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**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-238
[2023] NZHC 1835**

UNDER	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 Applicant
AND	MINISTER OF CLIMATE CHANGE Respondent

Hearing: 13 July 2023

Counsel: J D Every-Palmer KC, M R G van Alphen Fyfe and R A D'Silva
for the Applicant
A Hill and D Ranchhod for the Respondent

Judgment: 13 July 2023

JUDGMENT OF PALMER J

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Summary

[1] In these proceedings, the Lawyers for Climate Action New Zealand Inc challenge the Climate Change (Auction, Limits and Price Control for Units) Amendment Regulations 2022 (the Amendment Regulations). In particular, the applicant claims the Minister of Climate Change (the Minister) did not have reasonable grounds to be satisfied that the settings preferred by Cabinet (and adopted by the Minister) were consistent with s 30GC(2) or (3) of the Climate Change Response Act 2002 (the Act). A two-day hearing was scheduled to commence in the High Court on 21 August 2023. However, the Minister admits he erred in recommending the unit limits and price control settings for 2023 to 2027 that were adopted in the Amendment Regulations. The parties have agreed on the error and on the relief required. The Court agrees the relief is appropriate. In summary, the Court declares that the Amendment Regulations are ultra vires s 30GC of the Act and directs the Minister to reconsider the unit limit and price control settings for 2023 to 2027.

What happened?

[2] The facts in this case, as set out below, have been agreed between the parties.

Emissions Trading Scheme limits and price control settings

[3] The Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020 (the Regulations) contain limits and price control settings for the New Zealand Emissions Trading Scheme (ETS). The Regulations are updated annually to ensure that, at all times, they prescribe limits and price control settings for each of the next five calendar years.¹ The Regulations are made, and updated, by the Governor-General on the recommendation of the Minister.

[4] The limits restrict the annual volume of New Zealand units (NZUs) made available through auctioning, and overseas units that may be used, by ETS participants.

¹ Climate Change Response Act 2002, ss 30GB(3) and 30GB(4).

[5] As a portion of the auction limit, the price control settings establish a reserve amount of NZUs to be released for sale at auction if a trigger price is reached or exceeded by bidding at an auction. This reserve amount of NZUs, which can be set at zero, is known as the Cost Containment Reserve (CCR).

[6] The Regulations prescribe, for each calendar year:

- (a) a limit on the NZUs available by auction (an individual limit);
- (b) a limit on the approved overseas units used (another individual limit);
- (c) a limit on the sum of the following (the overall limit):
 - (i) the NZUs available by auction;
 - (ii) the NZUs available by other means;²
 - (iii) the approved overseas units used;
- (d) the following price control settings:
 - (i) the minimum price below which units must not be sold by auction; and
 - (ii) in relation to the CCR (unless the reserve amount is zero):
 1. one or more trigger prices; and
 2. the reserve amount of NZUs for each trigger price.

[7] The limit and price control settings must be in accordance with New Zealand's emissions budgets, New Zealand's Nationally Determined Contribution (NDC) communicated under the Paris Agreement, and the target in the Act to reduce net

² In practice, this is the industrial free allocation of NZUs to emissions-intensive and trade-exposed firms.

greenhouse gas emissions (except for biogenic methane) to zero by 2050, and to 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 (2050 Target).

[8] However they need not strictly accord with the emissions budgets or the NDC, as long as the discrepancy is justified after considering the matters listed in s 30GC(5) and (6) of the Act.

[9] There are various combinations of limit and price control settings that could accord with New Zealand’s emissions budgets, NDC, and the 2050 Target.

New Zealand’s NDC

[10] New Zealand’s current NDC was communicated to the United Nations Framework Convention on Climate Change Secretariat on 4 November 2021 pursuant to art 4 of the Paris Agreement.

[11] New Zealand’s current NDC is a commitment to reduce net greenhouse gas emissions to 50 per cent below gross 2005 levels by 2030. In terms that are comparable to New Zealand’s previous NDC, this corresponds to a 41 per cent reduction when managed using a multi-year emissions budget starting from New Zealand’s 2020 emissions target.

