice on the NDC;

- b. failed to undertake an analysis of the maximum extent to which the proposed emissions budgets could be met through domestic emissions reductions and domestic removals;
- c. failed to undertake an assessment of the relative costs and risks of offshore mitigation versus domestic emissions reductions and domestic removals; and
- d. recommending offshore mitigation to 'bridge the gap' between the emissions budgets and the 2030 NDC, when on the proper approach there should have been no such 'gap'.

GROUND 5: PROPOSED EMISSIONS BUDGETS ARE IRRATIONAL, UNREASONABLE AND INCONSISTENT WITH THE PURPOSE OF THE ACT

- 112. It will only be possible to limit the global temperature increase to 1.5°C if all countries do their share to reduce emissions so that global emissions do not exceed the 'budget' amount remaining before the concentration of greenhouse gases in the atmosphere reaches the level at which a higher temperature rise occurs.
- 113. The Commission has recommended emissions budgets which it predicts will result in 648 Mt CO₂-e of net emissions over the period 2021-30.
- 114. The budget for 2021-30 should be at least equivalent to the level of reductions in global greenhouse gases between 2010 and 2030 stipulated by the IPCC as having a 50-66% chance of limiting warming to 1.5°C with no or limited temporary overshoot, applied to Aotearoa New Zealand's net 2010 emissions levels.
- 115. On that approach, the figure for Aotearoa New Zealand for the period 2021-30 should be less than:
 - a. 568 Mt CO₂-e (based on the Commission's calculation); or
 - b. 484 Mt CO₂-e (based on the corrected calculation pleaded in paragraphs 81-89 above).
- 116. In addition, Aotearoa New Zealand's 'fair share' of the global carbon budget, as a substantial past emitter and as a developed country, requires a more ambitious target than 568 / 484 Mt CO₂-e.
- 117. The Commission correctly concluded that an NDC which allowed emissions of 596 Mt CO₂-e between 2021 and 2030 was not compatible with contributing to global efforts to limit warming to 1.5°C.

118. Setting emissions budgets that would allow 648 Mt CO₂-e of net emissions over this period is inconsistent with the Commission's analysis of the NDC and inconsistent with the purpose of the Act.
119. A reasonable decision-maker would have recommended 2021-2030 emissions budgets and a 2030 NDC allowing net emissions of no more than 400 Mt CO₂-e.
120. In recommending emissions budgets that are inconsistent with the purpose of the Act and with subpart 3 of Part 1B of the Act the Commission has acted outside its legal powers.
121. The Commission's Advice on the proposed emissions budgets and the revised 2030 NDC is advice no reasonable decision-maker in its position could have given.

RELIEF

122. On the basis of each of the grounds set out above, together and individually, the applicant seeks the following relief:
 - a. a declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5°C-compliant NDC;
 - b. an order that the Commission re-consider the part of the Advice that relates to the 2030 NDC in accordance with the law as set out in the Court's judgment; and
 - c. a declaration that the Commission acted unlawfully in proposing the first three emissions budgets;
 - d. an order that the Commission re-consider the proposed first three emissions budgets in accordance with the law as set out in the Court's judgment; and
 - e. such other relief as the Court thinks fit.
123. For the avoidance of doubt, the applicant does not seek to restrain the second respondent from proceeding to carry out his powers, functions and duties taking into account the Advice received from the first respondent. The applicant's position is that action by the second respondent consistent with the first respondent's Advice would be inadequate (and unlawful), but that it would prefer such action to be taken pending the determination of these proceedings than no action taken. It says that it will seek similar relief in respect of any decision made by the second respondent as is sought against the first respondent, to the extent that the second respondent's decision relies

on the aspects of the first respondent's Advice challenged in this proceeding.

This document is filed by Martin Smith, solicitor for the Applicant, of the firm Gilbert Walker. The address for service of the Applicant is at the offices of Gilbert Walker, Level 35, 48 Shortland Street, Auckland.

Documents for service on the Applicant may be delivered to that address or may be:

- (a) posted to the solicitor at PO Box 1595, Shortland Street, Auckland 1140;
or
- (b) emailed to the solicitor at martin.smith@gilbertwalker.com, and copied to sean.coupe@gilbertwalker.com.