[12] The Government estimates the NDC budget to be 571 million tonnes of carbon dioxide equivalent (Mt CO₂-e) for the 2021 to 2030 period.

New Zealand’s emissions budgets

[13] On 9 May 2022, the Minister published New Zealand’s first emissions budgets,³ covering the period 2022 to 2035:

- (a) the emissions budget for the 2022 to 2025 emissions budget period is 290 Mt CO₂-e;

³ Section 4(1) of the Act defines “emissions budget” to mean “the quantity of emissions that will be permitted in each emissions budget period as a net amount of carbon dioxide equivalent”.

- (b) the emissions budget for the 2026 to 2030 emissions budget period is 305 Mt CO₂-e; and
- (c) the emissions budget for the 2031 to 2035 emissions budget period is 240 Mt CO₂-e.

Amendment Regulations

[14] The most recent update to the Regulations was made by the Amendment Regulations. The Amendment Regulations were notified in the New Zealand Gazette on 15 December 2022 and came into force on 1 January 2023.

[15] The Amendment Regulations set the following limits and price settings for the ETS for the period 2023 to 2027:

Limits

Column 1	Column 2	Column 3	Column 4
	New Zealand units available by auction (millions)	Approved overseas units used (millions)	Overall limit on units (millions)
Calendar year			
2023	25.9	0.0	32.3
2024	24.8	0.0	31.1
2025	22.5	0.0	28.8
2026	20.0	0.0	26.2
2027	17.6	0.0	23.7

Price control settings

Column 1	Column 2	Column 3	Column 4
	Minimum price below which units must not be sold by auction (\$)	Trigger price for sale of reserve amount of New Zealand units (\$)	Reserve amount of New Zealand units (millions)
Calendar year			
2023	33.06	80.64	8.0
2024	35.90	91.61	7.7
2025	38.67	103.24	7.2
2026	41.45	115.84	6.5
2027	44.35	129.97	5.9

Climate Change Commission Advice

[16] The Climate Change Commission (Commission) must recommend to the Minister limits and price control settings, each time the Minister is required to recommend the making of regulations on limits and price control settings.⁴

[17] In July 2022, the Commission made recommendations for the Amendment Regulations in a document titled *Advice on NZ ETS unit limits and price control settings for 2023–2027* (Commission’s Advice). This was the first time the Commission gave advice as part of the annual process for revising regulations for the ETS settings.

[18] The Commission’s Advice recommended the following limits and price control settings for 2023–2027:⁵

Recommended unit limits and price control settings						
We recommend unit limits as follows:						
Million Units	2023	2024	2025	2026	2027	Total
Limit on NZUS available at auction ⁶	24.4	23.3	21.1	18.7	16.3	103.7
Limit on approved overseas units	0.0	0.0	0.0	0.0	0.0	0.0
Overall limit ⁷	30.8	29.6	27.4	24.9	22.4	135.0

We recommend cost containment reserve settings as follows:					
Cost containment reserve 2023	2023	2024	2025	2026	2027
Tier 1					
Trigger price, including inflation	\$171	\$182	\$193	\$203	\$214
Reserve volume, million NZUs	2.9	2.8	2.6	2.3	2.1
Tier 2					
Trigger price, including inflation	\$214	\$228	\$241	\$254	\$268
Reserve volume, million NZUs	5.1	4.9	4.6	4.2	3.8
Total reserve volume, million NZUs	8.0	7.7	7.1	6.5	5.9

⁴ Climate Change Response Act, s 5ZOA.

⁵ He Pou a Rangi | Climate Change Commission *Advice on NZ ETS unit limits and price control settings for 2023-2027* (July 2022) at 86.

⁶ Includes cost containment reserve volume.

⁷ The overall limit includes the units available by auction and approved overseas units above, and also includes forecast industrial free allocation.

We recommend auction reserve price levels as follows:					
	2023	2024	2025	2026	2027
Auction reserve price	\$60	\$64	\$68	\$71	\$75
All unit volume figures are rounded to one decimal place. Columns may not sum due to rounding.					

[19] The Commission’s recommendations were based on key judgements set out in the Commission’s Advice.

[20] The Commission’s key reasons were as follows:

Limits

- (a) The overall unit limit and the limit on units available by auction should be set in line with the emissions budgets, as stepping stones to the 2050 target and the intended domestic contribution to the NDC.
- (b) The emissions budget volume should be allocated to non-NZ ETS sectors based on specified shares of effort set by the Government’s sector sub-targets from the emissions reduction plan.
- (c) The emissions budget volume allocated to the ETS should then be adjusted for certain technical volume adjustments associated with differences between emissions estimated in the ETS compared to the national greenhouse gas inventory and New Zealand’s target accounting in respect of liquid fossil fuels and coal.
- (d) A deduction should be made from the total NZU supply to account for the industrial free allocation of NZUs to emissions-intensive and trade-exposed firms.
- (e) The NZU supply should then be reduced consistent with reducing the volume of existing “surplus” NZUs (estimated by the Commission at 49.1 million NZUs) towards zero by 2030 to derive the base auction volume.

- (f) The approved overseas unit limit should be set at zero.
- (g) All previous steps should then be combined into a calculation to give the annual auction volumes for the 2023–2027 period. Taken together, those decisions result in the following annual auction volumes:

Units (millions)	2023	2024	2025	2026	2027	Total
Step 1: accord with emissions budgets and NDC	73.6	72.1	69.7	66.5	63.9	345.9
Step 2: allocate the emissions budget	-41.3	-41.0	-41.0	-40.3	-40.2	-203.9
Step 3: technical adjustments	-1.6	-1.4	-1.3	-1.3	-1.3	-7.0
Step 4: free allocation	-6.4	-6.3	-6.3	-6.2	-6.1	-31.3
Step 5: surplus reduction	-8.0	-7.7	-7.1	-6.5	-5.9	-35.2
Step 6: international unit limit	0.0	0.0	0.0	0.0	0.0	0.0
Step 7: planned NZU auction volumes	16.3	15.6	14.0	12.2	10.4	68.5

Price control settings

- (h) While the CCR was intended to be used only rarely, it had been triggered three times in the last six auctions implying that the CCR trigger price was now below market participants' future price expectations.
- (i) Based on the repeated triggering of the CCR, analysis of how uncertainties may affect the emissions prices needed to meet emissions budgets, as well as the level and trajectory of international emissions prices, the trigger prices for the CCR should increase substantially to meet the intention that it be used only rarely.
- (j) The overall volume of NZUs included in the CCR should match the planned surplus reduction volume, which would provide a large enough volume to reduce the risk of excessive price increase, while avoiding adding further units to the banked surplus of NZUs.

- (k) The volume of units in the CCR should be divided into two tiers, to manage the risk of strongly increasing prices if the surplus units remain illiquid, while limiting the fiscal impacts and target risks relative to triggering a single tier CCR.

[21] In summary, the Commission's Advice contained three main recommended changes from the then current settings in the Regulations to ensure that the new settings would accord with the emissions budgets and the 2050 Target:

- (a) a significant increase in the auction reserve price based on modelling by the Commission of the minimum price consistent with achievement of the emissions budgets (e.g. from \$32.10 to \$60 in 2023);
- (b) a significant reduction in the base auction volume (e.g. from 18.6m NZUs to 16.3m NZUs in 2023) so that the auction volume aligns with achievement of the emissions budgets, and the "surplus" stockpile of NZUs assessed by the Commission to represent a significant risk to meeting the emissions budgets would be reduced; and
- (c) a significant increase in the CCR trigger price (e.g. from \$70 to a first tier at \$171 and a second tier at \$214 in 2023) to meet the intention that the CCR be triggered only rarely.

The Minister's recommendations

[22] The limits and price control settings which the Minister recommended for the Amendment Regulations differed from some, but not all, of the recommendations made by the Commission. In summary:

Limits

- (a) The Minister adopted the Commission's recommendation that the NZUs available by auction be reduced to draw down the "surplus" stockpile of NZUs held by participants and accumulated from previous years.

- (b) The Minister adopted the Commission’s recommendation for the individual limit on approved overseas units.
- (c) The Minister did not adopt the Commission’s recommended technical adjustment (described at paragraph [20(c)] above), but otherwise adopted the overall limit on units that was recommended by the Commission.

Price control settings

- (d) The Minister set the auction reserve price at a lower level than recommended by the Commission, adopting the status quo reserve price with an adjustment for higher-than-expected inflation.
- (e) The Minister adopted the Commission’s recommended total reserve volume of NZUs for the CCR.
- (f) The Minister set the CCR trigger price at a lower level than recommended by the Commission, adopting the status quo trigger price with an adjustment for higher-than-expected inflation.
- (g) The Minister did not adopt the Commission’s recommendations for a two-tiered CCR structure with two different trigger prices and volumes.

The decision-making process

[23] Subsequent to receiving the Commission’s Advice, the Ministry for the Environment (MfE) consulted on the proposed amended ETS price and volume settings through the consultation document *Proposed changes to New Zealand Emissions Trading Scheme limit and price control settings for units 2022* (the MfE Consultation).⁸

⁸ Manatū Mō Te Taiao | Ministry for the Environment *Proposed changes to New Zealand Emissions Trading Scheme limit and price control settings for units 2022* (December 2022).

[24] After receiving the Commission’s advice and following the MfE Consultation, the Minister also had regard to the following documents, prior to making recommendations on the annual update to the Regulations to Cabinet:

- (a) MfE’s *Regulatory Impact Statement: Annual update to New Zealand Emissions Trading Scheme limits and price control settings for units 2022*;⁹ and
- (b) a report prepared by Treasury for the Minister of Finance to inform Ministerial feedback on a draft of the Cabinet Paper, entitled *Supporting decisions on updating NZ ETS settings*.¹⁰

[25] The Minister sought approval from Cabinet for his proposed recommendations in a Cabinet paper: *2022 update to New Zealand Emissions Trading Scheme limits and price control setting for units* (the Cabinet Paper).¹¹ In the Cabinet Paper, the Minister recommended following the Commission’s Advice in full. The Cabinet Paper also provided alternative limits and price control options for Cabinet to consider.

[26] Cabinet met on 28 November 2022 and made decisions in relation to the limits and price control settings. Those decisions are recorded in a Cabinet Minute titled *New Zealand Emissions Trading Scheme: 2022 Update to limits and price control settings for units* (Cabinet Minute).¹²

[27] The Cabinet Minute authorised the Minister to further clarify and develop policy matters relating to the amendment in a way not inconsistent with Cabinet’s decisions and invited the Minister to issue drafting instructions to Parliamentary Counsel Office in order to promulgate the Amendment Regulations.

⁹ Manatū Mō Te Taiao | Ministry for the Environment *Regulatory Impact Statement: Annual update to New Zealand Emissions Trading Scheme limits and price control settings for units 2022* (3 November 2022).

¹⁰ Te Tai Ōhanga | The Treasury *Supporting decisions on updating NZ ETS settings* (28 October 2022).

¹¹ Cabinet Economic Development Committee “2022 update to New Zealand Emissions Trading Scheme limits and price control setting for units” (November 2022).

¹² Cabinet “New Zealand Emissions Trade Scheme: 2022 Update to Limits and Price Control Settings for Units” (28 November 2022) CAB-22-MIN-0533.

[28] The Minister sought approval from the Cabinet Legislation Committee for draft regulations to be submitted to the Executive Council, reflecting the decisions made by Cabinet on 28 November 2022, in the Cabinet paper *Climate Change (Auctions, Limits, and Price Controls for Units) Amendment Regulations 2022* (the LEG Paper).

[29] The Cabinet Legislation Committee approved the Amendment Regulations for submission to the Executive Council. The Amendment Regulations and Cabinet Legislation Committee approval were then considered by Cabinet and confirmed for submission to the Executive Council.

[30] The Amendment Regulations were made on 12 December 2022, notified in the New Zealand Gazette on 15 December 2022, and came into force on 1 January 2023.

[31] On 14 December 2022, the Minister presented a report to Parliament on the reasons for differences between the prescribed ETS limits and price control settings for units in the Amendment Regulations and the Commission's advice on these settings (the Minister's Reasons).

Analysis in the decision-making process

[32] In the Cabinet Paper, the Minister recommended following the Commission's Advice in full and explained the reasons for this recommendation. The Cabinet Paper identified alternative options which were marked "not preferred".

[33] The Cabinet Minute records that Cabinet made decisions which adopted some of the recommended options, and some of the "not preferred" options. In summary, Cabinet:

- (a) noted that the Commission recommended adjustments to limit settings, which result in reduced auction volumes compared to the status quo;
- (b) noted that this will reduce the supply of units into the NZ ETS, which may exert an upwards price pressure;

- (c) agreed to reduce the base auction volume to reflect the stockpile adjustment recommended by the Commission;
- (d) did not adopt the technical adjustment recommended by the Commission;
- (e) noted that NZU prices affect costs faced by households and the economy, including the prices of fossil fuels and electricity;
- (f) noted that price control settings for units are intended to mitigate unacceptably low or high NZ ETS prices, and are not intended to signal price expectations to the market, nor to be triggered regularly or often;
- (g) did not adopt the Commission's advice to significantly increase the auction reserve price, and instead agreed to extending status quo auction reserve prices adjusted for inflation for all years;
- (h) noted that status quo price control settings appear to have been encouraging market participants to bid high prices in order to trigger and exhaust the CCR fully each year;
- (i) noted that secondary market NZU prices have to date risen to the level of the CCR trigger price;
- (j) noted that a significant increase to the CCR trigger price is an attempt to decouple NZU prices from the upper price control settings;
- (k) agreed to updated CCR volumes;
- (l) did not adopt the Commission's advice to significantly increase the CCR trigger price, and instead agreed to adopt the status quo trigger price, extended and adjusted for inflation for all years;
- (m) noted that if NZU prices rise to the level of the recommended CCR trigger prices, this would have impacts on costs faced by households

and the economy, including increased fossil fuel and electricity prices;
and

- (n) agreed to inviting the development of additional actions if the CCR is triggered.

[34] Following the Cabinet decisions, the Minister considered whether the limits and price control settings agreed by Cabinet were in accordance with the emissions budgets, the NDC, and the 2050 Target prior to seeking authorisation to submit the Amendment Regulations to Executive Council and received advice from officials regarding the same. The Minister also considered the matters listed in s 30GC(5) and (6) of the Act. The Minister confirmed at that time he was satisfied that all statutory requirements, including consultation requirements, for the making of the Amendment Regulations had been met.

[35] In a briefing to the Minister which contained a draft of the LEG Paper for approval, officials provided the Minister with some analysis of the final proposed limit and price control settings in relation to the tests in s 30GC(2) and (3) of the Act.

[36] However, the Cabinet papers, associated Ministerial briefings, and other materials to which the Minister had regard in making his recommendation regarding the final limits and price control settings that were adopted in the Amendment Regulations did not adequately consider whether the combination of limits and price control settings adopted was in accordance with the emissions budgets, New Zealand's NDC, and the 2050 Target.

The requirements of s 30GC

[37] Section 30GC(1)(a) of the Act requires the Minister to comply with s 30GC in recommending the making of regulations that prescribe limits or price control settings. The parties agree on the following statements of the law.

The requirement for "accordance"

[38] Of particular relevance to this proceeding, s 30GC(2) and (3) provide that:

- (2) The Minister must be satisfied that the limits and price control settings are in accordance with—
- (a) the emissions budget, and the nationally determined contribution for New Zealand under the Paris Agreement, that applies to—
 - (i) the period for which the limits or price control settings are being prescribed; or
 - (ii) any period after that, if a budget or contribution exists for that period; and
 - (b) the 2050 target.
- (3) However, they need not strictly accord with the budgets or contributions as long as the Minister is satisfied that the discrepancy is justified, after considering the other matters under this section.

[39] Section 30GC(2) and (3) are subjective empowering clauses — meaning they require the Minister to subjectively satisfy himself of the matters therein. However, the parties agree there needs to be an objective basis for, and analysis underpinning, the Minister’s subjective conclusions.¹³

[40] Section 30GC(2) requires the Minister to satisfy himself the limits and price control settings are in accordance with (i.e. “in agreement or harmony with; in conformity to; according to”)¹⁴ each of:

- (a) the emissions budget and NDC applying to the period for which the limits or price control settings are prescribed;
- (b) any emissions budget or NDC that has been set for the period after that for which the limits or price control settings are prescribed; and
- (c) the 2050 target.

¹³ As stated in *Cuneen v Commissioner of Police* HC Wellington, CP625/91, 24 September 1992 at 7: “it is now settled law that a mere assertion of subjective satisfaction in the context of a statutory power ... does not prevent the Courts from considering whether or not there is an objective basis for the opinion so asserted”. For a more recent discussion of the authorities, see *Idea Services Ltd v Attorney-General* [2022] NZCA 470 at [49] to [53].

¹⁴ Oxford English Dictionary, Third Edition, December 2011; most recently modified version published online December 2022, “in accordance with (also to)”.

[41] In order to do so, it is logically necessary for the Minister to consider (among other matters):

- (a) the role the ETS is intended to play in achieving each of the relevant budgets, NDC(s), and the 2050 target (after considering how emissions are to be allocated between ETS and non-ETS sectors, and the possible use of voluntary cooperation under art 6 of the Paris Agreement); and
- (b) how the unit limits and price control settings contribute to the achievement of the ETS' anticipated role (i.e., how those settings operate to constrain emissions in sectors covered by the ETS to the levels needed).

[42] In particular, the Minister will need to consider:

- (a) the current surplus of NZUs (estimated by the Commission at 49.1 million NZUs) and how the proposed settings would address that surplus; and
- (b) to the extent that voluntary cooperation under art 6 of the Paris Agreement (colloquially known as offshore mitigation) is relied on to meet the NDC — the viability of options to access emissions reductions in other jurisdictions.

[43] Section 30GC(3) of the Act authorises deviation from strict accordance (i.e., exact or precise accordance) with the relevant emissions budgets and NDC(s), but only when the Minister is satisfied the discrepancy is justified by reference to the factors in subs (5) and (6). Further, the Minister must still be satisfied that the settings nevertheless accord with the emissions budgets and NDC(s).

[44] In considering the requirements of s 30GC(2) and (3), the Minister must be cognisant of his duty under s 5X(4) of the Act to “ensure that the net accounting emissions do not exceed the emissions budget for the relevant emissions budget period”.

The mandatory considerations

[45] Section 30GC(4) to (6) go on to provide that:

- (4) The Minister must consider—
 - (a) the main matters; and
 - (b) the additional matters, but only in relation to the price control settings
- (5) The **main matters** are as follows:
 - (a) the projected trends for New Zealand’s greenhouse gas emissions in the 5 years after the current year, including—
 - (i) the anticipated volumes of greenhouse gas emissions to which the emissions trading scheme applies (meaning emissions for which participants are required to submit returns or surrender units under this Act); and
 - (ii) the anticipated volumes of greenhouse gas emissions to which the emissions trading scheme does not apply:
 - (b) the proper functioning of the emissions trading scheme:
 - (c) international climate change obligations and instruments or contracts that New Zealand has with other jurisdictions to access emissions reductions in their carbon markets:
 - (d) the forecast availability and cost of ways to reduce greenhouse gas emissions that may be needed for New Zealand to meet its targets for the reduction of emissions:
 - (e) the recommendations made by the Climate Change Commission under section 5ZOA:
 - (f) any other matters that the Minister considers relevant.
- (6) The **additional matters** are as follows:
 - (a) the impact of emissions prices on households and the economy:
 - (b) the level and trajectory of international emissions prices (including price controls in linked markets):
 - (c) inflation.

[46] The main and additional matters listed in s 30GC(5) and (6) provide potential reasons for recommending settings which deviate from strict accordance with the relevant emissions budgets and NDC(s).

The admitted error

[47] The Minister admits that he erred in recommending the unit limits and price control settings for 2023 to 2027 adopted in the Amendment Regulations and admitted the ground of review pleaded at paragraph [93(f)] of the Statement of Claim.¹⁵ Namely, he admits that the Minister's decision, and hence the Amendment Regulations, are ultra vires s 30GC of the Act because, on the materials to which he had regard, he did not have reasonable grounds to be satisfied that the combination of settings preferred by Cabinet (and adopted by the Minister) were in accordance with the 2050 target and either:

- (a) strictly in accordance with the emissions budgets set under the Act and New Zealand's NDC; or
- (b) if not strictly in accordance with the emissions budgets and the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and (6) of the Act.

[48] In terms of the absence of reasonable grounds, the parties agree that the material before the Minister did not contain an adequate evaluation or analysis of the limits and price control settings adopted in the Amendment Regulations which differed from those recommended by the Commission for their accordance with the emissions budgets, NDC, and the 2050 Target (either individually or in combination).

[49] In particular, the applicant is concerned (and the Minister accepts) that the material before the Minister did not adequately evaluate whether the adoption of the base auction volume recommended by the Commission (which was intended to draw down part of the surplus unit stockpile) was in accordance with the emissions budgets,

¹⁵ With the exception that paragraph [93] incorrectly refers to s 5ZOA, as opposed to s 30GC of the Act.

NDC, and the 2050 target when combined with the different CCR trigger price that was adopted.

[50] For completeness, the Minister does not — for the purposes of this proceeding — admit that the combination of settings contained in the Amendment Regulations was necessarily unavailable to him under the Act following a proper analysis. The Minister’s admission is based on the deficiencies in the analysis presented to him regarding the settings that were preferred by Cabinet and ultimately adopted.

[51] The applicant does not intend to pursue its other grounds of review, given the Minister’s admission of the ground of review set out in at paragraph [93(f)] of the Statement of Claim.

Relief

[52] In light of the Minister’s admission, the parties jointly seek specified relief. Their joint reasoning is:

- (a) The settings in the Amendment Regulations are key to the operation of the New Zealand ETS and New Zealand’s compliance with its climate change commitments under the Act and international obligations.
- (b) An order for reconsideration is sought under s 17(3) of the Judicial Review Procedure Act 2016 — which, under s 17(6)(a), would have the effect of preserving the Amendment Regulations pending their revocation and replacement. This would avoid the market instability that would be associated with the settings in the Amendment Regulations immediately being quashed as well as the need for urgent steps to remake the relevant settings prior to the next ETS auction scheduled for 6 September 2023 (without settings in place, the auction cannot function). The parties concur that it would be unrealistic for the Amendment Regulations to be reconsidered before that auction.
- (c) In addition, the Minister and Cabinet are already due — as part of the annual revision of settings — to consider unit limits and price controls

for (at least) 2026 to 2028 and publish the new amendment regulations prior to 30 September 2023. If ordered, reconsideration, revocation and replacement of the Amendment Regulations could occur in parallel with decision-making on the 2023 annual update.

[53] For clarity, the Minister does not propose to undertake fresh consultation for the purposes of the reconsideration but will instead rely on the consultation already undertaken in 2022 (in relation to the 2023–2027 settings) and 2023 (in relation to the 2024–2028 settings).

[54] Relief in judicial review lies within the discretion of the Court. I am satisfied the relief jointly sought is appropriate. Accordingly, I order the relief sought:

- (a) a declaration pursuant to s 16(1)(b) of the Judicial Review Procedure Act that the Minister’s decision, and hence the Amendment Regulations, are ultra vires s 30GC of the Act because the Minister did not have reasonable grounds to be satisfied that the combination of settings preferred by Cabinet (and adopted by the Minister) were in accordance with the 2050 target and either:
 - (i) strictly in accordance with the emissions budgets and the NDC;
or
 - (ii) if not strictly in accordance with the emissions budgets and the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and (6);
- (b) because of the Minister’s admitted error, an order pursuant to s 17(3) (and with the jurisdiction set out in s 17(6)(b)) of the Judicial Review Procedure Act directing the Minister to reconsider the unit limit and price control settings for 2023 to 2027 in accordance with the requirements of s 30GC(2) and (3) of the Act, taking into account the

results of consultation undertaken in 2022 and 2023, and in accordance with any other terms of the Court's judgment; and

- (c) an order awarding costs to the Applicant (on a category 2B basis).

Palmer J